

BelgiumD

HS MCC 2021

Statement for Defendant

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Statement of Relevant Facts

1. Defendant against Anna (claimant I)

- Anna worked as an employee of XY Austria under a flex-time arrangement.
- Friday 9 October 2020 an important meeting was scheduled at XY Austria at 8 a.m.
- The New Mobile Working Guideline introduced by XY Austria states that every employee is obliged to work at least one day per week not at the office. Anna worked on Thursday 8 October 2020 on her mobile working day from home.
- At 9 p.m. Anna's supervisor, Katharina, called Anna in order to prepare for the meeting on 9 October 2020 but Anna did not answer the phone call.
- The following day Katharina blames Anna for being obstructive and not being fully prepared for the meeting. She dismisses Anna with immediate effect.

2. Defendant against Ferdinand (claimant II)

- After an accident on the 2nd of November 2020, Ferdinand's ability to concentrate has been reduced.
- A couple weeks after the accident Ferdinand consults an expert physician. After some tests the expert was not able to make a prognosis but nevertheless opines an adaptation of the workplace is needed to minimize surrounding noise and visual distractions.
- Ferdinand requests either a single office or to work from home and receive an ergonomically appropriate chair, desk, monitor, PC, lightning, shading and air-conditioning in line with the building features of the office.
- XY Austria has found the proposal for the single office unreasonable considering the high costs of a single office and the fact that it would destroy the open floor spirit.
- A permanent home office with the above mentioned work equipment would reduce the communication between the employees and create difficulties to attend meetings according to XY Austria.
- XY Austria did a counteroffer and suggested to provide Ferdinand with in-ear headphones and mobile panels to minimize distractions.
- Ferdinand is convinced XY Austria wants to get rid of him. He believes XY Austria is under the obligation to provide one of the suggested solutions.

3. Defendant against Josef (claimant III)

- Josef works as a freelancer for XY Austria and achieves 90% of his earnings by working for XY Austria.
- Josef is free to choose his place of work, but decides to work at the office of XY Austria.
- Josef is free to accept and deny work and is allowed to outsource some tasks as well.
- The Collective Agreement for employees of service providers in the field of automatic data processing and information technology has entered into force on 1 January 2020. The collective agreement provides salary scales that are also applicable to freelancers.
- The salary of Josef is not in line with the salary scale in the collective agreement.
- Josef claims the shortfall of his compensation for the last three years.

Description of Relevant Legislation

1. International legislation

United Nations Convention on the Rights of Persons with Disabilities

This convention intends to protect the rights and dignity of persons with disabilities, by obliging parties to promote and ensure the full enjoyment of human rights by persons with disabilities and ensure that persons with disabilities enjoy full equality under the law.

2. Legislation of the European Union

Charter of Fundamental Rights of the EU

This Charter aims to protect the fundamental rights of European Union citizens and residents. It also protects the working conditions of employees.

Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

This directive aims to improve the working conditions of employees so their safety and health at work is ensured.

Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.

This directive regulates the obligations of an employer regarding the information he is obliged to share with his employees.

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. (hereinafter “the Employment Equality Directive”).

This directive aims to combat discrimination on the grounds of disability, sexual orientation, religion and age on the workplace.

Directive 2003/88/EC 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.

Directive 2019/1152/EC of 20 June 2019 on transparent and predictable working conditions in the European Union.

This directive aims to protect and improve the working conditions in the EU.

3. Austrian legislation

Austrian Disability Employment Act

This act implements the Employment Equality Directive.

Austrian Act on White Collar Workers

This act applies to the employment relationship of white collar workers.

Austrian Federal Act on the Organisation of Working Time

This act implements the Working Time Directive.

Austrian Employment Contract Adaptation Act

This act sets out rules regarding the employment contract in order to protect the rights of employees.

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

This is a collective agreement for employees in the information technology providing rules regarding the working conditions.

Questions

1. Defendant against Anna

- Did Anna make any mistakes?
- Was Anna's dismissal with immediate effect justified?

2. Defendant against Ferdinand

- Can the condition of Ferdinand be considered a disability at the relevant time?
- Can the measures requested by Ferdinand be considered reasonable accommodation?
- Can the counteroffer of XY Austria be considered reasonable accommodation?

3. Defendant against Josef

- Are the salary scales in the collective agreement applicable to Josef?
- Does Josef have the right to claim the shortfall of his compensation for the last three years?

Summary of Arguments

1. XY Austria against Anna

Did Anna make any mistakes?

We first of all argue that Anna made multiple mistakes. She first of all did not answer her phone when her supervisor called, secondly she did not communicate with the company on her mobile working day and thirdly she was not fully prepared for the meeting.

Was Anna's dismissal with immediate effect justified?

Then we argue that, because of the above-mentioned mistakes, Anna's dismissal with immediate effect was justified. Regarding Anna's behaviour she appeared unworthy of the confidence of her employer and he could therefore dismiss her with immediate effect.

Was Anna's daily rest period respected?

Anna's rest period was respected. Her daily rest period could be reduced to 9 hours. Therefore, considering the meeting started at 8 a.m., she could have worked until 11 p.m. the day before.

2. XY Austria against Ferdinand

In first order: Can the condition of Ferdinand be considered a disability at the time of his requests?

In order to determine there is a discrimination, it is important to look at the condition at the time the alleged discrimination took place. There was no disability at the time XY Austria rejected the requests of Ferdinand, as the disability could not yet be considered long term. It is irrelevant that at the time of the pleadings his condition can be considered a disability.

In subordinated order: Can the measures requested by Ferdinand be considered reasonable accommodation?

It will be argued both requests are disproportional, taking into account the lack of public funding, the costs entailed, and the effect both measures have on the work environment.

In subordinated order: Can the counteroffer of XY Austria be considered reasonable accommodation?

The counteroffer XY Austria was willing to provide can be considered reasonable taking into account the low costs and the effectiveness of the measures.

3. XY Austria against Josef

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

It will be argued that the collective agreement cannot apply to self-employed service providers. Josef is a self-employed service provider, because he is not in a subordinated relation with XY Austria.

Does Josef have the right to claim the shortfall of his compensation for the last three years?

Because the collective agreement does not apply, Joseph is not entitled to the shortfall of his compensation for the last three years.

Arguments

1. Defendant against Anna

First of all, it should be noted that according to article 18 (3) of Directive 2019/1152 it is up to the employee to establish facts from which it may be presumed that there has been a dismissal on the grounds of the employee exercising their rights protected by the Directive. However, Anna fails to establish such facts. Consequently, it is not up to XY Austria to prove a justified dismissal.

By not answering the phone call of her supervisor, a day before an important meeting, whilst being fully aware the details of the meeting still needed to be discussed, Anna made multiple mistakes and consequently breached multiple provisions.

1. Anna should have answered the phone call

First of all, Anna made a mistake by not answering the phone call.

Anna is working under a flex-time arrangement. The timeframe for the flex-time is determined in her individual contract of employment. The timeframe shall be Monday through Friday from 7 a.m. until 9 p.m. Article 5 (b) of Anna's individual contract of employment states that when allocating her working hours she must take into account "*urgent business needs*".

Anna knew there was an important meeting scheduled the following day, Friday 9 October 2020. This can be considered an 'urgent business need'. It is important to note that an internal meeting can be just as important as an external one. It cannot be disputed that the information that is shared, or that was supposed to be shared, can be important for the good functioning of the company. Internal meetings are important because they are mainly about projects that should be performed in the short-term. During an internal meeting work tasks are planned, and problems related to the project can be solved. A meeting that is not constructive can create problems with the implementation of the work tasks. It is important for the attending employees that the meeting is clear, so they know what to do after the meeting took place. Anna created confusion by not sharing the same view as her supervisor. This could have been avoided by Anna picking up her phone the day before. The obstructive behavior of Anna resulted into a non-constructive meeting.

The meeting was not only a waste of time for all the attendees, it was also a heavy and wasteful cost of working hours for XY Austria. In addition, it also undermines Katharina's authority as a supervisor and causes harm to her reputation since Anna's view was not aligned with that of Katharina. Therefore, it can be concluded that the meeting can be seen as an urgent business need.

Katharina phoned Anna at 9 p.m. on Thursday 8 October 2020. Since article 5 (b) of her individual employment contract states that the timeframe for flex-time shall be "Monday through Friday (working days) from 7 a.m. until 9 p.m.", the phone call is still within the agreed timeframe for flex-time. Therefore, at that time, the employer still had to be able to reach Anna.

Besides, even if it would be considered outside the timeframe, then article 5 (b) of Anna's individual contract states that in case of urgent business needs, the employer has the right to request the employee's availability even outside the flex-timeframe. As stated before, the important meeting can be seen as an urgent business need. Any hours worked outside the flex-timeframe will count as overtime-work.

Article § 4b, 5 of the Federal Act on the Organisation of Working Time provides the Employer the possibility to request workers to work hours exceeding their normal working time. There is even no condition as "*urgent business needs*" mentioned in this article. The only condition is that the working hours shall be deemed to be overtime.

In addition, XY Austria wants to point out that Anna herself agreed to work under a flex-time arrangement, which has many advantages. An ILO report mentions the ability to better balance work with other, personal commitments¹, a EUROFOUND publication also states that flexible work can be a very effective stimulus to work-life balance and can increase productivity.² A good work-life balance is important for the well-being of employees, of which XY Austria is very concerned about. Therefore, XY Austria recognizes and promotes the employees' right to just conditions of work provided by article 2 of the European Social Charter, article 31 of the Charter of Fundamental Rights of the EU, article 7 of the International Covenant on Economic, Social and Cultural Rights, and article 2 of Directive 89/391.

¹ Eurofound and the International Labour Office, *Working anytime, anywhere*, (International Labour Organisation 2017) < <http://eurofound.link/ef1658> >, accessed 22 april 2021, 3.

² Eurofound, *Work-life balance and flexible working arrangements in the European Union*, (Eurofound 2017) < https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1741en.pdf > accessed 22 april 2021, 1.

XY Austria therefore also conceded with the requests of employees for options to work from home by introducing a new mobile working guideline.

However, with freedom comes responsibility. Anna cannot only profit from the benefits of flex-time work, she also has to fulfil her obligations. Anna cannot refrain from her responsibilities by not answering the phone. A flex-time arrangement requires flexibility from both sides.

XY Austria endorses the fact that it is important that an employee has sufficient rest but as the European Parliament itself already mentioned: “there is currently no specific Union law on the worker’s right to disconnect from digital tools, including information and communication technology (ICT), for work purposes.”³ Also in Austrian national law this right cannot be found. However, XY Austria values its employees and does not expect an employee to be available all the time. It should be noted that Anna could have expected a call from her supervisor, as she was aware an important meeting was planned the day after. The concept of good faith and duty of loyalty towards the employer allows an employer to expect an employee to work overtime, within reasonable limits.

2. Anna failed to communicate properly with her employer

A second fault made by Anna was by not communicating properly with her employer.

Article 9, (VII) (1) of the IT Collective Agreement states:

“Social integration and the employee’s communication with the company and employer should be guaranteed in spite of remote work.”

We first explain why this article is applicable and then explain why Anna failed to comply with this article.

According to article 9, (I) (2) of the Collective Agreement, ‘remote work’ is applicable:

“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”.

³ European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)).

According to this definition, article 9 applies to Anna's situation. She works regularly - one day per week - from home, and this in agreement with the employer.

The agreement that is required, is the New Mobile Working Guideline. This guideline obliges employees to work at least one day per week outside the office.

The company has the right to unilaterally introduce this Guideline as every single employment contract, including Anna's, contains the following clause:

“The Employee acknowledges that all employer policies and guidelines can be changed by the employer and will become enforceable and binding upon proper communication to the Employee.”⁴

This clause is valid. Article 5 (1) of Directive 91/533/EEC makes clear that certain aspects of the contract can be modified if the changes are “the subject of a written document to be given by the employer to the employee at the earliest opportunity and not later than one month after the date of entry into effect of the change in question.”

The European Court of Justice (hereinafter ‘the CJEU’) also stated that the conditions of an employment contract can be unilaterally altered “in so far as national law allows the employment relationship to be altered in a manner unfavourable to employees in situations other than the transfer of an undertaking”.⁵ The national Austrian law allows an employer to unilaterally change certain aspects of the working conditions: article § 2, 6 of the Employment Contract Adaptation Act provides the possibility to change the usual place of work on the conditions that the employee is notified in writing and no later than one month after it becomes effective.

Based on Anna's employment contract, article 5 (1) of Directive 91/533/EEC and article § 2 (6) of the Employment Contract Adaptation Act, two conditions can be identified: (1) the changes should be subject of a written document and (2) the employees should be notified in writing and no later than one month after it becomes effective.

⁴ Article 8, Anna's individual employment contract.

⁵ Case C-324/86 *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* [1988] CJEU. In the same way: Case C-343/98 *Renato Collino and Luisella Chiappero v Telecom Italia SpA* [2002] CJEU.

(1) The changes should be subject of a written document

This condition is fulfilled. The New Mobile Working Guideline is published on the company intranet. Directive 2019/1152, which will repeal Directive 91/533/EC, states in recital 24 that in the light of the increasing use of digital communication tools, information that is to be provided in writing can also be provided by electronic means.

(2) The employees should be notified in time

XY Austria gave very clearly substance to this communication requirement. All the employees have been informed on 9 September 2020. This is almost a month before the Guideline entered into force (1 October 2020). The Guideline is also accessible via the company intranet, which is easily accessible by all employees, at any time and even from outside the office.

The Mobile Working Guideline is therefore valid and binding and can be seen as the agreement which the Collective Agreement requires.

As a consequence, article 9, (VII) (1) of the Collective Agreement applies to the situation of Anna.

This article states that even in spite of remote work, social integration and the employee's communication with the company and employer should be guaranteed. Anna clearly failed to comply with this communication requirement.

Furthermore, Anna took no initiative at all to contact her supervisor during the day. Although she knew that an important meeting was scheduled the day after.

Second, she didn't answer her phone when Katharina tried to contact her and afterwards did not try to contact Katharina, although she could have done this, even in the morning just before the meeting since Anna's timeframe starts from 7 a.m. and the meeting was scheduled at 8 a.m. Any careful, professional and reasonable employee would have started on time if they missed a call from their supervisor on the day of an important meeting. Anna could perfectly have started her day at 7 a.m. since her timeframe for flex-time can be filled in from 7 a.m. until 9 p.m. and she finished working at 6 p.m. the day before.

Third, she never gave an explanation why she was unreachable. If there was a good reason for her to not pick up the phone, this could have been taken into account.

Therefore, Anna did not communicate at all with Katharina about the meeting on Friday 9 October 2020. At least a minimum of communication is required from a professional employee. Failing to do so is very negligent.

3. Anna was not prepared for the meeting due to unprofessional behaviour

A third argument for dismissing Anna was the fact that she was not prepared for an important meeting.

Anna could have contacted her supervisor Katharina earlier during the day to talk through the details of the following day's meeting, but she did not take any initiative at all. She did however know about the importance of the meeting. And as stated before, Anna could also have started earlier on Friday 9 October 2020.

As an employer you may expect that an employee is fully prepared for an important meeting. In every undertaking, and especially in a large international undertaking as XY Austria, it is important for the employer to know you can rely on your employees. Being unprepared for a meeting does not only harm the reputation of the employee herself, but also of the supervisor and the company in general. It may also undermine the professional working culture of the company. If other employees conceive the idea that they can show up to meetings being unprepared without consequences, this can be very obstructive for the well-functioning of the company.

Because of the above-mentioned reasons, Anna appeared unworthy of the confidence of her employer.

4. Concerning the rest periods

XY Austria further wants to point out that all the legal obligations concerning the rest periods were respected.

Article 12 (1) of the Federal Act on the Organisation of Working Time (hereinafter: 'Federal Act Working Time') states that every worker shall be entitled to a daily rest period of eleven hours after working hours. However, according to article 12 (2) Federal Act Working Time this rest period may be reduced to a minimum period of eight hours by collective agreement.

According to article 2, (2) of Directive 2003/88/EC (hereinafter: ‘Working Time Directive’) the “rest period” means:

“any period which is not working time.”

As confirmed by the CJEU, the two notions are mutually exclusive.⁶

Article 2 of the Working Time Directive 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 notion of “working time” is further specified in the case law of the CJEU.

In the first place, the physical presence is one criterion to determine whether we can speak of working time. The CJEU stated multiple times that when an employee is required to be present at the place of work to provide his professional services, this must be regarded as working time.⁷ Also when the worker has to be present at a place determined by the employer and to be available to the employer in order to be able to provide the appropriate services, so called ‘on-call duty’, this must be considered working time.⁸

Another criterion is the impact on the worker’s opportunities to pursue his personal and social interests.⁹

As the CJEU stated:

“the concept of ‘working time’ within the meaning of Directive 2003/88 covers the entirety of periods of stand-by time, including those according to a stand-by system, during which the constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests.”¹⁰

⁶ 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.

⁷ Case C-303/98 *Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] CJEU para. 48; Case C-518/15 *Ville de Nivelles v Rudy Matzak* [2018] CJEU, para. 57 ; Case C-14/04 *Abdelkader Dellas and Others v Premier ministre and Ministre des Affaires sociales, du Travail et de la Solidarité* [2004] CJEU, para. 45.

⁸ Case C-518/15 *Ville de Nivelles v Rudy Matzak* [2018] CJEU para. 59; Case C-151/02 *Landeshauptstadt Kiel v Norbert Jaeger* [2003] CJEU, para. 63.

⁹ Case C-344/19 *D. J. v Radiotelevizija Slovenija* [2021] CJEU para. 36.

¹⁰ *Ibid*, par. 37.

A possible constraint might be the very little time an employee has to be physically present at his work place, for example in the *Matzjak* case the employee only had eight minutes time to arrive at his work when asked.¹¹ Also the average frequency of the activities that the worker is actually called upon must be taken into account.¹²

Applying this to Anna's situation, we can conclude that Anna did not need to be physically present at the workplace nor at a place determined by the employer and was still able to freely manage her time. Anna was free to go where she wanted but only had to be reachable. As the CJEU states: "where the constraints imposed on a worker during a specific period of stand-by time do not reach such a level of intensity and allow him or her to manage his or her own time, and to pursue his or her own interests without major constraints, only the time linked to the provision of work actually carried out during that period constitutes 'working time' for the purposes of applying Directive 2003/88".¹³ Therefore only if Anna really performed work, by answering the phone call, that period would count as 'working time' in the sense of the Working Time Directive. The rest of the time, she can pursue her own interests and is not considered 'working time'.

In the applicable Collective Agreement article 4, (III) states that the daily rest period may be reduced to 10 hours after the working time "if this reduction is balanced out with a corresponding extension of another daily or weekly rest period within the 10 calendar days". The daily rest period may even be reduced to 9 hours if "in addition to the balancing out within the next calendar days – there are sufficient opportunities to rest and the reduction is not opposed by verifiable concerns from an occupational medicine point of view". Considering the meeting started on Friday 9 October 2020 at 8 a.m., Anna could have worked until 11 p.m. on Thursday 8 October 2020. Consequently, the daily rest period would still be respected.

Indeed, by answering the phone at 9 p.m. there was no breach of the rest period requirements at that specific moment. This would only be the case if after the time she worked, her rest period would not be respected. As the CJEU stated a rest period is meant to compensate the past working time: "such rest periods must therefore follow on immediately from the working time which they are supposed to counteract".¹⁴

¹¹ Case C-518/15 *Ville de Nivelles v Rudy Matzjak* [2018] CJEU para 63.

¹² Case C-344/19 *D. J. v Radiotelevizija Slovenija* [2021] CJEU para. 46; Case C-580/19 *R.J. v Stadt Offenbach am Main* [2021] CJEU, para. 45.

¹³ Case C-344/19 *D. J. v Radiotelevizija Slovenija* [2021] CJEU para. 38.

¹⁴ Case C-151/02 *Landeshauptstadt Kiel v Norbert Jaeger* [2003] CJEU.

Therefore, Anna had no reason to not answer the phone call on Thursday 8 October 2020 at 9 p.m.

Is a dismissal with direct effect justified?

The dismissal of Anna was therefore lawful. Article § 27, § 1 Austrian Act on White Collar Workers states that if an employee is guilty of “an act which makes him/her appear unworthy of the confidence of the employer”, this can be an important reason entitling the employer to dismissal with immediate effect. This article can be applied to the dismissal of Anna. Anna knew that a meeting was scheduled, and she knew about the importance of the meeting. Since Katharina was her supervisor she also should have known that it was necessary to know Katharina’s view. Anna was consequently not fully prepared for the meeting. It is therefore not possible for Katharina to rely on Anna in the future. As mentioned above, not only Anna refused to answer the phone call, she never tried to contact Katharina again and she was also unprepared for the meeting. She took no initiative to communicate with Katharina during the day nor the next morning before the meeting and therefore, appeared unworthy of XY Austria’s confidence and her dismissal was lawful.

2. Defendant against Ferdinand

In first order: Can the condition of Ferdinand be considered a disability at the relevant time?

This question is important to determine whether the defendant is obliged to provide reasonable accommodation to the claimant.

First it is important to determine what can be considered a disability.

The Austrian Disability Employment Act (hereinafter “DEA”) defines a disability as:

“The impact of a psychical, 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 6 months is considered to be not only temporary.”

The DEA is a result of the implementation of the Employment Equality Directive, which does not provide a definition on the concept ‘disability’.

In recent years the CJEU adopted a definition in line with the United Nations in the Convention on the Rights of Persons with Disabilities (hereinafter “UNCRPD”), which was approved on behalf of the European Union and Austria, and stated that the Employment Equality Directive as well as the national legislation should be interpreted in a manner consistent with the UNCRPD.¹⁵

According to the CJEU a disability must be understood as referring to limitations which result from:

“Long term, physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person in professional life on an equal basis with other workers.”¹⁶

¹⁵ 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.

¹⁶ *Ibid* [47].

This definition has been confirmed in a number of cases.¹⁷

- a) Ferdinand's condition cannot be considered long term at the moment the requests were rejected

According to previous mentioned descriptions, an important requirement to speak of a disability is the “long term” and “not merely temporary” characteristic of the impairment.

The Directive and the UNCRPD do not define ‘long-term’. The CJEU has held that the question whether a limitation is long-term is a factual matter. It is up to the national court to decide whether the limitation of the capacity of the person is long term based on the evidence that is brought before the court.¹⁸ In Austria a condition that lasts for more than 6 months can be considered long-term.

Based on the definition in section 3 of the DEA, it is not disputed Ferdinand’s condition should be considered a disability at this moment (May 2021) because his condition lasts for more than 6 months. However, the fact that he is disabled at this moment is irrelevant.

As stated by the CJEU in the Daouidi case, 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””.¹⁹

In the case at hand, this is when the management rejects the requested measures, but proposes to supply Ferdinand with noise-cancelling in-ear headphones and mobile panels, which is only some weeks after the accident.

¹⁷ 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 -artment and The Board of management of a community school* [2014] CJEU para. 76; Case C-406/15 *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol* [2017] CJEU para. 36; Case C-270/16 *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal* [2018] CJEU para. 28; Case C-397/18 *DW v Nobel Plásticos Ibérica SA* [2019] CJEU para. 41.

¹⁸ Case C-395/15 *Mohamed Daouidi v Bootes Plus SL and Others* [2016] CJEU para. 55.

¹⁹ *Ibid* [53].

Based on the facts and the situation at the moment the management made the decision, Ferdinand's condition could not with certainty be determined as long-term:

- First of all, at that moment, the accident only happened some weeks ago. At that time it could be very likely that Ferdinand's condition would improve after some time. A time period of only weeks after an accident is too short to take far-reaching conclusions on his condition.
- Second, according to the expert it was not clear when the claimant would recover. The expert did not state the condition of the claimant would be for an indefinite period of time. There was only a possibility his condition would last for an indefinite period. A mere possibility is not enough to be considered a non-temporary impairment. The condition of Ferdinand was uncertain, and therefore could not be determined as long term.
- Third, it is important to distinguish a situation where a clear prognosis could be made, from a situation where no clear prognosis is possible. Demanding an employer to provide far-reaching, expensive accommodation, from the moment an employee is ill without a clear prognosis, would be unreasonable. The expert could not make a clear prognosis on the condition of Ferdinand. For these uncertain situations section 3 of the DEA considers long term to be a period of at least 6 months. When the long term nature of the condition had to be assessed, only a few weeks had passed.

Consequently, Ferdinand could not fall within the concept of a disability at the time he asked for adjustments. The long term character was at that point uncertain. Therefore, it would be unreasonable to expect XY Austria to invest in expensive accommodation while there was no disability yet. It is very understandable that XY Austria was not prepared to invest in expensive adjustments at a time there was no clarity regarding Ferdinand's condition. However, even without being obliged to do so, XY Austria already suggested to provide Ferdinand with noise-cancelling in-ear headphones and mobile panels. This shows that XY Austria has always been willing to find a solution and acted cooperative and constructive.

It should be noted that the behaviour of the employer is irrelevant to determine whether there is a disability.²⁰ The fact that XY Austria was nevertheless willing to help him limit the distractions, does not mean that the impairment turns into a disability. It is solely a favor to the claimant. By doing this the company admits in no way that there is a disability.

To conclude, the CJEU should judge whether XY Austria acted in a discriminatory way at the moment Ferdinand's requests were refused, based on the facts known at that point in time. At that time, there was no disability yet. The fact that Ferdinand is disabled at the time of the pleadings is not relevant, nor is the willingness of XY Austria to provide headphones and mobile panels a recognition of a disability.

In subordinated order: Can the measures requested by be considered reasonable?

If, however, the Court would argue there was a disability at the time the requests were rejected and the Directive is applicable – which the defendant disputes, - there is still no discrimination based on disability as the employer made reasonable adjustments to Ferdinand's work place. The employer therefore met his obligations under Austrian and European law.

As stated in the facts, the claimant demands a single office or to work from home every day and receive an extensive list of work equipment, which includes an ergonomically appropriate chair, desk, monitor, PC, lightning, shading and air-conditioning in accordance with the building features of the office of the defendant. The defendant did a counteroffer and suggested to provide noise-cancelling in-ear headphones and mobile panels.

According to the International Labour Organisation (hereinafter, ILO) employers do not need to accept every request, as some might be too disruptive for the employer.²¹ The Committee on the Rights of Persons with Disabilities also stated that the process of seeking reasonable accommodation should be “cooperative and interactive and aim to strike the best possible balance between the needs of the employee and the employer.”²²

²⁰ Case C-397/18 *DW v Nobel Plásticos Ibérica SA* [2019] CJEU 46; 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 Skonboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (C-337/11)* [2013] CJEU, Opinion of AG Kokott, paras 39-43.

²¹ Lisa Wong, *Promoting diversity and inclusion through workplace adjustments; a practical guide*, (International Labour organization 2016) < www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_536630.pdf > accessed 20 april 2021, 16.

²² Communication no. 34/2015 *V.F.C v Spain*, Committee on the Rights of Persons with Disabilities, par. 8.7.

Not every adjustment requested by the employee is automatically reasonable, and not every alternative provided by the employer is automatically insufficient.

It is therefore necessary to determine what is considered a reasonable adjustment.

a) Reasonable accommodation

To determine whether the demands of the claimant are too disruptive it is important to define reasonable accommodation.

According to the DEA:

“Employers shall take appropriate and, in a specific case, necessary measures to enable persons with disabilities to have access to employment, to pursue a profession, to promotion and to participation in education and training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate if it can be sufficiently compensated for by incentive measures under federal or provincial law.”

The CJEU provides a broad definition of reasonable accommodation, in line with the definition that can be found in the UNCRPD. According to the Court reasonable accommodation should be interpreted as²³:

“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”.²⁴

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

²³ Joined cases C-335/11 and C-337/11 HK Danmark (n. 19) [53].

²⁴ Ibid [53]- [54].

²⁵ The Office of the United Nations High Commissioner for Human Rights, ‘A Thematic study on the work and employment of persons with disabilities: report of the office of the United Nations High Commissioner for Human Rights’ (2012) < www.ohchr.org/Documents/Issues/Disability/A-HRC-22-25_en.pdf > accessed 20 april 2021, 10.

b) Reasonableness of the accommodation

There is a wide range of examples of reasonable accommodation. Examples can be related to the organisation of work, work tasks, personal assistance, changing working hours,... which can be provided at a very low cost.²⁶ As the Office of the UN stated:

“there is a general misconception that accommodation will be too costly or difficult to provide.”²⁷

The measure taken as a reasonable adjustment should be effective and practical. The measures should permit the employee to perform his job. The CJEU stated that it is up to the national court to decide whether a specific measure is a disproportionate burden.²⁸ In EU²⁹ and national law³⁰ as well as in publications by the ILO³¹, various different factors which could be taken into account are listed. Examining these different factors we can distinguish four criteria.

- i) The possibility to receive public funding
- ii) The financial and other costs entailed
- iii) The scale and financial resources of the organisation
- iv) The practical impact

We first give an explanation on each criterion and then make assessments on the different requests.

- i) The possibility to receive public funding

The first criterion sets out the question whether the undertaking receives public or other funding. This may have an effect on the assessment of the proportionality of the adjustment. If an undertaking receives public financial assistance this might make it a bearable measure.³² This is also stated in recital 21 of the Directive §6 of the DEA.

²⁶ Wong (n. 26), 17.

²⁷ The Office of the United Nations High Commissioner for Human Rights (n. 30), 10.

²⁸ Joined cases C-335/11 and C-337/11 HK Danmark (n. 19) [59].

²⁹ Recital 21 Employment Equality Directive.

³⁰ §6 Austrian Federal Disability Employment Act.

³¹ Wong (n. 26).

³² Wong (n. 26); International Labour Office, *Achieving Equal Employment Opportunities for People with Disabilities through Legislation*, (International Labour Organisation 2014) <www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_322685.pdf> accessed 19 april 2021.

ii) The financial and other costs entailed

Another criterion are the financial and other costs entailed to the measures. If the financial or other costs are very high, this might be a disproportionate burden for the undertaking. However, it is important to point out that, the question as to what constitutes a disproportionate burden is “not merely dependent on the financial costs of an accommodation, the financial resources available or financial compensation schemes”.³³ So, the mere fact that a measure might not constitute a financial high cost, does not mean it cannot be seen as a disproportionate burden.³⁴

iii) The scale and the financial resources of the organisation

The scale and the financial resources of the organisation might also be relevant in the assessment of the reasonableness of the adjustment. According to the ILO, a large scale or many financial resources, do not automatically make the requested measurement reasonable.³⁵

iv) Practical impact

A fourth criterion is the practical impact. This criterion deals with implications of the requested measure beyond the purely financial impact. Different factors should be taken into account. According to the DEA, “the effect of the disadvantage in relation to the general interests of the individuals protected by the act” should be taken into account. The ILO guidelines give following factors: “effects on the overall work process”, “the functioning and the organisation of the company”, “whether the accommodation will benefit more persons than the individual making the request”³⁶.

c) Assessment of the request for an individual office

i) *Public funding*

An employer can only obtain subsidies from the *Sozialministeriumservice* when they hire a registered disabled person. To obtain the status of registered disabled person the claimant has to apply to the

³³ International Labour Office, *Achieving Equal Employment Opportunities for People with Disabilities through Legislation*, (International Labour Organisation 2014, p 46) www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_322685.pdf accessed 19 april 2021.

³⁴ Recital 21 Directive 2000/78, § 6 Austrian disability Employment Act; Wong (n.26) 19.

³⁵ Wong (n.26) 19.

³⁶ Ibid.

Sozialministeriumservice. During a determination procedure a medical expert will determine the degree of the disability. A registered disabled person needs to have at least a 50% degree of disability.³⁷

It is highly doubtful that the claimant will receive the status, as his condition is not severe enough. XY Austria has not requested any other type of funding which it might be eligible for as there was no need for funding at the time Ferdinand was hired as a non-disabled person. Even when his concentration reduced, there was no need to apply for public funding as XY Austria was convinced Ferdinand's condition could not be seen as a disability at the time of the requests. Even if it was a disability, public funding would not have been necessary to adjust the workplace as this problem could be solved with inexpensive measures. There were no indications at the time of the request that Ferdinand's condition would be non-temporary. It could not be expected that XY Austria had to invest in a new office at that time.

Therefore, the conclusion is that the employer does not receive any funding.³⁸ This relieves the burden for XY Austria in no way and therefore increases the likelihood that the measure will be seen as a disproportionate burden.

ii) *Financial and other costs*

XY Austria has recently invested in a new building, which does not contain individual offices. The only exception was made for the management staff. Providing Ferdinand with an individual office would entail excessive costs. The building is divided in a way an open floor office could be created. To provide Ferdinand with an individual office an architect, contractors, a painter and other staff should be consulted, which means that the costs would be disproportionate. There are other less significant measures that could be taken as the defendant already suggested. When assessing the costs entailed with building a new individual office, it should be taken into account the fact that it is not clear when the claimant will recover. It is possible that the claimant will recover before the individual office is built.

Building an individual office would entail a big financial burden on the defendant and therefore justifies XY Austria's rejection.

³⁷ §2 Disability Employment Act; Johann Döller, Mariella Beier, Vilmos Nagy, *Overview of the horizontal issue of disability in Austria* (Federal Ministry of Social Affairs, Health, Long-term Care and Consumer Protection 2020) <<https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=441>> accessed 20 april 2021.

³⁸ 'The participation in employment of people with disabilities' <www.sozialministerium.at/en/Topics/Social-Affairs/People-with-Disabilities/The-participation-in-employment-of-people-with-disabilities.html> Accessed 19 april 2021.

iii) Scale and financial resources

The company's growth is not disputed, however the new building has been a big investment as the prices for office buildings in Vienna are particularly high.

Due to these investments, the financial resources of XY Austria have been affected negatively.

iv) Practical impact

Providing Ferdinand with an individual office will affect the functioning of the organisation, as it will set a precedent for other workers. It is not possible for XY Austria to provide individual offices. The intention for the new premises was to create an open office space, in order to achieve economic returns due to better social interaction between the employees. If XY Austria has to provide an individual office to employees, the idea of the open work floor would be brought to nothing.

Moreover an individual office for Ferdinand will not create any benefits for other people.

To conclude the request for a single office is disproportionate. There are less expensive measures possible. According to the expert a single office is not necessary to adapt the workplace, he only suggested that it would be the best solution. Things would have been different if single offices were available. XY Austria tries to find the best solution taking into account the needs of Ferdinand. As the ILO has stated, reasonable accommodation does not have to be expensive and should not be a big burden on the employer. Providing Ferdinand with a single office, creates a big burden on XY Austria. The court should therefore consider this request unreasonable.

d) The assessment for the request to work from home

The request to work every day from home and receive an ergonomically appropriate chair, desk, monitor, PC, lightning, shading and air-conditioning in accordance with the building features of the office of the defendant is disproportionate.

i) Public funding

As stated before, XY Austria does not receive any public funding.

ii) Financial and other costs

Ferdinand demands a very extensive list of work equipment to help him concentrate. XY Austria does have some questions about the need for all this work equipment. According to the expert surrounding noise and visual distractions should be limited. The measures that should be taken should permit the employee to perform his job. It is not the task of the employer to virtually provide a home office for an employee.

iii) Scale and financial resources

For the scale and financial resources XY Austria refers to the assessment made for the single office.

iv) Practical impact

If Ferdinand is allowed to work from home every day and receive the extensive list of work equipment, it will set a precedent for other employees. XY Austria attaches a great importance to working together, therefore it will try to prevent exceptions to the new mobile working guideline. The guideline is not intended to let employees work from home all the time.

XY Austria also has some questions about the reasons for Ferdinand to request to work from home. It was not advised by the expert as a suitable option, moreover it looks like Ferdinand wants to stay home to take care of his kids. Distractions he will face at home with three children between the age of 1-5 years are likely to be more disruptive than the noises at the office. As stated before, the accommodation should be reasonable and effective. It is questionable if the request can be considered effective to limit distractions.

It can be concluded that the request to work from home every day, for what looks like reasons that have nothing to do with his condition and receive the extensive list of work equipment is disproportionate. The Court should therefore consider this request unreasonable.

Can the counteroffer of XY Austria be considered reasonable?

XY Austria was willing to provide noise-cancelling in-ear headphones and mobile panels to limit visual distractions and surrounding noise. This was rejected by the claimant.

a) Reasonableness of the accommodation

i) Public funding

XY Austria does not receive any public funding however, considering the low costs of the equipment, this would not be necessary. As stated before, reasonable accommodation does not have to be expensive. The adjustments should be effective and reasonable.

ii) Financial and other costs

The financial costs of providing Ferdinand with in-ear headphones and mobile panels is limited.

iii) Scale and financial resources

For the scale and financial resources XY Austria refers to the assessment made for the single office.

iv) Practical impact

By providing the equipment XY Austria is able to maintain the mobile working guideline, while Ferdinand will be able to concentrate as he is able to use his headphones and mobile panels inside and outside the office on the day(s) he prefers to work from home.

As stated in a European Commission report, an adjustment can be seen as reasonable if “there is no less burdensome accommodation that would achieve the same result”.³⁹ By providing noise-cancelling in-ear headphones and mobile panels, the distractions would be just as much limited and the adjustment would be less burdensome. Therefore, only the adjustments suggested by XY Austria can be seen as reasonable accommodations.

To conclude the counteroffer of XY Austria can be considered reasonable accommodation, therefore the Court should find these accommodations proportionate.

³⁹ European Commission, “Disability law and reasonable accommodation beyond employment”, 2016, 45.

3. Defendant against Josef

As stated in the facts the IT collective agreement has entered into force on 1 January 2020.

According to article 2 of the collective agreement the salary scales are also applicable to freelance workers.

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.

The core object of collective agreements is the regulation of working conditions, especially wages and working hours. This distracts the competitive process, but is accepted if it is concluded between employers and employees' organisations.

It is not disputed that the collective agreement provides conditions and terms of employment for employees, but rather if the agreement is applicable to the claimant as a freelancer.

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

a) Is Josef a self-employed service provider?

The first question is whether the claimant is a worker or a self-employed service provider within the meaning of EU law. The status of self-employed persons and workers are fundamentally different.⁴⁰ For workers collective bargaining is considered a fundamental right under European and international law. For self-employed persons it infringes competition law and can lead to civil and administrative liability.⁴¹ It is generally not accepted to bargain collectively as a self-employed person.⁴²

⁴⁰ Case C-413/13 *KNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] CJEU para. 30.

⁴¹ Victoria Daskalova, "Regulating the new self-employed in the Uber Economy: What role for EU competition law?" [2018] *German Law Journal* <<https://doi.org/10.1017/S207183220002277X>> accessed 15 april 2021, 472.

⁴² *Ibid* 463.

i) Josef is not a worker

The CJEU provides an autonomous definition of a worker.⁴³

“A worker is someone who performs services for and under the direction of another person, during a certain amount of time, in return for remuneration.”⁴⁴

Workers cannot be considered undertakings and therefore do not fall under the scope of competition law.⁴⁵

To determine whether a person is a worker the following employment test should be made:

1) Acting under the direction of his employer

The essential criterion to distinguish a worker from a self-employed person is the element of subordination of the worker to his employer. The employee acts under direction of his employer. To determine whether someone is under direction of his employer, all circumstances should be taken into account (ex. Holidays, remuneration,...)⁴⁶ The employer can give instructions and orders. He can exercise powers of authority, relating to working time, place of work and content of work.⁴⁷

The claimant is not a worker as he does not perform services under the direction of another person. He takes on jobs he likes and he even outsources some work. He is able to accept and decline work, which he does so as well. The fact that he most of the time works at the office of the defendant does not imply that he is under the direction of the defendant. The claimant is under no obligation to work at the offices of the defendant but chooses to do so.

If the claimant would argue there is some degree of receiving orders, it should be noted that most contracts for the supply of services involve a party to receive orders from the other.

⁴³ Case C-75/63 *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964]; Case C-256/01 *Debra Allonby v Accrington & Rossendale College and others*, [2003] CJEU, para 67.

⁴⁴ Case C-66/85 *Lawrie-Blum v Land Baden Württemberg* [1986] CJEU para. 17; C-85/96 *Martinez Sala v Freistaat Bayern* [1998] CJEU para. 32; Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] CJEU para. 34.

⁴⁵ Case C-22/98 *Becu and others* [1999] CJEU.

⁴⁶ Case C-232/09 *Dita Danosa v LKB Liżings SLA* [2010] CJEU paras. 46,49.

⁴⁷ Case C-256/01 *Debra Allonby v Accrington & Rossendale College and others*, [2003] CJEU, para 72; Dasklova (n.53) 476; 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 19 april 2021, 3.

If that would not be possible, it would be very hard to communicate what services you would like to receive. In example, if you want someone to paint the walls of your house, you tell them when you would like your walls to be painted, which color and which walls. You will not conclude from this that the painter is your employee. Some orders are normal to receive from a client and that does not insinuate that there is any subordination.⁴⁸

2) Integration into the employer's business organisation

An employee forms an economic unit with his employer. This is because they perform work for and under the direction of the employer. Therefore, an employee is not an autonomous entity.⁴⁹ It can be argued that a business organizes its employees by means of consent or permission, while contracts with third parties (in example external consultants) are dealt with by means of consultation and negotiation. This distinction is disputed.⁵⁰

If the claimant would argue Josef is a worker based on the fact that XY Austria has to give fiat for the delegation of work, this statement cannot be followed. According to Chris Towney, an employer does not have more power of fiat or authority than other contracting parties on the ordinary market.⁵¹

The fact that Josef has been working for XY Austria for four years cannot be taken into account either. It is not uncommon to have a service contract lasting for several years in example between lawyers or accountants and their clients.

3) He does not bear any financial or commercial risk arising out of the activity

Josef does accept financial risks. If he outsources work, he will be responsible for any damage caused by his subcontractors.

To be considered a worker all conditions have to be fulfilled. As Josef does not work under direction of XY Austria, we can conclude he is not a worker.

⁴⁸ Chris Townley, « The concept of an 'Undertaking': The boundaries of the Corporation – A discussion of Agency, Employees and Subsidiaries » [2009] <<https://ssrn.com/abstract=1358649>> accessed 18 april 2021, 10.

⁴⁹ Ibid 9.

⁵⁰ Ibid 11.

⁵¹ Ibid 11.

ii) *Josef is a self-employed service provider*

If a person does not meet the conditions to be a worker, the person should be qualified as a self-employed person. A self-employed person is considered an undertaking.

An undertaking is an autonomous concept and can be defined as an “entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”.⁵² This results into a very broad and heterogeneous range of service providers. It includes self-employed persons that provide services to a single client or to a limited number of customers.⁵³

According to a variety of documents of the European Commission, self-employed persons fall under the scope of micro-enterprises.⁵⁴

It should be noted that according to the interpretation rules in Austria, it is important the intention of the parties should be taken into account. The fact that both parties never contested the status of self-employed service-provider

To conclude it can be argued Josef is a self-employed person as he does not fall under the definition of a worker.

b) Can a collective agreement provide salary scales for freelancers?

As Josef can be considered a self-employed person, the next question that should be answered is whether it is possible to provide salary scales for freelancers in the collective agreement. For self-employed persons it is generally not accepted to bargain collectively.⁵⁵ Collective price-setting is considered a blatant breach of competition law.

According to its Albany judgement a collective agreement can fall outside the scope of article 101 TFEU by reason of its nature and purpose under two conditions:

⁵² Case C-41/90 Klaus Höfner and Fritz Elser v Macrotron GmbH [1991] CJEU para. 21.

⁵³ Valerio De Stefano, “Re-thinking the competition law/ labour law interaction: promoting a fairer labour market”, *European Labour Law Journal* < www.researchgate.net/publication/335624009_Re-thinking_the_competition_lawlabour_law_interaction_Promoting_a_fairer_labour_market > accessed 18 april 2021, 6.

⁵⁴ Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [2003] OJ L124/36; Daskalova (n. 53) 465.

⁵⁵ Tamás Gyulavári, “Collective rights of platform workers: The role of EU law” [2020] *Maastricht journal of European and comparative law* 415.

1) It improves conditions of work and employment

The first condition is fulfilled. Minimum fees have previously been accepted as an improvement of conditions of work and employment.⁵⁶

2) The agreement is an outcome of collective negotiations between organisations representing employers and workers⁵⁷

The second condition is not fulfilled. The collective agreement is in fact the result of negotiations between an organisation representing employers and an organisation representing workers and self-employed persons.

The exemption should be interpreted restrictively, therefore self-employed persons cannot take part in collective bargaining, thus the Albany exception is not applicable here.⁵⁸

Trade unions and employer's organisations who make collective agreements covering self-employment, appear to be acting in the capacity of an association of undertakings, and therefore fall under article 101 TFEU.⁵⁹ Article 101 TFEU should be interpreted widely, exceptions should be interpreted narrowly.⁶⁰ There is no exception for businesses whether they are self-employed persons or a multinational.⁶¹

However it could be argued freedom of association and the right to bargain collectively also applies to the self-employed. It is indeed true that international and European Labour law tend towards applying the right to collective bargaining to self-employed persons. However according to the European Committee of Social Rights it is not clear when and which categories of self-employed persons fall under the scope of article 6 §2 of the European Social Charter. This creates a lot of uncertainty and contradiction as:⁶²

⁵⁶ Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] CJEU.

⁵⁷ Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] CJEU para. 60-62; Gyulavári, (n. 69) 415.

⁵⁸ C-180/98 to C-184/98 *Pavlov and others v. stichting pensioenfonds Medische specialisten*; Gyulavári (n. 69) 416.

⁵⁹ Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] CJEU para. 26.

⁶⁰ Cases T-70/92 and T-71/92 *Florimex v Commission* 1997 CJEU para 152.

⁶¹ *Daskalova* (n. 53), 471-472.

⁶² European Committee of Social Rights, *Irish Congress of Trade Unions (ICTU) v. Ireland* Complaint no. 123/2016, adopted 12 September 2018, <[https://hudoc.esc.coe.int/fre/#{"sort":\["ESCPublicationDate%20Descending"\],"ESCDcIdentifier":\["cc-123-2016-dmerits-en"\]}](https://hudoc.esc.coe.int/fre/#{)> para. 40; Valerio De Stefano, "Rethinking the competition law/ labour law interaction: Promoting a

- It is not the intention of the EU to let self-employed persons engage in collective agreements. This can be illustrated by the fact that the Advocate General and the European Commission considered an Irish amendment on its competition law, to make it possible for self-employed persons to engage in collective bargaining a breach of article 101 TFEU.⁶³
- Moreover competition is an important objective according to article 3 TFEU.⁶⁴ Some agreements could have significant competitive harm. If we ignore the negative impact these agreements have on competition and only focus on the social policy benefits, then the optimal union balance might not be achieved.
- It should be noted that excluding self-employed persons from the scope of competition law could lead to undesirable consequences associated with cartels (higher prices, lower quality,..). Allowing self-employed service providers to fix prices can damage consumers.

When an organisation carries out negotiations in the name of self-employed service providers or on their behalf, it does not act as a trade union, but as an association of undertakings, this falls under the scope of article 101 TFEU.⁶⁵ This is a big risk for both parties as fines can be up to 10% of the global turnover of the entity.⁶⁶

c) Is the exception of the FNV Kunsten case applicable⁶⁷?

In order for the claimant as a freelancer to fall under the collective agreement a couple conditions need to be fulfilled.

- The collective agreement sets minimum fees.

Article 2, (1), c of the collective agreement states that the salary scales are applicable to freelance workers.

fairer labour market” 2019 *European Labour Law Journal* <<https://doi.org/10.1177/2031952519872322>> accessed 19 april 2021, 9-10.

⁶³ Daskalova, (n. 53) 473.

⁶⁴ Chris Townley, « The concept of an ‘Undertaking’: The boundaries of the Corporation – A discussion of Agency, Employees and Subsidiaries » [2009] <<https://ssrn.com/abstract=1358649>> accessed 18 april 2021, 14.

⁶⁵ Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] CJEU para. 30

⁶⁶ Daskalova, (n. 53)490.

⁶⁷ Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] CJEU.

- The service provider can be qualified as a false self-employed service provider

False self-employment can be defined as a fraudulent situation where someone is formally registered as a self-employed, but is in fact an employee, as he meets the legal criterium of a worker and therefore is bound by an employment relationship.⁶⁸

The fact that some self-employed persons share certain characteristic features with workers, does not mean they are to be found similar.⁶⁹ Moreover false self-employment is limited to situations where service providers are one economic unit with the firm they work for.⁷⁰

According to the facts, the claimant is not a false self-employed person, as the claimant does not fulfill the condition of a worker. The situation cannot be seen as comparable as the claimant is able to outsource some of his tasks and is free to decide where he works. The mere fact that the claimant derives 90% of his income from his work relationship with XY Austria does not mean he is false self-employed.⁷¹ Based on these facts the claimant cannot be seen as subordinated and therefore is not a false self-employed service provider.

- The false self-employed service provider is a member of one of the contracting employees' organisations

The claimant is not a member of one of the contracting employees' organisations.

We can conclude the collective agreement does not apply. The claimant can be considered a self-employed service provider.

The collective agreement breaches article 101 (1) TFEU. Only when the collective agreement was concluded in the name and on behalf of false self-employed service providers who are members of the employees' organisation that negotiated a collective agreement that sets minimum fees, the agreement can be excluded by article 101 (1) TFEU.⁷²

⁶⁸ Daskalova, (n. 53) 468; Case C-413/13 *KNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] CJEU para. 31.

⁶⁹ Case C-413/13 *KNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] CJEU Opinion of Advocate General Wahl C-413/13 FNV Kunsten paras. 61-62.

⁷⁰ Frans J.L. Pennings, "Exceptie van de mededingingsbepalingen voor (schijn)zelfstandigen: de zaak FNV Kiem", [2015] *Nederlands Tijdschrift voor Europees Recht* 116.

⁷¹ Nicola Kountouris, "The concept of worker in European labour law: fragmentation, autonomy and scope", [2018] *Industrial law journal*, volume 47[192-225].

⁷² Case C-413/13 *KNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] CJEU para. 30.

Does Josef have the right to claim the shortfall of his compensation for the last three years?

The claimant does not have the right to claim the shortfall of his compensation as he does not fall under the collective agreement.

Even if the claimant would fall under the collective agreement, he would not be able to claim the compensation for the last three years as the collective agreement only entered into force on 1 January 2020.

§13 of the Austrian Act on the Labour Constitution and freedom of association states that:

“The legal effects of the collective agreement, regarding working conditions which applied directly before its expiration, survive after that expiration until the application of a new collective agreement, related to those working conditions, or until a new contract is concluded with the affected workers.”

A collective agreement does not work retroactive. Therefore Josef cannot claim a shortfall of his compensation regarding his work before the 1st of January 2020.⁷³

⁷³ Alexander De le Court, “Stabilizing Collective Agreements in Continental Europe: How Contract Law Principles Reinforce the Right to Collective Bargaining” [2019] *Oñati socio-legal series*, <<https://doaj.org/article/c5b5bd5d7c5a4f7ab9f0b43299c0a25c>> accessed 20 april 2021, 56.

Pleadings

Considering the facts and the law stated above, the Defendants respectfully requests the Court to declare that :

1. To declare Anna's dismissal with direct effect justified;
2. In first order Ferdinand's condition does not qualify as a disability at the time the request were rejected;
3. The requests of Ferdinand are disproportionate;
4. The counteroffer of XY Austria is reasonable;
5. Josef is a self-employed person;
6. The collective agreement is not applicable, Josef is not eligible for the salary scales defined in the collective agreement.