



# New Zealand Employment Relations Authority Decisions

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## Thamer v Massey University WA 7/06 (Wellington) [2006] NZERA 617 (25 January 2006)

Last Updated: 24 November 2021

Determination Number: WA 7/06 File Number: WEA 221/05

Under the [Employment Relations Act 2000](#)

### BEFORE THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON OFFICE

**BETWEEN** Thamer R Thamer (Applicant)

**AND** Massey University (Respondent)

**REPRESENTATIVES** Thamer R Thamer in person

Hamish Kynaston for Respondent

**MEMBER OF AUTHORITY** G J Wood

### INVESTIGATION MEETING

21 December 2005

**SUBMISSIONS RECEIVED** By 4 January 2006

### DATE OF DETERMINATION

25 January 2006

### DETERMINATION OF THE AUTHORITY

1. The applicant, Mr Thamer, claims that a number of actions by representatives of the respondent (Massey), particularly his manager, have disadvantaged him at work and are unjustified. Massey denies that it has acted in any way unjustifiably, or to Mr Thamer's disadvantage.

### The Facts

2. Matters must be determined on the balance of probabilities. There can be no certainty as to whether the evidence of one witness over that of another is correct. In making my findings of fact I am conscious that the allegations Mr Thamer makes against Massey and Mr Freyberg in particular are very serious, e.g. bullying, slavery at work and racial harassment. Accordingly, the evidence in support of it needs to be as convincing in its nature as the charges are grave (*Honda NZ Ltd v. NZ (with exceptions) Shipwrights etc Union*, [\(1990\) 3 NZILR 23 \(CA\)](#) applied). The Authority therefore has the unenviable task of determining the facts on the basis of what it believes more likely than not occurred, i.e. on

the balance of probabilities.

3. This is the second application to the Authority by Mr Thamer, who continues in employment with Massey as its manager of IT Support in the Department of Information Systems. Mr Thamer's position is based in Wellington, but he is also required to oversee activities at Massey's Palmerston North campus. His manager is Associate Professor Chris Freyberg, who is head of the Department of Information Systems. Mr Freyberg is based in Palmerston North.
4. Mr Thamer's first application involved claims of work harassment and bullying, including denying him leave and the blocking and denial of payment for overtime worked by him. Those claims were resolved by way of a consent order determination of the Authority issued on 31 March 2005.
5. The consent determination involved Massey paying compensation to Mr Thamer, putting him several steps further up the remuneration scale, acknowledging the contribution he had made and apologising for its part in events leading to the differences of expectation between the parties. Also agreed was that Mr Thamer would work effectively with his head of department and accept reasonable and lawful directions from him and that he would provide, by 22 April 2005, and then comply with, a leave plan which reduced his leave balance to no more than 20 days by 31 December 2005. The settlement constituted a full and final settlement of all matters between the parties as at the date of acceptance, whether or not any such matter had ever been previously raised by either party.
6. Unfortunately, Mr Thamer's basic concerns quickly re-emerged. On 6 June 2005, Mr Thamer filed a further application with the Authority. Noting that none of the issues covered in the statement of problem had been raised formally with Massey I directed the parties to utilise the provisions in their employment agreement over employment relationship problems, before the Authority would be involved again. Those provisions stated that an employee should advise the employer of the existence and nature of the problem and that action was required. Advice to the employer was said to normally be by way of informing a manager, but this could also be done by raising it with their manager or human resources adviser. The employment agreement then goes on to provide for internal mediation, as well as mediation by the Department of Labour, before the Authority is to be involved.
7. The parties complied with this direction but unfortunately were unable to resolve the issues between them.
8. Mr Thamer's complaints related to what he saw were breaches of the agreement and ongoing harassment by Massey. In essence his complaints can be summarised as follows. He believes that he has been required to do not only his own job but effectively that of two to three others. This has required him to do a lot of extra work. Despite this he has been denied overtime by Mr Freyberg and this has put him in an impossible situation, described by him as "*slavery at work*". Mr Thamer also believes that he has been placed under unreasonable scrutiny and criticism by Mr Freyberg. In particular, he claims that Massey has been guilty of ignoring and/or delaying requests for assistance from him. Mr Thamer also claims that he has been denied advancement within Massey by Mr Freyberg. Mr Thamer also believes he has been harassed, even to the extent of racial harassment, by Mr Freyberg. Finally, Mr Thamer claims that a review of the IT Department's infrastructure and support, commissioned by Mr Freyberg, was further evidence of threatening behaviour by Mr Freyberg and was done as retaliation for Mr Thamer's complaining about his situation. Massey denies each and every one of these complaints.
9. Ordinarily the Authority would only deal with matters that occurred prior to the filing of the employment relationship problem. In this case, in the interests of justice and because the parties are in an ongoing employment relationship, I decided to investigate and determine all matters put before me in evidence. This included a great amount of material relating to events that occurred as recently as November 2005.
10. Mr Freyberg has been Mr Thamer's manager since the end of 2001. Hence they have had a reasonably long term relationship. While there have been difficulties in this relationship, as I have indicated above, those problems had all been resolved as of 31 March 2005. It is useful to note, however, similarities between the problems which arose pre-settlement and those that have arisen post-settlement, even although it is only the latter which are addressed here directly. In essence, however, I have only had regard to events post-settlement, as all previous matters have been resolved. It would undermine the administration of justice, which is basically determined by the

[Employment Relations Act](#) in this sphere, were matters which had been disposed of, particularly by agreement, allowed to be raised again.

11. Mr Thamer claims that he has been required to do the work of at least three or four people. Mr Thamer was invited to bring witnesses in support of this claim but he elected not to do so. This meant there was a lack of corroboration from other people as to Mr Thamer's claims, which made it much more difficult for me to accept the very serious allegations he has made. On the basis of the evidence before the Authority, I am unable to find that Mr Thamer was in fact required to do the work of three or four people. What can be established is that there is a staff vacancy at present. I find, however, that it is not appropriate to lay any particular blame on either Mr Freyberg or Mr Thamer for the delays that have occurred in filling that position.
12. Mr Thamer had in fact previously made out a case for additional staff on a permanent basis, as one option for dealing with the perceived excess of work in the IT support section. Other options identified by Mr Thamer were that he could do more work himself through overtime or that some work could be contracted out. That request, however, predated the settlement and therefore Mr Freyberg took the view that it did not need to be responded to. I find that this was a reasonable conclusion for him to reach as all matters had been resolved at that time.

13. The matter was raised by Mr Thamer again on 15 April, but in different terms in that he suggested only the one option of hiring additional staff. Mr Freyberg repeated his previous advice to Mr Thamer that the Department was not in a financial position to hire additional staff. It is clear from Mr Freyberg's evidence, which I accept, that the Department has been forced to implement a sinking lid policy where staff numbers are reducing rather than increasing, because of reducing student enrolments.
14. Mr Freyberg decided that the issues of workload would be dealt with in the meantime by prioritisation, delegation of work by Mr Thamer and contracting out of work if necessary. This decision was entirely within his prerogative, I find, for reasons given below. Mr Freyberg's key response, however, was to institute a review of both IT support and IT infrastructure in the Department. This review was approved by Mr

Freyberg's boss, Professor Barry McDonald, the Pro Vice Chancellor of the College of Business. It was formally announced in May.

15. Mr Freyberg envisaged that the review would be conducted by a group of five, including himself and Mr Thamer. Mr Thamer, however, declined to be involved in the review, in part at least because he felt it could impact on his claim before the Authority. More fundamentally, however, he felt that it was merely part of Mr Freyberg's campaign to make his job untenable. The review has in fact been on hold for several months, principally because of the potential for change as a result of probable reductions in the number of academic staff that the Information Services Department supports, as a result of a continued reduction in enrolments.
16. I simply can not accept on the balance of probabilities that what appears to be a genuine restructuring exercise, in which Mr Thamer was given the opportunity to become an integral part of, is an exercise designed to make Mr Thamer's job even more intolerable to him than it already is, or constitutes harassment in any way. This is primarily because of the opportunity afforded Mr Thamer to be a member of the review panel. This, combined with his intimate knowledge of the area because of his job, would have meant that he was in an ideal position to demonstrate the importance of his position, as well as the need for additional staff. In any event, Massey is entitled to conduct such reviews from time to time. I do not accept that there has been any bias or any other procedural irregularity in its establishment and therefore there are no legal grounds to challenge it.
17. In Mr Freyberg's response to Mr Thamer's request for additional staff, he also stated that Mr Thamer "*should aim to have a discussion with me soon about priorities and how we will manage our labour needs in the interim*". Other than requests by Mr Thamer for overtime, I accept that he has not made any specific response to that suggestion by Mr Freyberg.
18. Mr Freyberg has also offered to have work contracted out if there is too much work for Mr Thamer to do. Mr Thamer, no doubt because of past difficulties with contractors, does not consider that an efficient and effective way of dealing with the work required in his area. In particular, Mr Thamer was very disappointed with the standard of

service provided by an internal contractor filling a vacancy in the Department's Palmerston North campus at present. I accept Mr Freyberg's assurance that whenever concerns about a contractor's performance were raised with him, he raised them with the internal contractor's superiors at the Massey campus. It follows that Mr Thamer has declined assistance in the form of contractors, which may have alleviated some of the resourcing problems he believes the IT Support section faces.

19. Because of Mr Thamer's perception that reasonable standards of service to the Department of Information Systems cannot be provided under the level of existing resources during standard hours, he has voluntarily worked a significant amount of overtime since the date of settlement. Mr Thamer is well aware that his standard hours of work are 37.5 per week and that he is required to have overtime approved prior to it being worked. Despite this, Mr Thamer has worked 1,588 hours overtime between the period of 1 May and 25 October 2005. Thus over a period of 25 weeks Mr Thamer claims, and I accept, that he has worked on average over 60 hours' overtime per week. Thus he has worked approximately 100 hours per week over this period. This level of work, particularly in the circumstances of this case, where it has been clear to Mr Thamer that overtime is only to be worked when approved, is not only astonishing but most likely unsustainable. In this regard I accept the health and safety concerns of Massey that should this amount of hours worked allowed to be continue unchecked, it could be injurious to Mr Thamer's health over the long term.
20. I accept that Mr Thamer has worked these hours with the best intentions. At the end of the day, however, it is Massey that is responsible for the standards of service in the IT Department, as Mr Thamer's employer. As the manager of the area, it is therefore Mr Freyberg, not Mr Thamer, who is ultimately responsible for the standards of service. It is not for the Authority to intervene in his decision-making, in circumstances where he has decided not to approve overtime for Mr Thamer. Standards may well slip if Mr Thamer reduces his working hours, but Mr Freyberg is the one who will be judged on that, not Mr Thamer. In this regard, it is not the role of the Authority to substitute its decision for that of an employer in a clear area of management prerogative.
21. What Mr Thamer's behaviour actually shows, I hold, is that he has been unable to accept decisions made by Mr Freyberg in terms of the levels of servicing to the

Information Systems Department and has therefore acted in the only way he knows possible to remedy this, i.e. by taking on extra work for himself. The difficulty that Mr Thamer could face in the long run extends beyond the risks to his health. This is because Mr Thamer appears unwilling or unable to accept direction from his manager in any area he disagrees with. This

springs, I believe, from a fundamental misunderstanding of his responsibilities as an employee of Massey. The misunderstanding is that he insists on taking full responsibility for the overall functioning of his part of the IT operation, despite his manager making it clear that he is not so responsible. How Massey deals with this issue is for it to decide. What is clear, however, is that the Authority can not intervene on Mr Thamer's behalf on the basis of the evidence before it.

22. Because of the tensions between Mr Thamer and Mr Freyberg, they have only held three or four face-to-face meetings since 31 March. They have relied principally on written communication. A close assessment of the written communication does not show any of the threatening behaviour, when viewed objectively, that Mr Thamer complains of. Rather what it shows is a fundamental difference of perception about how the support services Mr Thamer manages, but Mr Freyberg is responsible for, should be operated. What the correspondence did show was management making decisions that Mr Thamer did not agree with. None of it, however, disclosed decisions that no reasonable employer could ever reach, particularly when most if not all related to clear areas of management prerogative, such as the direction of the Information Services Department. As I have stated already, ultimately the responsibility for the provision of these services lies with the University through Mr Freyberg and Professor Barry McDonald.
23. In particular, the documentation did not expose any unreasonable behaviour by Mr Freyberg over his treatment of issues between Mr Thamer and two other employees. Mr Freyberg investigated those matters and tried to seek a resolution between the parties. The fact that he did not side with Mr Thamer does not mean that he did not act reasonably, I determine. I also accept that Massey's efforts to ensure that a contractor had access to a computer during a period of Mr Thamer's leave were done innocently

and without breaching Mr Thamer's privacy, particularly as the contractor did not utilise Mr Thamer's computer, as had originally been envisaged.

24. Furthermore, Mr Thamer gave clear evidence that he did not complain about Mr Freyberg's behaviour because he had previously not had responses from Professor McDonald about complaints against Mr Freyberg and because he had no confidence in Massey's human resources staff. For instance, Mr Thamer says that he was abused, threatened and intimidated at a meeting on 11 May with Mr Freyberg, yet he told no one of this. Despite this, on the occasion that Mr Thamer believed he was being directly discriminated against on the grounds of race, he did complain to Ms June Dallinger, Massey's Employment Relations Manager. This makes it more unlikely that the other serious allegations against Mr Freyberg had substance, as they were not raised by Mr Thamer at the time.
25. Mr Thamer also provided a number of written statements by staff in support of him. One of these people stated that they had heard Mr Freyberg shouting at Mr Thamer on more than one occasion. Mr Freyberg denied shouting at Mr Thamer, although he did accept that on occasion he had raised his voice at him in frustration. I do not take this matter into account, because it was clear that these occasions preceded the settlement of 31 March.
26. On the balance of probabilities, I do not accept that Mr Freyberg unreasonably declined overtime requests by Mr Thamer, despite the fact that he did in fact work what would have to constitute excessive overtime. These were, I hold, examples of the different perceptions of the direction and support services necessary to the Department of Information Systems highlighted above.
27. As a result of the difficult communications between the parties I accept that Mr Freyberg has on occasion been slow to respond to requests from Mr Thamer. In all the circumstances of this case, however, I do not consider that those constitute unjustifiable actions. Furthermore, there was no disadvantage to Mr Thamer's employment resulting from the occasional somewhat tardy response. Certainly when assessed against the difficulties that Mr Freyberg has had on occasions getting responses from Mr Thamer, these omissions were only minor, I hold.
28. In order to gain a pay increase, Mr Thamer has to exhibit exceptional performance. Such assessments are made annually and the assessment process for 2004/2005 has not been completed. Until that process is completed, the Authority can not intervene to say that Mr Freyberg has failed to adequately recognise Mr Thamer's performance. Both parties have a responsibility to ensure that this process is advanced quickly. Furthermore, under his employment agreement Mr Thamer has to apply for a pay increase formally and he has not done so to date.
29. I turn finally to the serious charge of racial harassment. Mr Thamer advanced two grounds for why he believed he was being racially harassed. The first related to comments that Mr Freyberg made in a meeting attended by another member of staff, as well as Messrs Thamer and Freyberg. These comments were made during introductory comments by Mr Freyberg. He noted that Mr Thamer was about to take leave and then made some reference to the country of Mr Thamer's birth (Iraq) as not being a safe place to visit at this time. Given that this comment was made in a conversational context, I find that it did not constitute racial harassment. I accept that Mr Thamer took personal offence to the link between the lack of safety in Iraq and his forthcoming holiday. This offence appears misplaced, I hold, on the balance of probabilities, particularly as neither Mr Freyberg nor the other staff member present could recall any such comments being made.
30. Mr Thamer's other concern is that he was the only one who has been treated in the way that he has at Massey. This is a claim of such generality that it is unlikely to ever be sustained as racial harassment. Furthermore, the evidence does not establish any unfair treatment of Mr Thamer. As I have found that he has not been treated unfairly I therefore conclude that he has not been racially harassed.

## **Determination**

31. In order to find in favour of Mr Thamer, I would have to find that his employment was affected to his disadvantage by some unjustifiable action by Massey. Unfortunately for Mr Thamer, I have determined that there have been no unjustifiable actions by Massey. I therefore dismiss his claims.

## **Costs**

32. On behalf of Massey, Mr Kynaston sought costs at the higher end of the range between \$1,500 and \$3,000. Because a lot of the material was documentary in nature, the Authority's investigation was able to be conducted within the standard period of one day. A great deal of preparation was required in advance of the investigation, however, by the parties. This process was made more difficult for Massey because of the generalities of Mr Thamer's claims and the lack of specific details as to where, when and how he was mistreated.

33. In all the circumstances of this case, I consider that an award of \$3,000 in Massey's favour is justified. I therefore order the applicant, Thamer R Thamer, to pay to the respondent, Massey University, the sum of \$3,000 in costs.

**G J Wood**

**Member of Employment Relations Authority**

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