2022

Statement for Claimant

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D. Statement of Relevant Facts

Claim 1

- The kitchen staff consists of 14 women and four men, and the outdoor staff consists of 19 men and two women.
- All staff are remunerated according to a minimum payment clause and the kitchen staff has negotiated a monthly average salary of 3,000 EUR and the outdoor staff a monthly average salary of 3,500 EUR.
- The kitchen staff perform tasks which include lifting, moving and stirring and on busy days they can easily walk up to 25 000 steps a day.
- The outdoor staff's tasks include pruning and cultivating, and they have mechanical equipment to assist in their daily tasks.
- Until the transfer of undertaking, the kitchen staff and the outdoor staff worked for the same employer.

Claim 2

- Svend Svendsen worked as the chief of operations of Johannes Beer Garden and Bodega A/S (hereinafter the "Transferor").
- Until the transfer, Svendsen spent approximately 40 % of his time with the café services, and 60 % with the outdoor area.
- Svendsen and the Transferor have not concluded a formal contract of engagement.
- The major areas of responsibilities and the format for negotiating the salaries of the chief of operations are set out in a separate document (a description of the tasks).
- According to this description, Svendsen formally defers to Kristensen and negotiates his salaries with her.
- In the everyday activities, management and decisions are carried out by Svendsen after the formal approval of Kristensen.
- Svendsen is registered with the Danish Business Authority as a director and is a member of the board of directors, where he participates on an ad hoc basis without voting rights.
- The Transferor taxed Svendsen as an employee for taxation purposes.
- The salary level of Svendsen didn't vary considerably over time from other managers in charge of 20-30 staff members.
- Svendsen diligently continued to carry out his normal tasks after the date of the transfer.

- After the transfer in June 2021, the Transferor immediately dissolved with all the assets and employees taken over by the two new contractors: DAMA and Green Galore.
- DAMA continues the café services, Green Galore continues the outdoor area.
- DAMA and Green Galore are not clear on how to continue Svendsen's employment.
- Svendsen claims to be employed by Green Galore, as he spent most of his working time outdoors before the transfer.
- Subsidiarily he claims that he continues to be employed by DAMA and Green Galore both, so that his central role in developing the visitor centre and management of staff is continued.
- Overall and in either case, Svendsen claims to continue working full time in a way that his hours are not reduced.

Claim 3

- Ole Olsen gave a written statement in Hansen's equal pay claim.
- Green Galore and DAMA in unison organised a summer party for the former employees of Johannes Beer Garden.
- Olsen was invited to perform in the party.
- During the event, Olsen sang a traditional Danish song called a Song about a guy from Ore ("the Song").
- The summer party started at 3 pm, the employees received their normal renumerations until 5 pm, Olsen's performance took place at 7 pm.
- A few days after the party, two female employees approached Olsen and expressed their negative opinions about Olsen's performance.
- According to Olsen's response, he only sang to the beautiful women at the party.
- Staff guidelines on how to avoid sexist behaviour as well as both physical and verbal sexual harassment had just been introduced.
- The HR manager gives Olsen a written notice of dismissal according to which the reason for the dismissal was Olsen's breach of company rules for appropriate behaviour at the workplace

E. Description of Relevant Legislation

1. International conventions

ECHR

The Convention aims at securing the human rights of European citizens. Denmark has ratified this convention on 13 April 1953.

Relevant articles: 10

2. EU legislation

The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union lays down the fundamental rights of every citizen of the European Union.

Relevant articles: 30, 11, 23

TFEU

TFEU lays down the foundations of the European Union.

Relevant articles: 157, 267

Directive 91/533/EC

Directive 91/533/EC establishes employer's obligation to inform employees of the conditions applicable to the contract or employment relationship

Relevant articles: 1(1)

Directive 2001/23/EC

Directive 2001/23/EC lays down the general framework on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses

Relevant articles: 2, 3(1), 4

Directive 2003/88/EC

The Working Time Directive concerns certain aspects of the organisation of working time, which lays down minimum safety and health requirements for the organisation of working time, in respect of periods of daily rest, breaks, weekly rest, maximum weekly working time, annual leave and aspects of night work, shift work and patterns of work, has been significantly amended.

Relevant articles: 2

Directive 2006/54/EC

The Equal Pay Directive concerns equality and equal opportunities between men and women especially in matters of employment and occupation.

Relevant articles: 4, 19, 24

3. Danish legislation

Equal Pay Act

This Danish legislation governs equal pay between men and women.

Relevant sections: 1, 2, 6

Statutory Act on Employees' Rights in the event of Transfers of Undertakings

The legislation establishes the general guidelines on the employees' rights in the event of transfers of undertakings.

Relevant sections: 2

The Industrial Agreement

This collective agreement has been concluded between CO-industry and Danish Industry for 2020-2023.

Relevant clauses: 22

Law of the Danes of King Christian V

A national law provision concerning master's responsibility.

Relevant clauses: Third book, 19th Chapter, section 2 (3-19-2)

Statutory Act on a Labour Court and Industrial Arbitration

The legislation establishes rules on national labour Court and industrial arbitration court.

Relevant clauses: 24

F. Questions

Claim 1

Are the kitchen staff and the outdoor staff comparable with each other?

If yes, is the work performed by the two groups to be seen as same work or at least work of equal value?

Has discrimination based on gender occurred?

Claim 2

Is Svendsen an employee or a self-employed person?

If Svendsen is considered an employee, which company should he transfer to?

Claim 3

Was Olsen dismissed by the Defendant as a response to passing on information regarding pay?

Should the summer party be considered as working time?

Does Olsen's conduct fulfil the criteria for harassment or sexual harassment and is he, personally, held responsible for all consequences under the present circumstances?

G. Summary of Arguments

1. Claim 1

First, the Claimant argues that the work performed by the kitchen and outdoor staff should be regarded at least as work of equal value and that a breach of Equal Pay Act and discrimination based on gender has occurred.

Second, the Claimant argues that the discrimination can be – depending on the interpretation of the facts – classified either as direct or indirect discrimination based on gender. Thus, the Defendant must repay the claimants salaries from the last 3 years and align the future salary levels of the kitchen staff with those of the garden staff. It is ultimately for the Defendant to prove that no discrimination based on gender has occurred.

2. Claim 2

The Claimant argues that Svendsen is an employee as he has, for a certain period of time, performed services for and under the direction of another person in return for which he has received remuneration. Therefore, he transfers to Green Galore full-time as a part of the transfer of undertaking. The Claimant notes that this is the only option that does not worsen his working conditions in contradiction to the principles of the Directive 2001/23/EC.

Second, should the Court – against the Claimant's view – find that Svendsen cannot transfer to Green Galore full-time, Svendsen must be employed by DAMA and Green Galore in proportion to the tasks performed by Svendsen, accordingly with principles established in the case law of the CJEU[1]
Should the Court find that Svendsen in fact is a self-employed person, he should still be protected as an employee within the meaning of the Directive 2001/23/EC.

[1] Case C-344/18 *ISS Facility Services NV*, para 38.

3. Claim 3

Firstly, Olsen argues that he was unlawfully dismissed as a reaction to passing on information in the equal pay claim by Hansen.

Secondly, Olsen claims that his dismissal was a consequence of allegedly breaching company rules for inappropriate behaviour during working time, which never happened. Olsen argues that the time he sang the Song should not be considered as working time and that he cannot be dismissed for his behaviour outside working time. Further, Olsen argues that his conduct at the summer party and after it do not fulfil the criteria for harassment nor sexual harassment.

Ultimately, if the Court finds that Olsen has breached employer's guidelines on appropriate behaviour during worktime, Olsen claims that the employer should assume legal responsibility for his behaviour, since the employer invited Olsen to perform in the event.

H. Arguments

1. Claim 1

1.1. The kitchen staff is comparable to the outdoor staff, and they perform work of the same value or more value

Article 23(1) of the Charter of Fundamental Rights of the European Union states the following: *Equality between women and men must be ensured in all areas, including employment, work and pay*. This principle has also been adopted in TFEU where it states in article 157 that "*Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied*". The CJEU has ruled in the case *Defrenne II* that the principle that men and women should receive equal pay is both horizontally and vertically directly effective.[2] The CJEU also held that the principle of equal pay is one of the foundations of the Community.[3] According to article 4 of Directive 2006/54/EC, *for the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated*. The national provision concerning equal pay is included to section 1 of the Equal Pay Act and is similar with the EU provisions. The Claimant has raised the question of equal pay and the Claimant argues that the employer has breached its obligation to pay equal pay for women and men.

According to the CJEU, in order to determine whether a woman is entitled to equal pay, there must be (1) a comparator of the opposite sex who is or has been (2) engaged in equal work or work of equal value.[4] The CJEU has in its case law added an additional requirement that the comparator must be employed in the same establishment or service.[5]

[2] Case 43/75 *Defrenne II*, para 1.
[3] ibid, para 12.
[4] See for example C-400/93 *Royal Copenhagen* para 32.
[5] C-320/00 *Lawrence*, para 17.

1.1.1. The kitchen staff is comparable to the outdoor staff

In this case, the comparative group of workers with the kitchen staff is the outdoor workers. In *Macarthys* the Court stated that the comparator must be a real, identifiable person.[6] In *Roberts* the CJEU further confirmed that not only the comparator must be real, but he must also be in "identical" situation with the woman.[7] In *Royal Copenhagen* the CJEU stated that the two groups had to encompass all the workers who could be considered in a comparable situation, taking into account factors such as the nature of the work, training requirements and working conditions.[8] In this case, it is clear that the employees in their respective groups perform their work in the same conditions, the kitchen staff in the kitchen and the outdoor staff out in the gardens. Also, all kitchen staff have the same kind of education while the outdoor staff have received the same kind of training to perform their tasks in the garden. Therefore, when all the above-mentioned facts are taken into consideration, the people in both groups are comparable in their respective groups and thus the groups can also be compared with each other.

1.1.2. The work performed by the kitchen staff is of equal value as the work performed by the comparator

In *Royal Copenhagen,* the CJEU stated that it is for the national court, which alone has jurisdiction to assess the facts, to determine whether, in the light of facts relating to the nature of the work done and the conditions in which it is carried out, the work is of equal value.[9] The CJEU has later repeated this view in *JämO* and *Brunnhofer*.[10] In *Brunnhofer* the CJEU also held that the responsibility of the job is a factor that can be taken into consideration within the overall assessment.[11]

In this case, the Claimant states that the kitchen staff and the outdoor staff are performing work of equal value. Firstly, the compared jobs are of similar nature since they require the education of almost the same length. In *Lawrence* the national premise was that the work of dinner ladies and cleaners is of equal value to that of men performing jobs such as gardening.[12] Secondly,

[6] Case 129/79 *Macarthys*, para 16.
[7] C-132/92 *Roberts*, para 17.
[8] C-400/93 *Royal Copenhagen*, para 31-35.
[9] ibid, para 42.
[10] C-236/98 *JämO*, para 48; Case C-381/99 *Brunnhofer,*para 49.
[11] C-381/99 *Brunnhofer,* para 50.
[12] C-320/00 *Lawrence* para 15.

the physical working conditions for the two groups must be considered to have at least equal value. The kitchen staff's work is physically demanding as it includes lifting, stirring, and chopping all day and lots of daily steps. Also, it is indicated that the work also requires dexterity and different skills in the food preparations. Conversely, although the outdoor work typically requires physical condition, they have mechanical equipment and the latest power tools to assist them with all the tasks. In *Royal Copenhagen* it was stated that the physical constraints of one group and the dexterity required from the other group are comparable with each other,[13] which should confirm that the working conditions in the present case between the kitchen and outdoor staff are comparable.

In fact, it should be noted that the work of the kitchen staff requires responsibility and is of higher value since food has a central role in Bodega which should be reflected in the wages. In *Murphy* the CJEU has confirmed that the provisions on equal pay cover also cases where the person is engaged in work of higher value than the person compared to.[14] Thus, considering the nature of the work of the two comparable groups, the kitchen staff is performing work of at least equal value, or possibly even work of higher value than the outdoor staff.

1.1.3. The comparable groups work in the same establishment

Until the transfer all the staff worked for the same employer. After the transfer the two groups have been transferred to work for different employers, the kitchen staff for DAMA and the outdoor staff for Green Galore. The Claimant requests the future salary levels to be aligned. The CJEU has stated in *Defrenne II, Macarthys, Jenkins* and *Worringham* that discrimination according to Article 157 was found in cases where men and women received unequal pay for equal work carried out in the same establishment or service, whether it was public or private.[15] In *Lawrence,* the CJEU confirmed the same principle and stated that the applicability of the provision concerning equal pay is not limited to situations in which men and women work for the same employer.[16] The CJEU continued that if the differences identified in the pay conditions cannot be attributed into a single source, there is no body which is responsible for the inequality under the scope of article 157.[17] Correspondingly, it can be assumed that when the

[13] C-400/93 *Royal Copenhagen*, para 29.
[14] C-157/86 *Murphy,* para 12.
[15] Case 43/75 *Defrenne II,* para 40; Case 129/79 *Macarthys,* para 10; Case 96/80 *Jenkins*, para 17; Case 69/80 *Worringham*, para 23.
[16] C-320/00 *Lawrence*, para 17.
[17] Ibid, para 18.

conditions can be attributed into a single source, such a body exists. Here, both the kitchen staff and the outdoor staff work at the same visitor centre and both groups worked for the same employer before the transfer. Therefore, a single source for the pay differences can be identified and the employer is responsible for ensuring the equality in pay.

1.2. Gender discrimination and the burden of proof

1.2.1. Direct discrimination

Section 1a of the Statutory Act on Equal Pay between men and women states that "*Direct discrimination shall be taken to occur when a person on grounds of gender is treated differently than another person is, has or would be treated in a corresponding situation.*" According to the Directive 2006/54/EC direct discrimination is identified "*where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation*." In *Defrenne II* the CJEU established that *among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by article 157 must be included in particular those which have their origin in legislative provisions or in collective labour agreements and which may be detected on the basis of a purely legal analysis of the situation*.[18] The CJEU established further that these situations also include cases where men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private.[19] As established above, the two groups have worked and still work in the same establishment. According to the well-established case law,[20] the situations constituting direct discrimination can be identified with reference to Article 157 TFEU, which also applies to cases where men and women work in the same establishment. Therefore, the pay difference between the kitchen staff and the outdoor staff constitutes direct discrimination based on gender and thus the Claimant is also entitled to repayment of salaries from the last 3 years.

[18] Case 43-75 *Defrenne II*, para 21.
[19] ibid, para 22.
[20] See for example Case 43-75 *Defrenne II*, para 22; C-320/00 *Lawrence*, para 17.

1.2.2. Alternatively, indirect discrimination has occurred

In the case that direct discrimination would not be established in the present circumstances, the Claimant argues that the pay difference is based on the negotiations carried out by the employer and therefore constitute indirect discrimination.

Both the kitchen staff and the outdoor staff have been and continue to be bound by the same collective agreement. Clause 22(2) of CBA states that *the pay of each employee shall be agreed in each individual case between the enterprise and the employee without interference from the organisations or their members*. The Claimant argues that the pay difference between the two groups constitutes indirect discrimination based on sex, since the two groups are comparable with each other, and the employers have carried out pay negotiations which have led to unequal treatment of the kitchen staff. For these reasons, the Claimant is entitled to the repayment of salaries from the last 3 years.

According to Section 1a of the Equal Pay Act indirect discrimination is described *to occur when an apparently neutral provision, criteria, or practice places people of one gender at a disadvantage compared to members of the other gender, unless that provision, criteria or practice is appropriate and necessary and can be justified by objective factors and the means to achieve them are expedient and necessary*. The national provision is equivalent to the definition included in Article 2 of the directive 2006/54/EC. In *JämO*, the CJEU established that the national court must verify if the statistics available indicate that a higher percentage of women than men work in the occupation. If so, this constitutes as indirect discrimination. The court further established that it is for the national court to determine whether e.g., an agreement which purpose is to regulate employment collectively or even unilateral action by an employer with respect to his staff, which, though applying independently of the sex of the worker, actually affects a considerably higher percentage of women than men, is justified by objective reasons unrelated to any discrimination on grounds of sex.[21]

The Claimant argues that the statistics in this case indicate that there is a higher percentage of women than men working in the kitchen and more men than women working outdoors. Further, the Claimant argues that even if the applicable wage clauses in CBA have been applied by the

[21] C-236/98 *JämO*, para 50–51.

Defendant and these are considered equal in principle, their interpretation and application in practice constitutes a violation of the Equal Pay Act as the Defendant has not ensured that the results of wage negotiations would be equal. In *Enderby* the CJEU stated that the fact that the rates of pay are decided by collective bargaining processes conducted separately for each of the two professional groups concerned, without any discriminatory effect within each group, does not preclude a finding of prima facie discrimination where the results of those processes show that two groups with the same employer and the same trade union are treated differently.[22] Following from the fact that the difference in pay conditions is ultimately traceable to a single source, This would indicate that indirect discrimination has occurred.

1.2.3. The burden of proof

In *Enderby* the CJEU stated that it is normally for the person alleging facts in support of a claim to adduce proof of such facts.[23] The fact that the Claimant does work of equal value and receives different remuneration demonstrates prima facie discrimination. In *Brunnhofer* the CJEU held that as a general rule, it is for employees who consider themselves to be the victims of discrimination to prove that they are receiving lower pay than that paid by the employer to a colleague of the other sex and that they are in fact performing the same work or work of equal value, comparable to that performed by the chosen comparator; the employer may then not only dispute the fact that the conditions for the application of the principle of equal pay for men and women are met in the case but also put forward objective grounds, unrelated to any discrimination based on sex, to justify the difference in pay.[24]

According to Article 19(1) of the Directive 2006/54/EC article *Member States shall ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment*. The Danish Statutory Act on Equal Pay between men and women section 6(2) also states *where a person who finds that he or she has been discriminated against under section 1 establishes facts which give cause for presuming that direct or indirect discrimination has taken place, it*

[22] C-127/92 *Enderby,* para 22.
[23] ibid, para 13.
[24] C-381/99 *Brunnhofer,* para 80.

is incumbent on the other party to prove that the principle of equal treatment has not been violated. Thus, it is up to the Defendant to prove that there has been no direct or indirect discrimination based on gender and ultimately for the national court to decide whether discrimination has happened.

2. Claim 2

2.1 Svendsen is an employee and therefore transfers as a part of the transfer of an undertaking

The transfer of Johannes Beer Garden and Bodega A/S constitutes a transfer of an undertaking in accordance with the Directive 2001/23/EC. According to Article 3(1) of the Directive 2001/23/EC, *the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee*. The Section 2 of the Danish Statutory Act on Employees' Rights in the event of Transfers of Undertakings is in accordance with the Directive 2001/23/EC.

According to the Article 2(1)(d) of the Directive 2001/23/EC *for the purposes of this Directive "employee" means any person who, in the Member State concerned, is protected as an employee under national employment law*. According to the Article 2(2) *the Directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship*. However, Member States shall not exclude from the scope of this Directive contracts of employment or employment relationships solely because of i.e., the number of working hours performed or to be performed.

In accordance with the Articles 2(1) and 2(2) of the Directive 2001/23/EC, the definition of an employee is determined according to the national law, which in this case, is Danish law. According to *May*, the CJEU's case law must, however, be considered when assessing the term under national law.[25] As the further arguments will prove, Svendsen is an employee and therefore transfers as a part of the transfer of undertaking.

[25] C-519/09 *May*, para 24.

2.1.1 The definition of an employee within the meaning of Danish labour law

Danish labour law does not have a uniform statutory definition of the term employee and a uniform definition has not been established for 'employee' or 'employment relationship' in legal practice, even though a range of general criteria to determine whether specific work is carried out under an employment relationship or on a self-employed basis has been developing.[26] The definition of the term 'employee' introduced in section 1 (2) of the Act on a Written Statement (Ansættelsesbevisloven) represents a sui generis benchmark in this regard. In accordance with the underlying Directive 91/533/EEC on the employer's obligation to inform the employee of the working terms, an employee is defined as "***a person who receives remuneration for personal work in an employment relationship***."[27]

The main feature of an employment relationship in Danish labour law is **personal subordination of the person who carries out the work**. The decision of whether a 'worker' is personally subordinated to the 'employer' depends upon the concrete circumstances of the individual case. The decision whether a person is subordinated to another is primarily based on the following criteria:

- The degree of the employer's right to direct and control the work performed by the person in question (subordination);
- The arrangement of the financial relationship between the parties;
- The obligation to carry out the work personally or the right to have someone else perform the tasks;
- The personal relationship between the worker and the employer, including the place of the work; and
- The worker's social and occupational position, especially whether the worker is primarily considered to be comparable with an employee or a self-employed worker.

Subordination in the sense of being personally subordinated to the instructions and control of the employer is probably the most important criterion in determining whether a person is an employee.[28] Taxation for the work in question is an important criterion in determining whether

[26] J. Kristiansen 2017, p. 3.
[27] J. Kristiansen 2017, p. 3. See Article 1 Paragraph 1 of the Directive 91/533/EEC.
[28] ibid, p. 7.

a person is considered an employee in terms of labour law. According to the Act on a Written Statement, there seems to be a presumption in practice of a contract of employment in relation to labour law matters, if the work is treated by the employer as an employment relationship in relation to tax matters.[29] Thus, if tax issues are dealt with by the employer as they are under an employment relationship, it will be difficult for the employer to argue against the existence of an employment relationship.[30]

Another important characteristic of an employment relationship is that the employee himself performs the work or at least for the most part for the benefit of the employer. In addition, an employee is in principle obligated to carry out the work personally.[31]

The parties to a contract of work are free to choose between a contract of employment and a contract of services. The parties, however, have no freedom to decide whether the work is in fact based on an employment relationship or a relationship of self-employment. The legal concept of employee is mandatory and cannot be disposed of by the parties to the contract. Therefore, if a person qualifies as an employee based on an objective legal assessment based on the abovementioned objective criteria, the parties are not allowed to set this qualification aside by insisting that their contract is a contract of services.[32] Thus, the labelling of the contract is not in itself decisive for determining employee status.[33]

2.1.2 The CJEU's interpretation of the definition of a 'worker' and the purpose of the Directive 2001/23/EC must be considered when determining the term 'employee under national law

In addition to national law, the CJEU's interpretation of the definition of a worker and the purpose of the Directive 2001/23/EC must be taken into consideration when determining the definition under national law. In *May*, in the context of free movement of workers, the CJEU held that this information, given by the Court as regards the concept of 'worker' within the meaning of Article 45 TFEU, applies in respect of the same concept used in the legislative measures referred to in Article 288 TFEU too.[34] This means that the concept of a worker

[29] ibid, p. 12.
[30] ibid, p. 8
[31] ibid, p. 8
[32] ibid, p. 10-11.
[33] ibid, p. 9.
[34] C-519/09 *May*, para 24; C–94/07 *Raccanelli*, para 27.

developed in the context of the internal market also concerns secondary law and, consequently, the interpretation of directives which refer directly to national law. The purpose of this is to avoid situations in which Member States exclude certain categories of persons from the scope of the directives in the field of social law, even though the relationship between those persons and their contractors is not fundamentally different from the employment relationship between employees and their employer.

Directive 2001/23/EC refers to the term "employee" and not "worker". This, however, does not prevent the interpretation that the CJEU's case law regarding the term "worker" must be considered when assessing the term "employee" under national law, because these terms in fact have the same meaning. While the terminological inconsistency exists in the English language version of the Directive, other translations refer to identical concepts. For example, in the Finnish language versions of the Directive 2001/23/EC and the case law cited above, there is no distinction between the concepts of an employee and a worker. Same applies to Danish translations, where only the term "*arbejdstager*" is referred to. Thus, the CJEU's case law regarding the definition of a worker must be considered when assessing the definition under Danish law.

2.1.3 The definition of an employee within the meaning of CJEU's case law

The CJEU regularly points out that there is no single definition of 'worker' in Community law.[35] The CJEU has stated that it varies according to the area in which the definition is to be applied.[36] The CJEU has developed its understanding of the concept of 'worker' most extensively in the area of free movement of workers.[37] The point of departure for a European concept of 'worker' is the 1986 landmark decision Lawrie-Blum[38] in which the CJEU interpreted the term 'worker' within the meaning of Article 45 TFEU for the first time.[39]

In *Lawrie-Blum* the CJEU stated that the term '*worker'* has a Community meaning and must be interpreted broadly.[40] In *Levin* the CJEU further argued that, if that were not the case, the

[35] M. Risak and T. Dullinger 2017, p. 27.
[36] C-85/96 *Martínez-Sala*, para 31; C-543/03 *Christine Dodl and Petra Oberhollenzer*, para 27; C-256/01 *Allonby*, para 63.
[37] M. Risak and T. Dullinger 2017, p. 18.
[38] Case 66/85 *Lawrie-Blum*.
[39] M. Risak and T. Dullinger 2017, p. 27.
[40] Case 66/85 *Lawrie-Blum*, para 16; Case 53/81 *Levin*.

Community rules on freedom of movement for workers would be frustrated, as the meaning of those terms could be fixed and modified unilaterally, without any control by the community institutions, by national laws which would thus be able to exclude at will certain categories of persons from the benefit of the treaty.[41] In *Lawrie-Blum* the CJEU continued to state that that concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned, the essential feature of an employment relationship, however, is that **for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration**.[42]

This interpretation has been repeated in several cases. In *O* the CJEU stated that according to consistent case-law of the Court, that concept has a specific independent meaning and must not be interpreted narrowly. Thus, any person who pursues **activities that are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'**.[43] In this paragraph, the CJEU made a reference to *Lawrie-Blum*, *Collins*, *Trojani* and *Neidel*.[44] Similar interpretation has been made in, i.e., *Allonby, Martínez Sala, Fenoll, Matzak* and *Yodel.*[45]

In *Sindicatul* the CJEU held that an employment relationship implies **the existence of a hierarchical relationship between the worker and his employer**.[46] In *Holterman* the CJEU established that the issue whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterizing the relationship between the parties.[47] According to CJEU, these factors can be, i.e., being under the direction and supervision of the contractor, the obligation to comply with the rules of the contractor[48], the sharing of the commercial risks of the business, the freedom for a person to choose his own working

[41] Case 53/81 *Levin*, para 11.
[42] Case 66/85 *Lawrie-Blum*, para 17.
[43] C-432/14 *O*, para 22.
[44] Case 66/85 *Lawrie-Blum*, paras 16 and 17; C-138/02 *Collins*, para 26; C-456/02 *Trojani*, para 15; C-337/10 *Neidel*, para 23.
[45] C-256/01 *Allonby*, para 67; C-85/96 *Martinez-Sala*, para 32; C-316/13 *Fenoll*, para 27; C-518/15 *Matzak*, para 28, C-692/19 *Yodel*, para 29.
[46] C-147/17 *Sindicatul*, para 42.
[47] C-47/14 *Holterman*, para 46; C-229/14 *Balkaya*, para 37; C-256/01 *Allonby*, para 66.
[48] Case 66/85 *Lawrie-Blum*, para 18.

hours and to engage his own assistants[49], the remuneration of a person[50], and the substance of the contract and the arrangements for giving effect to those documents[51]. In *Yodel*[52] the CJEU stated that more leeway in terms of choice of the type of work and tasks to be executed, of the manner in which that work or those tasks are to be performed, and of the time and place of work, and more freedom in the recruitment of his own staff are the features which are typically associated with the functions of an independent service provider.[53] In the assessment it must be taken into account that the independence of that person does not appear to be fictitious and, second, there does not appear, a priori, to be a relationship of subordination between him and his putative employer.[54]

2.1.4 Svendsen's position as an employee

Based on all the factors and circumstances characterizing the relationship between the parties, it appears that Svendsen has been in a hierarchical relationship of subordination with the employer, as he has formally deferred to Kristensen in the everyday management and decisions. The simple fact that Kristensen has immediately approved all Svendsen's plans, and suggestions doesn't rule out the possibility that Svendsen has been in a relationship of subordination with the employer but is rather an indicator for Kristensen's right to direct and control Svendsen's actions, as Kristensen has had the possibility to not approve Svendsen's suggestions.

Svendsen has diligently continued to carry out his normal tasks also after the date of the transfer. This clearly indicates that neither of the transferees have questioned Svendsen's employment but have been willing to continue with Svendsen. The Transferor has also taxed Svendsen as an employee for taxation purposes, which is a clear indicator that Svendsen is an employee.

Svendsen has performed the work for the benefit of the employer in return for remuneration. Therefore, Svendsen has been economically dependent on the Transferor and cannot be seen as fully independent. In addition, the CJEU has established that even a limited remuneration would be enough to be seen as an employee.[55] As the salary level of Svendsen over time has

[49] C-3/87 *Agegate*, para 36.
[50] C-456/02 *Trojani*, para 16.
[51] C-94/07 *Raccanelli*, para 35.
[52] Reasoned order under Article 99 of CJEU's Rules of Procedure.
[53] C-692/19 *Yodel*, para 32; C-270/13 *Haralambidis*, para 33.
[54] C-692/19 *Yodel*, para 43.

not varied considerably from other managers in charge of 20-30 staff members, it is a strong indicator that Svendsen's remuneration is clearly enough for him to be seen as an employee.

Under the present circumstances, Svendsen has not himself been able to determine the place and time of his work. In addition, Svendsen has carried out the work personally, as there are no indicators that Svendsen would have been able to use substitutes. Overall, Svendsen's subordination does not appear to be fictitious.

The simple fact that Svendsen has been a member of the Board of Directors is not enough as such to rule out the existence of subordination. In *Dita Danosa*, the CJEU stated that the fact that Ms Danosa was a member of the Board of Directors of a capital company is not enough in itself to rule out the possibility that she was in a relationship of subordination to that company: it is necessary to consider the circumstances in which the Board Member was recruited; the nature of the duties entrusted to that person; the context in which those duties were performed; the scope of the person's powers and the extent to which he or she was supervised within the company.[56] In addition, Svendsen has not had voting rights, so he has been rather a silent observer than a full member of the board. Therefore, Svendsen should not be compared to a regular board member.

Svendsen and the Transferor have not concluded a formal contract of employment, but a description of tasks sets out his responsibilities. However, Svendsen cannot be excluded from the concept of employee on the sole ground that he does not have a contract of employment with the employer.[57] Labelling of the contract is not in itself decisive for determining employee status.[58]

Svendsen has pursued activities that are real and genuine, as he has **for a certain period of time performed services for and under the direction of another person in return for which he has received remuneration.** On the abovementioned grounds, Svendsen is an employee, both within the meaning of Danish labour law and the CJEU's case-law.

[56] C-232/09 *Dita Danosa*, para 47.
[57] C-216/15 *Ruhrlandklinik*, para 29.
[58] J. Kristiansen 2017, p. 9.

2.2 Even if Svendsen is a self-employed person, he should still be protected as an employee within the meaning of the Directive 2001/23/EC

Should the Court find that Svendsen in fact is a self-employed person, he should still be protected as an employee within the meaning of the Directive 2001/23/EC.

2.2.1 A self-employed person under national law may be considered as an employee within the meaning of certain directive

The CJEU has stated that it is possible for a person to be considered an employee within the meaning of a certain directive, even if that person is a self-employed person under national law. In *Allonby*, in the context of equal pay for men and women, the CJEU stated that the formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of Article 141(1) EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article.[59]

In *Dita Danosa*, in the context of Directive 92/85/EEC, the CJEU stated that formal categorisation as a self-employed person under national law does not exclude the possibility that a person may have to be treated as a worker for the purposes of Directive 92/85 if that person's independence is merely notional, thereby disguising an employment relationship within the meaning of that directive.[60] The CJEU continued to state that contrary to the assertions made by LKB, neither the way in which Latvian law categorises the relationship between a capital company and the members of its Board of Directors nor the fact that there is no employment contract between the company and the Board Members can determine how that relationship falls to be treated for the purposes of applying Directive 92/85. [61]

In *Holterman* the CJEU established that in order to ensure the full effectiveness of Regulation No 44/2001, in particular Article 18, the legal concepts that regulation uses must be given an independent interpretation common to all the Member States.[62] In *Ruhrlandklinik*, in the

[59] C-256/01 *Allonby*, para 71.
[60] C-232/09 *Dita Danosa*, para 41.
[61] Ibid, para 42.
[62] C-47/14 *Holterman*, para 37; C-154/11 *Mahamdia*, para 42.

context of temporary agency work, the CJEU stated that to restrict the concept of 'worker' as referred to in Directive 2008/104 to persons falling within the scope of that concept under national law, in particular, to those who have a contract of employment with the temporary-work agency, is liable to jeopardise the attainment of those objectives and, therefore, to undermine the effectiveness of that directive by inordinately and unjustifiably restricting the scope of that directive.[63]

2.2.2 Svendsen's categorization as a self-employed person would disrupt the aim of the Directive 2001/23/EC and undermine the effectiveness of that directive

The principle of *effet utile* means that EU terms must be interpreted with a view to effectively achieving the intent of legislation. The Directive 2001/23/EC aims to safeguard the rights and interests of the employees concerned by the transfer. According to its preamble Directive 2001/23/EC is intended "*to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded*. In *ISS Facility Services* the CJEU stated that Directive 2001/23 is intended to safeguard the rights of employees in the event of a change of employer by enabling them to continue to work for the new employer on the same terms and conditions as those with the transferor. The purpose of that directive is to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer.[64]

The Claimant argues that Svendsen's categorization as a self-employed person would disrupt the aim of the Directive 2001/23/EC and undermine the effectiveness of that directive by unjustifiably restricting the scope of that Directive, as it would result Svendsen being placed in a less favourable position solely because of the transfer. Therefore, should the court consider Svendsen a self-employed person, he should still be protected as an employee within the meaning of the Directive 2001/23/EC.

[63] C-216/15 *Ruhrlandklinik*, para 36.
[64] C-344/18 *ISS Facility Services NV*, para 25; C-472/16 *Colino Sigüenza*, para 48.

2.2.3 Request for a preliminary ruling under Article 267 of TFEU

Should the Industrial Arbitration Tribunal consider it obvious or questionable that the terms 'worker' and 'employee' under the present circumstances may not refer to the same concept and that, therefore, the CJEU's case law concerning the concept of 'worker' is not necessarily applicable to the main issue of determining the term 'employee' within the meaning of Directive 2001/23/EC, the Claimant considers that such unclarities may put the effective application of EU law at risk. According to section 24 of the Statutory Act on Labour Court and Industrial Arbitration the industrial arbitration tribunal may, in the same extent as a national court, ask a preliminary question from the CJEU.

The Directive 2001/23/EC refers directly to national law in order to define the term 'employee'. However, Denmark has no uniform statutory definition of the term 'employee'. The interpretation that the CJEU's case law concerning the concept of 'worker' doesn't need to be taken into account when considering the term 'employee' within the meaning of Directive 2001/23/EC, is liable to undermine the effectiveness of that Directive by unjustifiably restricting the scope of that Directive. That interpretation is also liable to cause uncertainty between different language versions, as the English language versions are the only ones making a notable distinction between a 'worker' and an 'employee'. For the sake of clarifying the interpretation of the Directive 2001/23/EC, the questions may be referred to the CJEU for a preliminary ruling. Should the Tribunal come into such conclusion, the Claimant considers that the questions should take into account the following aspects:

> 1) Under circumstances where the decision of the primary case depends on the interpretation of Article 2(1)(d) of the Directive 2001/23/EC, which refers directly to the national law regarding the concept of employee, and there is no statutory definition in the national law for the concept of employee, should article 1 of the Directive be interpreted in the way that it prevents the referring court to establish the position of the 'employee' in accordance with the settled case law of the Court concerning the concept of a 'worker' as defined in Article 45 of the TFEU?
>
> 2) If the first question is answered in the positive, after assessing the national notion of an 'employee' in the present case, where the national law does not differentiate the concepts of a worker and an employee, does Article 2(1)(d) of the Directive 2001/23/EC

preclude the national Court to entitle a person not considered an 'employee' within the meaning of that Directive the same level of protection as is afforded to employees?

2.3 Svendsen transfers to Green Galore full-time as a part of the transfer of undertaking

The Claimant argues that he transfers to Green Galore as a full-time employee. In *ISS Facility Services* the CJEU confirmed the possibility of transferring the contract of employment solely to the transferee with whom the worker is to perform his or her principal tasks, as it must be observed that that interpretation of the first paragraph of Article 3(1) of Directive 2001/23/EC ensures the safeguarding of the rights and obligations arising from the contract of employment vis-á-vis that transferee and protects, accordingly, the interests of the worker.[65] The CJEU has held that Directive 2001/23/EC is intended to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee so that the employees affected by the transfer are not placed in any less favourable position solely as a result of the transfer.[66] Accordingly, it should be noted that the directive cannot be invoked in order to undermine the working conditions of the employee affected by the transfer.[67] Since both Green Galore and DAMA have expressed to have an issue with Svendsen working as a part-time employee for both employers, the only solution that does not deteriorate his employment conditions is that either Green Galore or DAMA employ him as a full-time employee. Any other solution would put Svendsen in a less favourable position solely as a result of the transfer. Svendsen has performed his principal tasks in the outdoor area and therefore, Green Galore should employ him full-time.

2.4 Subsidiarily, Svendsen should be employed by DAMA and Green Galore in proportion to the tasks performed by Svendsen

Should the Court find that Svendsen cannot transfer to Green Galore full-time, Svendsen should be employed by DAMA and Green Galore in proportion to the tasks performed by Svendsen.

[65] C-344/18 *ISS Facility Services NV*, para 30.
[66] Case 105/84 *Foreningen af Arbejdsledere i Danmark*, para 26; C-472/16 *Colino Sigüenza*, para 48.
[67] Opinion of Advocate General Szpunar on C-344/18 *ISS Facility Services NV*, para 77.

In *ISS Facility Services*, the CJEU stated that where a transfer of undertaking involves a number of transferees, Article 3(1) of Directive 2001/23 must be interpreted as meaning that the rights and obligations arising from a contract of employment are transferred to each of the transferees, in proportion to the tasks performed by the worker concerned, provided that the division of the contract of employment as a result of the transfer is possible and neither causes a worsening of working conditions nor adversely affects the safeguarding of the rights of workers guaranteed by that directive, which it is for the referring court to determine.[68]

Until the transfer, Svendsen has spent probably 40% of his time with the café services, and 60% of his time with the outdoor area. In addition, Svendsen has diligently continued to carry out his normal tasks also after the date of the transfer. In light of the *ISS Facility Services*, Svendsen should be employed part-time by both DAMA and Green Galore, in proportion to the tasks performed by him.

3. Claim 3

3.1. Olsen was unlawfully dismissed as a reaction to passing on information regarding pay

Olsen argues that he was unlawfully dismissed as a reaction to giving a written statement in the equal pay claim against the employers. Although, according to Olsen's written notice of dismissal, Olsen was dismissed due to breach of company rules, there are clear indications that the actual reason for the dismissal was Olsen's written statement in the equal pay case. According to Section 3(1) of the Equal Pay Act *an employer shall not be allowed to dismiss an employee as a reaction to a complaint or because the employee has passed on information regarding pay*. The national provision is in line with Article 24 of the Directive 2006/54/EC which states that *member states shall introduce their legal systems such measures as are necessary to protect employees against dismissal by the employer as a reaction to complaint within the undertaking or any other legal proceedings aimed at enforcing compliance with the principle of equal treatment*.

[68] C-344/18 *ISS Facility Services NV*, para 38.

In this case, Olsen gave a written statement in the equal pay claim against DAMA in July 2021 and was dismissed after it on July 14th, 2021. Green Galore expressed dissatisfaction with the testimony in the equal pay case and considered it to be disloyal behaviour towards his employer. According to Section 3(2) of the Equal Pay Act *"(i)t is incumbent upon the employer to prove that the dismissal has not been made in violation of the rules laid down in 3(1)*". Since there are indications, that Olsen was unlawfully dismissed as a reaction to passing information regarding pay, it is up to Green Galore to prove that the dismissal is not based on Olsen's written statement in the equal pay case.

In *Jamina Hakelbracht* the CJEU confirmed that, in accordance with recital 32 of Directive 2006/54, '*an employee defending or giving evidence on behalf of a person protected under [that] Directive should be entitled to the same protection'* as the protected person, even after the termination of the working relationship. That recital confirms, therefore, that that directive aims to circumscribe the category of employees, other than the person discriminated against, who should be able to benefit from protection against retaliation, not on the basis of formal criteria, but on the basis of the role that those employees may have played for the benefit of the protected person and which may have led the employer concerned to take adverse action against them.[69] Therefore, the category of employees protected according to the Directive 2006/54 is broad and Olsen enjoys protection in accordance with it.

3.2. Olsen did not breach company rules for appropriate behaviour during working time and thus, he cannot be dismissed for it

If the Court considers that Olsen was not dismissed due to passing on information regarding pay, the Claimant further argues that Olsen cannot be dismissed due to breach of company rules. Firstly, Olsen sang the Song outside working time and secondly, his actions do not fulfil the criteria for harassment nor sexual harassment.

Under Danish law, breach of employee obligations constitute a lawful reason for dismissal only if the action is reasonable and proportionate. The Claimant argues that if the Court deems that Olsen has breached the rules for appropriate behaviour at the workplace, terminating the

[69] C-404/18 *Jamina Hakelbracht*, para 29.

employment is not reasonable or proportionate considering the severity of Olsen's conduct and that the claimed conduct partly took place outside working time.

3.2.1. Olsen cannot be dismissed based on his conduct outside working time

The Claimant argues that Olsen's performance at the summer party took place outside working time and therefore, Green Galore cannot terminate his employment due to the performance.

Working time is defined in article 2 of the Working Time Directive according to which *'working time' means any period during which the worker is working at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice*. The CJEU has confirmed that concept of "working time" in the Working Time Directive is placed in opposition of "rest period" and the Directive makes no provision of other situations falling between the two.[70] The CJEU has repeatedly held that the Working Time Directive defines "working time" as any period during which the worker is at work, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practices, and that that concept is placed in opposition to rest periods, the two being mutually exclusive.[71] Further, the CJEU has held that the concepts of "working time" and "rest period" constitute concepts within the EU law which must be defined in accordance with objective characteristics. Only such autonomous interpretation is capable of securing the full effectivity of the Working Time Directive and uniform application of those concepts within all the Member States.[72]

Concerning the first element of the concept of working time according to which the worker must be carrying his activity or duties, it should be noted that Olsen works for Green Galore as a greenhouse worker and it is not disputed that performing songs at office parties is not a part of his regular tasks. Also, the fact that the party committee had not defined the songs for the performance, confirms that Olsen had no instructions for the performance, which indicates that the performance occurred outside working time.

The concept of working time necessitates that the worker must be at the employer's disposal. The CJEU has stated that it should be noted that the decisive factor is that the worker is required to be physically present at the place determined by the employer and to be available to the

[70] See C-266/14 *Tyco*, para 17.
[71] C-266/14 *Tyco*, para 25. C-151/02 *Jaeger*, para 48; C-14/04 *Dellas and others*, para 42, orders in C-437/05 *Vorel*, para 24; C-258/10 *Grigore*, para 42.
[72] C-266/14 *Tyco*, para 27; C-14/04 *Dellas and others*, para 44 and 45.

employer in order to be able to provide the appropriate services immediately in case of need.[73] Accordingly, in order for a worker to be regarded as being at the disposal of his employer, that worker must be placed in a situation in which he is legally obliged to obey the instructions of his employer and carry out his activity for that employer.[74] Conversely, in *Simap* the CJEU held that the possibility for workers to manage their time without major constraints and to pursue their own interests is a factor capable of demonstrating that the period of time in question does not constitute working time within the meaning of Working Time Directive.[75] After his performance Olsen was not carrying out his activities or duties for the employer and there are no indications that Olsen did not have the possibility to pursue his own interests and was required to be physically present. This also amounts to the element of rest time (as the contrary of working time).

Therefore, the Claimant argues that in this case while Olsen was working at the time of his performance which was a part of the entertainment programme, any conducts after this have been outside his working time. After his performance Olsen was not carrying out his activities or duties. Olsen had the possibility to pursue his own interests and was not required to be physically present. In other words, the conduct happened during his rest period. Olsen performed the Song after hours passing on and also spurred his colleagues to sing. Thus, the Song was not a part of the entertainment programme and Olsen did not sing it during working time.

Moreover, it shall be noted, that the workers only received their normal remunerations until end of the working day at 5 pm and that Olsen's part of the entertainment programme started as scheduled at 7 pm. Although, according to CJEU case law receiving salary is not considered to be a mattering factor in the assessment whether a period is considered as working time or not, the fact that the employees did not receive renumeration after 5 pm can be considered as an indication that the time spent at the summer party is not working time.[76]

On the aforementioned grounds, Olsen argues that rest time started at 5 pm when the employees stopped receiving remuneration and performing their normal duties. Subsidiarily, Olsen disputes that the time he spent at the summer party after his performance should be regarded as

[73] C-266/14 *Tyco*, para 35.
[74] C-266/14 *Tyco*, para 36.
[75] C-303/98 *Simap*, para 50.
[76] C-344/19 *Radiotelevizija Slovenija,* para 26.

working time. Since Olsen's performance at the summer party took place during rest time, it should not be considered as a lawful ground for dismissal. Furthermore, the conduct in question had spurred no immediate responses of contempt or disdain, which translates to at least a reasonable doubt that the actions were not considered inappropriate in the course of the event.

Since the claimed harassment or sexual harassment have taken place during rest time, it does not have anything to do with the employment and cannot be a reason for the dismissal. The people concerned should file a civil claim against Olsen and leave it for the Court to decide whether such misconduct has occurred. However, the arbitration court should not rule on Olsen's behaviour outside working time.

3.2.2. Olsen's conduct does not fulfil the criteria for harassment nor sexual harassment

The Claimant argues that even in the case where the Court would determine that Olsen's performance took place during working time, Olsen's conduct at the summer party does not fulfil the criteria for harassment or sexual harassment. According to Green Galore's guideline on sexual harassment and harassment "Harassment and sexual harassment is unacceptable at Green Galore and may result in disciplinary action, including dismissal without notice.". According to the written notice of termination, Olsen was dismissed for a breach of company rules of appropriate behaviour at the workplace.

Firstly, there are no indications that Olsen's conduct at the summer party or after it would fulfil the criteria for harassment or sexual harassment nor any other sort of misconduct. Harassment and sexual harassment are defined in the company's guidelines as well as in the Equal Treatment Act and the Equal Pay Act as following:

> *"Harassment is any unwanted conduct related to the sex of a person with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.*
>
> *Sexual harassment is taken to occur when any form of unwanted verbal, non-verbal or physical behaviour with a sexual undercurrent is exhibited for the purpose or the effect of violating a person's dignity, in particular by creating a threatening, hostile, demeaning, humiliating or unpleasant environment."*

The definitions are also equivalent with the definitions provided in Article 2(1) of the Directive 2006/54/EC. Article 2(2)(a) then defines discrimination to include harassment and sexual harassment as well as any less favourable treatment based on a person's rejection of or submission to such conduct. Furthermore, European Union soft law concerning sexual harassment can be considered. Commission Recommendation and a Code of Conduct was established in 1991 and it was approved by a Council Declaration.[77] The Code of Conduct offers more precise soft law regulation on what can be considered as sexual harassment etc. According to the Code of Conduct "(s)exual attention becomes sexual harassment if it is persisted in once it has been made clear that it is regarded by the recipient as offensive, although one incident of harassment may constitute sexual harassment if sufficiently serious." Thus, the definition of harassment is broadly drawn to include conduct which has the purpose or effect on violating a person's dignity, its scope is reduced by the fact that not only the dignity shall be violated but also the conduct must create an intimidating, hostile, humiliating or offensive environment. Therefore, one individual incident might be said to violate the recipient's dignity without creating a hostile environment.[78]

Olsen's conduct at the summer party

In the assessment of Olsen's conduct at the party, the Court should notice that during the party no-one told Olsen that his actions had the effect of violating anyone's dignity. Olsen, conversely, got admiring attention from the female employees and no circumstances at the time indicated that his conduct was unwanted in any manner. The circumstances do not implicate that Olsen had the purpose on violating anyone's dignity. During the party, there were no indications that singing the song created any sort of negative environment as the atmosphere was described as loose and fun.

The song about a guy from Ore is a traditional Danish song. Nothing indicates that the views conveyed in it reflects Olsen's own views or opinions. If performing a traditional song would constitute a lawful ground for dismissal under Danish law, the ruling could constitute a breach

[77] 92/131/EEC: Commission Recommendation of 27 November 1991 on the protection of the dignity of women and men at work, Council Declaration of 19 December 1991 on the implementation of the Commission Recommendation on the protection of the dignity of women and men at work, including the code of practice to combat sexual harassment.
[78] Barnard (2012) p. 360.

of freedom of expression. Freedom of expression is secured in Article 10 of the ECHR which states that *everyone has the right to freedom of expression*. The freedom shall be restricted only by law and only if necessary for stated reasons. Should the Tribunal rule that performing a traditional song is a lawful ground for the dismissal, the claimant would like to point out the existence of a right to appeal to the European Court of Human Rights which has the jurisdiction to rule if such a decision violates the claimants rights conveyed in the Convention.

Olsen's conduct after the summer party

After the summer party, two female employees told Olsen that performing the song had crossed the line to which Olsen responded with a smile and wink saying that he only sang to the beautiful women at the party. As earlier stated, one incident may only constitute harassment or sexual harassment if it is sufficiently serious. A single eye-winking cannot be considered as sexual harassment. And eye-winking does not create such a hostile environment that the criteria for sexual harassment would fulfil.

As earlier stated, under Danish law, breach of employee obligations may constitute a lawful ground for dismissal, if reasonable and proportionate. A dismissal seems to be an unreasonable reaction to an individual incident. When assessing the reasonability and proportionality of the dismissal, the Claimant requests that the Court would also take into consideration that the guidelines had just been introduced. Employees like Olsen, that have worked for the Transferor and Green Galore for a long time, might be used to a certain atmosphere and possible other guidelines and therefore adapting to new guidelines may take time.

The Claimant submits that terminating the employment is not reasonable nor proportionate as a reaction to his behaviour that firstly, did not fully take place during working time and secondly, does not fulfil the criteria of harassment nor sexual harassment.

3.3. Subsidiarily, the employer is responsible for Olsen's behaviour

If, however, the Court determines that Olsen's sang the Song during working time and that Olsen's behaviour can be considered as harassment or sexual harassment, the Claimant argues that the employer is responsible for the employee's actions, or at least the redress to be appointed thereof, based on Law of the Danes of King Christian V. According to section 2 "*If a*

Master gives his Servant, or another, Authority to on his Behalf perform something, then the Master should himself answer for offenses in that regard by the one, that has received the Authority, and of him again seek Redress."

If the Court determines that the time Olsen was performing the Song is considered as working time, it would ultimately be impossible to argue that Olsen was not carrying a duty for the employer since it is one of the elements of working time. Also, the Party Committee, which organised the party on behalf of the employees, invited Olsen to sing at the party, but did not state which songs Olsen was allowed to sing. Therefore, the employee is responsible for Olsen's performance and cannot use it as a reason for the dismissal.

I. Pleadings

For the above reasons the Claimant respectfully requests the Tribunal to find that:

1. Hansen and the rest of the kitchen staff are performing at least work of equal value compared to the outdoor staff. The employers are therefore obligated to compensate Hansen the salaries from the last 3 years and align the future salaries.
2. Svendsen is an employee and transfers as a part of the transfer of undertaking. Green Galore is obligated to employ Svendsen full-time.
    a. Alternatively, Green Galore and DAMA are obligated to employ Svendsen part-time in proportion to the tasks performed by him.
3. Olsen was unlawfully dismissed as a reaction to passing on information regarding pay.
    a. Subsidiarily, Olsen was unlawfully dismissed due to his behaviour outside working time.
    b. In any case, Olsen's behaviour does not fulfil the criteria for harassment nor sexual harassment and therefore, he cannot be dismissed due to breach of company rules.
    c. If the court rules that Olsen's actions took place during working time and fulfil the criteria for harassment and/or sexual harassment, Olsen ultimately argues that the employer is responsible for Olsen's behaviour since Olsen was acting on the employer's request.