



HUGO SINZHEIMER MOOT COURT CASE 2021

A New Mobile Working Guideline

Vienna-based company Xperience Yourself GmbH ("XY Austria") is part of the international (US-based) Xperience Group, which specializes in the design, development, implementation and maintenance of web-based solutions for retail businesses. XY Austria serves businesses in Austria, Germany, Switzerland, and the CEE region. XY Austria employs approximately 500 employees and is highly profitable. The workforce has so far not established a works council.

The company's growth in recent years has been accompanied by a significant growth in headcount. Thus, the company now needs to move its Vienna operation to new premises. Employees have repeatedly asked for options to work from home or otherwise from outside the office. So far, management has been skeptical, believing that the close co-operation of the workforce at the (admittedly cramped) old premises aids the team spirit and the flow of information in its dynamic teams. Hitherto, working from home or otherwise from outside the office has been allowed only occasionally, on an ad-hoc and individual basis.

In planning the move to new premises, XY Austria has begun to rethink the mobile working strategy, inter alia in light of (i) the high prices for high-quality office space in Viennese central locations and (ii) expected further expansions. New close-to-center premises have been found in the hip and attractive Naschmarkt area. Office planning advisers have strongly counselled in favor of an open-floor solution and indeed, the decision was taken to use an open-floor office space design with non-individualized desks that can be chosen and used every day on a first-come, first-serve basis. Meeting areas, booths for telephone calls and more recreational spaces where employees can meet to have a coffee, a piece of fruit or whatever, will be available as well. Advisers have described this as market-standard and as an optimal solution through most efficient use of space. Essentially, instead of planning for an initial



approximately 500 desks (or other workplaces), planning has been made for 400 desks (or other workplaces) only.

Therefore, management has, to some extent, come around in its position towards working from outside the office and has decided to introduce a new mobile working guideline (hereinafter Mobile Working Guideline). The key element of the Mobile Working Guideline is the rule that every employee is obliged to work at least one day per week not at the office. On such days, employees can choose whether to work from home or elsewhere.

On 9 September 2020, the company informs all employees that the Mobile Working Guideline will enter into force on 1 October 2020. This guideline can be accessed via the company intranet, which is easily accessible by all employees at any time from inside and outside the office. Management has been advised by the HR department that they can legally introduce the Guideline unilaterally as every single employment contract includes 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.*" So far, a "Home Office Guideline" has been in place at XY Austria for a longer time (and has been known by the employees), but it was a short document, essentially outlining that, where employer and employee agreed, in a specific case, an employee could work from his/her home office.

In order to achieve the desired office space reduction and to allocate the "mobile working days" evenly among the work-force and teams, the employees are required to log their preferences as to which day will be their mobile working day for the coming month until the 15th of the preceding month.

Soon after the Mobile Working Guideline has been communicated, problems emerge.

Anna

The first problem arises concerning employee *Anna*. She is working (as most employees do) under a flex-time arrangement that, essentially, allows employees to determine the start and end time of their daily working hours themselves 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, although she would have time to do so. 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. During the meeting, she blames Anna for being obstructive in front of the whole team. Once the meeting is over, she dismisses Anna with immediate effect. Anna feels wrongly treated and brings an action at the local Court for Labour and Social Matters Vienna, seeking compensation for all benefits during the fictitious notice period because she considers the dismissal to be unlawful.

Ferdinand

Ferdinand is yet another long-standing and highly regarded employee of XY Austria who encounters difficulties with the Mobile Working Guideline. Whenever the weather permits (he uses public transportation only when it rains or snows), he goes to work on his personal e-scooter, not wearing a helmet. On 2 November 2020 he incurs an accident while so going to work: As his concentration briefly



slips, he realizes too late that a child on her way to school crosses the bike-path. In further consequence, he veers sharply to the side to avoid a collision with the child and falls to the ground, incurring bruises and a severe concussion. He appears to recover reasonably well within three weeks, but, as it turns out subsequently, his ability to concentrate is reduced. After several weeks, he consults an expert physician, who, after some tests and a brain scan, opines that Ferdinand's condition may well continue for an indefinite period and that Ferdinand'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. The duration of his limitations cannot be predicted at this point. There is no specific prognosis that his condition will improve over a certain period.

Ferdinand submits his medical diagnosis to XY Austria and requests a solution. He 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.

Management finds both proposals unreasonable. Single offices exist 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. Management also 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. In fact, management has also found out that Ferdinand 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 therefore scrambles to find appropriate child-care facilities. The company proposes 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 XY Austria. Ferdinand believes the company would want to get rid of him and brings an action at the local Court for Labour and Social Matters Vienna, seeking a declaratory judgement that XY Austria is under an obligation to provide one of the two solutions to the predicament that he has proposed.

Josef

The troubles that XY Austria encounters in connection with the introduction of the Mobile Working Guideline do not end there. *Josef* is a highly qualified IT freelancer, originally from Estonia, trained in the UK and Germany, who takes on jobs that he likes. Usually, he tends to move on after some years, pursuing an internationally mobile lifestyle. Josef has been working as one of the leading coders 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, where he enjoys the company of his co-workers and the excellent coffee. In the course of the implementation of the new Mobile Working Guideline, Josef asks around and realizes that, unbeknown to him, a collective bargaining agreement has entered into force in Austria that covers some terms and conditions of work for freelancers in the IT sector ([Annex 3](#)). He researches further and realizes that his monthly pay is not in line with such collective bargaining agreement.



Josef, whose qualification as freelancer is uncontested, brings an action at the local Court for Labour and Social Matters Vienna, seeking a judgement that would oblige XY Austria to pay the shortfall of his compensation when compared to the level provided for in the collective bargaining agreement for the last three years.

Annex 1: Relevant national legislation

Annex 2: Anna's Employment Contract

Annex 3: Collective Agreement 2020 for Employees Of Service Providers In The Field Of Automatic Data Processing And Information Technology