BelgiumC

HS MCC 2021

Statement for Claimant

Table of contents

Table of contents	2
List of Sources / Authorities	3
Statement of Relevant Facts	7
Description of Relevant Legislation	9
Questions	11
Summary of Arguments	12
Arguments	14
Pleadings	38

List of Sources / Authorities

Case-Law	**Page**
Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE* [2019] CJEU	16, 20
Case C-428/09 *Union syndicale Solidaires Isère v Premier ministre and Others* [2010] CJEU	20
Case C-303/98 *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] CJEU	16, 17
Case C-151/02 *Landeshauptstadt Kiel v Norbert Jaeger* [2003] CJEU	17, 19, 20
Joined cases C-397/01 to C-403/01 *Bernhard Pfeiffer (C-397/01), Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) and Matthias Döbele (C-403/01) v Deutsches Rotes Kreuz, Kreisverband Waldshut eV*. [2004] CJEU	17
Case C-518/15 *Ville de Nivelles v Rudy Matzak* [2018] CJEU	17, 18
Case C-14/04 *Abdelkader Dellas and Others v Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité* [2005] CJEU	17, 18
Case C-363/12 *Z. v A Government department and The Board of management of a community school* [2014] CJEU	24, 25
Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (C-337/11)* [2013] CJEU	24, 25, 26
Case C-270/16 *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal* [2018] CJEU	24, 25
Case C-406/15 *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol* [2017] CJEU	25

Case C-354/13 *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft, v Kommunernes Landsforening (KL)* [2014] CJEU	25
Case C-397/18 *DW v Nobel Plastiques Ibérica SA* [2019] CJEU	25, 30
Case C-395/15 *Mohamed Daouidi v Bootes Plus SL and Others* [2016] CJEU	25
Case *Demir and Baykara v. Turkey* [2008] ECHR 1345	31
Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] CJEU	32, 33
Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] CJEU	13, 32, 33, 34
Case E-8/00 *Norwegian Federation of Trade Unions and Others v Norwegian Association of Local and Regional Authorities and Others* [2002] EFTA	33
Case C-232/09 *Dita Danosa v LKB Līzings SIA* [2010] CJEU	34
Joined Cases C-427/16 and C-428/16, *„CHEZ Elektro Bulgaria" AD v Yordan Kotsev and „FrontEx International" EAD v Emil Yanakiev*, [2017] CJEU	36

Legislation	**Page**
Charter of Fundamental Rights of the European Union [2012] OJ C325/391	16, 21, 26, 31
Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ L 299, 18.11.2003, p. 9-19)	16, 17, 18, 19, 20, 21
Consolidated Version of the Treaty on European Union, 2010 O. J. C 83/01 (hereinafter « TEU »)	16, 36
Austrian Federal Act on the Organisation of Working Time	10, 16, 19

Collective Agreement 2020 for Employees of service providers in the field of automatic data processing and information technology (hereinafter, « the IT Collective Agreement »)	11, 13, 15, 16, 18, 19, 20, 30, 31, 33, 35, 37
Austrian Act on White Collar Workers	10, 21, 22, 23
Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O. J. C 115/47 (hereinafter « TFEU »)	13, 32, 33, 35, 36
Convention for the Protection of Human Rights and Fundamental Freedoms	26, 29
ILO, Recommendation concerning Collective Agreements, 1951 (No. 91)	36
Bundesgesetz vom 14. Dezember 1973 betreffend die Arbeitsverfassung (Arbeitsverfassungsgesetz - ArbVG)	36
ILO, Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1949 (No. 98)	31
ILO, Convention concerning Freedom of Association and Protection of the Right to Organise, 1948 (No. 87)	31
Austrian Disability Employment Act	10, 23, 24, 26, 30
Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation	9, 24, 26
Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163, available at: https://www.refworld.org/docid/3ae6b3678.html [accessed 6 April 2021]	26
United Nations Convention on the Rights of Persons with Disabilities	10, 24, 26

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Statement of Relevant Facts

1. Claimant I - Anna

- XY Austria has introduced a new Mobile Working Guideline, which obliges every employee to work at least one day per week not at the office. This guideline has been introduced unilaterally and simply communicated to employees.
- Anna is working under a flex-time arrangement that allows her to determine the start and end time of her daily working hours herself within certain limits.
- On Thursday 8 October 2020, Anna works on her mobile working day from home and finishes her work at 6 p.m.
- The following day, 9 October 2020, she has an important internal meeting scheduled at the premises of XY Austria for 8 a.m. On 8 October, her supervisor Katharina phones her at 9 p.m. in order to talk through the details of the following day's meeting. Anna realizes that her supervisor is trying to reach her but does not pick up the phone.
- At the next day's meeting, Katharina is furious as Anna is, in Katharina's eyes, not fully prepared since Anna's view is not aligned with her position. Once the meeting is over, she dismisses Anna with immediate effect.

2. Claimant II - Ferdinand

- XY Austria is a company that serves businesses in Austria, Germany, Switzerland, and the CEE region. The company employs approximately 500 employees and is highly profitable. The company has just invested in a new office complex in the center of Vienna.
- On 2 November 2020, Ferdinand had an accident. Subsequently, his ability to concentrate is reduced.
- Then he consulted an expert physician, who concluded first that Ferdinand's condition may continue for an indefinite period and second that Ferdinand's work environment would need to be adapted so that he can achieve a reasonably normal work output. Surrounding noise and visual distractions need to be minimized, which can best be achieved by him being able to occupy a single office.
- Ferdinand submitted his medical diagnosis to the Defendant and requested for a solution, wishing either to be supplied with a single office at the employer's premises or to be able to work from

home all days, with the Defendant providing proper work equipment, including an ergonomically appropriate chair, desk, monitor, PC, lightning, shading and air-conditioning.

- The Defendant's management found both of those proposals unreasonable and found out that he had to look after small children. The company proposed to supply Ferdinand with noise-cancelling in-ear headphones and mobile panels 60cm high that would provide some optical shields to the front and the two sides of the work-space that Ferdinand uses at the premises of the Defendant.
- Ferdinand believes the company would want to get rid of him.

3. Claimant III - Josef

- Josef is an IT freelancer. His qualification as a freelancer under Austrian law is uncontested.
- Josef has been working as a coder for XY on generally as well as specific solutions that XY Austria offers for four years on a freelance basis.
- He achieves 90% of his earnings by working for XY Austria.
- He has no employees himself and no permanent sub-contractors, although he sometimes (with the consent of XY Austria) outsources a few minor jobs to friends in Belarus whom he knows well.
- Although he is free to work wherever he chooses and has no obligation to work at the premises of XY Austria, most of his time he works at the XY Austria office.
- A collective bargaining agreement has entered into force in Austria that covers some terms and conditions of work for freelancers in the IT sector.
- Josef's monthly pay is not in line with such collective bargaining agreement.

Description of Relevant Legislation

1. International legislation

United Nations Convention on the Rights of Persons with Disabilities

This convention was adopted on 13 December 2006 at the United Nations Headquarters in New York, and was opened for signature on 30 March 2007. It clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made for persons with disabilities to effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced.

European Convention for the Protection of Human Rights and Fundamental Freedoms

A milestone document in the history of human rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948 as a common standard of achievements for all peoples and all nations.

2. Legislation of the European Union

Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time

This directive sets out certain rules regarding the organisation of working time.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

3. Austrian legislation

Austrian Federal Act on the Organisation of Working Time

This legal act lays down minimum requirements regarding hours of work, weekly rest and paid leave.

Collective Agreement 2020 for Employees of service providers in the field of automatic data processing and information technology

This collective agreement has been concluded between the Austrian Professional Association of Management Consultancy, Accounting and Information Technology of the Austrian Economic Chambers, on the one hand, and the Austrian Trade Union Federation, Union of Private Sector Employees - Graphical workers and Journalists, the economic sector Electrical and Electronics Industry, Telecommunication and IT, on the other hand. It is applicable to employees in the field of automatic data processing and information technology.

Austrian Act on White Collar Workers

This is a legal act applicable to white-collar workers, which are persons who are employed predominantly in commercial or other higher, non-commercial services or clerical office work.

Austrian Disability Employment Act

The main instrument about disability in Austrian law. This DEA constitutes the transposition in national law of international obligations on states to prevent discrimination based upon disability and to ensure the provision of reasonable accommodations for persons with disabilities, imposed by both Council Directive 2000/78/EC and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

Questions

1. Claimant I - Anna

- Was Anna legally required to answer her supervisor's phone call ?

- Was XY Austria entitled to dismiss Anna with immediate effect ?

2. Claimant II - Ferdinand

- Does Ferdinand fall within the definition of disabled person ?

- Are Ferdinands's requested accommodations reasonable ?

- Are XY Austria's offered accommodations reasonable ?

- Does Ferdinand have good reasons to believe that the company wants to get rid of him?

3. Claimant III - Josef

- Are the salary scales contained in the IT collective agreement applicable to Josef ?

- Must XY Austria pay the shortfall of his compensation when compared to the level provided for in the collective bargaining agreement ?

Summary of Arguments

1. Claimant I - Anna

Was Anna legally required to answer her supervisor's phone call ?

It will be argued that Anna had no legal obligation to answer her supervisor's phone call on 8 October 2020 at 9pm. Since there was no urgent business need, XY Austria did not have the contractual right to request Anna's availability outside her flex-timeframe. Anna's availability should also have been agreed upon in advance as part of her remote work agreement. Finally, she was entitled to reject the phone call in order to benefit from her daily rest period of 11 consecutive hours.

Was XY Austria entitled to dismiss Anna with immediate effect ?

Because Anna was not legally required to answer her supervisor's phone call, XY Austria was not entitled to dismiss her with immediate effect.

2. Claimant II - Ferdinand

Does Ferdinand fall within the definition of disabled person ?

Ferdinand falls within the definition of disabled person under the UN Convention on the Rights of Person with Disabilities, Directive 2000/78 and Austrian legislation. Ferdinand is thus protected against discrimination and need specific accommodation.

Are Ferdinands's requested accommodations reasonable ?

Ferdinand's requested accommodation can be considered reasonable regarding the directive. The charge they bring to the Defendant is not excessive regarding the cost and the set up.

Are XY Austria's offered accommodations reasonable ?

XY Austria's offered accommodation cannot be considered reasonable. It does not fit Ferdinand's needs.

Does Ferdinand have good reasons to believe that the company wants to get rid of him?

As XY Austria does not provide reasonable accommodation to Ferdinand, he cannot work in good conditions. This fact is constitutive of indirect discrimination and can lead him to resign. As a consequence, XY Austria should accept one of the proposed working adaptations suggested by Ferdinand to provide him reasonable accommodation suitable for his disabilities.

3. Claimant III - Josef

Are the salary scales contained in the IT collective agreement applicable to Josef ?

Josef falls under the scope of application of the collective agreement as regards the salary scales. Josef should be able to benefit from his fundamental right to bargain collectively.

EU antitrust law cannot hinder the exercise of that fundamental right in Josef's situation. Indeed, under the *FNV Kunsten* case-law, Josef can be considered a false self-employed. Therefore, the provisions of the IT collective agreement applying to Josef cannot, by reason of their nature and purpose, be subject to the scope of Article 101 TFEU.

Therefore, the salary scales contained in the 2020 IT collective agreement are applicable to Josef.

Must XY Austria pay the shortfall of his compensation when compared to the level provided for in the collective bargaining agreement ?

Stipulations in contracts of employment which are contrary to a collective agreement should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement.

Since the stipulations in Josef's contract regarding his monthly pay are contrary to the IT collective agreement, they should be replaced by the corresponding minimum basic salary contained in the IT collective agreement.

Arguments

1. Claimant I - Anna

Was Anna legally required to answer her supervisor's phone call ?

XY Austria dismissed Anna with immediate effect, on the grounds that she was not fully prepared for the meeting of 9 October 2020 since her position was not aligned with that of her supervisor. It is clear that Anna is in fact being blamed for not answering her supervisor's phone call at 9pm on 8 October 2020. It must therefore first be assessed whether Anna had a legal obligation to answer that phone call.

1) The phone call occurred outside the flex-timeframe

Anna is working under a flex-time arrangement. Under §4b of the Federal Act on the Organisation of Working Time, Anna may decide for herself about the beginning and end of her normal daily working hours within an agreed timeframe.

In accordance with Article 5 (b) of her Employment Contract, that timeframe is Monday through Friday from 7am until 9pm. That article further states that : « within those limits the Employee may allocate his/her working hours upon their own decision, taking into account urgent business needs. Working hours outside such timeframe are permissible only upon the Employer's specific instruction. (...) In case of urgent business needs, the Employer reserves the right to request the Employee's availability, and any hours so worked will count as overtime-work if allocated outside the flex-timeframe ».

On 8 October 2020, Anna decided to finish her work at 6pm. Anna's supervisor Katharina tried to reach her at 9pm, that is, outside the limits of Anna's flex-timeframe. Katharina had the right to request Anna's availability outside the timeframe only in case of urgent business needs.

It cannot be argued that preparing an internal meeting, which was only meant to be attended by XY Austria's team, is an urgent business need. Even if Anna's view was not aligned with Katharina's position, that could not have had any major consequence on the course of the meeting, nor on the good functioning of the business. Additionally, one could expect that if that meeting was as important as what the Defendant claims, Katharina would not have waited until 9pm the day before to prepare it.

Since there was no urgent business need, XY Austria did not have the contractual right to request Anna's availability outside her flex-timeframe.

2) Availability when performing remote work must be agreed upon

Article 9 (I) (2) of the IT collective agreement states : « Remote work shall apply when the employee temporarily or regularly performs part of his work at a previously agreed location outside of the permanent company premises in agreement with the employer ».

XY Austria has introduced a new Mobile Working Guideline, according to which every employee is obliged to work at least one day per week not at the office. Anna is now regularly performing part of her work outside the premises of the company. Therefore, Anna is performing remote work.

According to Article 9 (I) (3) of the IT collective agreement, « a remote work agreement is voluntary, both on the part of the employee and the employer » and « requires a written agreement between the employer and the employee ».

The Mobile Working Guideline has been introduced unilaterally by XY Austria. Therefore, it was not voluntary on the part of the employees. The guideline has simply been communicated to the employees, there has been no written agreement between XY Austria and its employees.

Article 9(I)(2) of the IT collective agreement states that « the location, availability, work equipment, and reimbursement of expenses for remote work must be agreed in advance in writing ». Furthermore, under Article 9 (II) of the IT collective agreement, « the employee's availability when performing remote work must be agreed upon. (...) The distribution of working hours between the permanent company premises and the agreed remote workplace is to be agreed in writing (Annex IV) ».

On 8 October 2020, Anna was working on her mobile working day from home. Her availability should have been agreed upon in advance. There should have been a written agreement between XY Austria and Anna regarding her working hours at the remote workplace.

XY Austria contravened the provisions of the collective agreement by unilaterally introducing the Mobile Working Guideline, without proper agreement of the employees. The company is now trying to blame Anna for not being available at 9pm. However, Anna did not agree to perform remote work at such a late time.

Since Anna's availability should have been agreed upon in advance as part of the remote work agreement, XY Austria did not have the right to request Anna's availability at 9pm.

3) Anna has a right to daily rest

§ 12 of the Austrian Federal Act on the Organisation of Working Time provides : « after termination of daily working time every worker shall be entitled to a minimum daily rest period of eleven hours ».

Accordingly, Article 4 (III) (2) of the IT collective agreement states : « following the daily working hours, an uninterrupted rest period of at least 11 hours is to be granted ».

The Court of Justice of the European Union (hereinafter, « CJEU ») has held that the right of every worker to a limitation of maximum working hours and to daily and weekly rest periods not only constitutes a rule of EU social law of particular importance, but is also expressly enshrined in Article 31(2) of the Charter of Fundamental Rights of the European Union (hereinafter « the Charter »), which Article 6(1) of the TEU recognizes as having the same legal value as the Treaties[1].

Article 3 of Directive 2003/88/EC concerning certain aspects of the organisation of working time[2] (hereinafter, « the WTD ») provides that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period. « Rest period » means any period which is not working time[3]. The CJEU has ruled in its *Simap* judgement that the concept of working time is placed in opposition to rest periods, the two being mutually exclusive[4].

XY Austria dismissed Anna with immediate effect because she did not answer her supervisor's phone call at 9pm on 8 October 2020.

However, on 9 October 2020, Anna had an important internal meeting scheduled at the premises of XY Austria for 8am. Consequently, in order for her minimum daily rest period of 11 hours to be complied with, Anna's working time on 8 October had to end at the latest at 9pm. Anna was therefore entitled to

[1] Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE* [2019] CJEU, para 30.
[2] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ L 299, 18.11.2003, p. 9).
[3] Article 2 (2) of the WTD.
[4] Case C-303/98 *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] CJEU, para 47.

reject Katharina's phone call at 9pm. Indeed, answering her supervisor's phone call can be considered working time for the following reasons :

a) Defining working time

Article 2 (1) of the WTD defines « working time » as any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice.

The CJEU ruled that the concepts of working time and rest period within the meaning of Article 2 of the WTD may not be interpreted in accordance with the requirements of the various legislations of the Member States but constitute concepts of Community law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of that directive[5].

The CJEU provided further interpretation of what has to be understood by « working time ».

In its *Simap* judgement, the CJEU held that time spent on call by doctors in health centres must be regarded in its entirety as working time if they are required to be present at the health centre[6]. The decisive factor in considering that the characteristic features of the concept of working time are present in the case of on-call duty is that the worker is required to be physically present at the place determined by the employer and to be available to the employer in order to be able to provide the appropriate services immediately in case of need[7]. On-call time must therefore be regarded as wholly working time, irrespective of the fact that, during periods of on-call time, the person concerned is not continuously carrying on any professional activity[8].

« On call time » should, however, be distinguished from a « stand-by system ». In the *Matzak* case, the CJEU held that, in the situation of a stand-by system which required that the worker be permanently accessible without being required to be present at the place of work, even if he is at the disposal of his employer, since it must be possible to contact him, in that situation the worker may manage his time with

[5] Case C-151/02 *Landeshauptstadt Kiel v Norbert Jaeger* [2003] CJEU, para 58.
[6] Case C-303/98 *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] CJEU, paras 49-52.
[7] Case C-14/04 *Abdelkader Dellas and Others v Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité* [2005] CJEU, para 48.
[8] Joined cases C-397/01 to C-403/01 *Bernhard Pfeiffer (C-397/01), Wilhelm Roith (C-398/01), Albert Süß (C-399/01), Michael Winter (C-400/01), Klaus Nestvogel (C-401/01), Roswitha Zeller (C-402/01) and Matthias Döbele (C-403/01) v Deutsches Rotes Kreuz, Kreisverband Waldshut eV*. [2004] CJEU, para 93.

fewer constraints and pursue his own interests. In those circumstances, only time linked to the actual provision of services must be regarded as « working time », within the meaning of the WTD[9].

Anna cannot be considered as performing on-call time. On 8 October 2020, she had no obligation to be present at her workplace to perform services. She was able to manage her time with few constraints and pursue her own interests.

Although neither the IT collective agreement, nor Austrian law make provision for a stand-by system, this concept is recognized under EU law. Anna's situation can be compared to that of a worker performing stand-by services. She was not required to be at a specific place, but it was possible to contact her. In those circumstances, it is the time linked to the actual provision of services that must be regarded as « working time ».

Time spent by a worker answering a phone call from a supervisor with the aim of preparing a meeting is undoubtedly linked to the actual provision of services. Being on the phone and actively preparing a working session makes it impossible for a worker to simultaneously manage his time and pursue his own interests. That is the case, even if the work provided in that situation is not as intense as the usual duties of the worker.

Indeed, the intensity of the work done by the employee and his output are not among the characteristic elements of the concept of « working time » within the meaning of that directive[10].

Therefore, if Anna had answered her supervisor's phone call, the time spent on the phone in order to prepare the meeting would have been linked to the actual provision of services. She would have been working, at her employer's disposal and carrying out her duties. That time would have been considered « working time » within the meaning of the WTD.

Nevertheless, Article 3 of the WTD requires a « consecutive » rest period of 11 hours, which means that that period cannot be interrupted. The CJEU has ruled that « in order to ensure the effective protection of the safety and health of the worker, provision must as a general rule be made for a period of work regularly to alternate with a rest period. In order to be able to rest effectively, the worker must be able to remove himself from his working environment for a specific number of hours which must not only be

[9] Case C-518/15 *Ville de Nivelles v Rudy Matzak* [2018] CJEU, para 60.
[10] Case C-14/04 *Abdelkader Dellas and Others v Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité* [2005] CJEU, para 43.

consecutive but must also directly follow a period of work in order to enable him to relax and dispel the fatigue caused by the performance of his duties »[11].

If Anna had answered Katharina's phone call, she would have provided services, and therefore, it would have been working time. Because of this interruption, she would not have benefited from a daily rest period of 11 consecutive hours, and could not have rested effectively before the meeting of 9 October.

Therefore, Anna was legally entitled to reject her supervisor's phone call.

b) Derogations

Article 18 of the WTD allows for derogations from Article 3 by means of collective agreements. Article 18 stipulates that those derogations shall be allowed on condition that equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned are afforded appropriate protection.

§ 12 (2) of the Austrian Federal Act on the Organisation of Working Time provides that rest periods may be reduced by collective agreement.

Article 4, III (2) of the IT Collective Agreement states the following :
« The daily rest period may be reduced to 10 hours if this reduction is balanced out with a corresponding extension of another daily or weekly rest period within the next 10 calendar days. The daily rest period may be reduced to 9 hours if - in addition to the balancing out within the next 10 calendar days - there are sufficient opportunities to rest and the reduction is not opposed by verifiable concerns from an occupational medicine point of view ».

The implementation of a derogation to the duration of the daily rest under Article 18, is expressly subject to the condition that the workers concerned are afforded equivalent periods of compensatory rest[12].

Such rest periods must follow on immediately from the working time which they are supposed to counteract in order to prevent the worker from experiencing a state of fatigue or overload owing to the accumulation of consecutive periods of work[13].

[11] Case C-151/02 *Landeshauptstadt Kiel v Norbert Jaeger* [2003] CJEU, para 95.
[12] Case C-151/02 *Landeshauptstadt Kiel v Norbert Jaeger* [2003] CJEU, para 90.
[13] Case C-151/02 *Landeshauptstadt Kiel v Norbert Jaeger* [2003] CJEU, para 94.

Since Anna was present at the meeting of 9 October at 8am, she could not have been afforded an equivalent period of compensatory rest directly following the working time of 8 October. Therefore, the condition that the worker concerned is afforded equivalent periods of compensatory rest is not met.

As a general rule, to accord such periods of rest only at other times not directly linked with the period of work extended owing to the completion of overtime does not adequately take into account the need to observe the general principles of protection of the safety and health of workers which constitute the foundation of the Community regime for organisation of working time[14].

Under the IT collective agreement, the daily rest period may be reduced to 10 hours if this reduction is balanced out with a corresponding extension of another daily or weekly rest period within the next 10 calendar days. This provision is not in line with EU law. Rest periods granted within the next 10 calendar days do not necessarily follow on immediately from the working time which they are supposed to counteract, and therefore do not adequately take into account the need to observe the general principles of protection of the safety and health of workers which constitute the foundation of the EU regime for organisation of working time. As a result, the condition that the worker is afforded equivalent periods of compensatory rest is not met.

As stated by the CJEU in its *Jaeger* case, it is only in entirely exceptional circumstances that appropriate protection may be accorded to the worker, where the grant of equivalent periods of compensatory rest is not possible on objective grounds »[15].

The CJEU pointed out that it is only the particular nature of the work or the particular circumstances in which that work is carried out that creates the possibility, exceptionally, to derogate from Article 3 of the WTD and the obligation to ensure a regular alternation of a period of work and a period of rest[16].

The principle remains that Member States are required to ensure that the effectiveness of the rights protected by the WTD is guaranteed in full, by ensuring that workers actually benefit from the minimum daily rest periods[17].

As developed above, preparing an internal meeting, which was only meant to be attended by XY Austria's team, cannot be considered an urgent business need. In that regard, it must also be added that under

[14] Case C-151/02 *Landeshauptstadt Kiel v Norbert Jaeger* [2003] CJEU, para 97.
[15] Case C-151/02 *Landeshauptstadt Kiel v Norbert Jaeger* [2003] CJEU, para 98.
[16] Case C-428/09 *Union syndicale Solidaires Isère v Premier ministre and Others* [2010] CJEU, para 60.
[17] Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE* [2019] CJEU, para 42.

Recital 4 of the preamble of the WTD, the improvement of workers' safety and health at work is an objective which should not be subordinated to purely economic considerations.

In the present case, it is clear that nothing, as regards the nature of the work or the circumstances in which that work is carried out, can justify the exceptional possibility to derogate from Article 3 of the WTD, which sets an absolute minimum of 11 hours of daily rest.

Since the condition that the worker is afforded equivalent periods of compensatory rest is not met, and since there are no entirely exceptional circumstances that enable appropriate protection to be accorded to the worker, there are no possible derogations to Anna's daily rest period.

Therefore, Anna had no obligation to answer her supervisor's phone call during her daily rest period.

It must be concluded that Anna was not legally required to answer her supervisor's phone call, for the following reasons :

- In the absence of an urgent business need, Anna had no obligation to work outside the limits of her flex-timeframe ;
- Anna's availability should have been agreed upon in advance as part of the remote work agreement ;
- Anna cannot be required to answer her phone during her daily rest period of 11 consecutive hours.

Was XY Austria entitled to dismiss Anna with immediate effect ?

Article 30 of the Charter grants every worker the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.

§ 27 of the Austrian Act on White Collar Workers states :
« An important reason entitling the employer to dismissal with immediate effect shall be considered in particular:

1. if the employee (…) is guilty of an act which makes him/her appear unworthy of the confidence of the employer;
   (…)

Anna was not legally required to answer Katharina's phone call. It should also be noted that Anna's employment contract contains the following clause : « The Employee must ensure that all statutory

working hour limits will be fully complied with, in particular with respect to the maximum daily working hours, the maximum weekly working hours, and the daily rest period ».

Not only was Anna entitled to reject her supervisor's call, but even more so, she was contractually obliged to do so.

She can therefore not be considered guilty of an act which makes her appear unworthy of the confidence of her employer.

Another reason entitling the employer to dismissal with immediate effect is « if the employee, without a legitimate reason, fails to perform the service for a considerable period of time taking into account the circumstances, or if he/she persistently refuses to perform his/her services or to comply with the employer's orders justified by the nature of the service, or if he/she attempts to induce other employees to disobey the employer[18] ».

Anna did not fail to perform a service for a considerable period of time. She did not answer her phone at a very late time in the evening, while she had been available and working all day. She did not persistently refuse to comply with her employer's orders. She only received one call that she denied.

Moreover, she had several legitimate reasons for rejecting that call. It occurred outside the limits of her flex-timeframe, and during her daily rest period. She also had not agreed in advance to be available as part of the remote work agreement.

It must be concluded that XY Austria was not entitled to dismiss Anna with immediate effect.

According to § 29 of the Austrian Act on White Collar Workers, if the employer dismisses an employee with immediate effect without good cause, « the employee shall, without prejudice to further damages, retain his contractual entitlement to remuneration for the period which should have elapsed until the termination of the employment relationship by the expiry of the specified contractual period or by proper termination by the employer giving notice (…) ».

Consequently, Anna retains her contractual entitlement to remuneration for the period which should have elapsed until proper termination of the employment relationship.

[18] § 27 (4) of the Austrian Act on White Collar Workers.

§ 20 of the Austrian Act on White Collar Workers states that « the employer may terminate the employment relationship at the end of each calendar quarter by giving prior notice. The period of notice shall be six weeks and shall be increased to two months after the completion of the second year of service, (…).
(…) it may be agreed that the period of notice shall end on the fifteenth or last day of a calendar month ».

According to Article 3 of Anna's Employment Contract, « the employment can be terminated by XY Austria under the statutory periods of notice with effect as of the 15th and last day of any calendar month as the termination date ».

Anna's employment contract applied with effect on 1 February 2019. She was dismissed on 9 October 2020. Therefore, Anna had less than two years of service and is entitled to a period of notice of six weeks.

If XY Austria had given notice on 9 October, the period of notice would have ended on 30 November, which is the last day of the calendar month after the six weeks period. Anna is therefore entitled, under § 29 of the Austrian Act on White Collar Workers, to receive remuneration for the whole months of October and November 2020. Anna's salary amounts 2,100.00 Euros (gross) per month.

Consequently, XY Austria must pay Anna the amount of 4,200.00 Euros (gross).

2. Claimant II - Ferdinand

Does Ferdinand fall within the definition of disabled person ?

Whether the Claimant is entitled to ask the Defendant for reasonable accommodation depends on his recognition as a disabled person. This question is to be treated under the Austrian Disability Employment Act (DEA).

Article 3 of the DEA provides a definition of disability : « Disability is the impact of a physical, mental or psychological impairment or impairment of sensory functions which is not merely temporary and which is likely to make participation in working life more difficult. A period of more than six months is considered to be not only temporary ».

The DEA transposes the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). These instruments provide a similar description of disability but they deal with « long term disability » while Austrian law envisages a period of « more than six months ».

There is no doubt that the Claimant's impairments (lack of concentration) constitute a disability which prevents him from working normally, even at the moment when the Claimant first asked for specific accommodation. This is confirmed by a medical diagnosis and by the behavior of the Defendant, who proposed accommodations, therefore confirming the presence of a disability. Moreover, by the time the present conclusions are delivered, the 6 months period has expired.

However, should the Defendant argue that there was no need for reasonable accommodations at the time the Claimant first asked them, because at that time the 6 months period had not yet expired, this argument must be rejected for the following reasons :

Firstly, Austrian law provides that « a period of more than six months is considered to be not only temporary », but does not state that less than 6 months is not. Furthermore, it is for the national court to determine whether a person is disabled, and the fact that a person meets the definition in national law does not mean that he or she will meet it in EU law[19].

Secondly, Austrian law should be interpreted in line with the UNCRPD and EU case-law[20] [21].

a) The UNCRPD does not contain a time limit, but describes what a disability could be and leaves room for more interpretations. Preparatory works indicate that « the Convention does not restrict coverage to particular persons ; rather, the Convention identifies persons with long-term physical, mental, intellectual and sensory disabilities as beneficiaries under the Convention. The reference to "includes" assures that this need not restrict the application of the Convention and States parties could also ensure protection to others, for example, persons with short-term disabilities or who are perceived to be part of such groups ». Preparatory works also indicate that long-term is not a fixed element : « There is recognition that, "disability" is an evolving concept

[19] Case C-270/16 *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal* [2018] CJEU, para 32-33.

[20] Case C-363/12 *Z. v A Government department and The Board of management of a community school* [2014] CJEU, para 73.

[21] Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (C-337/11)* [2013] CJEU, para 32 ; Case C-363/12 *Z. v A Government department and The Board of management of a community school* [2014] CJEU, para 75.

resulting from attitudinal and environmental barriers hindering the participation of persons with disabilities in society. Consequently, the notion of "disability" is not fixed and can alter, depending on the prevailing environment from society to society ». Thus the UN members never meant to limit disability to long term and would never have wanted long term to be defined in terms of a fixed number of months as it is in Austrian law.

b) EU case-law does not either contain a time limit[22] [23]. The long-term nature of the limitation must be assessed in relation to the condition of incapacity, as such, of the person concerned at the time of the alleged discriminatory act adopted against him. It is for the referring court to determine whether the limitation of the capacity of the person concerned is or is not « long-term », as such an assessment is, first and foremost, factual in nature[24]. The evidence which makes it possible to find that a limitation of capacity is « long term » include the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or the fact that that incapacity is likely to be significantly prolonged before that person has recovered.

Thirdly, a lack of a clear prognosis cannot exclude the Claimant from the disabled category. In this case, the duration of the Claimant's subsequent limitations cannot be predicted for now. After consulting an expert physician who made some tests and a brain scan, it appears that the Claimant's condition may well continue for an indefinite period and that there is no specific prognosis that his condition will improve over a certain period. In addition, disability is not considered as a medical condition, but rather as a result of the interaction between negative attitudes or an unwelcoming environment with the condition of particular persons.

In conclusion, the Claimant suffers from a disability now, but he also did at the time he first asked the Defendant for accommodation. As a consequence, his work environment has to be adapted and his employer shall provide him reasonable accommodation.

<u>Are Ferdinands's requested accommodations reasonable ?</u>

[22] Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (C-337/11)* [2013] CJEU, para 47.
[23] Case C-270/16 *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal* [2018] CJEU, para 28 ; Case C-406/15 *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol* [2017] CJEU, para 36 ; Case C-354/13 *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft, v Kommunernes Landsforening (KL)* [2014] CJEU para 59 ; Case C-363/12 *Z. v A Government department and The Board of management of a community school* [2014] CJEU, para 76 ; Case C-397/18 *DW v Nobel Plastiques Ibérica SA* [2019] CJEU, para 41.
[24] Case C-395/15 *Mohamed Daouidi v Bootes Plus SL and Others* [2016] CJEU para 53-56

The UNCRPD prohibits discrimination on the basis of disability which is defined in Article 2 as « any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation ». Article 21 of the Charter of Fundamental Rights of the European Union, Article 14 of the European Convention on Human Rights, Part V Article E of the revised European Social Charter, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and Article 7 of the Austrian DEA, include the same prohibition.

Article 5 of Council Directive 2000/78/EC of 27 November 2000 prescribes the employer to take appropriate measures to provide reasonable accommodation for disabled persons unless such measures are a disproportionate burden for the employer.

Reasonable accommodation is defined in Article 2 of the Convention as « necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms ».

Therefore, it is only possible for the employer to refuse to provide those accommodations when they are disproportionate.

Article 6 of the DEA indicates that « this burden shall not be disproportionate if it can be sufficiently compensated for by incentive measures under federal or provincial law ». According to the law, XY Austria has the possibility to apply for these compensation measures.

The CJEU held that the concept of « reasonable accommodation » must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers. The identification of reasonable accommodation should be made on the basis of an individual assessment of the needs of the person with a disability, the job and capability of what the employer can provide[25].

[25] Joined Cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab (C-335/11) and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (C-337/11)* [2013] CJEU, para 53-54.

In practice, there are many examples of reasonable accommodations. Recital 20 of the Directive states a non-exhaustive list : « adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources ».

In the present case, the Claimant has consulted an expert physician, who, after some tests and a brain scan, opined that the Claimant's work environment would need to adapt or be adapted so that he can achieve a reasonably normal work output. Specifically, surrounding noise and visual distractions need to be minimized, which can best be achieved by him being able to occupy a single office.

Following this diagnosis, the Claimant requested a solution to the Defendant and wishes either to be supplied with a single office at the employer's premises or to be able to work from home all days, with XY Austria providing proper work equipment, including an ergonomically appropriate chair, desk, monitor, PC, lightning, shading and air-conditioning, all in accordance with the new building features of the office.

The Defendant found both of these propositions unreasonable, and thus refuses them.

Is the Claimant's request a disproportionate burden for his employer ?

1) On the request for a single office

The Defendant refused to provide the Claimant a single office because it exists only for members of the Board of Management, costs for a separate office would seem very high and such a solution would also destroy the open floor spirit that has been carefully designed and established.

The CJEU has not yet provided additional clarifications on what might be viewed a disproport ionate burden.

Recital 21 of the directive states : « To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance ».

From this Recital, it can be concluded that a « disproportionate » burden exists in case the accommodation required entails a significant financial cost for

the employer, which is not financially sustainable for the entity in question taking into account the subsidies available.

The Defendant is a company that serves businesses in Austria, Germany, Switzerland, and the CEE region. The company employs approximately 500 employees and is highly profitable. Furthermore, the company has just invested in a new office complex in the center of Vienna. These elements show that for such an entity, the measure proposed cannot be considered as entailing a significant cost, which is not financially sustainable. In addition, the Defendant had the possibility to apply for subsidies that would cover these costs. If there is no available office for the Claimant, it would be easy to create an isolated space using low cost materials such as « OSB » panels.

The facts that single offices only exist for the board of management and that it would destroy the spirit of the open floor are irrelevant because the company has to respect national and international legislation about disability at work. These legislations require a specific treatment for disabled workers that cannot be found respecting this open floor spirit.

Therefore, the request of the Claimant for a single office should not be considered disproportionate.

2) On the request to work from home

The Claimant requests to work from home and his employer to provide him working equipment including an ergonomically appropriate chair, desk, monitor, PC, lightning, shading and air-conditioning, all in accordance with the new building features of the office.

This request is reasonable because the Claimant will stay at home every working day, compared to the other workers who will benefit from this equipment at the workplace up to 4 days out of 5.

The Defendant objects to a permanent home office arrangement in light of the difficulty this would create for attending meetings, the reduced level of communication with co-workers and the potential precedent that this would set.

Contrary to what the Defendant argues, this would not set a precedent because, as mentioned above, a particular situation needs a particular solution. Not every worker will be allowed to work at home like the Claimant. This measure only responds to the Claimant's particular needs and would not reduce communication with other employees more than the solution proposed by the employer (see below). On the contrary, it would facilitate it : in the case of the solution proposed by the Defendant, the Claimant

would be isolated from his working environment, which would not be the case at home with a video conferencing tool. Furthermore, this would not create difficulties to attend meetings as the company is already functioning on a hybrid system at home and at work with an efficient telework system.

In addition, the decision not to grant the Claimant work at home is unjustified because the Defendant based it on the fact that the Claimant has three children in the age group of 1-5 years and that his wife pursues a promising career as an academic scientist, having just taken up again her previous full-time position. The family scrambles to find appropriate child-care facilities. To base a decision on these premises constitutes a violation of the right to private and family life which is protected inter alia by article 8 of the European Convention on Human Rights. Combined with article 14, this leads to a prohibited discrimination based on family responsibilities.

Are XY Austria's offered accommodations reasonable ?

The Defendant proposes instead to supply the Claimant with noise-cancelling in-ear headphones and mobile panels 60 cm high that would provide some optical shields to the front and the two sides of the work-space that the Claimant uses at the premises of XY Austria.

In this regard, it appears that the solution offered by the Defendant is not sufficient to provide the Claimant a reasonable accommodation.

Firstly, the Claimant will not have a determined desk because the company's new policy is « first come first served ». The Claimant's workload will be increased as he will have to transport his equipment every morning and look for a workspace to install it and he will have to put this equipment away at the end or the day.

Secondly, the Claimant would need to wear headphones and be surrounded by isolating panels. This offer is not suitable because working all day long with this equipment would not be sustainable for any worker. In addition, it is unclear whether noise and visual distractions can be reduced sufficiently in the way suggested by the company. A single occupancy office isn't suggested by the Claimant himself but by an expert. As a consequence, it is sure it would fit the Claimant's disabilities and allow him to continue working.

For all these reasons, the Defendant's offer cannot be considered reasonable.

Does Ferdinand have good reasons to believe that the company wants to get rid of him?

In fact, treating the Claimant the way suggested by the Defendant would constitute a discrimination based upon disability because it means treating the same way different situations, to require the Claimant to go at work in the same conditions as his colleagues without taking his disability needs into account.

In the *Nobel Plastiques Ibérica SA* case, the Court stated that a dismissal of an employee with disabilities on the basis of objective criteria consisting of having productivity below a given rate, a low level of multi-skilling in the undertaking's posts and a high rate of absenteeism, without taking appropriate measures to accommodate them, constitutes indirect discrimination on the ground of disability.

In other words, the Court recognized the failure of provision of reasonable accommodation as the reason why it concluded the dismissal of the employee was discriminatory.

In the present case, the Defendant doesn't want to dismiss the Claimant but by not answering the Claimant's need, the Defendant pushes the defendant to resign because he cannot work normally.

Article 7c para. 2 of the DEA provides a definition of Indirect discrimination which « occurs where an apparently neutral provision, criterion or practice, or characteristic of a particular area of life, is liable to put disabled persons at a particular disadvantage compared with non-disabled persons, unless that provision, criterion or practice, or characteristic of a particular area of life, is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary ». As exposed before, the decision of the Defendant to refuse the Claimant's request is unjustified and the solution proposed by the Defendant is not appropriate and necessary.

As a consequence, the Defendant has the obligation to accept one of the Claimant's suggestions.

3. Claimant III - Josef

Are the salary scales contained in the IT collective agreement applicable to Josef ?

The IT collective agreement is applicable :

« (…) b) technically : for all member businesses of the Austrian Professional Association of Management Consultancy, Accounting and IT of the Austrian Economic Chambers which have a trade license for services in the field of automatic data processing and information technology;
c) personally : for all employees subject to the Austrian Act on Salaried Employment who are employed by businesses covered by the aforementioned technical scope as well as apprentices. Salary scales are also applicable to freelance workers in this sector »[26].

XY Austria is a service provider in the field of automatic data processing and information technology. Therefore, the IT collective agreement is applicable to its employees. Salary scales are also applicable to freelance workers in this sector. Josef is a freelancer under Austrian law. Consequently, the salary scales contained in the IT collective agreement are applicable to him.

It must be recalled that the right to bargain collectively has been explicitly recognized as a fundamental right in a number of international documents.

ILO Convention No. 98[27] recognizes the right to bargain collectively.

The European Court of Human Rights has decided in its *Demir and Baykara* case that « the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention[28] ».

The European Union has also recognized the right to collective bargaining as a fundamental right in Article 28 of the Charter.

Josef should be able to benefit from his fundamental right to bargain collectively.

XY Austria may argue that this right is a fundamental right of workers, and does not extend to freelancers.

However, Article 2 of ILO Convention No. 87[29] states : « Workers and employers, <u>without distinction whatsoever</u>, shall have the right to establish and, subject only to the rules of the organisation concerned,

[26] Article 2 of the IT collective agreement
[27] ILO, Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1949 (No. 98).
[28] Case *Demir and Baykara v. Turkey* [2008] ECHR 1345, para 154.
[29] ILO, Convention concerning Freedom of Association and Protection of the Right to Organise, 1948 (No. 87).

to join organisations of their own choosing without previous authorization ». This fundamental convention is in force in Austria.

It may be argued that extending the scope of a collective agreement to non-employees is prohibited under EU antitrust law.

Indeed, Article 101(1) TFEU prohibits « all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market », and in particular those which « directly or indirectly fix purchase or selling prices or any other trading conditions ».

The CJEU stated in its *Albany* decision that « certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to [Article 101 TFEU] when seeking jointly to adopt measures to improve conditions of work and employment[30] ».

According to the *Albany* case-law, a collective agreement is « by reason of its nature and purpose » falling outside the scope of Article 101 under the following two conditions : (1) the agreement improves conditions of work and employment, and (2) it is an outcome of collective negotiations between organizations representing employers and workers[31].

1) Improvement of conditions of work and employment

This condition has been interpreted broadly by the CJEU[32]. In the *FNV Kunsten* case, a collective labour agreement relating to musicians substituting for members of an orchestra laid down minimum fees not only for substitutes hired under an employment contract, but also for self-employed substitutes.

[30] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] CJEU, para 59.
[31] Tamás Gyulavári, « Collective rights of platform workers: The role of EU law » [2020] *Maastricht journal of European and comparative law* 415.
[32] Tamás Gyulavári, « Collective rights of platform workers: The role of EU law » [2020] *Maastricht journal of European and comparative law* 415.

The CJEU stated that the minimum fees scheme put in place by the provision in the collective labour agreement directly contributes to the improvement of the employment and working conditions of those substitutes[33].

Minimum salary scales such as those put in place by the IT collective agreement relate to a core element of collective agreements, namely wages[34]. They directly contribute to the improvement of the employment and working conditions. Consequently, the IT collective agreement does not, by reason of its purpose, fall within the scope of Article 101 TFEU.

2) The agreement is an outcome of collective negotiations between organizations representing employers and workers

To be excluded from the scope of Article 101, a collective agreement must be the result of collective bargaining between employers and employees[35].

The CJEU stated in the *FNV Kunsten* case that a provision of a collective labour agreement, in so far as it was concluded by an employees' organisation in the name, and on behalf, of the self-employed services providers who are its members, does not constitute the result of a collective negotiation between employers and employees, and cannot be excluded, by reason of its nature, from the scope of Article 101(1) TFEU[36].

However, the CJEU found that such a provision of a collective labour agreement may be regarded also as the result of dialogue between management and labour « if the service providers, in the name and on behalf of whom the trade union negotiated, are in fact 'false self-employed', that is to say, service providers in a situation comparable to that of employees[37] ».

The classification of a « self-employed person » under national law, for tax, administrative or organizational reasons, does not prevent that person being classified as an employee within the meaning of EU law if his independence is merely notional, thereby disguising an employment relationship[38].

[33] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] CJEU, para 39.
[34] Case E-8/00 *Norwegian Federation of Trade Unions and Others v Norwegian Association of Local and Regional Authorities and Others* [2002] EFTA, para 53.
[35] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] CJEU, para 59.
[36] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] CJEU, para 30.
[37] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] CJEU, para 31.
[38] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] CJEU, para 35-36.

Even if he is considered a freelancer under Austrian law, Josef may be considered an employee within the meaning of EU competition law, because he is in fact a « false self-employed ».

Under the *FNV Kunsten* case-law, to be considered a false self-employed, and thereby included in the EU notion of worker, a person must comply with the following test[39] :

a) Acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work (direction/control test)

« Direction » has been significantly watered down by the CJEU[40]. In the *Danosa* case, the CJEU found that the fact that Ms Danosa was a member of the Board of Directors of a capital company is not enough in itself to rule out the possibility that she was in a relationship of subordination to that company[41]. The CJEU found that even though Ms Danosa enjoyed a margin of discretion in the performance of her duties, she had to report on her management to the supervisory board and to cooperate with that board[42].

Even though Josef is technically free to work wherever he chooses and has no obligation to work at the premises of XY Austria, most of his time he works at the XY Austria office. He works for XY 90% of his working time. Therefore, his freedom to choose his working hours is limited.

Because he depends on XY for his living, he must also, in practice, comply with the guidelines of XY regarding the way he performs his work. Therefore, he has to report and cooperate with XY Austria.

Josef is undoubtedly in a relationship of subordination to XY Austria. He does not enjoy more independence and flexibility than employees who perform the same activity[43].

[39] Tamás Gyulavári, « Collective rights of platform workers: The role of EU law » [2020] *Maastricht journal of European and comparative law* 417.
[40] Emanuele Menegatti, « The Evolving Concept of "worker" in EU law » [2019] 12(1) *Italian labour law e-journal* <https://doi.org/10.6092/issn.1561-8048/9699> accessed 15 April 2021, 80.
[41] ETUI contributors, « The concept of 'worker' in EU law: status quo and potential for change » [2019] ETUI, The European Trade Union Institute <https://www.etui.org/fr/publications/rapports/the-concept-of-worker-in-eu-law-status-quo-and-potential-for-change> accessed 15 April 2021, 60.
[42] Case C-232/09 *Dita Danosa v LKB Līzings SIA* [2010] CJEU, para 49.
[43] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] CJEU, para 37.

b) For the duration of that relationship, forms an integral part of that employer's undertaking, thus forming an economic unit with that undertaking (integration into the employer's business organization)

Josef forms an integral part of XY Austria : he has been working for XY for four years. Most of the time he works at the XY office. He works as a coder on the web-based solutions that XY offers to its clients. Therefore, Josef forms an economic unit with XY Austria.

c) Does not independently determine his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking, so that his independence is merely notional (economic dependence/reality)

Josef does not independently determine his own conduct on the market because his main contractual partner is XY Austria. He provides the services in person. He has no employees himself and no permanent sub-contractors. It is true that Josef outsources a few minor jobs to friends in Belarus whom he knows well. However, this right is limited by XY's consent.

Josef is entirely dependent on XY Austria. He achieves 90% of his earnings by working for XY. He is therefore economically dependent on a single employer for his source of income. This economic dependance is precisely the reason why he needs employment protection, and thus to benefit from collective agreements[44]. He is in a situation comparable to that of employees.

Josef also does not bear any of the financial or commercial risks arising out of XY's activity. He is an auxiliary within the undertaking.

Since Josef acts under the direction of his employer, does not share in the employer's commercial risks, and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking, he can be considered a false self-employed. Therefore, the provisions of the IT collective agreement applying to Josef may be regarded as the result of dialogue between management and labour.

They cannot, by reason of their nature and purpose, be subject to the scope of Article 101 TFEU.

[44] Tamás Gyulavári, « Collective rights of platform workers: The role of EU law » [2020] *Maastricht journal of European and comparative law* 421.

In the alternative, should this Court consider that Josef is an undertaking, the provisions of the collective agreement applying to him do not necessarily fall within the prohibition laid down in Article 101(1) TFEU[45]. To determine whether this article has been infringed, it is necessary, on the one hand, to take into account the objectives of the collective agreement and the context in which it was adopted and, on the other hand, to examine whether the restrictive effects on competition resulting from it are inherent and proportionate to the pursuit of those objectives[46].

Protecting the economically dependent self-employed is a legitimate objective, aiming at full employment and social progress, as well as promoting social justice and protection, which are important objectives of the EU under Article 3 TEU.

Applying salary scales to those self-employed, in the same way that they are applicable to employees, is necessary to ensure a better balance of power within their relations to their single employer. Therefore, the restrictive effects on competition resulting from the provisions of the collective agreement applying to freelancers, are inherent and proportionate to the pursuit of those objectives.

Must XY Austria pay the shortfall of his compensation when compared to the level provided for in the collective bargaining agreement ?

Under Article 3 of ILO Recommendation No. 91[47], employers and workers bound by a collective agreement should not be able to include in contracts of employment stipulations contrary to those contained in the collective agreement. Stipulations in such contracts of employment which are contrary to a collective agreement should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement.

Accordingly, § 3 of the Austrian Labour Constitution Act[48] provides that the provisions of collective agreements may not be repealed or restricted by a works agreement or an employment contract.

[45] Joined Cases C-427/16 and C-428/16, *„CHEZ Elektro Bulgaria" AD v Yordan Kotsev and „FrontEx International" EAD v Emil Yanakiev*, [2017] CJEU, para 53.
[46] Adela Boitos and Manuel Kellerbauer, « Chapitre 4 - Le droit des prestataires de services économiquement dépendants de conclure des conventions collectives de travail au regard du droit de l'Union européenne » in Dumont, D. et al. (dir.), *Le droit de négociation collective des travailleurs indépendants* (1st edition, Brussels, Larcier, 2020), p. 102.
[47] ILO Recommendation concerning Collective Agreements, 1951 (No. 91).
[48] Bundesgesetz vom 14. Dezember 1973 betreffend die Arbeitsverfassung (Arbeitsverfassungsgesetz - ArbVG).

Since the stipulations in Josef's contract regarding his monthly pay are contrary to the IT collective agreement, they should be replaced by the corresponding minimum basic salary contained in the IT collective agreement. Those salary scales are applicable as of 1 January 2020[49].

XY Austria must therefore pay the shortfall of his compensation as of 1 January 2020, when compared to the level provided for in the 2020 IT collective agreement.

[49] Article 3(1) of the IT collective agreement.

Pleadings

For the foregoing reasons, the Claimants respectfully and humbly requests this Court to adjudge and declare that :

1. Anna has been wrongfully dismissed ;

2. XY Austria must pay Anna the amount of 4,200.00 Euros (gross) ;

3. Ferdinand has the quality of disabled person ;

4. XY Austria must accept one of the Ferdinand's requests ;

5. XY Austria must pay the shortfall of Josef's compensation as of 1 January 2020, when compared to the level provided for in the 2020 IT collective agreement.