

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 43  
5383368

BETWEEN                      GREG MATTHEWS  
Applicant

A N D                              JAN VAN DEN BERG t/a  
EUROPEAN CAR  
SPECIALISTS  
Respondent

Member of Authority:      K J Anderson

Representatives:            P Whiteford, Advocate for Applicant  
R Blackwood, Counsel for Respondent

Investigation Meeting:     24 January 2013 at Auckland

Date of Determination:    7 February 2013

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1]     The applicant, Mr Greg Matthews, claims that he was underpaid for the total period of his employment with the respondent, Mr Jan van den Berg. For the total period of his employment, 1 March 2006 to 24 February 2012, Mr Matthews was paid for 40 hours each week. However, he says that because he only had a half hour lunchbreak each day, he actually worked 42.5 hours each week. Therefore, Mr Matthews claims he was short paid by 2.5 hours for each week of his employment. He claims the gross sum of \$15,340, calculated on the basis of 130 hours per year multiplied by the relevant hourly rate that applied during each year. Mr Matthews also claims that he was not paid the wages due to him for the final week of his employment; a sum of \$935. The total sum claimed is \$16,275.00.

[2] Mr van den Berg denies that Mr Matthews has any entitlement to the payments claimed. He says that Mr Matthews was employed on the understanding that he would be paid for 40 hours each week. Mr van den Berg says that Mr Matthews was always paid for 40 hours each week, even if he took time off or the business closed early because of a shortage of work; or for any other reason that resulted in less than 40 hours being worked in any particular week.

### **Background**

[3] Mr Matthews commenced his employment as a motor mechanic at European Car Specialists (the business) on 1 March 2006. The evidence is that there was an employment agreement for an initial probation period of three months and then this was succeeded by a further employment agreement for a term of one year. Unfortunately, neither party has been able to produce a document for either of these periods, or indeed for any subsequent period. Nonetheless, it is commonly accepted that Mr Matthews was always paid for 40 hours each week at the relevant hourly rate that applied at the particular time.

[4] The evidence of Mr van den Berg is that when Mr Matthews commenced his employment it was agreed that he would be paid for 40 hours every week and this is what happened. However, Mr Matthews says that he was only permitted to have half an hour for lunch each day and that on most days; he worked from 8:00a.m. to 5:00p.m; hence he worked 8.5 hours per day or 42.5 hours per week (Monday to Friday). Therefore Mr Matthews says that he was short paid 2.5 hours every week during the total period of his employment.

[5] Mrs Deborah van den Berg is the wife of Mr Jan van den Berg and she is a partner in the business. Mrs van den Berg is responsible for the administration functions of the business, including the payment of wages and associated matters. Mrs van den Berg says that she talked to Mr Matthews at least once a week during the six years that he was employed but he never raised any concerns with her about the payment of his wages; apart from asking to have his wages paid a day earlier at one point, so that the money was in his bank account to enable automatic payments to be made on Fridays. Mrs van den Berg says that she made the necessary adjustments with the affect that Mr Matthews got paid every Thursday. This meant that he was being paid one day in advance, that is, the Friday of each week.

**August 2011**

[6] The common evidence is that the matter of Mr Matthews' hours of work was discussed some time in August 2011. The evidence of Mr van den Berg is that Mr Matthews talked about wanting to have a full hour lunchbreak. Mr van den Berg says that he informed Mr Matthews that having an hour for his lunchbreak would not be a problem, but Mr Matthews would have to make other arrangements instead of finishing early to pick up his son from school, doing his private telephone calling, and would have to do his other private business in his own time. The evidence of Mr van den Berg is that Mr Matthews decided to leave the arrangement that they had as it was.

[7] On the other hand, Mr Matthews says that he raised the matter of finishing work at 2:30p.m. on a Friday which, given that he was only having half an hour for lunch, would mean that he would still be working 40 hours each week, which is what he was being paid for.

[8] I find it odd that the two men should be at such cross purposes regarding the context of the discussion, but I am inclined toward the version of events presented by Mr van den Berg. This is because he also referred to his dissatisfaction in regard to Mr Matthews finishing work early on some days and simply recording it in the day book (diary) without discussing the early finishes with him. As I understand it, the evidence of Mr van den Berg is that when Mr Matthews made mention of wanting one hour for lunch, Mr van den Berg reacted by making it clear to Mr Matthews that he would not be able to continue having time off on full pay if he also wanted to take a full hour lunchbreak every day.

**Analysis and conclusions**

[9] Usually, the first step in a dispute like this would be to turn to the employment agreement in order to ascertain what the terms of employment are relating to the hours of work and the associated rate of pay. Unfortunately, there is not an employment agreement in existence, or at least nobody is able to produce one. Therefore, I am left with the oral evidence of the parties. Mr van den Berg says that it was agreed that Mr Matthews would be paid for 40 hours every week. Mr van den Berg also refers to the circumstances whereby he is often absent from the workshop obtaining parts for vehicle repairs and generally conducting the affairs of the business. Hence,

Mr Matthews and Mr van den Berg's son (Ben), had complete freedom to manage the day's work as they reasonably saw fit. This included having an hour for the lunchbreak if they wanted to.

[10] Mr van den Berg says that Mr Matthews has always been paid for 40 hours every week, even if he did not actually work the full time. Examples have been given whereby Mr Matthews had paid time off work to attend to his personal affairs, including taking care of his son who had some medical issues. Also when work was short, the workshop would close early but payment would still be made for the full 40 hours.

[11] Then there is the evidence of Mr Ben van den Berg. He worked with Mr Matthews and he refers to both of them being expected to manage their time to suit the 40 hours they were paid for each week. According to Ben van den Berg, there was a considerable amount of flexibility in the workplace with computer use during the lunchbreak and both men were able to pursue their personal interests to some extent. Ben van den Berg also refers to Mr Matthews leaving the workplace for his lunchbreak and work finishing as early as 3pm on some Fridays. The further evidence of Ben van den Berg is that he and Mr Matthews would often close the workshop early in the afternoon if they had finished the work that was available.

[12] There is also the remarkable circumstance whereby Mr Matthews worked for the business for six years and only made mention of a one hour lunchbreak in August 2011. Mr Matthews explains this, to some extent, by portraying Mr van den Berg as being hard nosed and difficult to communicate with and that any complaint would largely be ignored or reacted to. But the overall evidence, and my perception of Mr van den Berg, points more towards an employment relationship that was quite flexible and reasonably relaxed.

[13] I also note that Mr Matthews signed the wage book on a regular basis, thereby verifying the correct payment of his wages; and he never raised any issues with Mrs van den Berg at all. However, I also note that the signing of the wage book was a fairly casual arrangement whereby Mr Matthews would sign the book once a month albeit he was paid weekly, and he is rightly critical of the fact that he was not provided with any pay slips during the totality of his employment.

**Determination**

[14] First, I am bound to say that this dispute may have been avoided if the employer had provided a written employment agreement as required by s.65 of the Employment Relations Act 2000 (the Act). This provision of the Act specifically provides that an individual employment agreement must be in writing and among the various matters that must be included within the agreement is an indication of the arrangements relating to the times the employee is to work and the wages or salary payable to the employee.

[15] I also make the observation that the recording of the hours of work was a rather loose arrangement and really not satisfactory. However, notwithstanding this criticism, I conclude that the only agreement that existed in practice was that Mr Matthews would always be paid for 40 hours every week, regardless of whether he worked them or not. I conclude that both parties accepted that this was a satisfactory arrangement and Mr Matthews took full advantage of it accordingly during the total period of his employment. But for some reason, that has not been really explained, upon the termination of his employment with Mr van den Berg, Mr Matthews raised the claim that is now before the Authority.

[16] I also note that Mr Matthews ceased his employment on 24 February 2012 but a statement of problem was not received by the Authority until 21 September 2012. It strikes me that if Mr Matthews really felt that there was an issue regarding the appropriate payment of his wages, he would have been more active in pursuing such, both during his employment: and more promptly after finishing it.

[17] There is a legal onus on Mr van den Berg to ensure that a suitable written employment agreement is in place and proper wage and time records are maintained. However, notwithstanding this, I conclude that there was a flexible or give-and-take arrangement in place during the total period that Mr Matthews was employed. And by implication and the effluxion of time, he accepted this arrangement whereby he was paid for 40 hours every week, regardless of whether he actually worked them or not. I find that the only contractual agreement that existed between the parties was that Mr Matthews was entitled to be paid for 40 hours per week; and he was. The wage books reveal that there is no record of any part hours ever being paid for, or conversely, any wages ever being deducted, due to the absence of Mr Matthews for any particular reason. It seems to me that Mr Matthews cannot have it both ways. That

is, he cannot reasonably (or in equity) now say that that he is entitled to be paid for an extra half hour each day when he was quite content (and permitted) to take time off or work short time on various occasions, but still be paid for 40 hours.

[18] In summary, I find that there is not a contractual entitlement to the payments that Mr Matthews is claiming; hence his claims do not succeed.

[19] Finally and for completeness, an issue was raised in regard to whether Mr Matthews was paid for his final week of work. I accept the explanation given by Mrs van den Berg that Mr Matthews was not paid in arrears, rather he received his pay in the week that it was earned, and in fact received one day's pay in advance, being the Friday of each week. Hence, I find that Mr Matthews has been paid all wages that are due to him.

### **Costs**

[20] While normally costs would be allocated to the successful party, Mr van den Berg has failed to comply with his legal obligations in regard to providing an appropriate employment agreement with hours of work and details of remuneration set out. If an employment agreement been in place, this dispute may not have arisen. Therefore, I conclude that it is appropriate that costs should lie where they fall. It is so ordered.

[21] In conclusion, I recommend to Mr and Mrs van den Berg that they obtain professional advice (if they have not already done so) as to the relevant requirements of the Employment Relations Act regarding the provision of suitable (and signed) employment agreements and maintaining proper wage and time records.

**K J Anderson**  
**Member of the Employment Relations Authority**