**POLAND D**

**HS MCC 2017**

**STATEMENT FOR DEFENDANT**

## TABLE OF CONTENTS

TABLE OF CONTENTS 2

LIST OF REFERENCES TO LEGAL SOURCES AND DOCTRINE 3

STATEMENT OF RELEVANT FACTS 8

DESCRIPTION OF RELEVANT LEGISLATION 11

QUESTIONS 15

SUMMARY OF ARGUMENTS 16

ARGUMENTS 18

PLEADINGS 41

## LIST OF REFERENCES TO LEGAL SOURCES AND DOCTRINE

### LEGISLATION

#### hungarian legislation

* Act I of 2012 on the Labour Code, adopted by the Parliament on 13 December 2011
* Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, adopted by the Parliament on 22 December 2003

#### EU Legislation

* Council Directive 2001/23/EC of 12.03.2001 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 “**2001/23 Directive**”), OJ L 82, 22.3.2001, p. 16–20
* Council Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation (hereinafter “**2000/78 Directive**”), OJ L 303, 2.12.2000, p. 16–22
* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Investing in Europe’s Youth”, Brussels, 7.12.2016

#### ILO LEGISLATION

* R198 - Employment Relationship Recommendation, 2006 (No. 198) – Recommendation concerning the employment relationship adopted in Geneva, 95th ILC session (hereinafter “**ILO 198 Recommendation**”)

### LITERATURE

#### books

Ellis, Evelyn and Watson, Philippa, *EU Anti-Discrimination Law*, Oxford University Press 2014.

* Ghosheh, Naj, *Age discrimination and older workers: Theory and legislation in comparative context*, International Labour Organization 2008.
* O’Cinneide, Colm, *Age discrimination and European Law*, European Commission 2005.
* Pisarczyk Łukasz, *Przejście zakładu pracy na innego pracodawcę,* Warsaw 2013.
* Thüsing Gregor, *European Labour Law*, München 2013.
* Waddington, Lisa and Bell, Mark, *More equal than others: distinguishing European Union Equality Directives*, Common Market Law Review 2001.
* *Handbook on European non-discrimination law*, Publications Office of the European Union 2011.

#### articles and reports

* Foreign language skills statistics, Eurostat data, October 2015, <http://ec.europa.eu/eurostat/statistics-explained/index.php/Foreign_language_skills_statistics>
* Health and Safety Needs for Older Workers, National Research Council and Institute of Medicine Committee on the Health and Safety Needs of Older Workers; Wegman DH, McGee JP, editors. Washington: National Academies Press; 2004
* Tourism in Hungary 2016 Report, Hungarian Tourism Agency, <http://szakmai.itthon.hu/documents/28123/4083489/MTE_4001_105x210_LA4_StatElozetes_2016_ENG_NEW.pdf/db033798-0c79-4c38-8d7a-38c44a72c45f>
* Devlin, Kate, *Humans ‘naturally prefer pretty people’*, 13.08.2008, <http://www.telegraph.co.uk/news/uknews/2551882/Humans-naturally-prefer-pretty-people.html>
* Feingold, Alan, *Good-looking people are not what we think*, Psychological Bulletin, Vol 111(2), Mar 1992
* Williams, Ray, *Why we pay more attention to beautiful people*, 06.08.2011, <https://www.psychologytoday.com/blog/wired-success/201108/why-we-pay-more-attention-beautiful-people>

### CASE-LAW

#### CJEU CASE-LAW

* Case 24/85, Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV, 18.3.1986, European Court Reports/1986/01119
* C-340/01, Carlito Abler and Other v Sodexho MM Catering Gesellschaft mbH, 20.11.2003, European Court Reports/2003/I-14023
* C-466/07, Dietmar Klarenberg v Ferrotron Technologies GmbH, 12.2.2009, European Court Reports/2009/I-00803
* C-101/87, P. Bork International A/S, in liquidation v Foreningen af Arbejdsledere I Danmark, acting on behalf of Birger E. Petersen, and Jens E. Olsen and others v Junckers Industrier A/S, 15.6.1988, European Court Reports/1988/I-03057
* C-160/14, João Filipe Ferreira da Silva e Brito and Others v Estado português, 09.09.2015
* C-108/10, Ivana Scattolon v Ministero dell’Istruzione, dell’Università e della Ricerca, 6.9.2011, European Court Reports/2011/I-07491
* C-13/95, Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice, 11.3.1997, European Court Reports/1997/I-01259
* C-51/00, Temco Service Industries SA v Samir Imzilyen and Others, 24.1.2002, European Court Reports/2002/I-00969
* Case 324/86, Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S, 10.2.1988, European Court Reports/1988/-00739
* Case 287/86, Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro, 28.10.1987, European Court Reports/1987/-05465
* Cases 144 and 145/87, Harry Berg and Johannes Theodorus Maria Busschers v Ivo Martin Besselsen, 5.5.1988, European Court Reports/1988/-02559
* C-29/91, Sophie Redmond Stichting v Hendrikus Bartol and Others, 19.5.1992, European Court Reports/1992/I-03189
* C-172/99, Oy Liikenne Ab v Pekka Liskojärvi and Pentti Juntunen, 25.1.2001, European Court Reports/2001/I-00745
* C-175/99, Didier Mayeur v Association Promotion de l'information messine (APIM), 26.9.2000, European Court Reports/2000/I-07755
* C-171/94 and C-172/94, Albert Merckx and Patrick Neuhuys v Ford Motors Company Belgium SA, 7.3.1996, European Court Reports/1996/I-01253
* C-209/91, Anne Watson Rask and Kirsten Christensen v ISS Kantineservice, 12.11.1992, European Court Reports/1992/I-05755
* C-478/03 Celtec Ltd v John Astley and Others, 26.5.2005, European Court Reports/2005/I-04389
* C-396/07 Mirja Juuri v Fazer Amica Oy, 27.11.2008, European Court Reports/2008/I-08883
* C-499/04 Hans Werhof v Freeway Traffic Systems GmbH & Co. KG, 9.3.2006, European Court Reports/2006/I-02397
* C-426/11 Mark Alemo-Herron and Others v Parkwood Leisure Ltd, 18.7.2013, ECLI:EU:C:2013:521
* C-229/08, Colin Wolf v Stadt Frankfurt am Main, 12.1.2010, European Court Reports/2010/I-00001
* C-45/09, Gisela Rosenbladt v Oellerking Gebäudereinigungsges. mbH, 12.10.2010, European Court Reports/2010/I-09391
* C-447/09, Reinhard Prigge, Michael Fromm, Volker Lambach v Deutsche Lufthansa AG, 13.09.2011, European Court Reports/2011/I-08003
* Case 248/83, Commission of the European Communities v Federal Republic of Germany, 21.05.1985, European Court Reports/1985/-01459
* Opinion of Advocate General Kokott, delivered on 06.11.2014, C-564/13 P, Planet AE Anonimi Etairia Parokhis Simvouleftikon Ipiresion v European Commission
* Joined opinion of Mr Advocate General Cosmas delivered on 24.09.1998, C-127/96, C-229/96 and C-74/97, C-173/96 and C-247/96, European Court Reports/1998/I-08179

#### hungarian case-law

* BH 1995/493, the Supreme Court of Hungary (Magyarország Legfelsőbb Bírósága)

## STATEMENT OF RELEVANT FACTS

1. **Ad claim 1 - *The Defendant states that there was no* *transfer of enterprise.***
* Employer X operated a dining room.
* Employer X leased the real estate needed from the lessor and all accessories and tools from other institutions.
* The dining room at issue operated in the building where Employer X carries out exclusive veterinary service and related official epidemiological tasks. Based on the contract with the Hungarian Ministry of Health, Employer X had the right to issue the official permission for pets to travel.
* It offered sandwiches, lunch menu and a coffee machine.
* It mostly served as an in-house restaurant for office workers.
* When working at X, Plaintiffs had the following scopes of duties: waiter, kitchen worker and bartender.
* Their duties were different, depending on the daytime: they worked in the bar, welcomed guests, served meals and sometimes (depending on the number of guests) helped in the kitchen.
* On 1.11.2015 the owner of the real estate (the lessor) terminated the Employer X’s lease contract with 30 days of notice period and at the same time entered into a preliminary contract with Company Y (the Defendant).
* The parties agreed that the lessor would give all equipment present at the kitchen to Company Y who will be free to decide whether to use it or get rid of it.
* On 10.11.2015 Employer X terminated the employment relationship of 12 waiters, 2 cooks and chef, including the Plaintiffs. The reason for employment termination was the termination of the lease contract between the lessor and Employer X.
* On 01.01.2016, in accordance with the preliminary contract between the lessor and Company Y, the parties signed the final lease contract.
* Employment contracts between Plaintiffs and X terminated after 01.01. 2016.
* Company Y conducted a renovation, which lasted 3 months. Altogether, all operation at the premises ceased for 4 months – between 1.12.2015 and 2.04.2016.
* Company Y operates an exclusive Italian restaurant and bar from 2.04.2016.
* A famous Italian chef was employed to head the kitchen at Y.
* Employer Y employed 5 out of 12 waiters who had worked at X. Company Y employed other workers who had no previous contract with Employer X.
* The labour contract between Company Y and Plaintiff I was established on 2.04. 2016, since that time the Plaintiff I gets salary from Company Y in the amount of EUR 1400/month.
1. **Ad claim 2 - *The Defendant states that they are not obliged to* *pay Plaintiff I’s jubilee award.***

The facts listed above in sec. 1 and additionally:

* Employer X employed Plaintiff I from 01.01.1996.
* On the 01.01.2016, the Plaintiff I reached 20 years of seniority.
* During the meeting on 15.12.2015, Defendant Y informed the employees about the collective agreement being in force at his enterprise and explained that it did not provide any jubilee award.
* 31.12.2015 was the last day when the Employer X’s old collective agreement being in force. This collective agreement was concluded with the Trade Union A and contained the jubilee award clause providing the right to a 3 months’ wage after 20 years of service time.
* On the 01.01.2016, the new collective agreement between Employer X and Trade Union A entered into force. This collective agreement guaranteed the jubilee award of 4 months’ wage.
1. **Ad claim 3 – *The Defendant states that there was no duty to co-operate with Trade Union A and the co-operation with Trade Union A was a gesture of his goodwill.***

The facts listed above in sec. 1 and additionally:

* Employer Y did not inform the Trade Union A, operating at Employer X, about the meeting held on 15.12.2015.
* Plaintiff I – a representative of the Trade Union A – was present at the meeting.
* Employer Y requested Trade Union B (which operates at Y) to inform Trade Union A about the most important facts and decisions.
1. **Ad claim 4 – *The Defendant states that the Plaintiff II did not suffer age discrimination.***
* Company Y opened an exclusive Italian restaurant and bar in Budapest and hired a famous Italian chief to head kitchen.
* On 15.12. 2015 Company Y held a general meeting for the waiters and cooks, where the Company Y informed that they would employ 5 waiters.
* On 2.04.2016, the Company Y opened the restaurant. Plaintiff I and 4 other former employees of X worked for Company Y beginning from that date.

## DESCRIPTION OF RELEVANT LEGISLATION

1. **Ad claim 1**

The 2001/23 Directive sets out the employee rights and obligations of transferors and transferees in case of transfer of undertaking or a part thereof.

The art. 1 of the Directive provides conditions which must be met in order to conclude that there has been a transfer of undertaking or a part thereof.

**Article 1 of the 2001/23 Directive**

*1. (a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer* ***as a result of a legal transfer or merger****.*

*(b) Subject to subparagraph (a) and the following provisions of this Article, there is a transfer within the meaning of this Directive where there is a transfer of an economic entity* ***which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary****.*

*[…]*

*2. This Directive shall apply where and in so far as the undertaking, business or part of the undertaking or business to be transferred is* ***situated within the territorial scope of the Treaty****.*

*[…]*

Since the business at issue is situated in Hungary, the 2001/23 Directive may apply.

**Section 36 of Hungarian Labour Code**

*(1) Rights and obligations arising from employment relationships, existing at the time of transfer of an economic entity (organized grouping of material or other resources) by way of a legal transaction are transferred to the transferee employer.*

Section 42 of the Hungarian Labour Code and pt. 9 and 13(a) of the ILO 198 Recommendation define the employment relationship.

**Section 42 of the Hungarian Labour Code**

*Under an employment contract:*

1. *the employee is* ***required to work as instructed*** *by the employer;
b) the employer is* ***required to provide work*** *for the employee and to pay wages.*

**Pt. 9 of the ILO 198 Recommendation (soft law)**

*For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be* ***guided primarily by the facts relating to the performance of work*** *and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.*

**Pt. 13(a) of the ILO 198 Recommendation (soft law)**

*Specific indicators of the existence of an employment relationship […] might include:*

*(a)* ***the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work****;*

1. **Ad claim 2**

The art. 3 par. 3 of the 2001/23 Directive and Section 282 of the Hungarian Labour Code set out the principles of observance of collective agreements binding at the transferor.

**Article 3 par. 3 of the 2001/23 Directive**

*Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement,* ***until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement****.*

*Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year.*

**Section 282 of the Hungarian Labour Code**

*(1) In the case of transfer of employment upon the transfer of enterprise the receiving employer is required to maintain the working conditions specified in the collective agreement covering the employment relationship – apart from working time and rest periods – existing at the time of transfer for a period of one year after the date of transfer.*

*(2) The obligation referred to in Subsection (1)* ***shall not apply to the employer if the collective agreement expires within one year after the date of transfer, or if the employment relationship is covered by a collective agreement after the date of transfer****.*

1. **Ad claim 3**

The issue of informing and consulting trade unions is regulated in the art. 7 of the 2001/23 Directive.

**Article 7 of the 2001/23 Directive**

*1. The transferor and transferee shall be required to inform* ***the representatives of their respective employees*** *affected by the transfer […].*

*The transferor must give such information* ***to the representatives of his employees*** *in good time, before the transfer is carried out.*

*The transferee must give such information* ***to the representatives of his employees*** *in good time, and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment.*

*2. Where the transferor or the transferee envisages measures in* ***relation to his employees****, he shall consult the representatives of this employees in good time on such measures with a view to reaching an agreement.*

*[…]*

1. **Ad claim 4**

The issue of age discrimination is regulated in the 2000/78 Directive (implemented in the Hungarian law as the Act CXXV of 2003). At the same time, this Directive provides exceptions in which unequal treatment is justified.

**Article 4(1) of the 2000/78 Directive**

*Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is* ***based on a characteristic related to any of the grounds referred to in Article 1*** *shall* ***not*** *constitute discrimination where,* ***by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate****.*

**Article 6 of the 2000/78 Directive**

*1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall* ***not*** *constitute discrimination, if, within the context of national law, they are* ***objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.***

*Such differences of treatment may include, among others:*

*[…]*

*(b)* ***the fixing of minimum conditions of age****, professional experience or seniority in service for access to employment or to certain advantages linked to employment;*

 *[…]*

**Art. 22(a) Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities**

*The principle of equal treatment is* ***not*** *violated if:*

*a)* ***the discrimination is proportional, justified by the characteristic or nature of the work and is based on all relevant and legitimate terms and conditions.***

## QUESTIONS

1. Do the plaintiffs have a legal interest in bringing the proceeding to obtain a declaratory judgment?
2. **Ad claim 1**
	1. Did the transfer of enterprise/ the part of enterprise occur?
	2. If yes – were the Plaintiffs employed at the date of the transfer?
3. **Ad claim 2**
	1. Was Company Y is obliged to pay the Plaintiff I a jubilee award that became payable on 1 January 2016?
	2. If yes – what is the amount of the jubilee award due?
4. **Ad claim 3**
	1. Was Company Y obliged to cooperate with Trade Union A and on what basis?
	2. If yes:
		* + - what actions should be taken up by Company Y to meet this obligation;
				- did Company Y fulfil this obligation?
5. **Ad claim 4**
	1. Is the evidence in place sufficient to conclude that there was a difference in treatment?
	2. In which cases a difference in treatment does not constitute discrimination on the grounds of age?

## SUMMARY OF ARGUMENTS

1. The plaintiffs have no legal interest in requesting a declaratory judgment.
2. **Ad claim 1**

There was no transfer of undertaking (or part thereof) because:

* + 1. X’s restaurant was not capable of being transferred,
		2. There was no legal transfer or merger between X and Y,
		3. The identity of X’s undertaking was not retained at Y, as:
* Types of businesses and activities are different,
* There was no sufficient transfer of:
* Employees,
* Equipment,
* Intangible assets,
* Customers,
* There was a long break in operation
* During which no employment relationship could be established.
1. **Ad claim 2**

Plaintiff I has no right to demand the jubilee award from Y, since there was no transfer of undertaking (or part thereof).

Even if the Court finds that there was a transfer, whichever the date of the transfer is, Plaintiff I does not acquire the right to award when employed at Y and Y is not obliged to observe the X’s collective agreement (neither the old one, nor the new one).

1. **Ad claim 3**

Company Y is not obliged to co-operate with Trade Union A operating at X, as there was no transfer of undertaking (or part thereof).

There is no legal obligation for the transferee to cooperate with the transferor’s trade union, even if the transfer of undertaking is identified.

1. **Ad claim 4**

There is no conclusive proof that Y used age (or any other discriminatory criterion) when recruiting employees to a waiter position.

Even if the Court finds unequal treatment, it is justified:

1. Either due to a genuine occupational requirement of:
* Physical fitness,
* Ability to learn foreign languages and/or
* Appearance,

or

1. Due to a legitimate aim of integration of youth into the labour market.

## ARGUMENTS

### PLAINTIFFS HAVE NO LEGAL INTEREST IN REQUIRING A DECLARATORY JUDGMENT

The Plaintiffs have actually brought an action for a declaratory judgment. Out of four claims they formulate, two are of clearly declaratory nature (declaration of the transfer of enterprise and declaration of the fact that both plaintiffs suffered age discrimination). One claim is very imprecise (claim for the lack of co-operation), though the Defendant Y presumes that Plaintiff I also seeks a declaratory judgment in that regard. Finally, only one claim (to oblige Defendant Y to pay Plaintiff I’s jubilee award) allows the Court in the present case to fully investigate the issue and give the judgment as to the merits of the case.

It has been widely accepted, both in the national civil procedures of the Member States, and in the European Union law, that a plaintiff must have an interest in bringing proceedings each time he seeks a declaratory judgment. It is for the plaintiff to “***plead and prove that such an interest exists***”[[1]](#footnote-1). Certainly, it is not enough to provide only “*imprecise statements*” that would relate to the “*uncertainty*” of the plaintiff’s position. The plaintiff must provide in such case a “*substantiated argument […] why judicial protection is required*”. A clear distinction was made between, on the one hand – an action for performance, where plaintiffs intend to obtain “*satisfaction of specific claims*”, while the interest in bringing proceedings may be “*inferred automatically from the context*” of the plaintiff’s claim itself and, on the other hand – a declaratory judgment, in which plaintiffs demand declaration “*that a legal relationship or a particular right does or does not exist*”. This is not the role of the Court “***to issue abstract legal opinions***”[[2]](#footnote-2). Neither is it the role of the defendant to guess what the plaintiffs’ intentions are. In the present case, the Plaintiffs did not question termination of their employment contracts. Neither did they demand that an employment relationship be established with Y. Therefore, it remains unknown why they wish to obtain declaration of a transfer of enterprise. They also failed to provide the legal interest in the claim for “*the lack of cooperation*” and a declaration of discrimination. It is also completely unclear why Plaintiff II demands that both he and Plaintiff I suffered discrimination. Considering the above, those claims should be all dismissed.

### THERE HAS BEEN NO TRANSFER OF UNDERTAKING

If the Court finds that the Plaintiffs have legal interest in initiating these proceedings, the Defendant Y would like to state that there was no transfer of undertaking (or a part thereof).

#### The x’s restaurant was not capable of being transferred

The X’s restaurant does not constitute an entity which is capable of being transferred as a part of undertaking within the meaning of art. 1(1) of the 2001/23 Directive. The definition of an undertaking or a part thereof is flexible and depends on the sector in which an enterprise operates. Thus, in case of sectors based on manpower, a “*structured group of workers*” may correspond to an economic entity for the purposes of the Directive[[3]](#footnote-3). On the other hand, that would mean that in case of sectors based on equipment (such as catering in our case), ‘an economic entity’ shall be viewed through the prism of tangible assets it possesses. As explained below, X leased the kitchen from the real estate lessor, while all its tools and accessories from other institutions. It means that it would not be possible to transfer this economic entity understood as an assemble of material assets, because they were leased from at least two different subjects. X seems to have had no assets on its own that could be sold and acquired *uno actu* by another entity (such as Y), since the premises, equipment, tools and accessories came from different individuals or institutions. In order to acquire or lease all these elements, one would have to conclude a number of contracts with different entities. The facts of the case indicate however, that Y contracted only with the real estate lessor and nobody else. The lease of premises and possession of cooking equipment used by X would be enough to operate a simple kitchen as such, but not the whole restaurant, which requires much more “*tools and accessories*”, including all sorts of furniture, cutlery, glassware or tablecloths. It remains unknown who is in possession of the remaining part of X’s assets after its dining room ceased to operate.

Furthermore, X’s restaurant operated in the same building with veterinary office and it is actually referred to as a “*dining room*”, while the evidence in place suggest that it was an in-house restaurant, which means that it mostly served office workers rather than had random clients coming from the city. Therefore, it was probably only an ancillary activity of the veterinary office. This office is not capable of being transferred as it does not pursue an economic activity. It carries out i.a. “*official epidemiological tasks*” and issues pet passports which, according to the CJEU, would mean that such activity falls within the exercise of public powers and is not in competition with services offered by other private operators[[4]](#footnote-4). Besides, according to the case-law, in case of a transfer of an ancillary activity, the services carried out before and after the transfer must be exactly the same – for example an enterprise runs a canteen for its employees and then, entrusts management of the very same canteen to another entity[[5]](#footnote-5). However, in this case, as set out below, Y will run an exclusive Italian bar & restaurant and does not intend to continue the operation of X’s “*dining room*” anyway.

#### There was no legal transfer or merger

The 2001/23 Directive requires that a transfer of undertaking or a part thereof must result from a legal transfer or merger (art. 1.1.a). However, the facts of the case clearly indicate that no legal transfer or merger took place between X and Y. As stated in *Süzen* case, the lack of any contractual link between the presumed transferor and transferee „***may point to the absence of a transfer******within the meaning of the directive***”[[6]](#footnote-6). The CJEU made it clear that a transfer may occur between two entities not bound by any contractual link, but only in very specific cases, such as detailed below:

* A secondary school entrusts cleaning services to one company and then, to another entity (*Süzen*),
* Volkswagen entrusts cleaning of its production plants to one company (which subcontracts its subsidiary) and then, to another company (*Temco*)[[7]](#footnote-7),
* A/S Palads Teatret leases its restaurants and bars to one company and then, to another company, which immediately re-employs the former lessee’s employees (*Daddy’s Dance Hall*)[[8]](#footnote-8),
* An individual leases her tavern to another individual, then rescinds the contract and takes over operation of the tavern herself (*Ny Mølle Kro*)[[9]](#footnote-9),
* The owner of a bar-discothèque concludes a lease-purchase agreement with a commercial partnership and then, by a court decision, retakes his property (*Berg v Besselsen*)[[10]](#footnote-10).

In all the above situations, the CJEU stated that there was a transfer of undertaking even though the transferor and the transferee were not bound by any contract – either because they were subsequent contractors of the same entity (so they formed a ‘triangular’ relation), or because the contract of lease had already been terminated or rescinded and the undertaking was simply being restored to its original owner. However, it appears that the CJEU was eager to adopt a broad meaning of a “legal transfer or merger” only when the activities performed before and after the transfer were **exactly the same**. In the above cases, this identity resulted either from the constant needs of the original contractor (for example the secondary school and Volkswagen needed to have their premises cleaned on a daily basis, so they obviously concluded the same contracts for the same services with every subsequent cleaning enterprise) or from the nature of activity itself (for example the owners would terminate lease agreements in order to be able to run the very same tavern or bar-discothèque on their own). In yet another case, when analysing the expression of “legal transfer”, the CJEU reached a conclusion that such transfer may occur in case where a municipality decides to discontinue subsidies granted to a foundation engaged in helping drug addicts (causing this foundation to cease its activities) and transfers those subsidies to another foundation “***carrying on the same activities***”[[11]](#footnote-11). Again, the identity of conducted activities was the remedy for the lack of contractual link between the presumed transferor and transferee.

On the other hand, the lessor who leased the real state to X and then, to Defendant Y, had absolutely no interest whatsoever in the activity which was to be conducted in this place. Both entities (X and Y) provided different services on the premises - X operated a veterinary office and a dining room offering rather simple snacks, while Y will operate an exclusive Italian restaurant and bar. In this case, the mere fact that the lessor and real estate remain the same is certainly not sufficient to conclude that there was a legal transfer between X and Y, even if a wide definition of this notion is to be adopted, as the facts of the case pending now before the Court do not fit into circumstances of the above mentioned CJEU cases, in which the strict identity of conducted activities is the only factor explaining some kind of ‘link’ between the presumed transferor and transferee, despite the lack of a contractual link between them.

#### THE IDENTITY of the undertaking WAS NOT RETAINED

Another condition to be met according to the 2001/23 Directive (art. 1.1.b) in order for a transfer of an undertaking (or a parth thereof) to take place is retention of its identity. The problem was thoroughly explained and investigated in the case-law provided by the CJEU - mainly the *Spijkers* judgment in which a number of transfer criteria was provided:

**(1)** “*the type of undertaking or business*”,

**(2)** “*whether or not the business’s tangible assets, such as building and movable property, are transferred*”,

**(3)** “*the value of its intangible assets at the time of the transfer*”,

**(4)** “*whether or not the majority of its employees are taken over by the new employer*”,

**(5)** “*whether or not its customers are transferred*”,

**(6)** “*the degree of similarity between the activities carried on before and after the transfer*” and

**(7)** “*the period, if any, for which those activities were suspended*”[[12]](#footnote-12).

It appears that almost none of them are fulfilled in the case, as explained below.

##### The types of undertakings and activities carried out are not similar

The types of undertakings are not identical. Defendant Y will run an exclusive Italian restaurant and bar, while X operated a simple dining room. The only thing that those two undertakings have in common is that they both serve products which may be eaten or drunk. However, considering that there are plenty of places where one can consume meals and beverages (canteen, confectionery shop, bakery, café, bistro, tavern, pub, etc.), this degree of similarity seems to be not enough. After all, those establishments are visited on different occasions – in general, we choose canteens for a quick lunch, in pubs we organise informal meetings to eat and drink on weekends, we have a ‘coffee and cigarette’ break at a café and we choose exclusive restaurants for an official dinner. Therefore, those undertakings have much less in common than it could seem at first glance. This is in conformity with the CJEU’s position adopted in *Oy Liikenne Ab* where the Court stated that “*the mere fact that the service provided by the old and the new contractors is similar does not justify the conclusion that there has been a transfer of an economic entity between the two undertakings*”. The CJEU underlined that an entity cannot be simply reduced to the activity it carries out, because its identity emerges also from other factors, including workforce, management staff, the way in which work is organised, operating methods or operational resources which are available[[13]](#footnote-13). It also stated that factors such as “*organisation, operation, financing, management*” may identify an economic entity in such a way that “***any alteration of those factors***” resulting from its transfer would “*lead to a change in its identity*”[[14]](#footnote-14). That is why the undertakings of X and Y are both unique and distinct. They only share a minor part of workforce and the way this workforce is organised is different – X’s employees performed different functions, depending on the time of the day (working in the bar, welcoming guests, serving meals and helping in the kitchen). Even their scope of duties were clearly named as “*waiter, kitchen worker and bartender*”. On the other hand, Y simply needs waiters and does not intend to entrust them with such multitasking. The management is also different, as Y employed a famous Italian chef to head the kitchen. All those factors, when taken jointly into account, prove that the degree of similarity between the activities carried out by X and Y is very insignificant and insufficient to conclude a transfer of undertaking or part of undertaking.

##### There was no effective transfer of equipment

Transfer of tangible assets is also one of the *Spijkers* test criteria. Besides, the CJEU considers catering as “*the activity based essentially on equipment*”. Therefore, in case of restaurants, a transfer of undertaking may take place only if there is a transfer of the premises and equipment “*indispensable for the preparation and distribution of meals*”[[15]](#footnote-15). However, first of all, the quoted *Abler* case concerned two subsequent contractors of a hospital which provided catering services to its patients and staff. They both used the same kitchen and equipment and provided services to the same category of clients. On the other hand, in this case, the Italian restaurant & bar need different infrastructure from a general dining room, such as operated by X. Obviously, there are many kinds of cuisines and equipment used to prepare and serve meals. Thus, there are different sorts of equipment needed by e.g. a sushi restaurant, an American fast food bar or a molecular gastronomy restaurant. An exclusive Italian restaurant also needs to have special kitchen devices “*indispensable for the preparation of meals”* (a pizza oven, for instance) which neither X (serving simple snacks and lunches), nor the real estate lessor possessed, of course. Furthermore, X leased all its accessories and tools from certain institutions – therefore, these assets did not pass on to Y. Yet, the transfer of “*essential tools of production*” was considered by the CJEU as one of factors deciding about the transfer of undertaking[[16]](#footnote-16). Besides, considering its ‘exclusive’ status, Y will surely have to buy new elegant tables, chairs, cutlery, glassware or tablecloths which will thus constitute a valuable part of Y’s material assets not transferred from X’s general dining room. Finally, the contract of lease provided that all equipment present at kitchen would be transferred to Y which would be free to use or get rid of it. Thus, there are no conclusive proves that Y has after all decided to make effective use of the equipment left after X. All the above conclusions are additionally supported by the fact that before the opening of the Y’s restaurant, there was a need for a 3-months-long renovation of the building. It proves that the mere access to premises, in which X had provided services, without proper equipment and staff, did not by itself enable Y to operate its exclusive Italian restaurant.

##### No Intangible assets could be transferred

Since X operated a dining room offering simple meals and snacks, while its customers were mostly local workers who treated it as an office canteen, it is hard to imagine that such an undertaking could present a significant value of intangible assets. It remains unknown whether X had any trademarks, trade name, franchise or know-how. However, considering its status of a simple dining room for local office workers, it is very likely that it had none. Even if it had a trade name or know-how for instance, Y has no intention to use it, since it operates a totally different undertaking, which offers a completely different menu and is meant to be exclusive, therefore any intangible assets of a dining room would not help to build its brand and reputation. At the same time, it is worth mentioning that intangible assets were called “*of little or no importance*” **only** in case of transfers of undertakings in which “*the human factor, the workforce, is the main consideration*”[[17]](#footnote-17). As explained above, running a restaurant is an activity “*based essentially on equipment*”, therefore transfer of intangible assets and their value should be an important criterion in this case.

##### No majority of employees were taken over

No majority of employees were taken over - amongst 12 waiters only 5 were re-employed by Y - thus, yet another *Spijkers* condition remains unfulfilled. Besides, those 5 waiters constitute only a small part of former X’s workforce, which altogether consisted of 12 waiters, 2 cooks and 1 chef. The CJEU insists that in case of a transfer of employees who do not retain organisational autonomy with their new employer, “*the functional link between the various elements of production*” must be preserved[[18]](#footnote-18). However, in case of potential reemployment of 5 waiters only, it is hard to say that the functional link is preserved, as no X’s kitchen staff were hired by Y. The kitchen and its management (chef) is the core and heart of every restaurant. Those 5 waiters will become only a part of a bigger team. They would not be able to ensure functioning of a restaurant just on their own and do not form any kind of a key unit of Y’s establishment. Therefore, potential re-employment of 5 waiters is of no importance to the existence of transfer in this case. This conclusion seems to be in line with the case-law provided by the Hungarian Supreme Court which insists that if the same real estate and assets are to be transferred to another entity, the same employees must be taken over as well by the successor in order for a transfer to take place[[19]](#footnote-19).

##### There was no transfer of customers

Another *Spijkers* criteria is also not fulfilled in this case, as Y did not acquire from X any “*lists of suppliers and of customers*”[[20]](#footnote-20). Neither is there a proof that Y was “*recommended to customers*” by X or took over “*the existing contracts with customers*” or suppliers[[21]](#footnote-21),[[22]](#footnote-22). Actually, it would be rather hard to imagine any transfer of customers or suppliers, as an exclusive Italian restaurant has nothing to do with quick snacks in a casual dining room for office workers. Obviously, X’s customers will find another dining room offering snacks nearby rather than have an exquisite Italian dinner for lunch every day. This point proves additionally the lack of similarity between services provided by X before the termination of the lease agreement and services provided by Y after conclusion of the lease agreement.

##### There is a significant period during which all activities are suspended

There is a significant period for which all activities were suspended (no dining room or restaurant was in operation). Even though the CJEU has ruled that such a suspension does not automatically eliminate the possibility of a transfer, the period for which activities are frozen must not be too long - the case-law provides an example of a “***short period***”, namely a two-week-long break, which coincided with the Christmas and New Year holidays[[23]](#footnote-23). Meanwhile, the facts of this case indicate a 4-month-long suspension of activities (between 1.12.2015 and 2.4.2016) which seems to be far too much when compared to a 2 weeks’ Christmas break. Besides, any longer break in operation may only be justified in case of a seasonal business “*regularly closed for part of the year*”, where transfer may take place during the season when the undertaking is closed[[24]](#footnote-24). This is also not in line with the facts of the case, as neither X’s dining room, nor Y’s Italian bar and restaurant operate on a seasonal basis, typical for a seaside or mountain inn. Quite contrary, they are located in Budapest, so the demand for work is not dependent on any seasonal variations and they remain open throughout the whole calendar year. A long break in operation was necessary due to a serious renovation which had to be made in order to adapt the premises to the activity that Y intended to carry out. In the circumstances of this case, the closure of the X’s dining room and opening of the Y’s restaurant after a 4-month-long break prove that the undertaking (even if the Court will be able to identify the undertaking that could be transferred), ceased to be a going concern.

So far, the longest break in operation which did not prevent the transfer of enterprise from taking place was 2,5 months (between 19.02. and 01.05.). However, in that case, the transferee was the transferor’s main shareholder and majority of *Spijkers* criteria were met: the type of undertaking was the same (an airline), the activities were the same (operation of flights, the same routes), significant part of transferor’s assets were used (including 4 aeroplanes) and a number of employees were taken over[[25]](#footnote-25). Therefore, Defendant Y would like to emphasise that this judgment is of no importance for this case.

##### No effective employment relationship can be established between x’s employees and y before 2.04.2016

Furthermore, considering the significant period during which all activities are suspended, it is impossible to have an employment relationships between X’s staff and Y in such circumstances. According to the International Labour Organisation, determination of the existence of an employment relationship “*should be guided primarily by the facts relating to* ***the performance of work*** *and the remuneration of the worker*”. The most important conditions are that such work is carried out personally by the employee, according to the instructions and under control of the employer, solely or mainly for employer’s benefit, within specific working hours and at a specific workplace[[26]](#footnote-26). Also, the Hungarian Labour Code (Section 42 pt. 2) provides that under an employment contract the “*employee is* ***required to work*** *as instructed by the employer*”, while the “*employer is* ***required to provide work*** *for the employee and to pay wages*”. In this case though, if we were to presume that there was a transfer of undertaking, that would mean that at least for almost one third of the year – between January and April 2016, the transferred employees would perform no work at all, not to mention more specific requirements (receiving instructions, being under employer’s control, having specific workplace and working hours, etc.). It means that it is impossible to establish the existence of an employment relationship between the Plaintiffs and Y after conclusion of the lease agreement, as no work was performed by them in return for remuneration. After all, it is hard to expect from Defendant Y that he would entrust waiters or cooks with renovation works. Thus, employment contracts between Plaintiffs and X effectively terminated in January 2016 and Plaintiff I was hired by Y from 2.04.2016 (and not transferred).

### PLAINTIFF I HAS NO RIGHT TO THE JUBILEE AWARD from company y

Since there has been no transfer of (part of) undertaking, Y is bound only by the collective agreement which is in force in Company Y. That agreement contains no provisions on jubilee award. Thus, no claim for a jubilee award resulting from the X’s collective agreement can be made against Y.

As there was no transfer, any claims relating to the jubilee award based on collective agreement concluded by Employer X could only be brought against Employer X. Therefore, Y states that it should not be sued in respect of the Plaintiff I’s jubilee award claim and would like to ask the court to bring a third party action and engage Employer X as the defendant and the proper party to this lawsuit, who should replace Defendant Y.

#### Plaintiff I does not have the right to be awarded a jubilee award in case the court declares transfer on 2.04.2016

In case the Court declares a transfer of enterprise, the Defendant argues that the transfer took place on the 2.04.2016. According to the *Celtec* case, a certain date of transfer should be indicated. “*That date is* ***a particular point in time****, which cannot be postponed to another date at the will of the transferor or transferee*”, and is “*the date on which responsibility as employer for carrying on the business of the unit transferred moves from the transferor to the transferee*”[[27]](#footnote-27). In the case at hand, the 2 April 2016 should be declared as the date of transfer, as it will be the first day of re-establishment of activity after a 4-months-long break and therefore, it will be the moment when Y **becomes responsible ‘*as employer for carrying on the business’***. The 2001/23 Directive will not apply to Plaintiff I and Defendant Y because Plaintiff I was not employed by X on the date of transfer (his contract expired in January) and therefore, he can only be treated as an employee recruited by Y[[28]](#footnote-28). In that case, according to art.3(1) of the 2001/23 Directive, the Defendant is not obliged to pay him the jubilee award, which the Plaintiff I could potentially acquire before this date of transfer, during his employment with X.

#### Plaintiff I does not have the right to be awarded a jubilee award in case the court declares transfer on 1.01.2016

Even if the date of transfer is to be set on the date of final lease contract, none of the X’s collective agreements are binding for Employer Y. As stated in the art.3 par.3 of the 2001/23 Directive, following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.In the present case, 31.12.2015 was the last day of the first collective agreement being effective at X. Therefore, the old agreement expired before the transfer took place, so Y was not obliged to observe its terms after the date of transfer. The new collective agreement came into effect in X’s enterprise on the 1.01.2016, however that was when the transfer already took place, so the transferred employees were not covered at any time by this agreement. According to the literal reading of the aforementioned article, “*the transferee* ***shall continue to observe*** *the terms and conditions”* thus, in case of an unusual time coincidence, it cannot be stated that the collective agreement that comes into force on the 1.01.2016 binds the Employer Y, since the continuation requirement is not met.

Defendant Y would like to underline that Plaintiff I would become entitled to his jubilee award on the 1.01.2016, as the 31.12.2015 was the last day of his second decade of work at X. However, since he did not acquire his jubilee award when still employed with X under the old collective agreement, he cannot be granted the jubilee award under the new agreement either, as it does not apply to Y, so there is no legal basis for granting Plaintiff I a jubilee award on 1.01.2016.



Furthermore, in the *Juuri* case, the CJEU had already investigated the situation when the date of expiry of a collective agreement coincided with the date of transfer. The Court started clearly that the 2001/23 Directive does not require the transferee to observe the collective agreement binding at the transferor after the date of its expiry, even in case where “*that date coincides with the date on which the undertaking was transferred*”[[29]](#footnote-29). The Court also discussed situations where a contract of employment refers to a collective agreement binding the transferor, and there is a subsequent agreement to the one which was in force at the time of the transfer[[30]](#footnote-30); as well as the problem whether collective agreements negotiated and adopted after the date of transfer are enforceable against the transferee[[31]](#footnote-31). No case concerning such a unique time coincidence as present in the case at hand has ever been investigated. What needs to be taken into account though, is the fact that the Directive is not intended to protect only the employees and their interests, but it actually “*seeks to ensure* ***a fair balance*** *between the interests of employees, on the one hand, and those of the transferee, on the other*”[[32]](#footnote-32). The CJEU underlined the importance of the Charter of Fundamental Rights of the EU and stated that the Directive must be interpreted in accordance with source of primary EU law. Especially, the freedom of contract was considered as one of the most essential rights in this context. The Court stated that the transferee must be able to ***assert its interests effectively in a contractual process*** *to which it is party and is able to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity*[[33]](#footnote-33). In this case the CJEU decided that dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer are enforceable against the transferee. However, where that transferee does not have the possibility of participating in the negotiation process of such collective agreements concluded after the date of the transfer, the terms thereof cannot bind him, as they are not in line with the interpretation of the Directive[[34]](#footnote-34). Comparing this to our case, the Employer X must have been aware of the situation and the issue of a potential transfer of undertaking when the new collective agreement was negotiated. He probably knew that those employees, whose employment contracts were terminated and who were to be (potentially) transferred to Y, would never be covered by the new collective agreement at X. So, he negotiated an agreement which was to cover a part of his employees only upon their transfer to Y. Therefore, considering that Defendant Y did not take part in the negotiations and was not a party to this agreement, he should not be covered by it, as it adversely affects his freedom of contract.

Besides, Section 282(2) of the Hungarian Labour Code provides that obligation to maintain working conditions specified in the collective agreement binding at the transferor does not apply to the transferee if “*the employment relationship is covered by a collective agreement after the date of transfer*”. Plaintiff I was explicitly informed that Defendant Y has its own collective agreement which would cover the X’s employees to be hired by Y, since Defendant Y stated clearly that it “*did not see any possibilities*” to pay jubilee award in future.

Summing up, in our case, the possible transfer of undertaking would be an extremely complicated mosaic of agreements between three parties that, additionally, would be hard to place at a certain moment in time. Under those conditions, even if the Court declared the transfer of enterprise, Employer Y would not be able to have any impact on conclusion and the terms of collective agreement. Taking into consideration the literal reading of the Directive and the Court’s reasoning from the *Mark Alemo-Herron* case, it should be concluded that the second collective agreement is not binding for Employer Y and, as a result, Plaintiff I cannot derive the right to a jubilee award from it.

#### Plaintiff I does not have the right to be awarded a jubilee award in case the court declares transfer on 1.12.2015 or 15.12.2015

If the Court declared that the transfer took place on either 1.12.2015 (the end of X’s lease contract) or 15.12.2015 (meeting with cooks and waiters), the Defendant argues that Plaintiff I would not have the right to a jubilee award under condition that Hungarian law does not predict that Company Y is bound by the terms and conditions agreed in the first collective agreement after its expiry.

Thus, Plaintiff I’s right to a jubilee award derived from the first collective agreement concluded between X and Trade Union A would never realise. His jubilee award would become payable on 1.01.2016. On the 1.01.2016 the first collective agreement ceased to bind at Y, who was obliged to observe its terms only until the date of its expiry (with 31.12.2015 being the last day). The new collective agreement which came into effect at X on the 01.01.2016 is not binding for Y, as it was effective after the date of the transfer. The Plaintiff I would have acquired the right to the jubilee award if he had been employed by X on 1.01.2016, as on that date his work seniority would have exceeded 20 years.

### LACK OF COOPERATION WITH TRADE UNION “A”

#### Since there was no transfer, no cooperation with trade unions was required

Defendant Y had already explained in the pt. 2 above why there has been no transfer of undertaking or part of undertaking in this case. This means that there was no legal basis for his obligation to inform the Trade Union “A” about any business decisions made by him, including hiring of new staff or their pay conditions.

#### In case the court declares transfer, there is no obligation for a transferee to cooperate with the transferor’s trade unions

Furthermore, even if the Court finds that there has been a transfer of undertaking or part of undertaking, the 2001/23 Directive provides no legal basis for cooperation between the transferee and the transferor’s trade unions. The art.7 par.1 of the Directive requires the transferor and the transferee to inform the representatives of “***their respective employees*** *affected by the transfer*”. Besides, the Directive makes it clear again by underlining that “*the transferee must give […] information to the representatives of* ***his employees***”. Also, Section 265 of the Hungarian Labour Code does not provide any obligation of informing representative bodies of a different employer. Therefore, the fact that Defendant Y asked the Trade Union “B” that operates at his workplace to inform the Trade Union “A” about the most important circumstances related to potential reemployment of a few former employees of X is only a gesture of goodwill. Plaintiff I failed to explain why he believes that Defendant Y was obliged to cooperate with the Trade Union “A”, what exactly he means by ‘cooperation’ (as the Directive provides only for an obligation to ‘inform’ or ‘consult’ and **not** an obligation to ‘cooperate’), as well as he failed to provide any potential legal basis for their claims in this respect.

Besides, Plaintiff I was the representative of the Trade Union A and he was present at the meeting held on 15.12.2015. Therefore, he was perfectly aware of the situation and familiar with all information provided on that date, which makes his claim not only groundless, but also pointless.

### NO DISCRIMINATION TOOK PLACE IN THE PROCESS OF RECRUITMENT CONDUCTED BY Y

Plaintiff II failed to clarify his claim relating to age discrimination. It is very vague and violates the Defendant Y’s right of defence since he is not sure what are the exact allegations against which he should defend himself.

Firstly, Plaintiff II claims that “*they suffered*” age discrimination. It is unclear who are “*they*”. Defendant Y presumes that either it means that both Plaintiffs were subject to unequal treatment or that Plaintiff II acts on behalf of an unknown group of discriminated workers. However, since Plaintiff I was effectively employed by Defendant Y, it remains unknown what is the potential basis of him being discriminated. It is also unclear why Plaintiff II makes such collective claims and acts on behalf of Plaintiff I (or other people) in that regard. This is strikingly ill-founded and does not indicate any kind of probability that both Plaintiffs (or other workers) were discriminated.

Secondly, Plaintiff II does not clarify when discrimination was suffered. He could feel discriminated when Employer X terminated his employment contract. Alternatively, he could feel discriminated when Defendant Y announced that he did not need his services.

Considering the above, the Court should dismiss this claim. Nevertheless, in case the Court considers that there has been unequal treatment, Defendant Y would like to present his arguments. They address **only** the potential claim of Plaintiff II being discriminated by Defendant Y.

#### Hiring process was based on objective criteria and age was not a criterion of selection

The Court should take into account the hiring capacity of Employer Y. It was clearly stated during the meeting in December, that there were only 5 waiting posts available, which made the process very competitive, since 12 employees of Company X attended the meeting. Even though the phrase ‘*young and dynamic team of employees*’ was mentioned during the meeting, it was merely a descriptive statement, and there is no proof that the age was after all a decisive factor in the hiring process. Company Y did not refer to age as the criterion for hiring new waiters. There is no proof that all 5 X’s former employees that were employed by Defendant Y are below 40. There is also no proof that all 7 remaining employees of Company X, who certainly were not offered a job, were above the age of 40. Therefore, there is no clear comparator to which Plaintiff II could refer to in order to compare the situation of younger workers to older workers. Besides, as a reasonable entrepreneur, Y is authorised to choose 5 employees, who objectively have fitness and appearance necessary to fill the waiter vacancies. The Company Y held a face-to-face meeting to verify waiters’ fitness for the job, which is plain to see and does not require any specific tests to be conducted in that regard. The Defendant underlines that neither fitness nor appearance constitute a discrimination criterion, as they have not been mentioned by the EU legislator in the exclusive list of discrimination criteria.

#### Physical fitness as a genuine occupational requirement

The circumstances of the case point out that different treatment was based on the age-related characteristics, so it falls into justified exceptions provided by the 2000/78 Directive and therefore does not constitute discrimination.

According to the art.4 par.1 of the 2000/78 Directive, a difference in treatment based on a characteristic does not constitute discrimination where by reason of the nature of the particular occupational activities concerned or the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, as long as the objective is legitimate, while the requirement is proportionate. According to the legal writers, art.4 par.1 provides that there may be some circumstances under which an employer can decide not to choose an older worker when hiring, based on legitimate reasons “***relating to the responsibilities of the job in question or business-related reasons***”. Again, employer’s interests must also be considered, as anti-discrimination legislation “*is meant to be equitable*” – which means that employer has to be allowed to hire only younger staff when justified by the circumstances[[35]](#footnote-35). Moreover, it is important to mark that Hungarian law is considered to be very elastic in this regard, as occupational requirements were not defined in the Hungarian age discrimination legislation[[36]](#footnote-36)*.* Indeed, the art. 22 par.1 of the Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities states that the principle of equal treatment is not violated if “*the discrimination is proportional, justified by the characteristic or nature of the work and is* ***based on all relevant and legitimate terms and conditions***”. Therefore, the Court should remain flexible as to the use of this provision and assess it on a case-by-case basis.

The CJEU has already stated in the *Wolf* case that physical fitness (“*the need to possess high physical capacities*”) is a characteristic related to age. The Court accepted the scientific data it was provided, according to which “*respiratory capacity, musculature and endurance diminish with age*” and confirmed that the requirement of physical fitness may be regarded as a “*genuine and determining occupational requirement*”. In that case, 30 years as the maximum age limit for recruitment in the fire service was considered as legitimate and proportionate[[37]](#footnote-37). Also in the *Prigge* case, the CJEU confirmed that particular physical capabilities may be required in some professions and it is “***undeniable that those capabilities diminish with age***”. Thus, such physical capabilities may constitute a genuine and determining occupational requirement related to age[[38]](#footnote-38).

The scientific data show indeed that as we grow older, there is a “*gradual loss of muscle mass*” which results in their weakening. Other important signs of ageing include: vision impairment, hearing loss, worse respiratory capacity, decreasing bone density leading to more frequent fractures, weaker immune system and susceptibility to infection or sleep problems[[39]](#footnote-39). Therefore, older workers are more prone to get sick or to sustain an accident at work, especially if they are engaged in physical labour. The aforementioned signs of ageing indicate that older candidates for waiters are not able to perform their functions as good as younger candidates since they are physically weaker and their basic senses – hearing and eyesight – worsen gradually. It is hard to imagine that a waiter with poor eyesight and impaired hearing is able to function smoothly in a restaurant – receive orders, carry plates, etc.

Thus, in the case at issue, Plaintiff II is 61 years old. This job requires not only full physical fitness and mobility, but also the ability to react quickly and good memory. Waiters in an exclusive restaurant often have to carry trays with glasses or many dishes at once which may be not only heavy and hard to handle but also easy to drop. They also have to perform all different sorts of functions which require dexterity, such as opening bottles of wine or pouring beverages. They always have to remain vigilant and attentive, keep their eye on what is happening in the restaurant and be ready to respond to any wishes that customers may have. After reaching a certain age, one is no longer able to perform all those functions fast and impeccably, while every exclusive restaurant must have flawless waiter service if it wants to keep its high-ranking status. Besides, hiring an older waiter could not only pose a threat to the restaurant’s quality and reputation, but also to the customers themselves, who must be served in a safe way (after all, waiters carry a lot of potentially dangerous things, including hot dishes, heavy glass or sharp cutlery). Therefore, under those circumstances, Defendant Y was justified in not hiring Plaintiff II and employing those who guaranteed the highest standard of performance instead. Moreover, it should be underlined in that context that the waiters’ duties in the Y’s restaurant were incomparable with the waiters’ duties in the X’s dining room.

Furthermore, employers are not necessarily obliged to conduct the physical fitness examinations or in some other way test the ability of older employees to perform specific work. It has been accepted that in some circumstances the assessment of individual employees may be “***impracticable***”, “***impossible or excessively onerous***” and the age may be linked to a genuine occupational requirement or a characteristic which is relevant to the position[[40]](#footnote-40). It is important to note that if Defendant Y had employed Plaintiff II, most probably, considering the above requirements and expectations, Plaintiff II would have been dismissed in the near future due to being “*no longer capable of working*”. The CJEU ruled that such termination may be “***humiliating for those who have reached an advanced age***”[[41]](#footnote-41). Considering the above, it would be impractical for Defendant Y to conduct physical fitness examinations as part of recruitment process for each waiter vacancy and it could be humiliating for older candidates who undergo such examination, as a result of which they get rejected. Therefore, Defendant Y was justified in not conducting any examinations which could only lead to potential humiliation of elderly people.

#### The abILITY TO lEARN FOREIGN LANGUAGES AS a genuine occupational requirement

Since Defendant Y operates an Italian restaurant and bar, waiters are obviously required to know at least basic Italian in order to be able to understand the menu (the names of the dishes and ingredients), as well as to pronounce those words properly. The restaurant has a native Italian chef. Therefore, if waiters knew Italian, it would be easier to communicate with him. Finally, Budapest is indisputably the most important tourist hub in Hungary in terms of international visitors coming to the city (over 8 mln international guest nights in 2016, which is referred to as the “*solid popularity of Budapest*”)[[42]](#footnote-42). Italian tourists constitute a major force among those visitors – they are the fifth most common nation visiting Hungary (over 230,000 arrivals and hotel guest nights)[[43]](#footnote-43). Defendant Y expects that many Italians would be happy to visit his restaurant when being in Budapest. In general, the high profile of his restaurant is intended to attract tourists who are known to spend more money than local customers. Besides, waiters must be able to communicate with customers, obviously. They represent the restaurant – they are responsible for welcoming guests and making them feel comfortable. They must be able to understand the people they serve in order to cater for all their needs and wishes. Defendant Y runs an exclusive restaurant and knowing foreign languages (or at least being able to learn them quickly) is necessary when working in such an establishment – especially in a well-known tourist destination, such as Budapest, where foreigners constitute a significant part of customers.

It is hard to expect that Plaintiff II had opportunity to serve any foreigners while working at the X’s dining room – the facts of the case indicate that it was actually an in-house facility. Furthermore, due to his age, his ability to learn foreign languages is seriously impaired. According to the statistical data, younger people in general tend to report better foreign language skills. It is also important to point out that Hungary is known to have a “*considerable generation gap in foreign language skills*”[[44]](#footnote-44). Therefore, Defendant Y was justified in refusing to hire Plaintiff II, as this occupational requirement is related to age.

#### Appearance AS a genuine occupational requirement

Finally, it has also been accepted that employers may choose workers according to their own subjective ideas on how they want to operate their business. Such exceptions were accepted for example in case of singing, acting, dancing, artistic or fashion modelling[[45]](#footnote-45). Other examples include hiring an individual of Asian ethnicity in an Asian restaurant to maintain authenticity or hiring women in women-only fitness clubs[[46]](#footnote-46). Therefore, an employer must always be allowed a margin of appreciation when selecting candidates for work who fit into the establishment. Thus, Defendant Y could have recruited Italians, people of Italian descent or having Mediterranean appearance to give his restaurant an authentic Italian spirit. Besides, considering the exclusive status of his undertaking, he could choose younger, more attractive waiters. Obviously, young or middle-aged good-looking waiters could attract more customers than old waiters who are about to retire. The scientific study shows that people “*pay closer attention to people they find attractive*” and that humans in general “*prefer pretty people*”[[47]](#footnote-47),[[48]](#footnote-48). Good-looking people were found to be perceived as “*more sociable*”, “*intelligent and social skilled*” and people are more likely to have interactions with handsome people[[49]](#footnote-49). Therefore, Defendant Y was justified in relying on this data, as his major interest is to operate a popular restaurant, while hiring younger and handsome waiters significantly increases his profits.

#### youth employment as a legitimate aim

Besides, according to the art.6 par.1 of the 2000/78 Directive, a direct difference of treatment on grounds of age does not constitute discrimination if such difference is objectively and reasonably justified by a legitimate aim. “*Fixing of a maximum age for recruitment*” is specifically included as an example of justifiable discrimination, even though it may appear as a “*classic example of why age discrimination legislation is necessary*”[[50]](#footnote-50). It has been accepted that this article “*explicitly sacrifices the principle of non-discrimination to commercial and other interests*”[[51]](#footnote-51). It is important to know that youth employment is an important policy pursued by the European Commission. This is a part of the European employment strategy under which tackling youth unemployment, their integration into the labour market and better opportunities to access employment constitute major objectives, as explained in a recent communication issued by the Commission[[52]](#footnote-52). Therefore, Defendant Y was also fully entitled to be open primarily for younger staff to promote their participation in the labour market.

## PLEADINGS

The Defendant denies all of the Plaintiffs’ claims and demands that they be dismissed.

1. Opinion of Advocate General Kokott, delivered on 6.11.2014, C-564/13 P, Planet AE Anonimi Etairia Parokhis Simvouleftikon Ipiresion v European Commission, par.39. [↑](#footnote-ref-1)
2. *Ibidem*, par.40. [↑](#footnote-ref-2)
3. C-108/10, Ivana Scattolon v Ministero dell’Istruzione, dell’Università e della Ricerca, par.49 [↑](#footnote-ref-3)
4. C-108/10, Ivana Scattolon v Ministero dell’Istruzione, dell’Università e della Ricerca, par.44 [↑](#footnote-ref-4)
5. C-209/91, Anne Watson Rask and Kirsten Christensen v ISS Kantineservice, par.3 [↑](#footnote-ref-5)
6. C-13/95, Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice, par.11 [↑](#footnote-ref-6)
7. C-51/00, Temco Service Industries SA v Samir Imzilyen and Others, par.33 [↑](#footnote-ref-7)
8. Case 324/86, Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S, par.11 [↑](#footnote-ref-8)
9. Case 287/86, Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro, par.15 [↑](#footnote-ref-9)
10. Cases 144 and 145/87, Harry Berg and Johannes Theodorus Maria Busschers v Ivo Martin Besselsen, par. 14 [↑](#footnote-ref-10)
11. C-29/91, Sophie Redmond Stichting v Hendrikus Bartol and Others, par.14 [↑](#footnote-ref-11)
12. Case 24/85, Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV, par.13 [↑](#footnote-ref-12)
13. C-172/99, Oy Liikenne Ab v Pekka Liskojärvi and Pentti Juntunen, par.34 [↑](#footnote-ref-13)
14. C-175/99, Didier Mayeur v Association Promotion de l'information messine (APIM), par.53 [↑](#footnote-ref-14)
15. C-340/01, Carlito Abler and Other v Sodexho MM Catering Gesellschaft mbH, par.36 [↑](#footnote-ref-15)
16. C-466/07, Dietmar Klarenberg v Ferrotron Technologies GmbH, par.20 [↑](#footnote-ref-16)
17. Joined opinion of Mr Advocate General Cosmas delivered on 24 September 1998, C-127/96, C-229/96 and C-74/97, C-173/96 and C-247/96, par.83. [↑](#footnote-ref-17)
18. C-466/07, Dietmar Klarenberg v Ferrotron Technologies GmbH, par.53 [↑](#footnote-ref-18)
19. BH 1995/493 [↑](#footnote-ref-19)
20. C-466/07, Dietmar Klarenberg v Ferrotron Technologies GmbH, par.20 [↑](#footnote-ref-20)
21. C-171/94 and C-172/94, Albert Merckx and Patrick Neuhuys v Ford Motors Company Belgium SA, par. 8,15 [↑](#footnote-ref-21)
22. C-172/99, Oy Liikenne Ab v Pekka Liskojärvi and Pentti Juntunen, par.41 [↑](#footnote-ref-22)
23. C-101/87, P. Bork International A/S, in liquidation v Foreningen af Arbejdsledere I Danmark, acting on behalf of Birger E. Petersen, and Jens E. Olsen and others v Junckers Industrier A/S, par.16 [↑](#footnote-ref-23)
24. Case 287/86, Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro, par.16-17 [↑](#footnote-ref-24)
25. C-160/14, João Filipe Ferreira da Silva e Brito and Others v Estado português, par. 9,35. [↑](#footnote-ref-25)
26. Employment Relationship Recommendation, 2006 (No. 198) - Recommendation concerning the employment relationship, pt. 9 and 13(a). [↑](#footnote-ref-26)
27. C-478/03 Celtec Ltd v John Astley and Others, par.44 [↑](#footnote-ref-27)
28. Case 287/86, Landsorganisationen i Danmark for Tjenerforbundet i Danmark v Ny Mølle Kro. [↑](#footnote-ref-28)
29. C-396/07 Mirja Juuri v Fazer Amica Oy, par.34. [↑](#footnote-ref-29)
30. C-499/04 Hans Werhof v Freeway Traffic Systems GmbH & Co. KG [↑](#footnote-ref-30)
31. C-426/11 Mark Alemo-Herron and Others v Parkwood Leisure Ltd [↑](#footnote-ref-31)
32. *Ibidem*, par.25 [↑](#footnote-ref-32)
33. *Ibidem*, par.32 [↑](#footnote-ref-33)
34. *Ibidem*, par.37 [↑](#footnote-ref-34)
35. Age discrimination and older workers: Theory and legislation in comparative context, Naj Ghosheh, International Labour Organization 2008, p.36. [↑](#footnote-ref-35)
36. *Ibidem*, p. 38. [↑](#footnote-ref-36)
37. C-229/08, Colin Wolf v Stadt Frankfurt am Main, par. 41,44. [↑](#footnote-ref-37)
38. C-447/09, Reinhard Prigge, Michael Fromm, Volker Lambach v Deutsche Lufthansa AG, par. 67 [↑](#footnote-ref-38)
39. Health and Safety Needs for Older Workers, National Research Council and Institute of Medicine Committee on the Health and Safety Needs of Older Workers; Wegman DH, McGee JP, editors. Washington: National Academies Press; 2004. [↑](#footnote-ref-39)
40. Age discrimination and European Law, Colm O’Cinneide, European Commission 2005, p.35. [↑](#footnote-ref-40)
41. C-45/09, Gisela Rosenbladt v Oellerking Gebäudereinigungsges. mbH, par.43. [↑](#footnote-ref-41)
42. Tourism in Hungary 2016 Report, Hungarian Tourism Agency, <http://szakmai.itthon.hu/documents/28123/4083489/MTE_4001_105x210_LA4_StatElozetes_2016_ENG_NEW.pdf/db033798-0c79-4c38-8d7a-38c44a72c45f>, p.5. [↑](#footnote-ref-42)
43. *Ibidem*, p.9. [↑](#footnote-ref-43)
44. #  Foreign language skills statistics, Eurostat data, October 2015, <http://ec.europa.eu/eurostat/statistics-explained/index.php/Foreign_language_skills_statistics>.

 [↑](#footnote-ref-44)
45. Case 248/83, Commission of the European Communities v Federal Republic of Germany, par.34. [↑](#footnote-ref-45)
46. Handbook on European non-discrimination law, Publications Office of the European Union 2011, p.47. [↑](#footnote-ref-46)
47. Ray Williams, *Why we pay more attention to beautiful people*, 06.08.2011, <https://www.psychologytoday.com/blog/wired-success/201108/why-we-pay-more-attention-beautiful-people>. [↑](#footnote-ref-47)
48. Kate Devlin, *Humans ‘naturally prefer pretty people’*, 13.08.2008, <http://www.telegraph.co.uk/news/uknews/2551882/Humans-naturally-prefer-pretty-people.html>. [↑](#footnote-ref-48)
49. Alan Feingold, *Good-looking people are not what we think*, Psychological Bulletin, Vol 111(2), Mar 1992, p.304-341. [↑](#footnote-ref-49)
50. More equal than others: distinguishing European Union Equality Directives, Lisa Waddington and Mark Bell, Common Market Law Review 2001, p.599. [↑](#footnote-ref-50)
51. EU Anti-Discrimination Law, Evelyn Ellis and Philippa Watson, Oxford University Press 2014, p.409. [↑](#footnote-ref-51)
52. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Investing in Europe’s Youth”, Brussels, 7.12.2016. [↑](#footnote-ref-52)