

Employment  
Employment Case Law Update  
Rosling King LLP



### The Facts

The Claimant provided accountancy services for the brewery Exmoor Ales Limited (Brewery) for 27 years. From 1990 onwards she worked as an accountant and submitted invoices in the name of her partnership (with her husband) to the Brewery for payment. The tribunal held that she as then self-employed. However, from 2011 onwards the brewery paid her a quarterly payment of £1,000. It was said by the Claimant that this represented an exclusivity payment and was in return for her not working for any other clients. Everything was agreed verbally and invoices aside there was no written documentation between the parties, including the purpose behind the quarterly payments. When the brewery terminated her agreement she brought a number of claims including unfair dismissal and discrimination. The brewery denied that she was a worker or employee.

The tribunal held that the Claimant was an independent contractor until 2011 when she became an employee. It preferred her evidence that the quarterly payment required her to work exclusively for the brewery, and that she had no right to appoint a substitute in her absence. The brewery had said the £1,000 was a bonus and to assist with their cash flow.

The brewery appealed that decision on the basis that the tribunal had not looked at all the relevant factors on employment status, including her tax arrangements, and that she had prepared employment contracts for other staff but not herself, and was not a member of the employee share scheme. The EAT rejected the appeal. It held the Tribunal had been aware of the tax arrangements and the other factors but these had been overridden by other factors including mutuality of obligation, control and substitution. These factors, and the exclusivity obligation, were decisively in the Claimant's favour.

### Comment

What can be learnt from this decision? There was absolutely no written contract between the parties. The invoices produced by the Claimant had VAT added to them and the Claimant accounted to HMRC for her own tax, NICs and VAT but without any other written documentation the tribunal had to work out whose version of events to believe. The trial judge said simply that he preferred the Claimant's evidence and was "satisfied that there was a mutuality of obligations between the Claimant and the [Brewery] from April 2011 onwards and that the [Brewery] exercised a high level of control over the Claimant whilst at work". The mutual obligations were, on the Claimant's side, to provide services personally, precluding any substitution, and on the Brewery's side to provide her with work and pay. The judge also found that substitution of the Claimant, in the event of her absence from work for whatever reason, would not have been contemplated by the parties. Once again the ability to substitute turns out to be a deciding factor. Bizarrely this is one of those cases where substitution might not have been too difficult to arrange – the Claimant's husband was also her business partner and an accountant. Perhaps a missed opportunity?

For further information, please contact [Jacqueline Kendal](#) or the Partner with whom you usually deal.