

JERSEY / JUDGMENT

Jorg-Gustav Haertwig v Deerglen (Jersey) Limited

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Jersey Employment Tribunal This award, (subject to the right of appeal to the Royal Court, as set out in the Law) is legally binding and is the final decision of the Tribunal. Each party, if applicable, is responsible for establishing their liabilities with regard to Social Security and Income Tax payments. Case Number: 1710034/05 Employee: Mr J G Haertwig Employer: Deerglen (Jersey) Ltd Date of Hearing: Monday 23rd January 2006 Before: David Le Quesne, Chairman. Mary Curtis, Panel Member Tim Langlois, Panel Member Complainant: Jorg-Gustav Haertwig (who represented himself). Respondent: Deerglen (Jersey) Limited (represented by Mr Huw Thomas). Witnesses: Mr Haertwig & Miss Angelika Doehnert. Miss Lorraine Kelly & Mr Louis Parr.

Issues:

- a) Time within which claim for breach of contract must be submitted.
- b) Claim by Mr Haertwig for repayment of social security contributions wrongly deducted.
- c) Claim by Mr Haertwig for payment of bonus.
- d) Whether money advanced by Deerglen to Mr Haertwig was a loan of advance payment of bonus. Mr Haertwig is an architect. During the time in question he was working for Deerglen mainly on the rebuilding of that part of the Hotel de France which was destroyed by fire a few years ago. Deerglen is in the business of building, designing and managing projects. Mr Haertwig makes claims for return of part of his salary wrongly deducted for payment of social security payments and for payment of a bonus. Time for submitting the claim Mr Thomas made a preliminary submission that the claim form was submitted out of time, and therefore the claim should not be heard. He referred us to articles 76, 80 and 86 of the law. Article 86 describes the jurisdiction of this Tribunal, but does not describe time limits. Article 80 does not refer to time limits. Article 76 comes within Part 7 of the law, which is entitled “Unfair Dismissal” and the heading immediately above article 76 is “Remedies for Unfair Dismissal”. A complaint under article 76 must be made within 8 weeks. Mr Thomas’ submission was that the time of 8 weeks referred to in article 76 applies generally. We do not agree, for two reasons. First, the context and heading of the article make it clear that it applies only to unfair dismissal. Second, the law specifies the time within which various types of complaints must be made; most must be made within 8 weeks,

but we note that a complaint under article 24, in respect of a failure to allow an employee access to employment records, must be made within 13 weeks. These specific time limits make it impossible to conclude that there is an overall time limit. Given that the law does not provide a time limit within which all complaints must be made, we may have to decide one day what is the time limit for a complaint of breach of contract under article 86. For present purposes, we hold that there is not an 8 week time limit for complaints like those before us, which are for breach of contract. Social security Mr Haertwig claims that social security contributions were wrongly deducted from his salary. Deerglen agrees that, not realising that there was an earnings cap on contributions, it wrongly deducted 6% social security contributions from Mr Haertwig's salary above that cap, and produced figures showing that for the period from July 2003 to the end of the employment £2,423.46 should be repaid to Mr Haertwig. Mr Haertwig agreed this figure for that period, and we accordingly order Deerglen to pay that amount to him. Mr Haertwig also claimed that the same applied to the period up to July 2003; he told us that he remembers that similar deductions were made during that time, but he was unable to provide any documentary proof. On the other hand, both Miss Lorraine Kelly and Mr Louis Parr, directors of Deerglen, said that Mr Haertwig was not during that time an employee, but was a self employed consultant, and Miss Kelly was sure that no deductions from his salary were made. It was for Mr Haertwig to prove to us that the deductions were made, and he failed to do so. Miss Kelly provided to us the invoices which she prepared on behalf of Mr Haertwig, from Deerglen's accounting records, and was sure that the amounts shown on the invoices was paid in full; although the invoices did not prove the point, they were some circumstantial supporting evidence, and we found her evidence credible. We therefore are not satisfied that Deerglen made deductions for social security contributions from what it paid to Mr Haertwig up to July 2003. Bonus The typed contract of employment contains the following words hand written by Mr Parr after the contract was signed by the parties: "Bonus £4 for every hour worked". Were it not for the evidence of Mr Haertwig which we describe below, we would have found that he was unconditionally entitled to that payment. However, Mr Parr and Miss Kelly said that there were conditions attached to the bonus, the relevant one of which was that Mr Haertwig would remain on the project until its conclusion. Mr Haertwig agreed that this was a condition. We are reluctant to incorporate into written terms of employment an unwritten term, but where both parties agree upon an unwritten term, as in this case, it is right to treat that term as part of the contract. In our judgement, the bonus was only payable to Mr Haertwig if he remained on the project until its end. Mr Haertwig said that he did remain on the project until its end, but we do not accept that. What he said was that the work had not finished, but when he left Deerglen's employment that part of the hotel, or at least parts of it, were open for use. That is not the same as the project being finished, and it was clear to us that it had not finished when the employment came to an end. Mr Haertwig's claim for payment of the bonus therefore fails. Advance by Deerglen to Mr Haertwig Mr Haertwig made an arrangement with Mr Parr for Deerglen to pay the net sum of £9,000 to Mr Haertwig's bank in Germany, to pay a debt or obligation of Mr Haertwig. It was agreed that this was done as a kindness by Mr Parr. Mr Haertwig said to us that this was agreed with

Deerglen to be an advance payment of the bonus to which we have referred above. Mr Parr said that it was a loan. Immediately after the advance was made, Deerglen started deducting £300 per week from Mr Haertwig's salary. Mr Haertwig said that he objected, but his objections were ignored. Of the £9,000, £4,800 has been repaid in this manner. We asked Mr Parr if there was any written demand for repayment, which would have been evidence of a loan, but he told us that he did not expect payment of the remainder. We find that this was a loan, not an advance payment of the bonus. Both parties agreed that the condition to the bonus was that Mr Haertwig would remain at work on the project until the end. Further, Mr Parr said that, were it not for the necessity to retain Mr Haertwig on the project, he would have sacked him sometime before he left because of the way he spoke to his partner, Miss Kelly, who had been reduced to tears. In these circumstances, we find it unbelievable that (a) Deerglen would have agreed to pay in advance a substantial part of the bonus, and (b) it would have then reclaimed such advance payment by deductions from salary. Summary 1 Mr Haertwig's claim was submitted in time. 2 Mr Haertwig is entitled to repayment of £2,423.36 in respect of social security deductions which should not have occurred, but no more. 3 Mr Haertwig is not entitled to payment of the bonus. 4 The advance of £9,000.00 was a loan, not an advance against bonus. David Le Quesne. Chairman

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Prepared on 26 October 2026 · Esheria