The Netherlands D

HS MCC 2022

Statement for Defendants

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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 taken over by 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**) is part of the indoor staff and works as an employee for Defendant DAMA. Before that date she performed the same job as an employee of Johannes Beer Garden and Bodega A/S. Both indoor and outdoor staff are mixed, meaning that they are both represented by female and male workers. Some of the outdoor workers are former brewery workers who have retained their high levels of pay from their brewery working days.

4. In general, the workplaces are physically separated. The outdoor staff stays in the gardens and greenhouses while the indoor staff only goes outside to clear the tables on the terrace next to the gardens.

5. The salary negotiations are carried out by shop stewards, who have been elected by the various groups of staff. The indoor staff has managed to negotiate a monthly average salary of € 3,000,= whereas the outdoor staff has negotiated a monthly average salary of € 3,500,=.

Claim 2

6. Svend Svendsen (hereinafter: **Claimant Svendsen**) worked as the chief of operations of Johannes Beer Garden and Bodega, bearing the sole responsibility for 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 is registered as the director of Johannes Beer Garden and Bodega. Kirsten Kristensen (hereinafter: **managing director Kristensen**) is also registered as the managing director, but her day-to-day influence is limited. Managing director Kristensen's appointment as managing director is primarily chosen for image reasons due to her well-known standing in the Danish business community. Both Claimant Svendsen and managing director Kristensen are members of the board of directors.

8. As a result, Claimant Svendsen enjoys a wide responsibility in managing the everyday activities, management and decisions of Johannes Beer Garden and Bodega. All his suggestions and ideas are immediately approved. In addition, managing director Kristensen is responsible for negotiating Claimant Svendsen's remuneration package and park perks, the format of which is based on the task description of the chief of operations. This task description stipulates in a broad and non-specific way the areas in which Claimant Svendsen carries a responsibility.

9. Both Defendant DAMA and Defendant Green Galore object to employing Claimant Svendsen either full-time or part-time after the transfer of undertaking on 1 June 2021, on the basis of i) competition concerns and ii) a lack of sufficient tasks to employ a full-time manager.

Claim 3

10. Defendant Green Galore, a company that offers services in both the hospitality sector and the green sector, dismissed the employee Ole Olsen (hereinafter: **Claimant Olsen**) because he deeply insulted (at least) two female employees by singing a salacious song at a summer party with colleagues.

11. Already in 2018 Ole Olsen had shown problematic character traits since he tended to have a high level of beer consumption. To save him from his road to demise, he needed to be relocated to an alcohol-free workplace.
12. Two years later, soon after Claimant Olsen was transferred by operation of law to Defendant Green Galore, he shared a – seemingly – admirable statement concerning equal payment for men and women at work.

13. In retrospect, this obviously appeared to be an act in order to receive admiring attention from female employees.

14. Claimant Olsen clearly failed in keeping up appearances, when he expressed himself with extremely salacious verbal content like ‘‘screaming for a whore” and “They did it in so many ways, they humped and puffed for 14 days”.

15. Two female employees approached Claimant Olsen and stipulated that he crossed the line. When Claimant Olsen was confronted with his offensive singing performance, he responded by humiliating and insulting the two female employees even further, insinuating they are not beautiful in his opinion.

16. Claimant Olsen was dismissed, because of strict staff guidelines on how to avoid sexist behaviour and sexual harassment.

17. These strict guidelines were introduced after an earlier unfortunate #MeToo situation had taken place at the workplace of Defendant Green Galore.

18. Defendant Green Galore chose to act adequately in order to maintain a zero-tolerance policy regarding sexual harassment and dismissed Claimant Svendsen to protect female employees, both from a legal and a human perspective

Description of Relevant Legislation

International legislation

European Convention on Human Rights (hereinafter: ECHR)

The ECHR is an international convention to protect human rights and political freedoms in Europe. It was drafted in 1950 by the then newly formed Council of Europe and entered into force on 3 September 1953. All Council of Europe member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity. Article 6(1) "the right to a fair trial" is particularly relevant for claim 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 has been 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: the 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 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 the 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. 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.[1] Section 3(1) of this Act states that

[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) 2.

‘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.

Questions

Claim 1

19. 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

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

Claim 3

21. Was the dismissal of Claimant Olsen lawful?

Summary of Arguments

Claim 1

22. In the view of Defendant DAMA, the job classification system does not constitute an unjustified difference in salary. Both indoor and outdoor staff are represented by female and male employees and the workers within the groups are entitled to the same level of salary.

23. The indoor and outdoor works do not perform the same work or work of the same value in the sense of section 1(2) of the Equal Pay Act. The nature of the work is different as the work of the indoor staff is a lot more service oriented. In addition, the relevant education for the outdoor workers involves a lot of learning on-the-job whereas the indoor staff is obliged to follow a two-year education before they are allowed to work in the kitchen. Therefore, the salary levels of the two groups cannot be compared with each other.

24. Even if the two groups would be comparable, the difference in salary is in no way related to sex. The difference in salary is mainly the result of the salary negotiations. In addition, the difference may also originate from the fact that some of the greenhouse staff are former brewery workers who have retained their high pay levels from their brewery worker days.

25. Furthermore, the difference in salary cannot be attributed to a single source because the indoor and outdoor staff have different employers.

26. Defendant DAMA is thus not obliged to repay the salaries since the start of the Bodega nor to align the future salary levels with that of the outdoor workers' group.

Claim 2

27. Defendant Green Galore denies the primary claim of Claimant Svendsen that he must be employed on a full-time basis after the transfer of undertaking on 1 June 2021. Moreover, Defendant Green Galore and Defendant DAMA object to Claimant Svendsen's secondary claim to be employed on a part-time basis by both Defendants.

28. The primary reason why Claimant Svendsen's primary and secondary claim must be refused is that he does not qualify as an 'employee' under Danish national law, in particular section 1(2) of the White Collar Workers Act. As a result, Claimant Svendsen is not able to invoke the relevant provision in the Danish Act on Transfers of Undertakings in his claim to be included in the transfer of undertaking. In addition, Claimant Svendsen does not fall within the definition of 'worker' as set out in EU law.

29. As such, Defendant Green Galore cannot be compelled to offer Claimant Svendsen a full-time employment contract (primary claim), and Defendant Green Galore and Defendant DAMA must not be forced to offer a part-time employment contract to Claimant Defendant on a proportionality basis (secondary claim).

Claim 3

30. The dismissal of Claimant Olsen finds its basis in the fact that he has sexually harassed female employees, within the meaning of section 1(6) Equal Treatment Act, which constitutes a reasonable and proportionate reason for dismissal.

31. Furthermore, the termination of Claimant Olsen's employment relationship was lawful, in coherence with national law[2] and European law[3] regarding Defendant Green Galore's duty of care to maintain a safe and healthy working environment.

32. Section 3(1) of the Act on Transfers of Undertakings has not been violated since the dismissal was unrelated to the aforementioned transfer of undertaking.

33. Section 3(1) of the Equal Pay Act has not been violated either, since the dismissal of Claimant Olsen was, by no means, related to his statement regarding the payment case.

34. Claimant Olsen might try to invoke Article 30 EU Charter (concerning unjustified dismissal), substantiating that the reason for dismissal was not clear to him. As to the absence of extensive specifications regarding the reason for dismissal, this does not alter

[2] Section 1 of the Act on Occupational Health and Safety.
[3] Article 1(1) of the Framework Directive.

the fact that Claimant Olsen sexually harassed female employees, which constitutes a lawful reason for dismissal.

35. Moreover, if Claimant Olsen tries to invoke Article 30 EU Charter, it must be established that this article does not provide a subjective right to force reinstatement (or alternatively compensation) in a horizontal relationship.

36. Therefore, Claimant Olsen's pleading for reinstatement and alternatively compensation because he believes the termination of his employment relationship was 'unlawful', should be rejected.

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 constitutes an unjustified difference in salary based on sex.

38. Defendant DAMA strongly believes that the indoor and outdoor workers are not in a comparable situation. It is up to Claimant Hansen to (i) establish facts for presuming that (in)direct discrimination has taken place. In the following, it will be argued that (ii) there is no indirect discrimination because the indoor and outdoor staff do not perform the same work or work of the same value. If the Court however determines that this is not the case, it will be argued that (iii) there are objective reasons that justify the difference in salary. Even if indirect discrimination is determined, Defendant DAMA is not obliged to pay Claimant Hansen compensation because (iv) the difference in salary cannot be attributed to a single source. As a result, Defendant DAMA disputes all claims set forward by Claimant Hansen.

General remarks

39. Defendant DAMA is particularly a proponent of equal pay between men and women. This is shown by the fact that the male and female workers of the indoor staff are rewarded the same levels of salary, regardless of differences in tasks.

I. Burden of proof

40. The job classification system of Defendant DAMA does not breach section 1 of the Danish Equal Pay Act. This provision prohibits both direct and indirect discrimination on grounds of sex. These forms of discrimination are defined in section 1a of the aforementioned Act.

41. As follows from section 6 of the Equal Pay Act, it is for the employees who consider themselves to be victims of discrimination to prove that they are receiving a lower salary

than paid by the employer to a colleague of the other sex who is performing the same work or work of the same value. This provision is in accordance with Article 19 of the Recast Directive.

42. The mere finding that the average salary of a group of workers consisting predominantly of women is lower than the average pay of a group of workers consisting predominantly of men, even when performing work to which equal value is attributed, does not suffice to establish that there is discrimination with regards to pay. The employer may not only dispute that the conditions for the application of the principle for equal pay are met but may also put forward objective grounds, unrelated to any discrimination based on sex, to justify the difference in pay.[4]

II. No work of the same value

43. In this case, Claimant Hansen does not carry out the same work or work of the same value as a worker from the outdoor staff. Therefore, the outdoor staff cannot be used as a comparator for equal pay in the sense of section 1 of the Equal Pay Act.

44. To compare the average salary of two groups of workers, it must be established that the two groups each encompass all the workers who can be considered to be in a comparable situation. In this regard, it is important that they cover a relatively large number of workers to ensure that the differences are not due to purely fortuitous or short-term factors. Relevant factors that should be considered are the nature of the work, the training requirements, and the working conditions.[5]

45. The indoor and outdoor groups are large enough in size to be compared. Yet, it is obvious that the indoor and outdoor workers do not perform the same work. The indoor workers prepare meals, wait on tables, and clean the café whereas the outdoor workers maintain the park areas and the greenhouses. These different tasks also show that the nature of the work is not the same. The work inside is a lot more service oriented as the indoor workers are

Case C-381/99 *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG* [2001] ECR 358.
[5] Case C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S* [1995] ECR 155, para 33.

constantly helping and serving visitors. On the contrary, the outdoor workers work a lot more on their own and have little contact with visitors.

46. Ole Olsen and Dorthe Dideriksen explain in their statements that they think it is reasonable that the indoor and outdoor staff are paid the same because they all contribute to the success of Johannes Breweries. Although Defendant DAMA encourages this sense of team spirit, this does not follow from the collaboration between the two groups in practice. Generally, the workplaces are physically separate, and the indoor and outdoor workers barely see each other.

47. Due to the difference in nature, the training requirements of the indoor and outdoor workers also differ from each other. The relevant education for the outdoor workers involves a lot of learning on-the-job. Most outdoor workers followed a 2.5-year occupational training with a two-year internship. Some of the workers are unskilled and learned everything in practice. Furthermore, the former brewery workers only followed a short course for greenhouse work. The requirements to work indoors are, on the other hand, a lot stricter. This is logical because the Bodega has a professional kitchen that serves food to the visitors. The kitchen assistants are obliged to follow a two-year education including a 6 months' educational internship before they are allowed to work in the kitchen.

48. The *Wiener Gebietskrankenkasse* case emphasises the importance of a difference in training requirements when determining if two groups perform the same work. In this case, the two groups performed seemingly identical tasks but did not have the same professional qualifications for the practice of their profession. Consequently, the ECJ ruled that the two groups were not in a comparable situation because of the different scope of their qualifications.[6] In accordance with this judgement, it can be concluded in the case of Claimant Hansen that the indoor and outdoor staff are not in a comparable situation due to the difference in training.

49. As it comes to working conditions, both groups of staff are covered by the Industrial Agreement 2020-2023 and are remunerated according to the minimum payment clause.[7]

[6] Case C-309/97 *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse* [1999] ECR 241.
[7] Clause 22 of the Industrial Agreement 2020-2023.

50. The difference in salary between the indoor and outdoor staff is mainly the result of the salary negotiations. If the indoor staff is not satisfied with the salary that is negotiated for them, they are able to pick a different negotiator. Defendant DAMA cannot be held responsible for the discontent of the indoor staff with the result of the negotiations.

III. Objective reasons that justify the difference in salary

51. It is right that the principle of equal pay also applies when elements of the salary are determined by collective bargaining or by negotiations at local level. Nevertheless, the national court must take into account whether the differences between the average salary of the two groups are due to objective reasons unrelated to any discrimination on grounds of sex.[8]

52. In this case, there are objective reasons that justify the difference in salary. Even if it would be established that the indoor and outdoor workers perform work of the same value, the higher salary of the outdoor workers is in no way related to sex. On the contrary, the difference originates from the fact that some of the outdoor workers are former brewery workers who have been relocated to the alcohol-free Johannes Beer Garden workplace. They have retained their high salary levels from their brewery worker days while working outdoors.

53. This is justified because the relocated brewers have a 4 years' occupational education background, which is considerably higher than the educational background of the other outdoor staff. In addition, Defendant DAMA wants to stimulate them to stay sober. It is, however, inevitable that their high level of salary causes the monthly average salary of the outdoor staff to be higher than that of the indoor staff.

IV. No compensation

54. Even if the difference in salary is not justified, it is particularly relevant to point out that the indoor and outdoor workers do not work for the same employer. The indoor staff is

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

employed by Defendant DAMA whereas the outdoor staff is employed by Defendant Green Galore.

55. The ECJ ruled in the *Lawrence* case that the difference in salary must be attributed to a single source. Otherwise, it is not possible to hold anyone responsible for the unequal treatment and there is no one that can restore the difference in salary.[9] This judgement was confirmed in the *Allonby* case. The ECJ stated in this case that the fact that the level of salary is influenced by the amount which the previous employer paid, is not sufficient to conclude that those undertakings constitute a single source to which the difference in pay can be attributed.[10]

56. Similarly, Defendant DAMA cannot be held responsible for the higher level of pay from the previous employer of the outdoor staff. Therefore, Defendant DAMA is not obliged to repay the salaries since the start of the Bodega nor to align the future salary levels with that of the outdoor workers' group.

[9] Case C-320/00 *A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd* [2002] ECR 498, paras 17-18.
[10] Case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* [2004] ECR 18.

Claim 2

57. Defendant Green Galore respectfully asks the Court to refuse Claimant Svendsen's primary claim to be employed full-time by Defendant Green Galore after the transfer of undertaking on 1 June 2021. In addition, in case the Court refuses Claimant Svendsen's primary claim, both Defendant Green Galore and Defendant DAMA state that Claimant Svendsen's secondary claim to be employed on a part-time basis by both Defendants must not be accepted as well.

58. Claimant Svendsen is not included in the transfer of undertaking on 1 June 2021 from Johannes Beer Garden and Bodega to respectively Defendant Green Galore and Defendant DAMA, primarily because he does not qualify as an 'employee' under Danish national law and, as such, is unable to invoke section 2 of the Danish Act on Transfers of Undertaking.

59. Moreover, Claimant Svendsen does not fall within the definition of 'worker' as defined in EU law, meaning he is not included in the scope of the Transfer of Undertakings Directive.

60. Regarding both claims, Defendants Green Galore and DAMA do not breach both Danish law and EU law by not continuing Claimant Svendsen's employment relationship with Johannes Beer Garden and Bodega.

General remarks

61. 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 - as a result - 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.

62. As set out in the Transfer of Undertakings Directive, the goal of the regulatory framework concerning the transfer of undertakings 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.[11]

63. Nonetheless, at the same time, the interests of the transferee(s), who must be in a position to make the adjustments and changes necessary to carry on his business, cannot be disregarded as well.[12] The Transfer of Undertakings Directive does not aim solely to safeguard the interests of employees in the event of a transfer of undertaking, but seeks to ensure a fair balance between the interests of the employees, on the one hand, and those of the transferee(s), on the other, the ECJ reiterated in *Alemo-Herron*.[13]

I. No application of the Danish Act on Transfers of Undertakings

64. To start, Defendants Green Galore and DAMA argue that Claimant Svendsen cannot be qualified as an 'employee' under section 1(2) of the White Collar Workers Act. Given the absence of this status, Claimant Svendsen cannot invoke section 2 of the Danish Act on Transfers of Undertaking, meaning he is not included in the transfer of undertaking on 1 June 2021.

65. Since chief of operations Claimant Svendsen worked in a management role, the White Collar Workers Act is applicable to him.[14] As Kristiansen writes, the interpretation of 'employee' under the White Collar Workers Act is narrower. In particular, executives "who are entitled to enter into commitments at their own discretion" are generally not considered to be employees under the White Collar Workers Act.[15]

66. To Defendants Green Galore and DAMA, it is crystal clear that Claimant Svendsen did not qualify as an 'employee'.

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[11] 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.
[12] Case C-499/04 *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG* [2006] ECR I-02397, para 31.
[13] Case C-426/11 *Mark Alemo-Herron and Others v Parkwood Leisure Ltd* [2013] ECR I-000, para 25.
[14] 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.
[15] 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.

67. First, there was no employment contract conducted between Claimant Svendsen and Johannes Beer Garden and Bodega, merely a formal contract of engagement.

68. Second, given how the management of Johannes Beer Garden and Bodega was structured, it is clear that Claimant Svendsen did not work in a subordinate relationship with Johannes Beer Garden and Bodega and managing director Kristensen.

69. Claimant Svendsen was a member of the board of directors of Johannes Beer Garden and Bodega, thus carrying a large extensive responsibility in ensuring the smooth business operations. Furthermore, Claimant Svendsen enjoyed a wide and *autonomous* discretionary responsibility as chief of operations for the visitor centre, Johannes Beer Garden and Bodega and for all its employees. His ideas and plans of running the company were immediately incorporated in the company's operations, as well as his day-to-day management decisions.

70. Third, the sole reason why Claimant Svendsen was not appointed as the managing director of Johannes Beer Garden and Bodega lies in the fact that managing director Kristensen, due to her wide network in the Danish commercial world, was better suited to represent Johannes Beer Garden and Bodega's interests in areas *outside* the running of the company.

71. As such, Claimant Svendsen does not classify as an 'employee'. Consequently, he cannot invoke section 2 of the Danish Act on Transfers of Undertakings and, as a result, Claimant Svendsen is not included in the transfer of undertaking on 1 June 2021.

72. If Claimant Svendsen would invoke the Transfer of Undertakings Directive, which is implemented in Danish law through the Danish Act on Transfers of Undertaking, that would run counter to the provisions of the Directive. As the Transfer of Undertakings Directive stipulates, the Directive applies without prejudice to the national definition of an 'employee' and its provisions shall be without prejudice to national (here: Danish) law as regards how an employment relationship is defined.[16] Given that Claimant Svendsen does not meet the national definition of 'employee', this confirms the lack of applicability of both the Danish act and the Transfer of Undertakings Directive.

[16] Respectively Article 2(1)(d) and Article 2(2) of the Transfer of Undertakings Directive.

II. No classification as 'worker' under EU law

73. In case Claimant Svendsen claims to fall within the definition of 'worker' as set out in EU law, Defendants Green Galore and DAMA argue that Claimant Svendsen does not meet the criteria to be included in this definition. As such, Claimant Svendsen cannot rely on the Transfer of Undertakings Directive, regardless of his status under national, in this case Danish, law. Claimant Svendsen cannot side-track Danish national law by invoking the *effet utile* of the Transfer of Undertakings Directive – which is implemented by the Danish Act on Transfers of Undertakings – and as such force himself within the relevant scope of Danish national law.

74. The seminal case of *Lawrie-Blum* 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.[17]

75. Claimant Svendsen does not meet these criteria, for the following reasons.

76. First, as set out above, the position of Claimant Svendsen within Johannes Beer Garden and Bodega can best be described as the executive-in-charge with a wide range of powers and minimal supervision. Furthermore, Claimant Svendsen was a valued member of the board of directors of Johannes Beer Garden and Bodega, who contributed greatly to the long-term management of the company as well.

77. Second, the fact that the remuneration and park perks of Claimant Svendsen were eventually determined by managing director Kristensen does not mean that there existed a subordinate relationship between the two parties. On the contrary, the format of the remuneration *negotiation* – which thus does not constitute a one-sided decision by managing director Kristensen – was clear in advance, meaning she did not have a wide degree of influence in determining Claimant Svendsen's remuneration and park perks.

78. As such, Claimant Svendsen does not fall within the concept of 'worker' as set out in EU law, which means he is not included in the scope of the Transfer of Undertakings Directive.

[17] Case 66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121.

This fact does not undermine the effectiveness of the Transfer of Undertakings Directive. On the contrary, the ultimate goal of the Directive is to ensure a fair balance between the interests of those employees transferred, on the one hand, and those of the transferee, on the other.

79. In other words: the *effet utile* of the Transfer of Undertakings Directive would not be undermined if Claimant Svendsen cannot invoke its provisions, given that it is inherent in the framework of a transfer of undertaking that the transferor is allowed to make adjustments and changes necessary to carry on his business.[18]

III. No full-time employment with Defendant Green Galore

80. If, however, the Court decides that the employment relation between Claimant Svendsen and Johannes Beer Garden and Bodega is included in the transfer of undertaking of 1 June 2021, Defendant Green Galore argues that this does not compel them to offer Claimant Svendsen a full-time employment contract.

81. Claimant Svendsen worked before the transfer of undertaking 60% of his time in the outdoor areas (acquired by Defendant Green Galore) and 40% of his time in the café area (acquired by Defendant DAMA). This fact of the case is not in dispute between the parties.

82. Given that Claimant Svendsen worked 60% at the business acquired by Defendant Green Galore, awarding Claimant Svendsen an employment contract on a full-time (100%) basis would be - at the very least - disproportionate and would run counter to the *ratio* of the Transfer of Undertakings Directive that strives a fair balance between the interests of the employees and the transferee(s), as the ECJ already ruled in *Govaerts*. Such an interpretation thus disregards the interests of Defendant Green Galore.

83. At any rate, Defendant Green Galore strongly argues that it cannot be Claimant Svendsen's primary employer after the transfer of undertaking.

[18] Case C-499/04 *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG* [2006] ECR I-02397, para 31.

84. As the Court ruled in *AFMB*, the concept of employers in a provision of EU law must be given an autonomous and uniform interpretation.[19] In particular, the element of 'authority' must be interpreted broadly, including who recruited the worker and who can use the worker. Crucial in determining the hierarchical relationship between the employer and the worker are the questions which entity exercises the actual authority over the worker, actually carries the relevant wage costs, and enjoys the actual power to dismiss that worker.[20]

85. Defendant Green Galore does not exercise the actual authority over Claimant Svendsen nor the actual complete wage costs. As discussed under I and II, Claimant Svendsen enjoys wide and autonomous discretionary powers in his work as the chief of operations.

86. Even if Defendant Green Galore does exercise authority over Claimant Svendsen, this will only be *some* of the authority given that Claimant Svendsen divides his working hours between the Bodega (which Defendant DAMA acquired) and the greenhouses/outdoor area (which Defendant Green Galore has tendered). Due to this situation, it is highly unlikely that Defendant Green Galore will exercise the types of authority as set out in *AFMB*. At the very best, it could be determined that Defendant Green Galore exercises authority over Claimant Svendsen for the time he spends working at Defendant Green Galore (meaning part-time), but this stretches not so far as to include a full-time employment of Claimant Svendsen.

87. Given the above, Defendant Green Galore requests the Court to refuse the claim by Claimant Svendsen that he should be employed on a full-time basis by Defendant Green Galore.

IV. No part-time division between Defendant DAMA and Defendant Green Galore

88. In case the Court decides that Claimant Svendsen is not employed on a full-time basis by Defendant Green Galore, Defendants Green Galore and DAMA strongly refute Claimant

[19] Case C-610/18 *AFMB e.a. Ltd v Raad van bestuur van de Sociale verzekeringsbank* [2020] ECLI:EU:C:2020:565.
[20] Case C-610/18 *AFMB e.a. Ltd v Raad van bestuur van de Sociale verzekeringsbank* [2020] ECLI:EU:C:2020:565, para. 80. *See* also Mathijs van Schadewijk, 'The notion of 'employer': Towards a uniform European concept?*'* [2021] ELLJ 369.

Svendsen's secondary claim to be employed on a part-time basis by both Defendants after the transfer of undertaking on 1 June 2021.

89. The Transfer of Undertakings Directive aims to ensure a fair balance between the interests of employees and of the transferee(s).[21] The latter must be allowed to make changes and adjustments necessary to carry on his business.[22]

90. Defendant DAMA and Defendant Green Galore acknowledge that the ECJ, in the case of multiple transferees, allowed in *Govaerts* the possibility that the rights and obligations arising from a contract of employment can be transferred to each of the transferees in proportion to the tasks performed by the worker.[23]

91. However, Defendant DAMA and Defendant Green Galore argue that such a division of contract of employment as a result of the transfer of undertaking is not possible in this case. Having a manager in the highest level of the company working part-time for a direct competitor in a similar high-end role would be an unreasonable burden for both Defendants, especially in light of the competition concerns that will inevitably arise in that case.

[21] Case C-499/04 *Hans Werhof v Freeway Traffic Systems GmbH & Co. KG* [2006] ECR I-02397, para 31.
[22] Case C-426/11 *Mark Alemo-Herron and Others v Parkwood Leisure Ltd* [2013] ECR I-000, para 25.
[23] 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.

Claim 3

92. Defendant Green Galore has dismissed Claimant Olsen. The written notice, overhanded by Defendant Green Galore, states the reason for the dismissal, namely: Claimant Olsen breached company rules for appropriate behaviour at the workplace.

93. In this regard, it must be established, first of all, that i) the dismissal found its basis in facts proving that Claimant Olsen sexually harassed female employees. Therefore, the termination of Claimant Olsen's employment relationship was lawful, in coherence with national and European law regarding Defendant Green Galore's duty of care to maintain a safe and healthy working environment (ii). Moreover, it will be argued that no prohibition of national law was violated since the dismissal was, by no means, related to the aforementioned transfer of undertaking (iii) nor was it related to Claimant Olsen's statement regarding the payment case (iv). To end with, it will be argued that v) European law, regarding unlawful determination, does not provide a subjective right to force reinstatement (and alternatively compensation) in a horizontal relationship.

94. Therefore, Claimant Olsen's pleading for reinstatement and alternatively compensation because he believes the termination of his employment relationship was 'unlawful', should be rejected.

I. The reason for dismissal: sexual harassment

95. The dismissal of Claimant Olsen finds its basis in the fact that he has sexually harassed female employees, within the meaning of section 1(6) Equal Treatment Act.

96. In the context of worldwide social media movements such as #Metoo, that demonstrate the widespread prevalence of sexual harassment, especially in the workplace, there is no doubt that sexual harassment constitutes a reasonable and proportionate reason for dismissal.

97. However, when addressing the above-mentioned Section 1(6) from a legal point of view, it is necessary to further clarify the applicable legal framework of 'sexual harassment' codified in the Recast Directive.

98. According to Article 288 TFEU, national law must be interpreted in coherence with European law. This means that the national court is obliged to interpret national law in accordance with the wording and purpose of European Directives.[24]

99. Before defining 'sexual harassment' under the Recast Directive, it should be noted that as early as 1978, the ECJ made clear that 'sex equality' is a fundamental principle of the European Union.[25] The standard of equal treatment means that discrimination on this ground is prohibited.[26]

100. According to Article 2(1)(d) of the 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."

101. Article 1 of the 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.

102. According to the Code of Conduct in Recommendation 92/131/EEC of the European Commission, regarding the dignity of women and men at work (hereinafter referred to as: the Code of Conduct), the essential characteristic of sexual harassment is that it is undesirable for the recipient, and that it is up to each individual to determine what behaviour is acceptable to him or her and what he or she considers offensive.[27]

103. Regarding the aforementioned summer party, first of all, it should be noted that colleagues are obliged to always behave respectfully towards one another. Most certainly at occasions with colleagues (like for example the aforementioned summer party), this obligation arises from the relationship with the employer. Serious matters of misbehaviour, like sexual harassment, taking place at a party with colleagues, concern the employer. It follows, therefore, that the misbehaviour of Claimant Olson must be regarded as falling within the

[24] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR 395, para 8.
[25] Case C-149/77 *Gabrielle Defrenne v SABENA* [1978], ECR 130.
[26] Recast Directive, Article 2(1)(b).
[27] Recommendation of the Commission 92/131/EEC on the protection of the dignity of women and men at work of 27 November 1991, p. 4.

wide scope of "matters of employment" (Article 1 of the Recast Directive), regardless of who organised the party.

104. The concept of 'unwanted' is an entirely subjective notion.[28] This means that the perception of the victims of sexual harassment (in this case the two female employees that approached Claimant Olsen) is essential to the assessment of whether a conduct constitutes sexual harassment or not. The subjective element is a necessity to protect the dignity of women.[29] Claimant Olsen's verbal conduct was clearly unwanted and considered offensive. Two female employees approached Claimant Olsen and declared this by stipulating that he crossed the line.

105. Moreover, Claimant Olsen expressed himself with extremely offensive verbal conduct of a 'sexual connotation'. He propagated salacious lyrics like ''screaming for a whore" and "They did it in so many ways, they humped and puffed for 14 days". The fact that he sang the lyrics in an informal setting does not alter the fact that his performance was sexist, cruel and demeaning to women. The atmosphere at the party cannot be used as an element elevating the threshold for sexual harassment. Claimant Olsen violated the dignity of female employees, in particular since a humiliating situation was created, as two female employees pointed out.

106. It should be noted that, since sexual harassment is regarded as discrimination,[30] the reversal of burden of proof applies. The main rules on the distribution of evidence in the case of sex discrimination were codified for the first time in the Burden of Evidence Directive,[31] thereafter codified in Article 19(2) of the Recast Directive and adopted by the Danish legislator in Section 16a Equal Treatment Act. The section states that: "where a person, who finds that he or she has been discriminated against, establishes facts, from which it may be presumed that direct or indirect discrimination has taken place, it shall be for the respondent to prove that the principle of equal treatment has not been violated."

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[28] Maria Rasmussen, Ruth Nielsen, and Christina Tvarnø, 'From a Fight against Less Favorable Treatment to Protection of Dignity Gender Equality Law in Transition: Sexual Harassment As Discrimination' [2019] CBS LAW Research 10.
[29] Maria Rasmussen, Ruth Nielsen, and Christina Tvarnø, 'From a Fight against Less Favorable Treatment to Protection of Dignity Gender Equality Law in Transition: Sexual Harassment As Discrimination' [2019] CBS LAW Research 10.
[30] Article 2(1)(d) of the Recast Directive.
[31] The rules arise from: Case C-109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECR 383 and Case C-127/92 *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] ECR 248.

107. Since two female employees, who believe that a distinction has been made to their detriment, submitted facts (brought forward by Defendant Green Galore) that suggest sexual harassment, Claimant Olsen must prove that the principle of equal treatment has not been violated.

108. In conclusion, Claimant Olsen's performance at the beforementioned summer party must be seen as sexual harassment within the meaning section 1(6) Equal Treatment Act, as he showed "unwanted verbal conduct of a sexual connotation that occurred with the purpose or effect of violating the dignity of a person, in particular since a humiliating situation was created."

II. Defendant Green Galore's duty of care

109. Defendant Green Galore has a duty of care to maintain a safe and healthy working environment, codified in Section 1 of the Act on Occupational Health and Safety. This general duty of care derives from Article 1(1) of the Framework Directive.

110. Research has pointed out that sexual harassment is a particularly pernicious form of harassment that can result in long-lasting psychological damage to victims.[32] Moreover, empirical research has shown that sexual intimidation is an important risk factor for suicidal behaviour, which indicates that workplace interventions to combat sexual intimidation on the workplace, could contribute to a decreased burden of suicide.[33]

111. In order to comply with the abovementioned duty of care, Defendant Green Galore is obliged to protect employees against serious health issues and risks for suicidal behaviour. Therefore, Defendant Green Galore employs strict staff guidelines on how to avoid both physical and verbal harassment, to ensure that sexual harassment does not occur and, if it does occur, to secure those adequate procedures are readily available to deal with the problem and prevent its recurrence.

112. In this regard, it should be noted that when Claimant Olsen was confronted with his offensive singing performance, he humiliated and insulted two female employees even more by insinuating they are not beautiful in his opinion. He stated, "You should not be too

[32] Charanjit Rihal and others, 'Addressing Sexual Harassment in the #MeToo Era: An Institutional Approach' [2020] Elsevier 749.
[33] Linda Hanson, Anna Nyberg and Ellenor Mittendorfer-Rutz, 'Work related sexual harassment and risk of suicide and suicide attempts: prospective cohort study' [2020] BMJ 370.

concerned; I was singing only to the beautiful women at the party". This verbal conduct confirms Claimant Olsen's problematic character traits, his lack of respect towards women and his lack of self-reflection. Moreover, it clearly indicates he does not regret his offensive verbal conduct at the party. He created an unsafe working environment for female employees and Defendant Green Galore responded adequately by giving him a written notice of termination and putting him on garden leave.

113. This decision is in line with Defendant Green Galore's duty of care to maintain a safe and healthy working environment. In order to protect employees, Defendant Green Galore is obliged to employ and act upon strict staff guidelines on how to avoid both physical and verbal harassment.

III. No violation of section 3 (1) Statutory Act on Employees' Rights in the event of Transfers of Undertakings

114. Defendant Green Galore did not violate Claimant Olsen's rights under the Statutory Act on Employees' Rights in the event of Transfers of Undertakings. Section 3 (1) of this Statutory 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.' This section is in accordance with Article 4 of the Transfer of Undertakings Directive.

115. Defendant Green Galore did not violate this section since the dismissal was a direct response to misconduct on the side of Claimant Olsen. The transfer of undertaking did not constitute a ground for dismissal since the termination of his employment relationship is completely unrelated to his transfer.

IV. No violation of section 3(1) of the Statutory Act on Equal Pay

116. Furthermore, the dismissal of Claimant Olsen was in no way related to his statement about equal payment for men and women at work.

117. Claimant Olsen cannot demonstrate actual circumstances that give reason to assume that the dismissal has happened in violation of Section 3(1) of the Statutory Act on Equal Pay.

Consequently, Claimant Olsen must prove causality between his statement and the dismissal.

118. Since this causality does not exist, Claimant Olsen has no justification to use section 3(3) of the Statutory Act on Equal Pay as a legal basis to restore his relationship with Defendant Green Galore or to claim compensation.

V. Application of Article 30 of the EU Charter

119. Claimant Olsen might try to invoke Article 30 EU Charter (concerning unjustified dismissal), substantiating that the reason for dismissal was not clear to him. He might argue that "a breach of company rules for appropriate behaviour at the workplace" is too vague to constitute a lawful reason for dismissal.

120. As to the fact that no further specifications have been given as to why Claimant Olsen was dismissed, this does not diminish the legitimacy of the lawful reason for dismissal.

121. In this regard, it should be noted that every right-minded person is ought to understand that sexual harassment is the reverse of "appropriate behaviour" and constitutes a lawful reason for dismissal.

122. Moreover, the written notice of dismissal explicitly states that company rules for appropriate behaviour were breached, which clearly refers to the strict staff guidelines regarding sexist behaviour and sexual harassment, that had just been introduced after an unfortunate #MeToo situation at Green Galore. Since this situation received media attention, Claimant Olsen must have been aware of the new zero-tolerance policy at Green Galore.

123. However, since Claimant Olsen might try to appeal to Article 30 EU Charter, it is necessary to further clarify the applicable legal framework of this provision concerning unjustified dismissal.

124. Ever since *Åkerberg Fransson*,[34] the opinion of the ECJ on the applicability of the fundamental rights of the EU Charter has been clear. It underlines the restriction stated in

[34] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR 105.

Article 51 EU Charter, which lays down that the provisions of the Charter are addressed to Member States, not to private parties.

125. Moreover, Article 30 EU Charter does not possess the same status as a human right like several other labour rights do, for example the prohibition of forced and child labour (article 32 EU Charter). As of present, there are little to no legal sources of international or European law besides Article 30 EU Charter which support the argument that the protection against unjustified dismissal constitutes a human right.

126. Furthermore, Article 30 EU Charter is ambiguous, since the first part of the sentence gives the impression of a real right, whereas the reference to the Union law and national laws increases the margin of elaboration for the Member States. This reference gives a very wide scope to the Member States and the EU to regulate the protection against unjustified dismissal, which clearly indicates Article 30 EU Charter should be perceived as a 'principle' rather than a 'right'. This results from the clarification in Article 52(5) of the EU Charter, stating that 'principles may be implemented by legislative and executive acts' taken by the Union, and by acts of Member States when they are implementing Union law.

127. Now that it has been established that Article 30 EU Charter must be qualified as a principle, it should be noted that it does not have direct horizontal effect. The ECJ ruled in *AMS* that, whereas 'rights' can have horizontal direct effect, 'principles' do not have the same effect.

128. Protection against dismissal has been partly regulated in only a few directives. In this regard it is important to consider that fragmented rules on dismissal protection (like Article 4 of the Transfer of Undertakings Directive) cannot be regarded as the 'implementation' of the generally formulated protection declared in Article 30 EU Charter.

129. A claim for reinstatement (and alternatively compensation) for so-called 'unlawful' termination, in a horizontal relationship, lies outside the scope of EU law.

130. In conclusion, the absence of extensive specifications regarding the reason for dismissal, does not alter the fact that Claimant Olsen sexually harassed female employees, which constitutes a lawful reason for dismissal. If Claimant Olsen tries to appeal to Article 30 EU Charter, it must be established that this article does not provide any subjective rights in a horizontal relationship. Therefore, Claimant Olsen's pleading for reinstatement and

alternatively compensation because he believes the termination of his employment relationship was ‘unlawful’, should be rejected.

Pleadings

For the foregoing reasons, Defendant DAMA and Defendant Green Galore respectfully and humbly request this Court to dismiss all claims as set forth by the Claimants.