



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Hayden

**Respondent:** CMME Group Ltd

**Heard at:** Southampton **On:** 24 and 25 September 2019

**Before:** Employment Judge Reed sitting alone

**Representation**

**Claimant:** Mr C McDevitt, Counsel

**Respondent:** Mr P Sands, Solicitor

**JUDGMENT** having been sent to the parties on 11 October 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. In this case the claimant Mr Hayden alleged he had been unfairly dismissed by his former employer, CMM Group Ltd ("the Company"). The Company denied that Mr Hayden had been unfairly dismissed but also denied that he had sufficient service to make such a claim. I dealt with that issue – length of service - as a preliminary point.
2. I heard evidence from Mr Hayden himself and, on his behalf, from Mr Powell, a former director of the Company. For the Company I heard from Mr Duncan, another former director. In addition, my attention was directed to a number of documents and I reached the following findings.
3. Mr Hayden is an IT expert and is the owner and operator of a personal company, Hayden Aubrey Ltd ("HAL"). For a considerable period before he was engaged by the Company he had provided services through HAL to other businesses. In the course of those arrangements he had not always provided all of the services himself but had on occasion appointed other people to carry out the work.

4. In September 2016 he was approached by Mr Powell with a view to providing services to the Company and as a consequence a contract was concluded between HAL and the Company for that purpose.
5. Mr Hayden began working for the Company on 26 September 2016. Although in his witness statement he says, "I left my company dormant and began working for the Respondent solely", the services were in fact provided through HAL. Invoices were submitted on behalf of that company. Payment was made without any deduction of tax or National Insurance.
6. In the course of his work for the Company, Mr Hayden became very involved in the business. He would attend management meetings, for example. Furthermore, he actually interviewed potential employees to be involved in the work he was undertaking and those employees, when recruited, reported to him.
7. Mr Hayden was involved in a team building exercise with employees of the Company.
8. In December 2016, Mr Hayden's role broadened and discussions took place with a view to him becoming an employee of the Company.
9. Mr Hayden attended the Company's Christmas party.
10. The contract between HAL and the Company actually terminated on 24 December 2016. Mr Hayden commenced work as an employee of the Company on 3 January 2017 and remained an employee until he was dismissed on 1 November 2018.
11. Under Section 108 of the Employment Rights Act 1996, the right to claim unfair dismissal is only enjoyed by an employee who has been continuously employed for a period of not less than two years ending with the effective date of termination of his employment.
12. Under Section 230 of the Act, an employee means an individual who has entered into or works under a contract of employment.
13. Clearly, Mr Hayden was an employee of the Company between 3 January 2017 and 1 November 2018. However, he contended he was actually an employee from 26 September 2016, such that he had qualifying service to claim unfair dismissal. For the Company it was said that he was not an employee until 3 January 2017 and that, even if that was not the case and he had been an employee from September 2016, his continuity of service was broken by the period of a week between 24 December 2016 and 3 January 2017.
14. There are a number of tests that can be applied in order to determine the employment status of an individual.
15. Firstly, I was bound to consider the control exercise over Mr Hayden by the Company. It is clear that he had a great deal of freedom and autonomy in the way he carried out his job. On the other hand, he had been expressly

brought into the Company because of the expertise he had but which the Company itself did not. In those circumstances it was inevitable that the Company would control him less than a relatively unskilled individual.

16. It was certainly the case that he was more fully integrated into the Company than one might expect from a third party. In particular, it would be unusual for employees to report to anyone other than an employee of the same company.
17. The major problem Mr Hayden had, however, related to the requirement for him to provide personal service. Both parties agreed that he was entitled to have his work undertaken by a “substitute”. In fact, I concluded that was not an accurate reflection of the arrangement between the parties. The contract pursuant to which Mr Hayden was carrying out his duties before January 2017 was one in which the Company contracted not with him personally but rather with his company.
18. Clearly, there will be situations where it is appropriate to describe such an arrangement as a sham – for example, where the “employer” insists that an individual contracts through a company but the understanding and expectation of both parties is that he will provide services personally.
19. That was not the case here. Whilst it cannot be said that the parties had equal bargaining power, Mr Hayden was clearly happy for HAL to enter into the arrangement. He had entered into such arrangements before with other organisations and there were no doubt advantages to him to do so.
20. The possibility of others undertaking the work under the contract was no sham. On the contrary, both parties agreed that he was at liberty to have the work undertaken by someone else. That was entirely consistent with a genuine commercial arrangement between two corporate entities, which this was.
21. Furthermore, there was not present the mutuality of obligation that would be required in order for Mr Hayden to be an employee. There were certainly mutual obligations between HAL and the Company but none as between Mr Hayden and the Company. He was at liberty to provide none of the services himself and payment was to be made by the Company to HAL, not himself.
22. In all the circumstances my conclusion was that Mr Hayden was not an employee of the Company until 3 January 2017.
23. For the sake of completeness I deal with the alleged break in employment over Christmas 2017. It is correct that Mr Hayden was undertaking work during that period on behalf of the Company but that was not pursuant to any contract between the parties. It was, essentially, an act of goodwill on his part, no doubt in anticipation of the relationship that would come into place in January.
24. There clearly was a complete week between the end of the “corporate” contract and the beginning of his employment contract. In the course of his closing submissions Mr McDevitt wished to assert that although Mr Hayden

only began working as an employee on 3 January, in fact, that was pursuant to a contract that came into existence well before that date.

25. No evidence had been given by either of the parties to that effect and it did not seem to be supported by any documents. Given the very late stage at which this was being suggested, I was not prepared to allow Mr Hayden to be recalled in order to provide evidence on that subject (there was no reference to it in his witness statement and the Company would have been entirely within its rights to object to further evidence being adduced at such a late stage).
26. I concluded that even had Mr Hayden been an employee pursuant to the contract of September 2016, there was thereafter a “non-counting” week – a week when he was not an employee. There was therefore a break in his employment such that he could not claim continuous employment until his dismissal from a date earlier than 3 January 2017.

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Employment Judge Reed

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Date 30 November 2019