2022

Statement for Defendant

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- Case C-151/02 *Landeshauptstadt Kiel v Norbert Jaeger* [2003] EU:C:2003:437 (p. 34, 35)

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- Case 170/84 *Bilka - Kaufhaus GmbH v Karin Weber von Hartz* [1986] EU:C:1986:204 (p. 20, 21)

- Case 129/79 *Macarthys Ltd v Wendy* Smith [1980] EU:C:1980:103 (p. 16)

- Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] EU:C:1976:56 (p. 16, 18)

- Case C-344/19 *D.J. v. Radiotelevizija Slovenija* [2021] EU:C:2021:182 (p. 35, 38)

- Case 909/19 *BX v Unitatea Administrativ Teritorială* D [2021] EU:C:2021:893 (p. 34 and 35)

3. Literature

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- J. Kristiansen, *The concept of employee: The position in Denmark*, in B. Waas and G.H. van Voss (eds.) *Restatement of Labour Law in Europe Volume I*, Hart Publishing 2017. (p. 23, 24, 25)

- Niklas Bruun, Klaus Lörcher, Isabelle Schömann and Stefan Clauwaert: *The European Social Charter and the Employment Relation* (Oxford and Portland, Oregon 2017) (p. 37, 38)

D. Statement of Relevant Facts

Claim 1

- Helle Hansen has filed a claim for equal pay and she claims compensation from DAMA for breach of the Equal Pay Act
- Hansen claims repayment of salaries for the last 3 years and for future salary levels to be aligned with the outdoor workers
- 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
- Some of the outdoor staff are former brewery workers, who have retained their brewery worker salaries
- 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

Claim 2

- Svend Svendsen has been working as the chief of operations of Johannes Beer Garden and Bodega A/S (hereinafter the "Transferor").
- Svendsen has been responsible for the visitor centre and for all its employees.
- Svendsen has been registered with the Danish Business Authority as a director of the Transferor with reference to the managing director.
- Svendsen is a member of the board of directors, where he participates on an ad hoc basis but without voting rights.
- Until the transfer, he has spent probably 40 % of his time with the café services, and 60 % of his time with the outdoor area.
- The managerial tasks have been the same in the two entities and the investment in time is the only distinguishing element in his commitments.
- Svendsen and the Transferor have not concluded a formal contract of engagement.

- A description of the tasks of the chief of operations sets out his major areas of responsibilities and the format for negotiating his salaries with Kirsten Kristensen, the managing director.
- Although Svendsen formally defers to Kristensen, so far, all the suggestions and plans of Svendsen have been immediately approved by Kristensen.
- The transfer was made on June 2021, and the Transferor was immediately dissolved with all the assets and employees taken over by the two new contractors; DAMA and Green Galore.
- DAMA and Green Galore have not been entirely clear on the question of how to continue the employment of Svendsen.
- The risk of Svendsen ending up working as part-time manager with DAMA and part-time manager with Green Galore is quite an issue for DAMA for obvious, competitive reasons.
- Full-time employment is not a viable option for DAMA; there are not enough managerial tasks to fill a full-time position.
- Green Galore would like to keep status quo with Svendsen on a part-time basis but is similarly reluctant to have one of their central managers working also with another company.
- It is not possible for Green Galore to employ Svendsen as full-time manager, as the economic considerations did not include remuneration for a full-time manager.

Claim 3

- Olsen gave a written statement in Helsen's equal pay claim against the companies
- Green Galore and DAMA in unison organise a summer party for the former employees of Johannes Beer Garden in which Olsen was invited to perform a few songs
- Olsen performed at the summer party a song about a guy from Ore which consists of inappropriate lyrics
- After the summer party two female employees approached Olsen and expressed their opinions about Olsen's performance in which Olsen responded with a wink and said that he only sang to the beautiful women at the party.
- Strict staff guidelines on how to avoid sexist behaviour as well as both physical and verbal sexual harassment have been introduced prior to the event.

- 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. Danish legislation

Equal Pay Act

This Danish legislation governs equal pay between men and women.

Relevant sections: 1, 2, 3, 6

The Industrial Agreement

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

Relevant sections: 22

Statutory Act on Equal Treatment of Men and Women with regards to Employment

This legislation establishes the guidelines on equal treatment between men and women with regards to employment matters.

Relevant sections: 1

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

Statutory Act on Occupational Health and Safety

The legislation concerns safety and health at work.

Relevant sections: 1

2. EU legislation

Treaty on the Functioning of the European Union "TFEU"

The TFEU is one of the primary treaties of the European Union and forms the basis of EU law.
Relevant articles: 157(1), 267

Directive 89/391/EEC

This directive lays down the principles on the introduction of measures to encourage improvements in the safety and health of workers at work.
Relevant articles: 5, 6

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), 1(2), 2(1), 2(2), 2(3)

Directive 89/391/EEC ("Framework directive")

The Framework directive establishes the employer's obligations to ensure safety and health within every aspect related to work
Relevant articles: 5

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: 2, 4, 19, 26

3. International conventions

European Social Charter, Strasbourg 3 May 1996

The Charter is a Council of Europe Treaty that guarantees fundamental social and economic rights.
Relevant articles: 26

F. Questions

Claim 1

Should the work performed by the two groups be regarded as having equal value?

Can the pay difference be justified based on objective factors?

Claim 2

Is Svend Svendsen an employee or a self-employed person?

Does Green Galore have an obligation to employ Svendsen full-time?

Do Green Galore and DAMA together have an obligation to employ Svendsen part-time, in proportion to the tasks performed by him?

Claim 3

Was Olsen dismissed lawfully?

Did Olsen's behaviour fulfil the criteria of harassment or sexual harassment?

Did Olsen's behaviour take place during working time?

G. Summary of Arguments

1. Claim 1

First, the Defendant argues all the claims regarding the alleged pay discrimination claims should be dismissed since there is no single source for the pay difference. that the work performed by the kitchen staff and the outdoor staff cannot be regarded as same work or having equal value and thus no discrimination based on gender has occurred.

If the Tribunal is to consider that there is a single source for the pay difference, the Defendant argues that the work performed by the kitchen staff and the outdoor staff cannot be regarded as same work or as having equal value and thus no discrimination based on gender has occurred.

If the Tribunal is to consider the work as same work or work of equal value, the Defendant argues that the pay difference between the two groups can be justified based on objective factors.

2. Claim 2

Firstly, the Defendant argues that Svendsen is not an employee, but a self-employed person, as Svendsen has not been subordinated to the instructions and control of another person. Thus, his "employment relationship" doesn't transfer as a part of the transfer of an undertaking. The Defendant further argues that the definition of an employee is solely determined according to the national law, which in this case, is Danish law.

Secondly, if the Tribunal finds that Svendsen is an employee, the Defendant argues that Green Galore does not have an obligation to employ Svendsen full-time. There are two transferees, Green Galore and DAMA, between whom the transferee's obligations must be divided and the interests of the transferee cannot be disregarded. Svendsen's will to be employed full-time by Green Galore is irrelevant and Svendsen's working conditions cannot be improved solely due to a transfer of undertaking.

Thirdly, the Defendant argues that Green Galore and DAMA together do not have the obligation to employ Svendsen part-time, as the division of his employment is impossible due to

competitive reasons, within the meaning of interpretation established by the CJEU in *ISS Facility Service*.[1]

3. Claim 3

The Defendant argues that Olsen was lawfully dismissed due to breach of company rules on appropriate behaviour. Green Galore had just introduced strict staff guidelines on zero tolerance for harassment and sexual harassment.

Firstly, the Defendant claims that time spent at the summer party shall be considered as working time. Therefore, Olsen performed the Song about the guy from Ore during working time and the performance should be considered as a reason for the dismissal.

The Defendant also argues that Olsen's behaviour fulfils the criteria for harassment and/or sexual harassment. Olsen's behaviour at the summer party as well as at the workplace was inappropriate

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

H. Arguments

1. Claim 1

1.1. There is no single source for the pay difference and therefore all claims regarding assumed discrimination should be dismissed

First of all, the Defendant would like to note that all claims regarding assumed discrimination between two groups of employees working for different employers should be dismissed by the virtue of the fact that there is no single body which is responsible for the alleged inequality and, therefore, the equality would be impossible to restore even in the case where this could otherwise be established. And, in this sense, the two groups of employees working for different employers cannot be compared as such. This principle has been confirmed by the CJEU in, for instance, the case *Lawrence*, where the circumstances were strikingly similar to the case at hand and the Court considered differences in pay conditions to fall outside the scope of Article 157 TFEU.[2]

In the case the Tribunal would place serious consideration to the Claimant's argument relying to the CJEU case law, according to which the principle of equal pay is not limited to situations where women and men work for the same employer[3], the Defendant will present the following. As demonstrated in the very first paragraph, in *Lawrence* the CJEU established that where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality, and which could restore equal treatment. Such a situation does not come within the scope of Article 157. The work and the pay of those workers cannot therefore be compared on the basis of that provision.[4] The CJEU further repeated this opinion in *Allonby* with the effect that workers working alongside each other in the same establishment but with different contracts of employment with different legal entities do not enjoy equal pay.[5] Thus, cross-employer comparison can only be made whereas the differences in pay could be attributed to a single source. Here, the pay rates of the two groups are based on negotiations between the shop

[2] C-320/00 *Lawrence*, para. 18 and 19.
[3] 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.
[4] C-320/00 *Lawrence*, para 18.
[5] C-256-01 *Allonby*, para 46.

stewards and the employers. Hence, even though the minimum pay rate is provided in the CBA, the salary is singlehandedly negotiated for each staff group. Therefore, even if the tribunal considers that the kitchen staff and the garden staff perform work of equal value, no cross-employer comparison can be made after the transfer since there is no single source for the pay difference.

If, however, the Tribunal would find that such a single body exists and that the pay conditions in the present case could be attributed to a single source, the Defendant would present the following observations.

1.2. There is no discrimination based on gender since the work performed by the two groups is not same work or work of equal value

TFEU article 157 states 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*. In *Royal Copenhagen*, the CJEU has stated that there can be no sex discrimination between two groups of workers if the groups are not carrying out the same work or at least work to which equal value is attributed.[6] According to Section 6(2) of the Danish Equal Pay Act, it is up to the other party to prove that the principle of equal treatment has not been violated in cases where a person has found that he or she has been discriminated against under section 1 of the Equal Pay Act. If assumed that the Tribunal would not accept the Defendant's view that the claims regarding discrimination should be rejected *prima facie,* the following arguments are made in order to prove that 1) the work performed by the kitchen and outdoor staff cannot be regarded as same or equal work or 2) the pay difference is justified based on objective factors. It should also be noted that it is ultimately up to the national court to determine if the work should be regarded as same work or work of equal value.[7] The Defendant argues that the work performed by the two groups cannot be regarded as same work or work of equal value.

1.2.1. The work performed by the two groups cannot be regarded as same work or having equal value

First, it should be noted that even though both groups are bound by the same collective agreement and the agreement includes a minimum payment clause which indicates the minimum

[6] C-400/93 *Royal Copenhagen*, para 40.
[7] ibid, para 23

wage for all employees regardless of their tasks, this in itself does not indicate that the groups would be performing same work or work of equal value. This was indicated in *Brunnhofer*, where the CJEU stated that the fact that the female and male employees are classified in the same job category under a collective agreement is not sufficient to constitute that they are performing same work or work of equal value.[8]

The Defendant argues that it is clear in this case that the work performed by the two groups cannot be regarded as same work. In the CJEU case law, same work has been contemplated in cases where two groups perform same tasks or close to same tasks. For example, in *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*, the CJEU contemplated the concept of same work in a situation where two groups, one male dominated and the other female dominated, were all employed by the same employer as psychotherapists.[9] Also in *Brunnhofer*, the national court asked assistance in determining if the male and female employees were performing same work or work to which equal value is attributed in a situation where the male and female employees were employed by the same company, had received an education related to the same field and were performing their work tasks in the same establishment.[10] In *Defrenne II*, the same work was performed by male and female flight attendants.[11] In this case, it has clearly been established that the workplaces of the two groups are physically separate and the employees in the two groups have received completely different education or training. The kitchen staff and outdoor staff are also not part of the same occupational group, unlike in *Defrenne II* and *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse* where the comparable groups are working in the same occupation. Therefore, in this case the two groups cannot be considered to perform the same work, since the groups are clearly performing different tasks in separate locations, and they have different education or training to be able to perform their tasks.

Secondly, the Defendant argues that the two groups are not performing work of equal value. When determining work of equal value, the following must be taken into consideration: the facts relating to the nature of the work carried out and the conditions in which it is carried out.

[8] C-381/99 *Brunnhofer*, para 44.
[9] C-309/97 *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*, para 2.
[10] C-381/99 *Brunnhofer*, para 8–10.
[11] Case 43/75 *Defrenne II*, para 2.

If these facts can be considered as objective factors unrelated to any discrimination on grounds of sex, the pay differentials can be justified.[12]

The nature of the work carried out

It is clear from the statements of Olsen and Dideriksen that the two groups perform different activities and are not performing the same tasks. The tasks performed by the kitchen staff and the outdoor staff are thus noncomparable. According to Dideriksen, the kitchen staff's tasks include e.g., lifting, moving, stirring and chopping and the tasks can be quite varied depending on the season and the menu. On busy days, Dideriksen claims that the staff can easily walk in excess of 25,000 steps. According to Olsen, the outdoor work includes using different kinds of machinery to help with the heavy lifting, cultivating and pruning.

Even though the education received by the two groups is approximately the same length, it should be noted that the CJEU has stated that "two groups of persons who have received different professional training and who, because of the different scope of the qualifications resulting from that training, on the basis of which they were recruited, are called on to perform different tasks or duties, cannot be regarded as being in a comparable situation".[13] Since the educations of the two groups provide qualifications to perform different tasks, the kitchen staff and the outdoor staff cannot be regarded to be in comparable situations on the basis of their education. Also, even though some of the outdoor workers, according to the statement of Ole Olsen, are "unskilled", they still receive on-the-job-training and therefore, all of the outdoor workers have received at least some kind of training for the job.

The conditions in which the work is carried out

Regarding the conditions in which the work of the two groups is carried out, it should be noted that the outdoor staff performs their tasks outdoors whereas the kitchen staff works mainly indoors in the kitchen. Furthermore, it has clearly been stated that the workplaces are physically separate. In *Lawrence*, it was established that the equal pay principle may be invoked before

[12] C-400/93 *Royal Copenhagen*, para 42; C-236/98 *JämO*, para 48.
[13] C-309/97 *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*, para 21.

national courts in cases in which the work is carried out in the same establishment or service.[14] Since it has been established in the facts of the case that the workplaces of the two groups are physically separate it can therefore be stated that the employees are not carrying out their tasks in the same establishment anymore and the equal pay claim has no grounds based on this.

By comparing the nature of the work carried out and the conditions in which the work is carried out, the Defendant concludes that the two groups are not performing work of equal value. As the two groups are not performing work of equal value, pay discrimination based on gender has not occurred since it has been established by the CJEU that there can be sex discrimination between two groups of workers only if the two groups carry out at least work to which equal value is attributed.[15]

1.3. Should the Tribunal evaluate that the jobs are the same or have equal value, the difference is justified by objective factors that are unrelated to any discrimination linked to the difference in sex

If the Tribunal considers the jobs as same work or having equal value, the pay difference can still be justified, if the companies in question can present objective factors that are unrelated to any discrimination that attributed to the pay difference. The CJEU has established that if a difference in pay between the two groups compared is found to exist, and if the available statistical data indicate that there is a substantially higher proportion of women than men in the disadvantaged group, TFEU article 157 requires the employer to justify the difference by objective factors unrelated to any discrimination on grounds of sex.[16] Even though there is an observable difference in pay between the two groups and the kitchen staff has a somewhat higher proportion of women than men among the staff, it should be noted that the CJEU has also established that the pay difference does not automatically constitute discriminatory behaviour in the light of Article 157 TFEU and the Equal Pay Directive. Discrimination cannot be established when the differences are explained by objectively justified factors unrelated to any discrimination on grounds of sex.[17]

[14] C-320/00 *Lawrence*, para 17.
[15] C-400/93 *Royal Copenhagen*, para 40.
[16] C-236/98 *JämO*, para 54.
[17] C-400/93 *Royal Copenhagen*, para 41; Case 170/84 *Bilka*, para 30.

Although in preliminary-ruling proceedings it is up to the national Court to establish whether such objective factors exist in the particular case before it, the CJEU, whose task is to provide the national court with helpful answers, may provide guidance based on the documents in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment.[18]

In *Bilka* the CJEU stated that if the national court finds that the measures, chosen by the employer, correspond to a real need on the part of the undertaking and are appropriate with a view to achieving the objectives pursued and are necessary to that end, the fact that the measures affect a far greater number of women than men is not sufficient to show that they constitute an infringement of article 157 TFEU.[19]

The kitchen staff and the outdoor staff are bound by the same collective agreement. This has been the case before the transfer and the situation has remained the same after the transfer. Both groups have also had shop stewards negotiating their wages and the collective agreement includes a minimum payment clause, which warrants the same minimum pay for both groups. As both groups are bound by the same minimum payment clause in the collective agreement and the wages have been negotiated for them by the shop stewards, the Defendant has reliably established that these are objective factors which justify the pay difference between the two groups.

2. Claim 2

2.1 Svendsen is a self-employed person and thus, his "employment relationship" doesn't transfer 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

[18] C-243/95 *Hill*, para 36.
[19] Case 170/84 *Bilka*, para 36.

2001/23/EC. As the further arguments will prove, Svendsen is not an employee, but a self-employed person, and thus, his "employment relationship" should not be transferred as a part of the transfer of undertaking.

2.1.1 The term 'employee', within the meaning of the Directive 2001/23/EC, must be defined under national law

According to the Article 2(1) of the Directive 2001/23/EC for the purposes of this Directive 'employee' shall mean 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.

In *May*[20], 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.[21] This means that the concept of a worker developed in the context of the internal market also concerns secondary law and, consequently, the interpretation of directives which refer directly to national law. However, Directive 2001/23/EC refers to the term 'employee' and not 'worker'. Thus**, the concept is not the same** and the case law concerning the definition of a 'worker' cannot be used as a guideline when determining the term employee within the meaning of the Directive 2001/23/EC.

In *Foreningen af Arbejdsledere i Danmark*, in the context of a transfer of undertaking, the CJEU stated that it is common ground that Directive 77/187/EEC does not contain an express definition of the term 'employee'. In order to establish its meaning, it is necessary to apply generally recognized principles of interpretation by referring in the first place to the ordinary meaning to be attributed to that term in its context and by obtaining such guidance as may be derived from Community texts and from concepts common to the legal systems of the Member States.[22] However, it is clear from those provisions that Directive 77/187/EEC is intended to achieve only partial harmonization essentially by extending the protection guaranteed to

[20] Reasoned order under Article 99 of CJEU's Rules of Procedure.
[21] C-519/09 *Dieter May*, para 24; C–94/07 *Raccanelli*, para 27.
[22] Case 105/84 *Foreningen af Arbejdsledere i Danmark*, para 23.

workers independently by the laws of the individual Member States to cover the case where an undertaking is transferred. It is not intended to establish a uniform level of protection throughout the Community on the basis of common criteria.[23] It must therefore be held that the term 'employee' within the meaning of Directive 77/187/EEC must be interpreted as covering any person who, in the Member State concerned, is protected as an employee under national employment law. It is for the national court to establish whether that is the case in this instance.[24] In *Luis Manuel Piscarreta Ricardo* the CJEU repeated this interpretation by stating that a person is covered by the concept of 'employee' within the meaning of Article 2(1)(d) of Directive 2001/23 in so far as that person is protected as an employee under the national law concerned, which is, however, a matter for the referring court to verify.[25]

In accordance with the case-law cited above and 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.

2.1.2 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. However, 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**'.[26] Neither the courts have not developed a uniform definition of 'employee' or 'employment relationship'. They have, however, developed a range of general criteria to determine whether specific work is carried out under an employment relationship or on a self-employed basis.[27]

[23] Ibid, para 26.
[24] Ibid, para 28.
[25] C-416/16 *Luis Manuel Piscarreta Ricardo*, para 54.
[26] J. Kristiansen 2017, p. 3. See Article 1 Paragraph 1 of the Directive 91/533/EEC: This Directive shall apply to every paid employee having a contract or employment relationship defined by the law in force in a Member State and/or governed by the law in force in a Member State.
[27] J. Kristiansen
2017, p. 3.

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 the '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 (including tax law issues and the worker's entrepreneurial risk);
- 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]

Consequently, if a person is not subordinated to the instructions and control of another person, he or she will normally not be considered to be an employee. Nonetheless, a duty to comply with the instructions and control does not in itself suffice to qualify a person as an employee, as a self-employed person might also be obligated to comply with certain instructions and control measures from an 'employer' depending on the parties' contractual clauses. In this case it might be of some significance whether the 'employer' is entitled to determine the person's place and time of work. Accordingly, if the person is not under the instructions and control of another and is free to decide the place and time of work, this is a strong indicator of self-employed status.[29]

[28] ibid, p. 7.
[29] ibid, p. 8.

Taxation for the work in question is an important criterion in determining whether a person is to be considered an employee in terms of labour law. However, it still depends on the concrete circumstances of the individual case whether the 'worker' performs work as an employee or a self-employed person.[30]

Finally, what might play a (minor) role in borderline cases is whether the terms and position of the worker is more comparable with an employment relationship than self- employment, or vice versa.[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 on the basis of 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]

2.1.3 Svendsen's position as a self-employed person

The Defendant argues that Svendsen has not been subordinated to the instructions and control of another person. Svendsen has had a responsible role of the chief of operations and has been responsible for the visitor centre and for all its employees. Svendsen has been registered with the Danish Business Authority as a director of the Transferor with reference to the managing director. In addition, Svendsen has been a member of the board of directors, where he has participated on an ad hoc basis but without voting rights. All these factors indicate that Svendsen has been in a leading position and has had his own employees, whom which he has been responsible for.

In the everyday activities, management and decisions are carried out by Svendsen after the formal approval of Kristensen. Although Svendsen formally defers to Kristensen, so far, all the

[30] ibid, p. 12.
[31] ibid, p. 8.
[32] ibid, p. 10-11.
[33] ibid, p. 9.

suggestions and plans of Svendsen have been immediately approved by Kristensen. This indicates that Svendsen's subordination is, in fact, fictitious, as all his plans have been immediately approved by Kristensen.

Svendsen and the Transferor have not concluded a formal contract of engagement, but a description of tasks sets out his major responsibilities. Thus, there is no contract of employment or any contract, which would indicate that Svendsen has been subordinated to the instructions and control of another person. Actually, it seems that Svendsen has had quite a freedom in his work. Nonetheless, a duty to comply with the instructions and control does not in itself suffice to qualify a person as an employee.

The simple fact that Svendsen has been taxed as an employee, is not enough in itself to rule out the possibility that Svendsen is, in fact, a self-employed person. It still depends on the concrete circumstances of the individual case whether the "worker" performs work as an employee or a self-employed person.

The Defendant argues that Svendsen is not an employee, but a self-employed as Svendsen has not been subordinated to the instructions and control of another person. Therefore, Svendsen has not been transferred as a part of the transfer of undertaking.

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

Should the Tribunal – against the Defendant's view – find that the terms 'worker' and 'employee' in fact are the same concept and that, therefore, the CJEU's case law concerning the concept of 'worker' needs to be taken into account when considering the term 'employee' within the meaning of Directive 2001/23/EC, it doesn't change the outcome of the assessment of Svendsen's relationship with the Transferor. Nevertheless, Svendsen should be deemed as a self-employed person.

In *Lawrie-Blum* the CJEU stated 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.[34]

This interpretation has been repeated in several cases of the CJEU. For example, in a more recent *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'. The essential feature of an employment relationship is, according to that case-law, 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.[35] In this paragraph, the CJEU made a reference to *Lawrie-Blum*, *Collins*, *Trojani* and *Neidel*.[36] In addition, similar interpretation has been made in, i.e., *Allonby, Martínez Sala, Fenoll, Matzak* and *Yodel.*[37]

In *Yodel*[38] 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.[39] 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.[40] Any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity.[41]

As stated before, Svendsen has not been subordinated to the instructions and control of another person. Thus, Svendsen is not an employee, but a self-employed person and should therefore not transfer as a part of the transfer of undertaking.

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[34] Case 66/85 *Deborah Lawrie-Blum*, para 17.
[35] C-432/14 *O*, para 22.
[36] Case 66/85 *Lawrie-Blum*, paras 16 and 17; C-138/02 *Collins*, para 26; C-456/02 *Trojani*, para 15; and C-337/10 *Neidel*, para 23.
[37] C-256/01 *Allonby*, para 67; C-85/96 *Maria Martinez-Sala*, para 32 ; C-316/13 *Fenoll,* para 27; C-518/15 *Matzak*, para 28, C-692/19 *Yodel*, para 29.
[38] Reasoned order under Article 99 of CJEU's Rules of Procedure.
[39] C-692/19 *Yodel*, para 32 with a reference to C-270/13 *Haralambidis*, para 33.
[40] C-692/19 *Yodel*, para 43.
[41] Joined Cases C-151-152/04 *Nadin-Lux and Durre*, para 31.

2.1.5 Request for a preliminary ruling under Article 267 of TFEU

Should the Tribunal find that the terms ‘worker’ and ‘employee’ in fact are the same concept and that, therefore, the CJEU’s case law concerning the concept of ‘worker’ needs to be considered when determining the term ‘employee’ within the meaning of Directive 2001/23/EC, the Defendant considers that there is a unclarity which needs to be solved properly. According to section 24 of the Statutory Act on a 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’. The interpretation that the CJEU’s case law concerning the concept of ‘worker’ needs to be taken into account when considering the term ‘employee’ within the meaning of Directive 2001/23/EC, is liable to cause uncertainty concerning the scope of the Directive 2001/23/EC. For the sake of clarifying the interpretation of the Directive 2001/23/EC, the questions for the CJEU could be the following:

> 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? 2.2 Green Galore does not have an obligation to employ Svendsen full-time.

Should the Court – against the Defendant’s view – find that Svendsen is not a self-employed person, but an employee, Green Galore still does not have an obligation to employ Svendsen full-time.

2.2.1 There are two transferees, Green Galore and DAMA, between whom the transferee's obligations must be divided

In *ISS Facility Services NV*, where there were two transferees, the CJEU stated that the possibility of transferring the contract of employment solely to the transferee with whom the worker is to perform his or her principal tasks, it must be observed that that interpretation of the first paragraph of Article 3(1) of Directive 2001/23 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.[42] However, that interpretation of the first paragraph of Article 3(1) of Directive 2001/23 has the effect of disregarding the interests of the transferee, to whom there are transferred the rights and obligations arising from a full-time employment contract although the worker concerned is to perform his or her tasks with that transferee only part-time.[43] The CJEU continued to state that, where there is a transfer of undertaking involving a number of transferees, Article 3(1) of Council Directive 2001/23/EC 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.[44]

Considering what the CJEU has stated above, Green Galore is not solely responsible for the transfer of Svendsen, as there are two transferees, between whom the transferee's obligations must be divided.

2.2.2 The interests of the transferee cannot be disregarded

Although the Directive 2001/23/EC aims to safeguard the interests of the employees, the interests of the transferee must also be protected and taken into account. In *Werhof* the CJEU stated that, although in accordance with the objective of the Directive 77/187/EEC the interests of the employees concerned by the transfer must be protected, those of the transferee, who must be in a position to make the adjustments and changes necessary to carry on his operations, cannot

[42] C-344/18 *ISS Facility Services NV*, paragraph 30.
[43] Ibid, para 31.
[44] Ibid, para 38.

be disregarded.[45] In *Alemo Herron and Others* and *Österreichischer Gewerkschaftsbund* the CJEU ruled that the Directive 2001/23/EC does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other. More particularly, it makes clear that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations.[46] These statements were repeated in *Asklepios Kliniken Langen-Seligenstadt GmbH* and then again in *ISS Facility Services NV*.[47]

In the light of the aforementioned case law, it is clear that the interests of Green Galore, as a transferee, cannot be disregarded. Green Galore does not have financial possibilities to employ Svendsen as a full-time manager, as the economic considerations for taking over the Beer Garden operations did not include remuneration for a full-time manager. Thus, Green Galore has an economic reason due to which it is not possible to continue Svendsen's employment full-time. If Green Galore were obligated to employ Svendsen full-time, would its interests be totally disregarded, and its responsibilities extended beyond what is necessary. This would have the effect of disregarding the interests of the transferee. Consequently, the interpretation that Svendsen should be transferred solely to Green Galore would be against what the CJEU has stated in *ISS Facility Services NV*.

2.2.3 Svendsen's will to be employed full-time by Green Galore is irrelevant

Svendsen's will to be employed full-time by Green Galore does not in itself constitute an obligation for Green Galore to employ Svendsen full-time. Svendsen's will to be employed by Green Galore is irrelevant to the assessment whether Green Galore should employ Svendsen full-time or not.

2.2.4 Svendsen's working conditions cannot be improved solely on the occasion of a transfer of undertaking

The CJEU has stated that the Directive 2001/23/EC cannot usefully be invoked in order to obtain an improvement of remuneration or other working conditions on the occasion of a

[45] C-499/04 *Werhof*, para 31.
[46] C-426/11 *Alemo-Herron and Others*, para 25; C-328/13 *Österreichischer Gewerkschaftsbund*, para 29.
[47] Joined Cases C-680/15 and C-681/15 *Asklepios Kliniken Langen-Seligenstadt GmbH*, para 22 and C-344/18 *ISS Facility Services NV*, para 26.

transfer of an undertaking.[48] It follows that the argument that the rights and obligations from the contract of employment in question would in entirety be transferred to Green Galore must be rejected, in so far as that entails an improvement in the working conditions of Svendsen.[49]

On these abovementioned grounds, Green Galore does not have an obligation to employ Svendsen full-time.

2.3 Green Galore and DAMA together do not have the obligation to employ Svendsen part-time, as the division of his employment is impossible due to competitive reasons

Svendsen has subsidiarily claimed to be employed by Green Galore and DAMA, so that his time is divided by Green Galore and DAMA and his central role in developing the visitor centre and management of staff is continued and his hours are not reduced. This would result to a part-time employment of Svendsen by both Green Galore and DAMA.

2.3.1 The division of Svendsen's employment is impossible due to competitive reasons.

In *ISS Facility Services* the CJEU stated that, where there is a transfer of undertaking involving a number of transferees, Article 3(1) of Council Directive 2001/23/EC 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. If such a division were impossible to carry out or would adversely affect the rights of that worker, the transferee(s) would be regarded as being responsible for any consequent termination of the employment relationship, under Article 4 of that directive, even if that termination were to be initiated by the worker.[50]

The Defendant argues that Green Galore and DAMA together do not have the obligation to employ Svendsen part-time, as the division of his employment is impossible to carry out due

[48] C-108/10 *Ivana Scattolon*, para 77.
[49] See Opinion of Advocate General Szpunar on Case C-344/18 *ISS Facility Services NV*, para 73.
[50] C-344/18 *ISS Facility Services NV*, para 38.

to obvious competitive reasons. As a result of the transfer of an undertaking, the Transferor has dissolved, and DAMA has continued the Bodega and Green Galore has continued the outdoor area/greenhouses, as two separate business entities. This has resulted to the fact that Green Galore and DAMA are competitors.

Until the transfer, Svendsen has been working as a chief of operations and been a part of the Transferor's board of directors. Thus, Svendsen has had a central and leading role in the Transferor. It seems obvious, that the two transferees, Green Galore and DAMA, do not want to have Svendsen working as a central manager in both companies, as it would in general result in major problems, as regards to i.e., non-compete and non-disclosure. On the abovementioned grounds the Defendant argues that, within the meaning of the aforementioned paragraph 38 of *ISS Facility Services*, the division is impossible to carry out due to the competitive reasons.

2.3.2 The employers do not have financial or organizational possibilities to employ Svendsen full-time

As stated before, it is neither in the interests of Green Galore nor financially possible to employ Svendsen full-time. DAMA is similarly reluctant to continue with Svendsen full-time, as there are not enough managerial tasks to fill a full-time position. Thus, both companies have economic and organizational reasons due to which it is not possible to continue Svendsen's employment full-time. In fact, these economic and organizational reasons would most likely lead to the dismissal of Svendsen, if the either Green Galore or DAMA would be forced to employ Svendsen full-time.

In this connection, it is important to recall that, under Article 4(1) of the Directive 2001/23/EC, while the transfer of an undertaking or part of an undertaking cannot constitute in itself a ground for dismissal for the transferor or the transferee, other than in the situations mentioned in Article 4(1) of that directive, that provision does not however preclude the possibility of dismissals occurring for economic, technical or organisational reasons entailing changes in the workforce.[51] The relationship may be altered with regard to the transferee to the same extent as it

[51] C-344/18 *ISS Facility Services NV*, para 36. See also Case 105/84 *Foreningen af Arbejdsledere i Danmark*, para 14.

could have been with regard to the transferor, provided that the transfer of the undertaking itself may never constitute the reason for that amendment.[52]

Therefore, the employers emphasize that ruling that Svendsen should be employed full-time to either of the companies, would most probably lead to a situation in which the interests of any of the parties would not be fulfilled.

3. Claim 3

3.1 The dismissal is lawful

3.1.1 Olsen was dismissed due to breach of company rules on appropriate behaviour

Olsen breached Green Galore's rules for appropriate behaviour at the workplace and was dismissed due to it. Green Galore had clear staff guidelines on how to avoid sexist behaviour as well as physical and verbal sexual harassment. The guidelines clearly state that Green Galore has zero tolerance on sexual harassment. Despite the guidelines, Olsen acted in an inappropriate manner at a company summer party and at the workplace. Under Danish law, breach of employee obligations may constitute a reason for dismissal, if reasonable and proportionate.

For the sake of clarity, it shall be stated that there is no indication that the dismissal had anything to do with the unproven claims considering Olsen passing on information on equal pay.

3.1.1.1. The breach of company guidelines during working time

Working time is defined in 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 the concept of 'working time' is in the Working Time Directive placed in opposition of 'rest period' and the Working Time Directive makes no provision of other situations falling between the two.[53] 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

[52] Case 324/86 *Daddy's Dance Hall A/S*, para 17.
[53] See for example C-266/14 *Tyco*, para 16.

that that concept is placed in opposition to rest periods, the two being mutually exclusive.[54] 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.[55]

The first element of the concept of working time is that the worker must be carrying his activity or duties. In this case, the party committee invited Olsen to sing as few songs as a part of the entertainment programme at the summer party which was hosted and financed by Green Galore and DAMA. Hence, Olsen was carrying out an activity ordered from his employer. In *Unitatea Administrativ Teritorială* the CJEU held that the fact that the activity carried out by a worker during periods of vocational training differs from that which he or she carries out in the course of his or her normal duties also does not preclude those periods from being classified as working time where the vocational training is undertaken at the employer's request and where, consequently, the worker is subject, as part of that training, to the employer's instructions.[56] Therefore, it can be argued that it is not a mattering fact that performing songs is not included into Olsen's normal duties when the performance was undertaken at the employer's request. Thus, the first element of working time fulfils.

As regards to the second element of concept of working time according to which the worker must be at the employer's disposal during that time, 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 employer in order to be able to provide the appropriate services immediately in case of need.[57] 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.[58] Here, the summer party took place at Johannes Bodega and Olsen had to be present at the party for his performance. Therefore, also the second element of the concept

[54] C-266/14 *Tyco*, para 25. C-151/02 *Jaeger*, para 48; C-14/04 *Dellas and others*, para 42 and orders in C-437/05 *Vorel*, para 24; C-258/10 *Grigore*, para 42.
[55] C-266/14 *Tyco*, para 27; C-14/04 *Dellas and others*, para 44 and 45.
[56] C-909/19 *Unitatea Administrativ Teritorială*, para 46.
[57] C-266/14 *Tyco*, para 35.
[58] ibid, para 36.

of working time fulfils and the time Olsen spent at the party should be considered as working time.

Also, the fact that the party was strictly reserved for staff and that the companies paid for all the costs speaks for the interpretation that the summer party should be considered as working time.

In *Unitatea Administrativ Teritorială* the CJEU stated that the fact that the periods of vocational training took place in whole or in part, outside normal working hours is also irrelevant since, for the purposes of the concept of Working Time Directive 2003/88 draws no distinction according to whether or not such time is spent within normal working hours.[59] Hence, it is irrelevant that the summer party might have taken place outside working hours.

For the sake of clarity, the Defendant emphasizes that according to CJEU case law, the compliance of the Working time directive should not be subordinated purely to economic considerations.[60] Therefore, the fact that the employees received their normal renumeration only until 5 pm is irrelevant when determining working time in this case.

3.1.1.2. Olsen's behaviour fulfils the criteria for harassment and/or sexual harassment

According to Green Galore's zero tolerance 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." 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*

[59] C-909/19 *Unitatea Administrativ Teritorială*, para 44; See also, by analogy, C-303/98 *Simap*, para 51.
[60] C-344/19 *Radiotelevizija Slovenija,* para 26, C-151/02 *Jaeger,* para 66-67.

of violating a person's dignity, in particular by creating a threatening, hostile, demeaning, humiliating or unpleasant environment."

The definitions are equivalent with the definitions provided in Article 2(1) of the Equality Directive. Harassment and sexual harassment features as a specific type of discrimination under EU non-discrimination directives where unwanted verbal, non-verbal or physical conduct is of a sexual nature. According to the most profound views in European employment law, the assessment on what constituted sexual harassment is subjective not objective. Account shall be taken to the effect of the conduct upon the individual concerned rather than examining the effect of equivalent conduct of a "reasonable person".[61]

The song about the guy from Ore has inappropriate and sexist lyrics and performing the song most likely fulfils the criteria for harassment as defined above since it is offensive to women. It should be noticed that the purpose of the act is insignificant if the behaviour had the *effect* of creating an intimidating, hostile, demeaning, humiliating or offensive environment. There are clear indications that Olsen's behaviour at the summer party was creating an unpleasant environment with at least the effect of violating his two female colleagues who personally informed Olsen about crossing the line. As stated above, the assessment of what constitutes sexual harassment is subjective, not objective. However, in this case also the HR manager considered that "some would indeed find this text offensive." Performing the song therefore fulfils the criteria for harassment both subjectively and objectively.

According to section 1(4) of the Equal Treatment Act *a person's rejection of submission to harassment or sexual harassment may not be used as grounds for the decision of, which affects that person*. Therefore, it is insignificant that the women intervened to Olsen's actions only after the summer party because the definitions of harassment and sexual harassment are not based on persons rejection or response to the harasser's conduct.

Olsen's actions after the summer party indicate that the criterion for sexual harassment is fulfilled since he created a humiliating environment to the women by saying that he only sang to the beautiful women at the party and winked his eye. Olsen's verbal actions created a humiliating environment whereas Olsen's non-verbal conduct, here the eye-winking, is of sexual

[61] Cf. Barnard (2012) p. 358.

nature. Also, Olsen's response to the discussion with the women was inappropriate and in the overall assessment it could be considered as a factor that increases the blameworthiness of his behaviour.

Furthermore, it should be emphasized that the right to dignity at work is a fundamental right ensured in article 26 of the European Social Charter. The article aims to ensure effective exercise of the rights of workers to protection of their dignity at work and to promote awareness, information, and prevention of sexual harassment in the workplace. The ECSR has emphasized a broad scale of behaviours that fall under sexual harassment under 26§1, such acts can be physical acts, words or gestures having a sexual connotation, and any display of sexually offensive material.[62] This speaks for the interpretation that a dismissal is a reasonable and proportionate reaction to harassment and/or sexual harassment at workplace since it is a question of a fundamental right.

3.2. Although the dismissal had occurred in violation of the Equal Pay Act, it would be obviously unfair to demand the employment relationship to be restored.

If the Tribunal would – against the Defendants view – rule that Olsen has been dismissed as a reaction to his actions in the equal pay claim in accordance with section 3(1) of the Equal Pay Act, the Defendant argues that it would be obviously unfair to demand the employment relationship to be restored. According to section 3(3) of the Equal Pay Act a dismissal that has occurred in violation of the Equal Pay Act shall be made invalid unless after an evaluation of the interest of the parties, it would be obviously unfair to demand the employment to be restored.

The staff guidelines on harassment and sexual harassment had just been introduced and therefore, Olsen must have been aware that his behaviour was not acceptable at Green Galore. Hence, Olsen breached the employer guidelines wilfully. Also, the views conveyed in the song are against Green Galore's values. Taking this into consideration together with the circumstances that indicate that also harassment and/or sexual harassment most likely has occurred, it would be obviously unfair to demand the employer to keep an employee that acts clearly against its values and creates an unpleasant working environment for the other employees.

[62] Bruun et. al. (2017) p. 445.

3.3. Green Galore, as the employer, has a duty to ensure safety and health of its workers in every aspect related to work

The employer has the primary responsibility for everyone and the conduct of everyone who performs work at the workplace under the employer's control.[63] Section 1 of the Statutory Act on Occupational Health and Safety states that the act strives to create a basis for the companies to solve questions of health- and safety by themselves with guidance from the labour market organisations and guidance and control by the Danish Working Environment Authority. Green Galore, has in accordance with the act, established a zero-tolerance guideline to prevent harassment and sexual harassment at the workplace and stated that harassment or sexual harassment may lead to a dismissal.

Article 26 of Directive 2006/54/EC requires Member States to *encourage employers to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace*. Also, article 5 of the Framework Directive states that *employers shall have a duty to ensure safety and health of workers in every aspect related to work.*

In *Radiotelevizija Slovenija* the CJEU pointed out the classification of a period of stand-by time as a 'rest period' for the purposes of applying Working Time Directive is without prejudice to the duty of employers to comply with their specific obligations under the Framework Directive to protect the safety and health of their workers. That latter directive is fully applicable to matters of minimum daily and weekly rest periods and maximum weekly working time, without prejudice to more stringent and/or specific provisions contained in Directive 2003/88.[64] Therefore, even if the Tribunal would – against the Defendants view – rule that the time when Olsen was singing the Song at the summer party would not be considered as working time, the Tribunal should note that the employer has some obligations to ensure the safety of its workers anyway.

The Commission Recommendation on the protection of the dignity of women and men at work, including the Code of Practice to combat sexual harassment may serve a useful function as guidance for employers as to good practice. For example, the Section 5 (A) of the Code recommends employers to issue a policy statement, which expressly states that all employees have

[63] Bruun et. al. (2017) p. 446.
[64] C-344/19 *Radiotelevizija Slovenija*, para 61.

a right to be treated with dignity, that sexual harassment will not be permitted. The Code also recommends that the policy statement should leave no doubt as to what is considered inappropriate behaviour and it should also specify that appropriate measures will be taken against employees found guilty of sexual harassment. This statement must be communicated to all concerned to ensure maximum awareness.[65]

Therefore, Green Galore, has fulfilled its obligations as an employer to protect the health and safety of its workers when determining a clear staff guideline harassment and sexual harassment.

[65] Barnard 2012, p. 359.

I. Pleadings

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

1. All claims should be dismissed
2. Svendsen is not an employee and doesn't transfer as a part of the transfer of an undertaking.
    a. Green Galore does not have an obligation to employ Svendsen full-time. Furthermore, Green Galore and DAMA together do not have the obligation to employ Svendsen part-time, as the division of his employment is impossible due to competitive reasons.
3. Olsen was dismissed lawfully due to breach of company rules for appropriate behaviour.
    a. The summer party should be considered as working time.
    b. Olsen's behaviour at the summer party and after it at the workplace fulfil the criteria for harassment and/or sexual harassment.