The Netherlands C

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Statement for Claimants

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Statement of Relevant Facts

1. Johannes Breweries A/S is a large Danish brewery. In July 2018, Johannes Breweries A/S opened a visitor centre called 'Johannes Beer Garden' and a café called 'Bodega', organised under the limited public company Johannes Beer Garden and Bodega (A/S).

2. On 1 June 2021, the assets and employees of Johannes Beer Garden and Bodega were transferred to two new contractors. DAMA (hereinafter: **Defendant DAMA**) continues the Bodega whereas Green Galore (hereinafter: **Defendant Green Galore**) continues the outdoor areas and greenhouses.

Claim 1

3. Helle Hansen (hereinafter: **Claimant Hansen**) works as an employee for Defendant DAMA as of 1 June 2021. Before that date she performed the same job as an employee of Johannes Beer Garden and Bodega A/S. She is part of the indoor staff, which is predominantly female (14 women and 4 men). Together with the outdoor staff, they make sure that the visitors of Johannes Breweries have the perfect experience. The outdoor staff is predominantly male (19 men and 2 women).

4. Both groups of staff are covered by the same collective agreement, the Industry and Services Agreement 2020-2023.

5. There is, however, a difference in salary between the indoor and outdoor staff. Within the job classification system, the indoor staff earns a lower monthly average salary (€ 3,000,=) than the outdoor staff (€ 3,500,=). The salary negotiations for the indoor and outdoor workers are carried out by shop stewards, who are elected by the groups of staff.

Claim 2

6. Svend Svendsen (hereinafter: **Claimant Svendsen**) diligently worked as the chief of operations of Johannes Beer Garden and Bodega, with his work focused on the visitor centre, the Bodega, and its employees. Except for the investment in time - Claimant Svendsen spent 40% of his time with the indoor services and 60% of his time with the outdoor area – the employment tasks have been the same for both businesses within Johannes Beer Garden and Bodega.

7. Claimant Svendsen reports to the managing director of Johannes Beer Garden and Bodega, Kirsten Kristensen (hereinafter: **managing director Kristensen**), who moreover must approve all Claimant Svendsen's work decisions and plans. In addition, managing director Kristensen is responsible for negotiating on a yearly basis Claimant Svendsen's remuneration package and park perks. Although Claimant Svendsen is a member of the board of directors, he only participates on an ad hoc basis and has no voting rights.

8. While Johannes Beer Garden and Bodega and Claimant Svendsen have not concluded a formal contract of engagement, a detailed description of his tasks and responsibilities as chief of operations is provided to Claimant Svendsen.

9. After the transfer of undertaking on 1 June 2021, there exists uncertainty regarding the status of Claimant Svendsen's employment relationship with the new tenders Defendant DAMA and Defendant Green Galore, with both new tenders not providing the required clarity.

Claim 3

10. Ole Olsen (hereinafter: **Claimant Olsen**) is a loyal and involved employee who has worked for Johannes Breweries for 4 years. Initially, in 2017, he started as a brewer. After one year he switched jobs to work at Johannes Beer Garden and Bodega, because he discovered loving the outside working. On 1 June 2021, his employment relationship was transferred to Defendant Green Galore.

11. Soon after his employment relationship was transferred, it came to his attention that the indoor staff was paid less than the outdoor staff. When Claimant Hansen represented the female employees of the Bodega by filing a claim for equal pay, Claimant Olsen felt the need to share his opinion about this matter. He submitted a statement, concerning equal payment for men and women, because he is a feminist and strongly despises inequality at work.

12. The case caused a lot of negative media attention and Defendant Green Galore did not appreciate Claimant Olsen´s statement.

13. Claimant Olsen´s (former) colleagues, on the contrary, recognized his efforts in the equal pay case with an invitation to sing a few songs at the summer party organised by Johannes Beer Garden and Bodega.

14. Days after, two female employees complained because they took offence at the lyrics of a certain song performed by Claimant Olsen.

15. Soon afterwards Claimant Olsen was fired, because he was accused of “breaching company rules for appropriate behaviour at the workplace”.

16. No specific reason or explanation was given by Defendant Green Galore, nor was Claimant Olsen heard before the dismissal.

Description of Relevant Legislation

International legislation

ILO Equal Remuneration Convention No. 100 (hereinafter: Equal Remuneration Convention)

The Equal Remuneration Convention is an ILO treaty that intends to ensure the principle of equal remuneration for men and women workers for work of equal value. It was adopted by the Governing Body of the ILO in 1951. Articles 2 and 3 of this Convention are relevant for claim 1.

ILO Discrimination (Employment and Occupation) Convention No. 111 (hereinafter: Discrimination Convention)

The Discrimination Convention is an ILO treaty that prohibits discrimination in the field of employment and occupation. This includes any distinction, exclusion or preference made on the basis of sex which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. The Discrimination Convention was adopted by the Governing Body of the ILO in 1958. This Convention is relevant for claim 1 and 3.

European legislation

Treaty on the Functioning of the European Union (hereinafter: TFEU)

The TFEU defines the principles and objectives of the EU and determines the scope for action within the different areas of policy. In addition, the TFEU sets out organisational and functional details of the EU institutions. Relevant for claim 1 is article 157 TFEU, which concerns the principle of equal pay for male and female workers for equal work or work of equal value.

Charter of Fundamental Rights of the European Union (hereinafter: EU Charter)

The EU Charter consists of civil, political, economic and social rights for European citizens. It is legally binding since the Lisbon Treaty entered into force on 1 December 2009. According to article 6, paragraph 1, it has the status of EU primary law. Article 21 and 23 of the EU Charter are relevant for claim 1. These articles prohibit any discrimination on grounds of sex and enshrine the right to equal treatment between men and women in all areas, including employment, work and pay. Furthermore, article 30 concerning protection against unjustified dismissal, is relevant for claim 3.

Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (hereinafter: Recast Directive)

The Recast Directive aims to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. To that end, it contains provisions to implement the principle of equal treatment in relation to working conditions including pay as well as access to employment and occupational social security schemes. Chapter 1 about equal pay is particularly relevant for claim 1 and article 2(3), regarding 'sexual harassment' is particularly relevant for claim 3.

Directive 2001/23/EC of 12 March 2001 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 (hereinafter: the Transfer of Undertakings Directive)

The Transfer of Undertakings Directive aims to protect the contracts of employment of people working in businesses that are transferred between owners. The Directive stipulates that any employee's contract of employment will be transferred automatically on the same terms as before in the event of a transfer of the undertaking. Article 3 of the Transfer of Undertakings Directive, which states that 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, is at issue in claim 2. Article 4 of this Directive, stating that 'the transfer of an undertaking, business or part thereof shall not in itself constitute grounds for dismissal', is particularly relevant for claim 3.

Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (hereinafter: the Burden of Evidence Directive)

The Burden of Evidence Directive aims to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them, to have their rights asserted by judicial process. This directive is particularly relevant for claim 3.

Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (hereinafter: the Framework Directive)

The Framework Directive aims to introduce measures to encourage improvements in the safety and health of workers at work (article 1(1)). It serves as a basis for more specific Directives covering all the risks connected with safety and health at the workplace. This directive is particularly relevant for claim 3.

National legislation

Statutory Act on Equal Pay between men and women (hereinafter: Equal Pay Act)

The Statutory Act on Equal Pay is a federal act that prohibits discrimination on grounds of gender specifically in relation to pay. Section 1, 1a, 2 and 6 are relevant for claim 1.

Industrial Agreement 2020-2023, between CO-industry and Danish Industry (hereinafter: Industrial Agreement 2020-2023)

The Industrial Agreement 2020-2023 is a collective agreement that covers Johannes Beer Garden and Bodega A/S. Chapter V is about the pay conditions. The Agreement does not mention the obligation for equal pay between men and women.

Statutory Act on Equal Treatment of Men and Women with regards to Employment Consolidation Act No. 734 of 28 June 2006 (hereinafter: Equal Treatment Act)

This Statutory act provides general rules providing protection against discrimination on the grounds of sex. This act correctly implements Recast Directive. Section 1 (6), regarding 'sexual harassment' is particularly relevant for claim 3.

Act on a Written Statement (*Ansættelsesbevisloven*)

The Act on a Written Statement provides a *sui generis* definition of the term 'employee', which - according to the preparatory works of the Act - must be seen as the general starting point for defining an employee in Danish labour law. Section 1(2) - stipulating the definition - is particularly relevant for claim 2.

White Collar Workers Act

White collar workers, for instance managerial staff, clerks and shop assistants, are covered by a separate, specific statute, the White Collar Workers Act. The Act covers over 50% of all

Danish employees.[1] The definition of 'employee' provided in the Act is narrower compared to the Act on a Written Statement.

Statutory Act on Employees' Rights in the event of Transfers of Undertakings Consolidated Act No. 710 of 20 August 2002 (hereinafter: the Act on Transfers of Undertakings)

This Statutory act provides employment rights to employees when their employer changes as a result of a transfer of an undertaking. According to section 2 of the Danish Act on Transfers of Undertakings, which is particularly relevant for claim 2, a transferee of (part of an) undertaking automatically takes over the rights and duties of the transferor under the employment relationship with the transferred employees.[2] Section 3(1) of this Act states that "the transfer of an undertaking, business or part thereof shall not in itself constitute grounds for dismissal by the transferor or the transferee, unless the dismissal takes place for economic, technical, or organisational reasons entailing changes in the workforce", which is particularly relevant for claim 3. This act correctly implements the Transfer of Undertakings Directive.

Statutory Act on Occupational Health and Safety Consolidated Act No. 2062 of 16 November 2021 (hereinafter: the Act on Occupational Health and Safety)

According to section 1(1) this act aims to create a safe and healthy physical and psychological working environment that at any time corresponds to the technical and social development of society. Furthermore, according to section 1(2), it strives to create a basis in order 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. This act correctly implements the Framework Directive.

[1] Jens Kristiansen, 'The concept of employee: The position in Denmark' in Bernd Waas and Guus Heerma van Voss (eds), *Restatement of Labour Law in Europe Volume I* (Hart Publishing 2017) 5.
[2] Jens Kristiansen, 'The concept of employee: The position in Denmark' in Bernd Waas and Guus Heerma van Voss (eds), *Restatement of Labour Law in Europe Volume I* (Hart Publishing 2017) 2.

Questions

Claim 1

17. Does the job classification system that is used by Defendant DAMA (and previously within Johannes Breweries A/S) constitute an unjustified difference in salary based on sex?

Claim 2

18. How should the employment relationship between Claimant Svendsen and either one or both of the Defendants be qualified, i.e., is Claimant Svendsen an employee and if so, who is from a legal perspective his employer after the transfer of undertaking on 1 June 2021?

Claim 3

19. Was the dismissal of Claimant Olsen lawful?

Summary of Arguments

Claim 1

20. In the view of Claimant Hansen, the difference in salary between the indoor and outdoor staff is unjustified. She claims that the indoor staff is entitled to the same level of salary as the outdoor staff. Her point of view is supported by Claimant Olsen and Dorthe Dideriksen, who both submitted a statement in favour of equal pay.

21. It is apparent that the difference in salary between the indoor and outdoor staff is a form of unjustifiable indirect discrimination as described in section 1a of the Equal Pay Act. In addition, the job classification system also violates the principle of equal treatment as stated in Article 4 of the Recast Directive. The indoor staff predominantly consists of women whereas the outdoor staff predominantly consists of men. According to section 6 of the Equal Pay Act, it is up to Defendant DAMA to prove that the principle of equal treatment has not been violated.

22. Furthermore, it is clear that the indoor and outdoor staff perform work of the same value in the sense of section 1(2) of the Equal Pay Act. Both jobs are physical in nature and the indoor and outdoor workers also have a common goal. The training requirements are similar as the length of the education is roughly the same and both include an internship to gain some hands-on experience. As it comes to working conditions, both groups are covered by the same collective agreement.

23. Therefore, Claimant Hansen is entitled to compensation and can invoke section 2(1) and 2(2) of the Equal Pay Act. Defendant DAMA is, being the transferee due to the transfer of undertakings that took place on 1 June 2021, liable in respect of obligations which arose before the date of the existing employment contract. On this ground, Defendant DAMA is obliged to repay the salaries since the start of the Bodega and to align the future salary levels of the indoor staff with that of the outdoor workers' group.

Claim 2

24. Claimant Svendsen claims to be employed full-time by Defendant Green Galore after the transfer of undertaking on 1 June 2021, primarily due to his status as an employee under Danish national law and, secondarily, because in any event he falls under the definition of 'worker' as set out in relevant European law. Based on section 2 of the Danish Act on Transfers of Undertakings, which implements the Transfer of Undertakings Directive, his employment contract with Johannes Beer Garden and Bodega transferred on 1 June 2021 to i) Green Galore (primary argument) or ii) is split up and transferred accordingly to Green Galore and DAMA (secondary argument).

25. Given the work structure of Johannes Beer Garden and Bodega, it is clear that Claimant Svendsen works in subordination to the managing director Kristensen. Next to reporting to managing director Kristensen, she additionally must approve the work activities of Claimant Svendsen. Claimant Svendsen's 'room for manoeuvre' in his work activities is also limited because of the description of tasks that sets out his major areas of responsibilities. Moreover, the yearly negotiation of Claimant Svendsen's remuneration package and park perks is exclusively handled by managing director Kristensen.

26. Because of the transfer of undertaking on 1 June 2021, the employment contract of Claimant Svendsen is transferred automatically to Defendant Green Galore. Claimant Svendsen spent a majority of his working hours in the outdoor areas – now operated by Defendant Green Galore – since these areas required substantially more time and effort compared to the Bodega activities from the perspective of both business solutions and employee-management.

27. Given that Claimant Svendsen has continued these tasks after the transfer of undertaking, Defendant Green Galore must be considered the transferee of Johannes Beer Garden and Bodega. Defendant Green Galore bears the principal assignment of Claimant Svendsen's tasks after the transfer of undertaking and therefore must be identified as the full-time employer of Claimant Svendsen.

28. On a secondary level, Claimant Svendsen states that, after the transfer of undertaking, his employment contract must be split between the transferees Defendant Green Galore and Defendant DAMA in proportion to the tasks performed by Claimant Svendsen. Any possible practical problems for Defendant Green Galore and Defendant DAMA do not weigh up against safeguarding the rights of Claimant Svendsen arising from his employment contract and the transfer of undertaking.

Claim 3

29. Defendant Green Galore violated article 30 EU Charter, which stipulates the right to protection against unjustified dismissal, in conjunction with the right to a fair trial as laid down in article 6(1) ECHR , since Claimant Olsen received a vague written notice of dismissal without a hearing, a specific reason, or an explanation.

30. Even though the written notice of dismissal contains a reference to company rules 'at the workplace' and does not refer to events that happened during a party, Defendant Green Galore might argue that the reason for dismissal of Claimant Olsen is grounded in his singing performance at the summer party.

31. In this regard, it must be established that the unlawful dismissal cannot be justified with the potential, undue, accusation that Claimant Olsen would have sexually harassed female employees by singing a 'salacious' song at a summer party with colleagues.

32. Considering this potential accusation, it should be noted that events in the private sphere fall outside the scope of the Recast Directive.

33. Moreover, singing a song in the context of licentious merrymaking, cannot be regarded as sexual harassment.

34. Therefore, the unlawful dismissal cannot be justified with misplaced accusations towards Claimant Olsen that are unreasonable and blown out of proportion.

35. Furthermore, it must be established that Defendant Green Galore violated Claimant Olsen's rights under the Act on Transfers of Undertakings (Section 3(1)), by dismissing him within two months after a transfer of undertaking had taken place, without having an economic, technical or organisational reason.

36. To end with, Claimant Olsen was dismissed in the same month he altruistically expressed his opinion regarding an inequality case in the Defendant's organisation. Therefore, the dismissal of Claimant Olsen should be made invalid on the ground of Section 3(3) Equal Pay Act. Alternatively, if a restoration of his employment relationship is considered unfair by the Court, the Claimant remains entitled to receive monetary compensation, based on Section 3(2) Equal Pay Act, and on Section 15 Equal Treatment Act.

Arguments

Claim 1

37. The main legal question to be answered by the Court in the case of Claimant Hansen is whether the job classification system of Defendant DAMA (and previously of transferor Johannes Breweries A/S) constitutes an unjustified difference in salary based on sex.

38. Claimant Hansen is part of the indoor staff that predominantly consists of women whereas the outdoor staff predominantly consists of men. That is why, hereinafter, it will be argued that i) the principle of equal pay between men and women has been breached. The difference in salary between the indoor and outdoor staff is (ii) a form of indirect discrimination based on sex and (iii) both groups of staff perform work given the same value. Furthermore, it will be argued that iv) Defendant DAMA is obliged to pay Claimant Hansen compensation and to align the future salaries of the indoor and outdoor staff.

General remarks

39. The claim of Claimant Hansen originates from the start of the Johannes Beer Garden and Bodega in 2018. The salaries of the indoor and outdoor staff should have been equal from the beginning. Due to the transfer of undertakings, all rights and obligations from the Bodega moved to Defendant DAMA (as follows from section 2(1) of the Transfer of Undertakings Act and Article 3 of the Transfer of Undertakings Directive). Therefore, Defendant DAMA is responsible to restore the inequality in salary.

I. Equal pay between men and women

40. In the view of Claimant Hansen, the difference in salary between the indoor and outdoor staff is unjustified. The job classification system that is applied by Defendant DAMA breaches section 1 of the Danish Equal Pay Act. No discrimination on grounds of sex, whether direct or indirect, may take place in violation of this Act. Section 1a of the Equal Pay Act defines these two forms of discrimination.

41. According to section 1(4) of the Equal Pay Act, this provision is not applicable to the extent in which a similar obligation to offer equal pay is laid down in a collective agreement. Chapter V of the Industry and Services Agreement 2020-2023 concerns pay conditions. However, this Chapter does not have a clause about equal pay between men and women. Claimant Hansen can therefore rely on the Equal Pay Act.

42. The prohibition of discrimination on grounds of sex is laid down in Article 4 of the Recast Directive and the definitions of direct and indirect discrimination are incorporated in Article 2(1). The Directive aims to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Sections 1 and 1a of the Equal Pay Act are in accordance with Articles 4 and 2(1) of the Recast Directive.

43. The principle of equal treatment between men and women can also be found in other sources of EU law. It is even one of the founding principles of the EU, as mentioned in Article 2 TEU. First, the principle is included in Articles 21 and 23 of the EU Charter. The principle of equal pay is specifically laid down in Article 157 TFEU. The ECJ has ruled in the *Defrenne II* case that this article has a horizontal direct effect which means that individuals can rely on it before national Courts.[3] This judgement is still considered to be a landmark ruling that established equal treatment in the workplace.[4]

44. Second, the principle of equal treatment is acknowledged in the Conventions of the ILO. Particularly relevant are the Equal Remuneration Convention and No. 111 about Discrimination in the field of Employment and Occupation. These treaties are ratified by all Member States of the EU and are thus binding upon them.

45. The aforementioned sources show that the principle of equal treatment between men and women, in particular in relation to pay, is very important and may not be violated under EU law.

[3] Case C-149/77 *Gabrielle Defrenne v SABENA* [1978], ECR 130.
[4] Sarah Tas, 'Defrenne v Sabena: a landmark case with untapped potential' [2021] European Papers 881

II. Indirect discrimination

46. In the case of Claimant Hansen, it is apparent that the difference in salary is a form of indirect discrimination based on sex. Statistically seen, the indoor staff predominantly consists of women (14 out of 18 is 78%) whereas the outdoor staff predominantly consists of men (19 out of 21 is 90%). As a result, women are particularly disadvantaged compared to men.

47. Direct discrimination can be identified solely by the criteria laid down by Article 157 TFEU, especially when the origin is in legislative provisions or collective labour agreements. In case of indirect discrimination, facts need to be established that prove men and women receive unequal pay for equal work in the same establishment or service (whether public or private). The distinction is only allowed when there are objective reasons that justify the difference in salary.[5]

48. The burden of proof in case of indirect discrimination can be found in section 6 of the Equal Pay Act, which is a correct implementation of Article 19 of the Recast Directive. Given that in this statement, Claimant Hansen establishes facts which give cause for presuming that direct or indirect discrimination has taken place, it is up to Defendant DAMA to prove that the principle of equal treatment has not been violated.

III. Work given the same value

49. Section 1(2) of the Equal Pay Act states that discrimination between two groups can only take place if the two groups carry out, if not the same work, at least work to which equal value is attributed. In this regard, the Court has identified three relevant factors in the *Royal Copenhagen* case. The relevant factors that should be considered are the nature of the work, the training requirements and the working conditions.[6]

[5] Case C-149/77 *Gabrielle Defrenne v SABENA* [1978], ECR 130.
[6] Case C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S* [1995] ECR 155 para 33.

50. In case of Claimant Hansen, the nature of the work, the training requirements and all working conditions - except for pay - are similar. It can thus be argued that the indoor and outdoor staff perform work of the same value.

51. First of all, the nature of the work is the same for both groups of staff. Although the tasks may vary, both jobs are mainly physical. The outdoor workers need to be physically fit in order to maintain the outside areas and the greenhouses. The indoor workers need to have a sturdy physique because the kitchen work can be demanding and on busy days, they easily walk more than 25,000 steps.

52. The statements of Ole Olsen and Dorthe Dideriksen confirm that the indoor and outdoor workers also have a common goal. They are mutually responsible to make the visitor centre a good experience for the customers. As Ole Olsen said in his statement: "*Every person is a small but important cog in a well-oiled machinery*". If the food experience is not good, the visitors will leave with a bad impression, even if the outside areas are well cared for. This also works the other way around. The indoor and outdoor work can thus be considered as two sides of the same coin.

53. Furthermore, the training requirements are quite similar for both groups. Most of the outdoor workers have a relevant education that consists of 2.5 years of occupational training, including a two-year internship. The kitchen assistants must follow a two-year kitchen education, including a six months' internship. Hence, the length of the education is roughly the same and both include an internship to gain some hands-on experience.

54. As it comes to working conditions, both groups are covered by the same collective agreement, the Industrial Agreement 2020-2023. The only working condition that is different is the salary because this is negotiated by the respective shop stewards. Defendant DAMA might state that the indoor group should just pick a better negotiator. This is not a valid argument because the principle of equal pay for men and women also applies when elements of the pay are determined by collective bargaining or by negotiation at local level.[7]

[7] Case C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S* [1995] ECR 155.

IV. Compensation

55. It has been determined that the job classification system of Defendant DAMA constitutes an unjustified difference in salary based on sex. Article 18 of the Recast Directive states that national legal systems must include measures for real and effective compensation or reparation for damage caused by discrimination on grounds of sex. These measures should be dissuasive and proportionate to the damage suffered.

56. First of all, Claimant Hansen invokes section 2(1) of the Equal Pay Act. This Article states that an employee whose pay is lower than that of others in contravention of section 1 of this Act, is entitled to the difference. Claimant Hansen is entitled to compensation because the indoor workers have been paid a monthly average salary that is € 500,= less than that of the outdoor workers.

57. Moreover, Claimant Hansen is also entitled to compensation in the sense of Section 2(2) of the Equal Pay Act. When determining the size of the compensation, the length of employment and the individual circumstances of the case need to be taken into consideration. There has been a difference in salary between the indoor and outdoor staff ever since the start of the Bodega in 2018. Therefore, Defendant DAMA is obliged to repay the salaries for the last three years and future salaries are to be aligned with that of the outdoor workers' group.

Claim 2

58. Claimant Svendsen primarily claims to be employed full-time by Defendant Green Galore after the transfer of undertaking on 1 June 2021 and, secondarily, that he is employed on a part-time basis with both Defendant Green Galore and Defendant DAMA for respectively 60% and 40% of the working hours he worked at Johannes Beer Garden and Bodega before the transfer of undertaking on 1 June 2021, and with no reduction in his working hours.

59. Claimant Svendsen primarily bases his claim on section 2 of the Danish Act on Transfers of Undertakings, on the basis of which the employment relationship between Claimant Svendsen and Johannes Beer Garden and Bodega is transferred automatically to the transferee(s) in question - primarily: Defendant Green Galore, secondarily: both Defendant Green Galore and Defendant DAMA - given that Claimant Svendsen classified as an 'employee' under Danish national law.

60. On a secondary basis, regardless of the classification of Claimant Svendsen's employment relationship under Danish national law, he falls under the definition of 'worker' as set out in relevant European law principles and, as such, must be included in the transfer of undertaking on 1 June 2021.

61. Defendant Green Galore, as regards to the primary claim, and Defendants Green Galore and DAMA, as regards to the secondary claim, are currently in breach of their obligations under both Danish national law and European law by not employing Claimant Svendsen respectively full-time or on a part-time basis.

General remarks

62. The main legal questions to be answered by the Court in the case of Claimant Svendsen is i) what the legal status was of the employment relationship between Claimant Svendsen and Johannes Beer Garden and Bodega before the transfer of undertaking, ii) whether Claimant Svendsen is included in the transfer of undertaking on 1 June 2021, and iii) who the employer of Claimant Svendsen is after the transfer of his employment contract.

63. As set out in the Transfer of Undertakings Directive, the goal of the regulatory framework concerning the transfer of undertaking is to provide for the protection of employees in the event of a change of employer, in particular to ensure that their rights are protected.[8] In other words, the underlying objective of the Transfer of Undertakings Directive is to prevent unfair dismissals or unfair terminations which arise out of a legal transfer or merger of companies and entities.

I. Classified as an employee under Danish national law

64. Claimant Svendsen primarily claims to be employed full-time by Defendant Green Galore after the transfer of undertaking on 1 June 2021.

65. Due to his status as an employee under Danish national law, Claimant Svendsen employment relationship with his previous employer Johannes Beer Garden and Bodega is included in the transfer of undertaking on 1 June 2021 on the basis of section 2 of the Danish Act on Transfers of Undertakings and subsequently transferred to Defendant Green Galore.

66. According to section 1(2) of the White Collar Workers Act, under which Claimant Svendsen falls due to his managerial tasks, an "employee is under a duty to perform work upon the employer's request."[9] Claimant Svendsen meets these criteria. In particular, he meets the requirement of personal subordination both vis-à-vis i) his previous employer Johannes Beer Garden and Bodega before the transfer of undertaking on 1 June 2021 and ii) his new employer Defendant Green Galore after the transfer of undertaking on 1 June 2021. At any rate, he falls within the *sui generis* definition of 'employee' as set out in section 1(2) of the Danish Act on a Written Statement, meaning "a person who receives remuneration for personal work in an employment relationship".

[8] Council Directive 2001/23/EC of 12 March 2001 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, recital 3. *See*, for example, Case C-344/18 *ISS Facility Services NV v Sonia Govaerts and Atalian NV, formerly Euroclean NV* [2020] ECLI:EU:C:2020:239, para 34.
[9] *See* also Jens Kristiansen, 'The concept of employee: The position in Denmark' in Bernd Waas and Guus Heerma van Voss (eds), *Restatement of Labour Law in Europe Volume I* (Hart Publishing 2017) 3.

67. Claimant Svendsen carried out his activities under the direction and supervision of Johannes Beer Garden and Bodega. In particular, Claimant Svendsen reported to managing director Kristensen, who also had to approve the everyday work activities and decisions carried out by Claimant Svendsen. The 'room for manoeuvre' of Claimant Svendsen within his work activities was furthermore limited by the description of tasks that set out his major areas of responsibilities. And although Claimant Svendsen was a member of the board of directors, he only participated on an ad hoc basis with no voting rights. On top of that, managing director Kristensen negotiated the remuneration package and park perks Claimant Svendsen would receive.

68. In other words, managing director Kristensen was the end-station of Johannes Beer Garden and Bodega. She bore the ultimate responsibility for its activities and performance, which strongly limited the scope of Claimant Svendsen's work activities. As such, he was under a duty to perform work upon the request of Johannes Beer Garden and Bodega.

69. Moreover, Johannes Beer Garden and Bodega taxed Claimant Svendsen as an *employee* for taxation purposes, meaning they retained his taxes on behalf of the tax authorities.

70. To Claimant Svendsen, it is thus as clear as daylight that, based on the above, he worked as an employee under Danish national law which, in turn, enables the application of section 2 of the Danish Act on Transfers of Undertakings.

II. Falling within the definition of 'worker' as set out in EU law

71. If the Court would, despite the above, decide that Claimant Svendsen does not classify as an employee within the meaning of Danish national law, Claimant Svendsen secondarily stakes his claim to be full-time employed by Green Galore on the fact that he must be classified as a 'worker' within the meaning given to it by EU law and that he, on that very basis, must be included in the transfer of undertaking on 1 June 2021.

72. In particular, to ensure the *effet utile* of the Transfer of Undertakings Directive, upon which the Danish Act on Transfers of Undertakings is based, his status as a 'worker' under EU law ensures that Claimant Svendsen can invoke the rights granted by section 2 of the Danish Act on Transfers of Undertakings, regardless of his classification under Danish national law.

73. While it is true that Article 2(1)(d) of the Transfer of Undertakings Directive declares that "'employee' shall mean any person who, in the Member State concerned, is protected as an employee under national employment law", the *effectiveness* of EU law (and in particular: of the Transfer of Undertakings Directive) would be undermined if Claimant Svendsen is not classified as an employee under Danish national law and - for that very sole reason - misses out on the protection offered by the Transfer of Undertakings Directive.

74. Based on the same facts under section 1, it is clear that Claimant Svendsen meets the criteria of the seminal case of *Lawrie-Blum*, in which the ECJ established that the essential feature of an employment relationship 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.[10]

75. In addition, it must be noted that "the nature of the employment relationship under national law is of no consequence as regards whether or not a person is a worker for the purposes of EU law", the ECJ ruled in *Balkaya*.[11] The concept of 'worker' "must be given an autonomous and independent meaning in the EU legal order."[12]

76. Furthermore, it also follows from *Balkaya* that even a director - which Claimant Svendsen is not - can fall within the EU definition of 'worker', regardless of whether this director is considered an 'employee' under national law or not.

[10] Case 66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121.
[11] Case C-229/14 *Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH* [2015] ECR onbekend (ECLI:EU:C:2015:455), para 35.
[12] Case C-229/14 *Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH* [2015] ECR onbekend (ECLI:EU:C:2015:455), para 33.

77. Because Mr Balkaya, a member of the board of directors, i) was appointed by the general meeting of the company's shareholders who could revoke his mandate 'at any time', ii) was under the direction and supervision of that body, and iii) did not own any shares of the company in question, the ECJ held that Mr Balkaya was a 'worker' under EU law.[13] Given that a person such as Mr Balkaya is already labelled as a 'worker', this would all the more be the case for Claimant Svendsen, who - at the very least - carries out some managerial tasks.

78. Moreover, in several cases where EU legislation limits the scope of the instrument to those classified as an employee under *national* law, the ECJ nevertheless ruled that the discretion granted to Member States regarding the concept of 'employee' is not unlimited. In *O'Brien*, which concerned the Framework Agreement on part-time work, the ECJ stated that "Member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness."[14] The "effet utile" argument was subsequently repeated by the ECJ in *Rurhlandklinik gGmbH* in respect to the Temporary Agency Workers Directive.[15]

79. Based on the foregoing, the effectiveness of the Transfer of Undertakings Directive would be severely undermined if Claimant Svendsen would be excluded from its scope due to his employment status under Danish national law, especially given that the objective of the Transfer of Undertakings Directive is first and foremost to protect employees in the event of a change of employer, in particular to ensure that their rights are protected.[16]

[13] Case C-229/14 *Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH* [2015] (ECLI:EU:C:2015:455), para 40. *See* also Case C-232/09 *Dita Danosa v LKB Lizings SIA* [2010] ECR I-11405.
[14] Case C-393/10 *Dermod Patrick O'Brien v Ministry of Justice, formerly Department for Constitutional Affairs* [2012] ECLI:EU:C:2012:110.
[15] Case C-216/15 *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH* [2016] ECLI:EU:C:2016:883.
[16] *See*, for example, Case C-344/18 *ISS Facility Services NV v Sonia Govaerts and Atalian NV, formerly Euroclean NV* [2020] ECLI:EU:C:2020:239, para 34.

III. Full-time employment with Defendant Green Galore

80. Given that Claimant Svendsen - primarily - meets the criteria of an 'employee' under Danish national law and - secondarily - of a 'worker' under EU law, he falls within the scope of the Danish Act on Transfers of Undertakings. As a result, his employment relationship with Johannes Beer Garden and Bodega is included in the transfer of undertaking on 1 June 2021.

81. This means that Johannes Beer Garden and Bodega's rights and obligations arising from the employment relationship with Claimant Svendsen existing on the date of the transfer shall, by reason of this transfer, be transferred to the transferee in question. Claimant Svendsen primarily argues that Defendant Green Galore is the transferee that must offer Claimant Svendsen a full-time employment contract.

82. First, it must be noted that, according to the ECJ in *Colina Sigüenza*, the underlying ratio of the Transfer of Undertakings Directive is, amongst others, to ensure as far as possible that the contract of employment 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.[17]

83. Second, to Claimant Svendsen, it is clear that Defendant Green Galore is the primary transferee that takes over Claimant Svendsen's rights and obligations arising from his employment contract with Johannes Beer Garden and Bodega, i.e., they are the principal employer of Claimant Svendsen after the transfer of undertaking.

84. Claimant Svendsen spent most of his time working in the outdoors department of Johannes Beer Garden and Bodega, which is the department acquired by Defendant Green Galore on 1 June 2021. As is not in discussion between parties, Claimant Svendsen had been required to spend more time at the outdoor department compared to the indoor services, given the outdoor area required more innovative solutions and a more intentional effort with the staff to get the new image in place.

[17] Case C-472/16 *Colina Sigüenza* ECLI:EU:C:2018:646 para 48.

85. As such, Claimant Svendsen is assigned to carry out the majority of his work commitments and duties under the auspice of Defendant Green Galore. In this sense, there exists a clear *relationship* between Claimant Svendsen and the part of Johannes Beer Garden and Bodega Defendant Green Galore acquired on 1 June 2021 (the outdoor area), i.e., the criteria the ECJ considered in *Bötzen* to be the determining factor in deciding to which part of the undertaking the employee is transferred.[18]

86. Based on the foregoing, Claimant Svendsen is therefore entitled to a full-time employment contract with Defendant Green Galore.

IV. Employment divided between Defendant DAMA and Defendant Green Galore

87. In case the Court decides that Claimant Svendsen is not employed on a full-time basis by Defendant Green Galore, he argues on a secondary level that, after the transfer of undertaking on 1 June 2021, his employment contract must be split between the Defendant DAMA and Defendant Green Galore in proportion to the tasks performed by Claimant Svendsen.

88. In *Govaerts*, a similar case to the situation at hand, the ECJ was asked to rule on the situation where an employment contract of a transferring worker is transferred to multiple transferees.[19]

89. The ECJ allowed dividing up a full-time contract to different part-time contracts in case of a transfer of undertaking to multiple transferees. In particular, the ECJ concluded:[20]

> "[A] transfer of the rights and obligations arising from a contract of employment to each of the transferees, in proportion to the tasks performed by the worker, makes it possible, in principle, to ensure a fair balance between protection of interests of workers and protection of the interests of transferees, since the worker obtains the safeguarding of the rights arising from his or her contract of

[18] Case 186/83 *Arie Botzen and others v Rotterdamsche Droogdok Maatschappij BV* [1985] ECR 00519, para 15.
[19] Case C-344/18 *ISS Facility Services* ECLI:EU:C:2020:239.
[20] Case C-344/18 *ISS Facility Services* ECLI:EU:C:2020:239 para 34.

employment, while the transferees do not have greater obligations imposed on them (...)."

90. As such, the tasks performed by Claimant Svendsen must be divided *pro rata* between Defendant DAMA and Defendant Green Galore. Given that Claimant Svendsen worked, before the transfer of undertaking, 60% of his time with the outdoor areas/greenhouses and 40% of his time with the indoor services, this would constitute a part-time contract with Defendant Green Galore that accounts for 60% of the working hours and remuneration compared to his pre-transfer of undertaking situation, and a part-time contract with Defendant DAMA for 40% of his original working hours and remuneration.

91. Claimant Svendsen stresses that the exemptions to the rule of *Govaerts*, as set out by Advocate General Spzunar in his Opinion, are not in play in the current case.[21] Dividing the employment tasks of Claimant Svendsen *pro rata* between Defendants A and B would not prove to be impossible, for example because of competition concerns as might be brought forward by Defendants.

92. Claimant Svendsen highlights the fact that both entities will engage in different activities. Defendant DAMA has continued the indoor café, whereas Defendant Green Galore has taken over the outdoor area/greenhouses. The competitive concerns that Defendants might raise are thus mainly hypothetical and can, in any case, be mitigated by signing confidentiality agreements and non-compete agreements (the latter to prevent Claimant Svendsen from fully joining either Defendant DAMA or Green Galore exclusively in the near future).

[21] Case C-344/18 *ISS Facility Services* ECLI:EU:C:2019:1009 para 79.

Claim 3

93. Claimant Olsen pleads for establishing reinstatement and alternatively compensation, since Defendant Green Galore breached prohibitions of wrongful determination under international, European and national law.

94. First of all, Claimant Olsen states that i) the dismissal was in conflict with protection under European law, codified in Article 30 EU Charter in conjunction with international law, namely provision 6 of the ECHR (ii). Moreover, it must be established that iii) the unlawful dismissal cannot be justified with potential, undue, accusations that Claimant Olsen would have sexually harassed female employees by singing a 'salacious' song at a summer party with colleagues.

95. Furthermore, the dismissal of Claimant Olsen was unlawful under Danish law. It will be argued that iv) the dismissal violated the Act on Transfers of Undertakings. To end with, it will be argued that v) the dismissal was in conflict with the Equal Pay Act, which provides Claimant Olsen a subjective right to force reinstatement and alternatively compensation from his employer.

I. Violation of Article 30 EU Charter

96. Defendant Green Galore violated the right to protection against unjustified dismissal as codified in Article 30 EU Charter, since a written notice of termination was overhanded by Defendant Green Galore without a specific reason, a hearing or an explanation.

97. Regarding the written notice of dismissal, it must be established that "a breach of company rules for appropriate behaviour at the workplace" is too vague to constitute a lawful reason for dismissal. Without further explanations or a hearing, Claimant Olsen was left to guess what he was accused of.

98. When addressing Article 30 EU Charter, it must be noted that this provision is formulated as a positive, individual right and directly the workers are addressed by this right. It can be argued that it should be recognized as a human right, since it is inherently connected to human dignity and autonomy of each individual, as work is a crucial part of personal development.[22] In the *Max-Planck* and *Bauer* judgments, the ECJ accepted that certain fundamental rights could have horizontal direct effect and, as such, be invoked by individuals in horizontal proceedings.[23]

99. Since it has not yet been exhaustively made clear which provisions of the EU Charter can have horizontal direct effect, additionally, the obligation to interpret national law in conformity with the EU Charter can be found in the *Bauer* judgement.[24] Therefore, irrespective of whether or not Article 30 EU Charter should be qualified as a human right or a principle of EU law, national Courts must take EU Charter provisions into due consideration.

II. Violation of Article 30 EU Charter in conjunction with Article 6(1) ECHR

100. Furthermore, it should be taken into consideration that there are essential connections between Article 30 EU Charter and the rights of workers on termination of employment arising from article 6(1) ECHR.[25]

101. Even though ECHR is not a direct source of Article 30 EU Charter, due to the reference of the EU Charter to the ECHR (in its Preamble and Article 52(3)), the rights in the ECHR constitute central standards for fundamental rights protection and play a special role in the interpretation of the rights of the EU Charter. Moreover, the ECtHR delivered several judgments affecting the protection from dismissal, where the dismissal violated another fundamental right.

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[22] Hugh Collins, *Justice in dismissal: The law of termination of employment* (Clarendon Press 1992) 16.
[23] Case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu* [2018] ECR 874 and Case C-569/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* [2018] ECLI:EU:C:2018:871.
[24] Case C-569/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* [2018] ECLI:EU:C:2018:871.
[25] Jeff Kenner, 'Article 30: protection in the event of unjustified dismissal' In: Steve Peers, Hervey Anthology (eds), Jeff Kenner (eds), Angela Ward (eds), The EU Charter of Fundamental Rights: a commentary (Hart Publishing, Oxford 2014).

102. Article 6 of ECHR, which protects the right to a fair trial, can be invoked in this context, as this right constitutes part of the right to protection against unjustified dismissal. Ever since 1990 the European Court of Human Rights (hereinafter: ECtHR) recognized that a dismissal issue falls within the scope of Article 6 ECHR, since the dispute as to the dismissal is unquestionably a 'civil' matter within the meaning of Article 6.[26]

103. Moreover, in the case *K.M.C. v Hungary,* the ECtHR pointed out that a dismissal of a civil servant without giving reasons, violated article 6(1) ECHR, because without knowing the reasons for dismissal, "it is inconceivable for the applicant to have brought a meaningful action, for want of any known position of the respondent employer."[27]

104. Claimant Olsen has been put in a similar position since he was dismissed, without a hearing, a specific reason or an explanation. Therefore, it is indecipherable why Claimant Olsen was fired.

105. Although the above-mentioned judgments concern vertical disputes, it is important to note that national Courts are also part of the state, and like all other state organs, they are obliged to fully respect the ECHR.[28] If the national Court does not take into account the ECHR, a claimant can complain about it in Strasbourg. This fact has been explicitly emphasised by the ECtHR in *Pla & Puncernau v. Andorra*.[29]

106. Therefore, Claimant Olsen refers to a sufficient level of human rights protection that arises from the obligation of the Court to comply with article 6(1) ECHR and Article 30 EU Charter.

[26]*Obermeier vs. Austria* App no *11761/85* (ECHR 28 juni 1990).
[27]*K.M.C. v Hungary the European Court of Human Rights* App no *19554/11 (*ECHR 10 July 2012).
[28] European Court of Human Rights 2021, 'THE ECHR IN 50 QUESTIONS' 67075 Strasbourg cedex, France, p. 3.
[29]*Pla v Puncernau t. Andorra Court of Human Rights* App no *69498/01* (ECHR 13 juli 2004).

III. Potential accusation addressed by Defendant Green Galore to justify the unlawful termination

107. Defendant Green Galore might argue that the reason for dismissal, that is, "a breach of company rules for appropriate behaviour at the workplace" refers to Claimant Olsen's singing performance on Friday 9th of July. In this regard, it is important to point out that the particular performance took place at a summer party. The reason for dismissal refers to "a breach of company rules at the workplace", and clearly, does not concern events at a party.

108. Nevertheless, Defendant Green Galore might try to justify the unlawful dismissal by arguing that Claimant Olsen has sexually harassed female employees by singing a "salacious" song.

109. When addressing this potential, undue, accusation of Defendant Green Galore against Claimant Olsen, it is necessary to further clarify the applicable legal framework of 'sexual harassment'.

110. According to Article 2(1)(d) Recast Directive sexual harassment is regarded as discrimination and is defined as "where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment".

111. Article 1 Recast Directive stipulates the purpose of this Directive, namely, to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

112. Should Defendant Green Galore make an accusation concerning 'sexual harassment', as justification for dismissal, Claimant Olsen would first of all like to point out that any references to events regarding the recent summer party, fall outside the scope of Recast Directive.

113. That is, because Defendant Green Galore was not engaged in the festivities of the party in question (neither organised it nor was involved in any other way). Thereby, the party took place in a private sphere, which must be regarded as not falling within the scope of matters of employment and occupation (article 1 Recast Directive).

114. If the Court should rule that the scope of Recast Directive applies to private festivities with colleagues, it is important to point out that the setting of the party in question was very informal.

115. Moreover, at the respective occasion, Claimant Olsen received positive feedback only. Claimant Olsen did not encounter any warning that night that he might have crossed a line which could possibly have violated female employees' dignity. At the party, no one gave any indication whatsoever to assume his performance was perceived as unwanted behaviour. 'Sexual harassment' refers to unwanted behaviour with a sexual connotation and with the purpose or effect of violating the dignity of a person.[30] Singing a song at a summer party, in a loose and fun atmosphere, received by an amused audience, cannot be regarded as such.

116. If Defendant Green Galore argues that the reason for dismissal of Claimant Olsen is based on his singing performance, the dismissal must be regarded as unreasonable and disproportionate.

117. Days after Claimant Olsen's performance took place, two female employees complained, because they took offence at the lyrics of a certain song. In this regard, it should be taken into consideration that Claimant Olsen did not come up with particular lyrics himself. He sang an existing popular song to entertain his colleagues and did not, by any means, carry out a personal opinion.

[30] Article 2(3) Recast Directive.

118. According to empirical research, nearly one-third of popular songs contains lyrics that degrade or demean women by portraying them as submissive or sexually objectified.[31] This is problematic; however, it is unreasonable to hold Claimant Olsen responsible for the popularity of music with offensive lyrics, particularly since his audience initially responded with great enthusiasm.

119. Moreover, the fact that Claimant Olsen, incidentally, sang a song with disputable lyrics during a party does not detract from the fact that he is very concerned about equal rights for man and woman. Claimant Olsen's statement regarding the equal payment matter proves that he must be regarded as a feminist. The Court should take this into consideration to prevent from giving a disproportionate weight to licentious merrymaking, in the context of feasting, drinking and joking around.

120. In conclusion, the written notice of dismissal concerns a breach of company rules "at the workplace" and does not refer to events that happened during a party. However, Defendant Green Galore might argue that the reason for dismissal of Claimant Olsen is grounded in his singing performance at the summer party. Regarding potential accusations, it must be noted that events in the private sphere fall outside of the Recast Directive. Furthermore, singing a song in the context of licentious merrymaking, cannot be regarded as sexual harassment. Therefore, the unlawful dismissal cannot be justified with misplaced accusations towards Claimant Olsen that are unreasonable and blown out of proportion.

IV. Violation of Section 3(1) of the Act on Transfers of Undertakings

121. Furthermore, the dismissal of Claimant Olsen is unlawful since Defendant Green Galore violated his rights under the Statutory Act on Employees' rights in the event of Transfers of Undertakings. Section 3(1) of this Act states that 'the transfer of an undertaking, business or part thereof shall not in itself constitute grounds for dismissal by the transferor or the transferee, unless the dismissal takes place for economic, technical, or organisational reasons entailing changes in the workforce.'

[31] Cynthia Frisby and Elizabeth Behm-Morawitz, 'Undressing the words: Prevalence of profanity, misogyny, violence, and gender role references in popular music from 2006–2016' [2019] Media Watch 5.

122. This section is in accordance with article 4 of the Transfer of Undertakings Directive. The aim of this directive is to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded (consideration 3 of the Transfer of Undertakings Directive).

123. Defendant Green Galore did not safeguard Claimant Olsen´s rights and violated section 3(1) of the Act on Transfers of Undertakings, by dismissing a transferor (in less than two months after a transfer of undertaking had taken place), without a specific reason.

124. It is upon Defendant Green Galore that to prove that the dismissal had not been made in violation of section 3 (1) Statutory Act on Employees' Rights in the event of Transfers of Undertakings, by providing an economical, technical or organisational reason for dismissal. Again, Defendant Green Galore did not give any specific reason for dismissal, leaving Claimant Olsen to guess.

V. Violation of Article 3(1) Equal Pay Act

125. Moreover, it can be argued that the dismissal of Claimant Olsen, relates to his statement concerning equal payment for men and women. It should be taken into consideration that the equal pay case caused a lot of negative media attention and Defendant Green Galore did not appreciate Claimant Olsen´s involvement in the matter.

126. In this regard, it is very peculiar that Claimant Olsen was dismissed in the same month he altruistically expressed his opinion regarding an inequality case in the Defendant's organisation. The facts indicate that he was victimised, because of his courage to stand up for colleagues who have been discriminated against on grounds of sex.

127. It should be noted that, since the dismissal took place less than one year after Claimant Olsen had made a demand for equal pay, it is upon Defendant Green Galore to prove that the dismissal had not been made in violation of this section (section 3(2) Equal Pay Act).

128. Since Defendant Green Galore does not have any proof in this context, a violation of section 3(1) Equal Pay Act must be established. Consequently, the dismissal should be considered invalid on the ground of section 3 (3) of the Equal Pay Act.

129. If the Court rules that it would be unfair to demand for a restoration of the employment relationship between Claimant Olsen and Defendant Green Galore, Claimant Olsen remains entitled to receive monetary compensation. Not only based on Section 3(2) Equal Pay Act, but also based on Section 15 Statutory Act on Equal Treatment of Men and Women. Claimant Olsen made a statement to demand equal payment for men and women, and therefore claimed equally with regards to working conditions (Section 4 Equal Treatment Act). Dismissal as a reaction to a claim for equal treatment can be awarded compensation from the employer (Section 15 Equal Treatment Act).

130. It should be stipulated that the ECJ has stated, in the recent *Hakelbracht judgement*, that employees who have supported colleagues who have been discriminated against on grounds of sex, should be protected against victimization.[32]

131. In conclusion, Defendant Green Galore breached prohibitions of wrongful determination under international, European and national law. Therefore, the dismissal must be regarded as unlawful, and Claimant Olsen is entitled to force reinstatement and alternatively compensation from Defendant Green Galore.

[32]Case C-404/18 *Hakelbracht* [2019], ECR 523.

Pleadings

For the foregoing reasons, the Claimants respectfully and humbly request this Court to:

I. sentence Defendant DAMA to pay compensation to Claimant Hansen for the breach of the Equal Pay Act, to repay the salaries since the start of the Bodega and to align the future salary levels of the indoor staff with that of the outdoor staff;

II. sentence Defendant Green Galore to employ Claimant Svendsen on a full-time basis, and alternatively to sentence Defendant Green Galore and Defendant DAMA to employ Claimant Svendsen on a part-time basis, with an employment contract consisting of respectively 60% and 40% of Claimant Svendsen's work commitments prior to the transfer of undertakings;

III. establish reinstatement for Claimant Olsen at Defendant Green Galore, and alternatively sentence Defendant Green Galore to pay compensation to Claimant Olsen for unjustified termination of his employment relationship.