Denmark C

2021

Statement for Claimant

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D. Statement of Relevant Facts

Claim 1

1. Ms. Anna is working under a flex-time agreement at Xperience Yourself GmbH (hereinafter: **XY Austria**).
2. The timeframe for flex-time is Monday through Friday from 7 a.m. until 9 p.m.
3. The flex-time agreement allows Ms. Anna to allocate her working hours upon her own decision, and thus, to determine the start and end time of her daily working hours.
4. According to her employment contract Ms. Anna 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.
5. On Thursday, 8 October 2020, Ms. Anna works on her mobile working day from home and finishes her work at 6 p.m.
6. Also Thursday, 8 October 2020, Ms. Anna's supervisor calls her at 9 p.m. Ms. Anna does not answer the phone.
7. The supervisor does not contact Ms. Anna again before the internal meeting on 9 October 2020 at 8 a.m.
8. At the internal meeting, the supervisor blames Ms. Anna for being obstructive in front of the whole team and claims that Ms. Anna was not fully prepared for the meeting.
9. Immediately after the internal meeting, the supervisor dismisses Ms. Anna with immediate effect and without any further explanation.
10. XY Austria does not follow up on the oral dismissal with a formal written notice that confirms and explains the dismissal.

Claim 2

11. Mr. Ferdinand is a long-standing and highly regarded employee of XY Austria.
12. On 2 November 2020 Mr. Ferdinand was involved in an accident while going to work and suffered a severe concussion. As a result of the accident, Mr. Ferdinand's ability to concentrate has been reduced.
13. Based on inter alia a brain scan, an expert physician states that Mr. Ferdinand's condition may well continue for an indefinite period.

14. According to the expert physician, Mr. Ferdinand's work environment needs to be adapted in order for him to achieve a reasonably normal work output.
15. Especially surrounding noise and visual distractions need to be *minimized*. This can be achieved by him being able to occupy a single office.
16. Mr. Ferdinand requests to be allowed to use a single office at XY Austria's premises.
17. Alternatively, Mr. Ferdinand suggests that he can work from home all days, with XY Austria providing adequate work equipment.
18. XY Austria refuses both of Mr. Ferdinand's solutions without any testing.
19. XY Austria proposes to supply Mr. Ferdinand with noise-cancelling in-ear headphones, whose effectiveness to minimize noise has not been proven.
20. Furthermore, XY Austria proposes to supply Mr. Ferdinand with 60 cm high mobile panels, which merely provide *some* shields to the front and the sides.
21. The desks at XY Austria are non-individualized and can be chosen every day on a first-come-first-served basis.
22. The mobile panels must be moved around every morning and every evening by Mr. Ferdinand to and from his workspace any given day.

Claim 3

23. Mr. Josef is a highly qualified IT professional.
24. Originally, Mr. Josef is from Estonia and trained in the UK and Germany.
25. Mr. Josef is working as one of the leading coders for XY Austria.
26. As a leading coder, Mr. Josef works on general as well as specific solutions that XY Austria offers.
27. Mr. Josef has been working for XY Austria for four years on a freelance basis.
28. Mr. Josef has no employees himself and no permanent sub-contractors.
29. XY Austria has from time to time approved that certain assignments have been carried out by other persons.
30. A collective agreement that has entered into force in Austria specifically extends rights to freelancers in the IT sector.
31. Mr. Josef's salary is not paid out according to the collective agreement.

E. Description of Relevant Legislation

1. International conventions

CRPD

The purpose of the CRPD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. The EU ratified the CRPD on 23 December 2010. Austria ratified the CRPD on 26 September 2008.
Relevant Article: *1*

ECHR

ECHR is an international convention, which protects the human rights of European citizens. Austria signed the convention on 13 December 1957. Austria ratified the convention on 3 September 1958.
Relevant Article: *11*

2. EU legislation

TFEU

The TFEU is one of the EU's primary treaties and forms the basis of EU law. It defines the principles and objectives of the EU as well as the scope for action within its policy areas. The TFEU was signed on 13 December 2007, as a part of the Lisbon Treaty. The Lisbon Treaty entered into force on 1 December 2009.
Relevant Articles: *45 and 101*

CFREU

The CFREU contains fundamental rights and principles of the European citizens, by synthesizing the constitutional traditions and international obligations common to the Member States. CFREU is recognized by the European Union as having the same legal value as the Treaties in accordance with the TEU Article 6.
Relevant Articles: *31 (2), 51 (1)*

Directive 2000/78

Directive 2000/78 lays down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation, an relation to employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.
Relevant recitals: *20, 21*
Relevant Article: *5*

Directive 2003/88

The Directive establishes a minimum support of safety, hygiene and health of workers by setting minimum requirements for the organisation of working time, rest periods and annual leave. The purpose of the Directive is to improve the working environment. Austria has implemented the protection concerning certain aspects of the organisation of working time of the Directive in the Working Time Act.
Relevant Articles: *1 (1), 3 and 5*

3. Austrian legislation

Working Time Act

The Working Time Act implements the protection concerning certain aspects of the organisations of working time of Directive 2003/88. The Act regulates the organisation of working time, flexible working time and rest period.
Relevant sections: *4b (4), 12 (1)*

Disability Employment Act

The Disability Employment Act is a national statutory act of Austria. The Disability Employment Act governs the protection against discrimination on the grounds of disability in employment.
Relevant sections: *3, 6 (1a) and 7b*

White Collar Act

The White Collar Act is a national statutory act of Austria. The White Collar Act governs generally applicable employment terms for persons employed in the business operations of a merchant primarily for the performance of commercial (assistants) or higher, non-commercial services or for secretarial work. The White Collar Act describes lawful terminations for this group of employees.
Relevant sections: *20 (2), 20 (3), 27 (1), 27 (4) and 29 (1)*

4. Austrian Collective Agreements

Collective Agreement 2020

The Collective Agreement 2020 is an agreement reached by negotiation between the Austrian Professional Association of Management Consultancy, Accounting and Information Technology of the Austrian Economic Chambers, on one hand, and the Austrian Trade Union Federation, Union of Private Sector Employees, on the other hand. It constitutes a binding regulation of the employment relationship for employees of service providers in the field of automatic data processing and information technology. The agreement came into effect as of 1 January 2020.
Relevant Articles: *2 (1) (c), 3 (1), 4 (I) (1), 5 (I) (1), 9 (IV) (1), 13 (6), 13 (7), 15 (II), 15 (V) (1), 15 (V) (4), 20, 22 (I)*

Collective Agreement 2019

The Collective Agreement 2019 came into effect as of 1 January 2019 and was replaced by the Collective Agreement 2020.

Collective Agreement 2018

The Collective Agreement 2018 came into effect as of 1 January 2018 and was replaced by the Collective Agreement 2019.

F. Questions

Claim 1

1. Is the dismissal lawful?
    a. Does the employer have a duty to supply reasons for immediate dismissals?
    b. Has Ms. Anna breached her contractual obligations?
    c. Was the immediate dismissal proportionate?

2. If the dismissal was unlawful, which benefits should be compensated?

Claim 2

1. Is Mr. Ferdinand disabled?

2. Are the solutions proposed by Mr. Ferdinand within the duty of accommodation of XY Austria?
    a. Are the solutions appropriate?
    b. Do the solutions pose a disproportionate burden on XY Austria?

3. Is the solution proposed by XY Austria fulfilling their duty of accommodation?
    a. Is the solution appropriate?

Claim 3

1. Is Mr. Josef covered by the collective agreements?
    a. Is Mr. Josef covered by the collective agreements of 2020, 2019 and 2018?
    b. Is Mr. Josef covered by the collective agreements of 2020, 2019 and 2018 as a freelance worker?

2. Does the Collective Agreement 2020 infringe TFEU Article 101?

3. Is XY Austria obligated to pay compensation for the shortfall of Mr. Josef's salary for the last three years?

G. Summary of Arguments

Claim 1

The Claimant submits that Ms. Anna has the right to compensation for all benefits in the fictitious notice period from 9 October 2020 until 30 November 2020, as the immediate dismissal was unlawful.

Firstly, XY Austria has violated Ms. Anna's right to a justified dismissal, as XY Austria did not fulfil their duty to give Ms. Anna a reason following the immediate dismissal.

Secondly, XY Austria has the burden of proof of whether or not there was a lawful reason for immediate dismissal. XY Austria has failed to satisfy this burden of proof. The Claimant submits that none of the reasons stated in the White Collar Act § 27 are applicable.

Thirdly, should the Court find that Ms. Anna did breach her contractual obligations, the Claimant withstands that the immediate dismissal was unlawful, as the dismissal was disproportionate. XY Austria should – and could easily – have chosen a less severe action.

Claim 2

The Claimant submits that XY Austria is obligated to provide one of the two solutions proposed by Mr. Ferdinand in order to avoid discriminating against Mr. Ferdinand on the basis of his disability.

The Claimant states that Mr. Ferdinand, as a person with a disability, holds the right to appropriate accommodation against XY Austria. Mr. Ferdinand has proposed two different solutions which are both appropriate, as they meet the accommodative needs of Mr. Ferdinand. None of Mr. Ferdinand's proposals are a disproportionate burden.

XY Austria has refused both of Mr. Ferdinand's proposals and instead proposed their own solution. XY Austria's proposed solution is not appropriate, as it does not protect Mr. Ferdinand's right to full and effective participation in his professional life on an equal basis with the

other workers. Therefore, XY Austria's proposal does not fulfil XY Austria's duty of accommodation, and thus their refusal of Mr. Ferdinand's proposals is a discriminatory act.

Claim 3

Primarily, the Claimant submits that Mr. Josef is covered by the collective agreements 2020, 2019 and 2018 as a result of him in fact being a worker within the meaning of TFEU Article 45. It would be an infringement of his right to free movement and the duty to provide free access to the labour market in Austria if the collective agreements are interpreted as excluding Mr. Josef. Therefore, Mr. Josef has the right to payment in accordance with the collective agreements from 2018, 2019 and 2020.

Alternatively, the Claimant submits that Mr. Josef is covered by the Collective Agreement 2020 as a freelance worker, which is not in breach of competition law as Mr. Josef is not an undertaking. The payment should cover the last three years, as the Collective Agreement 2020 succeeds collective agreements of 2019 and 2018 which Mr. Josef was also covered by. XY Austria has failed to provide evidence that Mr. Josef should not be covered by the previous collective agreements from 2018 and 2019.

H. Arguments

Claim 1

The Claimant submits that XY Austria terminated the employment of Ms. Anna unlawfully. Therefore, XY Austria is obligated to compensate Ms. Anna for all benefits during the fictitious notice period from 9 October 2020 until 30 November 2020, cf. the White Collar Act § 20 (2) and § 29 (1).

According to section 3 of the employment contract, the employment relationship can be terminated by XY Austria under the statutory periods of notice with effect as of the 15th and the last day of any calendar month. This is in accordance with the White Collar Act § 20 (3). This means that Ms. Anna's employment may be terminated on the 15th or on the last day of any calendar month.
According to the White Collar Act § 20 (3), cf. § 20 (2), the notice period is six weeks. Ms. Anna was dismissed on 9 October 2020. Therefore, the fictitious notice period runs from 9 October 2020 and six weeks forward to 20 November 2020. However, as the employment relationship can only be terminated on the 15th or on the last day of any calendar month, the fictitious notice period will run from 9 October 2020 until 30 November 2020.

In support of the claim, the Claimant firstly argues that XY Austria carries the burden of proving that the immediate dismissal was lawful. Since XY Austria did not even provide Ms. Anna with any explicit reason for the immediate dismissal, this is in itself, in principle, enough for the Court to rule that the dismissal was unlawful.

Secondly, an investigation after the fact of the possible reasons that could have motivated the supervisor to dismiss Anna with immediate effect reveals no legal justification whatsoever for this action. The circumstances of the case clearly indicate that Ms. Anna did not in any way breach her employment contract – or at the very least not in a manner that meets the threshold of the White Collar Act § 27.

As the dismissal was unlawful, Ms. Anna has a right to compensation. These arguments are elaborated in the following.

1.1 XY Austria has violated Ms. Anna's right to a justified dismissal by not giving a reason

The Claimant argues that the dismissal was unjustified, as Ms. Anna was not given a reason for the immediate dismissal.

A duty to give reasons for a dismissal follows from a general interpretation of the White Collar Act. § 27 mentions the possible, specific and strong reasons for dismissal, which in connection with § 29 would be unnecessary and useless if the employer did not have a duty to provide the reasons. § 29 (1) gives protection '*if the employer dismisses an employee with immediate effect without good cause*'. Dismissed employees are not able to know if the dismissals are with good cause if they are not provided with the reasons for the dismissal, and thus plead the protection provided in § 29.

Ms. Anna was dismissed orally with immediate effect after the meeting. XY Austria did not follow up on the oral dismissal with a written notice that confirmed the dismissal. XY Austria has not given Ms. Anna any reason for the immediate dismissal. XY Austria carries the burden of proof of the existence of good cause, and the Claimant submits that the lack of reasoning is, in itself, enough to rule that the dismissal was unlawful. Any reasons provided during the proceedings in this case are just rationalizations after the fact and should be rejected as such.

1.2 Ms. Anna did not breach her contractual obligations

The following line of argumentation will pertain to the ways in which Ms. Anna did not breach her contractual obligations.

XY Austria has the burden of proof of Ms. Anna having *both* breached her contractual obligations *and* having done so in a manner sufficiently severe to justify an immediate dismissal. Should the Court accept that XY Austria is allowed to state reasons for the dismissal after the fact, without in any way documenting that those reasons were in fact the motivation at the time of the dismissal, the Claimant can only guess for the possible reasons.

1.2.1 The internal meeting

The White Collar Act only prescribes a few reasons entitling an employer to dismiss an employee with immediate effect, and these are listed in § 27 which states:

> *'1. if the employee [...] is guilty of an act which makes him/her appear unworthy of the confidence of the employer;*
> *[...]*
> *4. 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;'*

Since no reasoning was given by XY Austria, as stated above, the Claimant must guess for the possible reasons but argues that none of these reasons exists.

1.2.1.1 Disagreement does not constitute breach of contract

The supervisor might have dismissed Ms. Anna as a result of Ms. Anna's view not being aligned with the supervisor's position.

Firstly, the Claimant argues that there is no general regulation of whether an employee has a duty to agree with their supervisors at internal meetings. XY Austria has the burden of proof for the existence of such a duty. XY Austria has not satisfied the burden of proof.

Alternatively, the Claimant argues that having another view than one's supervisor does not meet the threshold for dismissal according to the White Collar Act § 27 (1) which states *'if the employee [...] is guilty of an act which makes him/her appear unworthy of the confidence of the employer;'*.

Even if Ms. Anna did act in a way at the internal meeting that made her supervisor question her confidence in Ms. Anna, Ms. Anna did not act in a way that could have made her *unworthy* of the supervisor's confidence, cf. the White Collar Act § 27 (1).

The confidence in an employee differs depending on the employee's position and tasks. Ms. Anna is a white collar worker who has a supervisor. She does not possess a leading job. Her position does not require the same level of confidence as an employee in a leading job who has much greater responsibilities.

Further, it follows from the structure of the White Collar Act that the starting point in the case of a termination is a regular termination with a notice period. Because of the severity, the possibility for a dismissal with immediate effect must be interpreted narrowly. In order for XY Austria to dismiss Ms. Anna, her behaviour must be equivalent to a severe breach of her contractual obligations. This is not the case – not even close.
If stating one's opinion at an internal meeting is to be seen as just cause for an immediate dismissal, then almost anything could be a just cause.
Ms. Anna merely spoke her opinion at a purely *internal* meeting not knowing that this was even prohibited. A duty to agree with one's supervisor at internal meetings does not fall within the ancillary obligations of good faith and loyalty either. Internal meetings are internal for several reasons compared to external meetings.
One of the characteristic purposes of internal meetings is to share opinions that foster the creation of development within the company. Team spirit and flow of information in the dynamic teams are exactly principles which are an important part of XY Austria. Instead of seeing Ms. Anna's point of view as an act of disobedience, it should be seen as a help.

If XY Austria believes a difference of opinion to be a just cause for immediate dismissal, they should at the very least be required to lift the burden of proof for having informed Ms. Anna that the employees should not openly disagree with the supervisors at internal meetings. XY Austria has not provided any evidence that the employees have been informed hereof.

In addition, she has not acted in this way before and the act was not of severe character, e.g. stealing from the employer, getting into a physical fight, or repetition of a behaviour which singlehanded could not justify immediate dismissal. Thus, a single little misstep cannot lead to her appearing unworthy of the confidence of the employer and therefore an immediate dismissal. In combination with the lack of an explicit reason, the immediate dismissal was a very severe action, which was disproportionate.

On these grounds the Claimant submits that having another opinion than the supervisor does not result in Ms. Anna being unworthy of XY Austria's confidence and does therefore not qualify for a dismissal with immediate effect, cf. the White Collar Act § 27 (1). Therefore, the immediate dismissal of Ms. Anna was unlawful.

1.2.2 Ms. Anna's general behaviour

Another guess from the Claimant for a possible reason for the immediate dismissal could be Ms. Anna's general behaviour in the company.

The White Collar Act § 27 (4) states:

> *'if the employee, without a legitimate reason, fails to perform the service for a considerable period of time (...), 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, (...)'*

XY Austria has in no way provided evidence which suggests that the disagreement at the internal meeting was not a single event. XY Austria has not provided any evidence that Ms. Anna at any point failed to perform her services for a considerable period of time, persistently refused to perform her services, or refused to comply with the supervisor's orders. Therefore, the Claimant submits that the requirements in § 27 (4) of the White Collar Act have not been met.

1.2.2.1 Ms. Anna did not have an obligation to pick up her phone

As XY Austria did not fulfil their obligation to provide Ms. Anna with a reason for her dismissal, the Claimant must guess for reasons. If the immediate dismissal was motivated by the fact that Ms. Anna did not pick up her phone, the Claimant argues that not picking up the phone does not constitute a reason for immediate dismissal.

Neither the White Collar Act § 27 (4) nor the flex-time agreement and the fictitious time period in her employment contract, states that not answering the phone constitutes an important reason for immediate dismissal.

Section 5 (b) of the employment contract states:

'The timeframe for flex-time shall be Monday through Friday (...) from 7am until 9pm. 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. (...)'

The wording of the time frame for flex-time is from 7 a.m. until 9 p.m., which stipulates that the working time precisely ends at 9 p.m. The last minute of Ms. Anna's working time would therefore begin at 8:59 p.m., and thus, the phone call at 9 p.m. should be treated as outside the timeframe for flex-time. The framework for the time frame for flex-time in her contract corresponds to the maximum working time of 12 hours according to the Working Time Act § 4b (4). Furthermore, the time frame for flex-time allows for flexibility, since Ms. Anna is allowed to decide in respect of the 7 a.m. until 9 p.m. time frame when Ms. Anna wants to start and end her ten hours working day.

The word "time frame" in the employment contract describes the absolute limit of working time for Ms. Anna. If the absolute time frame was extended, the mandatory rest period of 11 consecutive hours in the Working time Act § 12 (1) would be breached: The meeting the next day on 9 October 2020 started at 8 a.m., and the Claimant would therefore not have had 11 hours of uninterrupted rest before the new working period started.

The Working Time Act on which the contract is based, cf. section 5 of the employment contract, implements Directive 2003/88 and therefore the Working Time Act must be interpreted in conformity with the Directive 2003/88.[1] An interpretation of national law that extends working time beyond 8:59:59 p.m. is contrary to Directive 2003/88.

Article 1 (1) of Directive 2003/88 states that the purpose of the Directive is to lay:

'(...) down minimum safety and health requirements for the organisation of working time, in respect of periods of daily rest, breaks, weekly rest, maximum weekly working time, annual leave and aspects of night work, shift work and patterns of work, has (sic.) been significantly amended.'

[1] C-14/83 *Von Colson*, para 26

The overarching purpose is to lay down minimum safety and health requirements for the organisation of working time. Initiating a task past exactly 9 p.m. would undermine the rest period laid down in Article 3 and 5 of Directive 2003/88 and the overarching purpose of the directive found in Article 1 (1).

Additionally, CFREU Article 31 (2) stipulates that *'Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.'*

The CJEU has already determined that even though CFREU addresses the Member States, cf. Article 51 (1), rather than individuals, Article 51 (1) cannot be interpreted as meaning that it systematically precludes individuals being required to comply with certain provisions of the CFREU. CFREU Article 31 (2) is sufficiently clear, precise and unconditional and therefore has horizontal direct effect.[2] Direct horizontal effect means that private parties, such as private employers as XY Austria, are bound by the provision. Thus, Ms. Anna can rely on and plead CFREU Article 31 (2). Working outside the time frame for flex-time and therefore not having the mandatory rest period of 11 hours does not live up to the minimum protections provided for in Article 3 and 5 in Directive 2003/88 or CFREU Article 31 (2). Therefore a requirement to work at 9.00 p.m. is a breach of the fundamental protections provided.

On 8 October 2020, she chose to allocate her working time so it ended at 6 p.m as she was entitled to under the flex-time provision in the employment contract. She was therefore not obligated to be available for any work after 6 p.m. From the wording of the employment contract section 5 (b) it is clear that work after 6 p.m requires positive action from the employer in the form of a specific instruction. XY Austria has not provided any evidence of an agreement where Ms. Anna, prior to working, was obliged to inform the employer about the placement of her daily working hours.

On these grounds the Claimant argues that Ms. Anna did not breach any obligations by not picking up her phone. Therefore, this does not fulfil the requirements for immediate dismissal found in the White Collar Act § 27.

[2] See joined Cases C-569-570/16 *Bauer and Broßonn*, paras 85-92

Should the Court determine that Ms. Anna was obligated to pick up her phone, the fact that she did not, does in no way equal her failing to perform the service for a considerable period of time or persistently refusing to perform her services. Therefore, instead of taking such a drastic action on a minor misstep, the employer could have given her a warning, tried moving her to another department or moved her to another supervisor. They could even have tried suspending her for a few days. Even if XY Austria did not want her as an employee anymore, they could, by default, just have used the normal termination with a notice period. These sanctions would have been far more proportionate and respectful. The immediate dismissal is without question disproportionate in this situation.

1.2.2.2 Urgent business needs

The employment contract section 5 (b) also states that '*in case of urgent business needs, the Employer reserves the right to request the Employees availability, (...)*'.

The Claimant contests that the need for preparation for the internal meeting the next day would constitute an "urgent business need" in the sense of this provision. The word "urgent" suggests that the matter must be strongly pressed upon a person's attention or that it calls for prompt action. XY Austria has failed to point to any evidence that the meeting called for prompt action.

Furthermore, the provision prescribes that XY Austria can request the employee's availability. If XY Austria wanted to invoke this provision, they should have requested the availability of Ms. Anna. A request must, self-evidently, be placed prior to the ending of the flex-time period at 8:59 p.m. XY Austria has failed to point to any evidence showing that Ms. Anna's availability had been requested before the supervisor called her at 9 p.m. As XY Austria did not request Ms. Anna's availability according to the timeframe for flex-time, they were not entitled to extending the working hours after 9 p.m. Ms. Anna was, therefore, not obligated to answer the phone.

XY Austria has failed to point to any evidence that the matter was "urgent". Therefore, calling Ms. Anna at 9 p.m. was outside her working time and flex-time period. Thus, she did not fail to perform her services when not picking up the phone. Thus, the requirements for immediate dismissal found in the White Collar Act § 27 (4) are not fulfilled.

On these grounds, the Claimant submits that Ms. Anna did not breach any contractual obligations. Firstly, a disagreement with a supervisor does not constitute a breach of contract. Secondly, Ms. Anna was not obligated to pick up her phone as the call was outside her working time and as there were no urgent business needs. Should the Court find that Ms. Anna did breach her contractual obligations, the Claimant submits that the immediate dismissal was disproportionate. In summary, the immediate dismissal of Ms. Anna was unlawful.

1.3 Ms. Anna has the right to compensation

According to the White Collar Act § 29 (1) Ms. Anna has the right to compensation as a result of the unlawful dismissal. The following line of argumentation will pertain to the ways in which Ms. Anna has the right to compensation for all benefits during the fictitious notice period from 9 October 2020 until 30 November 2020, cf. the White Collar Act § 20 (2) and § 29 (1).

Ms. Anna is covered by the Collective Agreement 2020 as an employee at XY Austria, cf. Article 2 (1) (c) in the Collective Agreement 2020.

1.3.1 Over-time compensation

The Collective Agreement 2020 Article 4 section I (1) states that normal working hours are 38.5 hours per week. According to the employment contract, Ms. Anna's normal working hours are 40 hours per week. This is less favourable for Ms. Anna than the Collective Agreement 2020, as she works 1.5 hours extra every week. The Collective Agreement 2020 Article 22 (1) states that '*special agreements are only effective if they are more favourable for the employee or if they concern matters that are not regulated in the collective agreement*'. Ms. Anna's employment contract is therefore not effective in regard to working hours.
Article 5 section I (1) of the Collective Agreement 2020 states:

> *'Each working hour that has been expressly ordered exceeding the amount of the respective normal working hours according to the collective agreement (...) and under consideration of the fixed normal daily working hours from the provisions in Art. 4 II. is considered overtime.'*

On these grounds Ms. Anna is entitled to a compensation equalling the 1.5 overtime hours of work each week in the fictitious notice period from 9 October 2020 until 30 November 2020, cf. Article 5 section I (1) in the Collective Agreement 2020.

1.3.2 Work equipment

Article 9 section IV (1) of the Collective Agreement 2020 establishes that all necessary computing and communications equipment for remote work shall be provided by the employer. Ms. Anna has the right to a compensation equalling the value of having said equipment at her disposal in the fictitious notice period from 9 October 2020 until 30 November 2020.

The burden of proof in regard to the employees' right to use the equipment in private lies with XY Austria. As XY Austria has not provided any evidence that the employees were not allowed to use the equipment after hours, XY Austria has not satisfied such burden of proof.

On these grounds, Ms. Anna has the right to compensation equalling the value of having said equipment at her disposal in the fictitious notice period from 9 October 2020 until 30 November 2020.

1.3.3 Christmas and holiday allowance

According to the Collective Agreement 2020 Article 13, every employee is entitled to a 13th and 14th monthly salary each year. The 13th salary, known as the Christmas allowance, must be paid on 1 December of each year at the latest. The 14th salary, known as the holiday allowance, must be paid on 1 June of each year at the latest. Article 13 (6) and (7) prescribes that employees who leave the company during a calendar year are entitled to proportionate parts of the 13th and 14th monthly salary.

Ms. Anna has not been paid the two allowances connected to 2020, which makes her entitled to a proportionate part of the extra two months of salary. If XY Austria disagrees, XY Austria must point to any evidence that Ms. Anna, in fact, has been paid Christmas and holiday allowance for the year 2020.

On these grounds, Ms. Anna is entitled to compensation containing the two months allowance.

1.3.4 Increased salary

According to the Collective Agreement 2020 Article 15 section V (1), a company's total of the contractual monthly basic salaries must be increased as a whole by 2.2% as of 1 July 2020 at the latest. Ms. Anna has the right to a 2.2% increase in her basic salary effective from 1 July 2020 until the end of employment

Article 15 section V (4) of the Collective Agreement 2020 states:

> *'Up to 10% of all employees who are employed at the company in July 2020 or at the earlier reference date as defined in paragraph 2 may be excluded from an individual increase of the monthly basic salary.'*

As the individual increases in monthly basic salaries are incumbent on the employer, XY Austria must point to any evidence that Ms. Anna is not one of the employees who should have such an increase. XY Austria has failed to prove this.

On these grounds Ms. Anna is entitled to compensation containing the 2.2% increase in the fictitious notice period from 9 October 2020 to 30 November 2020.

Claim 2

The Claimant submits that XY Austria is obligated to choose between supplying Mr. Ferdinand with a single office at their premises or providing work equipment in order to let Mr. Ferdinand work from home all days.

In support of this claim the Claimant argues that, because Mr. Ferdinand has a disability in the understanding of the Disability Employment Act § 3, the employer has a duty to take appropriate and necessary measures. The cumbersome and ineffective desk panels as well as the uncomfortable headphones suggested by XY Austria are not in any way effective and would create more problems than they would solve. Thus, XY Austria must provide one of the two solutions proposed by Mr. Ferdinand. Otherwise they would discriminate against Mr. Ferdinand on grounds of disability, according to the Disability Employment Act § 7b and Directive 2000/78 Article 5. These arguments are elaborated in the following.

2.1 Mr. Ferdinand is disabled

The following line of argumentation will pertain to the ways in which Mr. Ferdinand has a disability and because of this is entitled to reasonable and appropriate accommodation at work.

According to the Disability Employment Act § 3 disability consists of three elements: 1) An impact of a physical, mental or psychological impairment or impairment of sensory functions 2) which is likely to make participation in working life more difficult, and 3) which is not merely temporary. The second sentence of the provision states that *'A period of more than six months is considered to be not only temporary'*.

The CJEU has clarified that the concept of 'disability' must be understood as an impairment '*which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers'*.[3]

[3] Joined cases C-335/11 and 337/11 *HK Denmark,* para 38

In C-13/05 *Chacón Navas* the CJEU determined that '*(...) the concept of 'disability' for the purpose of Directive 2000/78 must (...) be given an autonomous and uniform interpretation*'.[4] Therefore, the term "disability" in the Disability Employment Act § 3 must be interpreted and understood in accordance with EU law.[5]

The Claimant submits that Mr. Ferdinand is disabled, cf. the Disability Employment Act § 3.

Firstly, Mr. Ferdinand has a *physical or physiological impairment of sensory functions*, as his ability to concentrate is reduced after an accident.

Secondly, as a result of the working conditions at XY Austria's premises the impairment *hinders Mr. Ferdinand's full and effective participation in professional life on an equal basis with other workers*. If the work environment stays the same it will result in Mr. Ferdinand's impairment hindering his full and effective participation, i.e., the working conditions at XY Austria pose barriers for Mr. Ferdinand.

Thirdly, Mr. Ferdinand's impairment is *not merely temporary*. According to an interpretation of the wording, the last sentence in the provision is not a minimum threshold in regard to the duration of the impairment. The last sentence is not a definition of "temporary" but merely states that impairments with a durability of more than six months are, at any rate, not only temporary.

Should this interpretation of "not temporary" in the Disability Employment Act § 3 be disputed, the Claimant submits that the wording must be interpreted and understood in accordance with EU law.[6]

In joined cases C-335/11 and 337/11 *HK Denmark* the CJEU defined "disability" as used in Directive 2000/78.[7] In order to establish disability, it is a criterion that the limitation is a long-

[4] C-13/05 *Chacón Navas*, para 42; Repeated in C-395/15 *Daouidi*, para 50

[5] C-14/83 *Von Colson*, para 26

[6] C-14/83 *Von Colson*, para 26, and joined cases C-397-403/01 *Pfeiffer*, paras 111-116 (especially para 115)

[7] Joined Cases C-335/11 and 337/11 *HK Denmark*, paras 38-39 and 47

term one,[8] and the Directive '*(...) must, as far as possible, be interpreted in a manner consistent with (...) CRPD*'.[9] It follows from CRPD Article 1 that disability presupposes the impairment to be long-term. The CJEU has stated that if the impairment, at the time of the allegedly discriminatory act, does not display a clearly defined prognosis as short-term, the impairment is to be considered long term.[10] I.e., the impairment is classified as long term if the duration is unknown.

An interpretation of the Disability Employment Act § 3 where the 6 months is a minimum threshold is therefore incompatible with Directive 2000/78 and CRPD.

The long-term nature of the impairment must be assessed in relation to the condition of the impairment at the time of the discriminatory act.[11] At the time of the discriminatory act the expert physician had opined that Mr. Ferdinand's condition may well continue for an indefinite period and there was no specific prognosis that his condition would improve over a certain period. I.e., Mr. Ferdinand's impairment did '*not display a clearly defined prognosis as regards short-term prognosis'*,[12] and it should therefore be classified as long-term.

If it were *contra legem* to interpret the Disability Employment Act § 3 in consistency with EU law, as the national provision should be interpreted as demanding 6 months to have elapsed, the national provision would infringe a general EU principle of prohibition of discrimination on the basis of disability.[13] As a result of this the provision should be set aside, as the general EU principle has direct horizontal effect.[14]

In summary, the Claimant argues that Mr. Ferdinand in any case has a disability which entitles him to reasonable accommodation, cf. the Disability Employment Act § 6 (1a).

[8] Joined Cases C-335/11 and 337/11 *HK Denmark*, para 47

[9] Ibid., para 32

[10] C-395/15 *Daouidi*, para 56, and repeated in C-397/18 *Nobel Plastiques*, paras 44-45

[11] C-395/15 *Daouidi*, para 53, and repeated in C-397/18 *Nobel Plastiques*, para 44

[12] C-395/15 *Daouidi*, para 56

[13] T-706/17 *UP v. EU Commission*, para 33

[14] C-144/04 *Mangold*, para 77

2.2 The two solutions proposed by Mr. Ferdinand do not pose a disproportionate burden on XY Austria

The following line of argumentation will pertain to the ways in which the solutions proposed by Mr. Ferdinand do not pose a disproportionate burden on XY Austria.

The Disability Employment Act § 6 (1a) states: *'employers shall take appropriate and (...) necessary measures to enable persons with disabilities to have access to employment'*. XY Austria is therefore obligated to take appropriate and necessary measures to ensure Mr. Ferdinand a reasonably normal work output.

The Disability Employment Act does not specify when the measures will be considered appropriate and necessary. However, national law must be interpreted in accordance with EU law,[15] and therefore the Disability Employment Act § 6 (1a) must be read in accordance with Article 5 of Directive 2000/78, which states:

> *'In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, (...), unless such measures would impose a disproportionate burden on the employer'.*

The CJEU has specified the purpose of providing reasonable accommodation as '*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*'.[16]

In the following, the Claimant will argue the ways in which a single office or working from home all days with proper work equipment, are appropriate measures and do not impose a disproportionate burden on XY Austria.

[15] C-14/83 *Von Colson*, para 15

[16] Joined Cases C-335/11 and 337/11 *HK Denmark*, para 54

2.2.1 Single office at XY Austria's premises

The employer must take 'appropriate measures'. According to recital 20 in the preamble to Directive 2000/78 'appropriate measures' are '*effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment*'.

According to the expert physician, surrounding noise and visual distractions need to be not merely reduced but *minimized*. The expert physician states that this can be achieved by letting Mr. Ferdinand occupy a single office at XY Austria.

When determining whether these measures would be appropriate or not it must be assessed if the measures meet the needs of Mr. Ferdinand. It must be borne in mind that the CJEU has stated that this means '*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*'.[17]

The need for *minimizing* surrounding noise and visual distractions would obviously be met effectively and practically with a single office, as Mr. Ferdinand could close the door to the open-floor office. A single office would also without doubt ensure Mr. Ferdinand's ability to *full and effective participation* on *an equal basis with* his co-workers. The solution of providing a single office is therefore appropriate.

In order to determine whether a specific solution gives rise to a disproportionate burden, the Commission has, in recital 21 of Directive 2000/78, stated that:

> *'(...)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'.*

Therefore, an accommodating measure may pose a burden on XY Austria, as long as the burden is not disproportionate.

[17] Ibid.

XY Austria has not done any serious calculation or provided any evidence of the financial costs prior to dismissing Mr. Ferdinand's solution. By giving Mr. Ferdinand one of the already existing single offices there would be no financial costs. Further, XY Austria has the possibility to apply for compensation measures, cf. the Disability Employment Act § 6 (1a), and the burden can therefore not be seen as disproportionate.

According to XY Austria, single offices exist only for members of the Board of Management. However, assigning an unoccupied single office to Mr. Ferdinand does not pose a disproportionate burden on XY Austria, as the single offices already exist. The fact that they are only used for members of the Board Management is therefore not a relevant consideration.

Mr. Ferdinand would not need the *same* office space each day: He merely needs *a* single office each day. As *most of* the single offices usually are occupied, there must always be at least one available, and thus, it is not a disproportionate burden, if even a burden, to let Mr. Ferdinand occupy a single office.

XY Austria argues that a solution with a single office would destroy the open floor spirit. The open floor-office consists of 400 desks, each occupied by an employee. Allowing *one* of the 400 employees to occupy a single office because of disability would not nearly impact the open floor spirit, let alone destroy it.

On these grounds, the Claimant argues that a single office at XY's Austria's premises is an appropriate measure which does not pose a disproportionate burden.

2.2.2 Work from home all days with proper work equipment provided by XY Austria

Working from home is another way to minimize surrounding noise and visual distractions, as Mr. Ferdinand would not be placed in an open office environment with lots of co-workers, who interact and move around in the dynamic teams. Overall, working from home will ensure Mr. Ferdinand's ability to achieve a reasonable normal work output, and thereby eliminate the barriers that hinder full and effective participation on an equal basis with other workers, but it will not hinder him from being an integrated part of the team. Thus, the solution is appropriate.

The Claimant opposes XY Austria's concern of the potential precedent a remote work-solution could cause, as XY Austria has not given any documentation for the relevance of such concern. XY Austria wants their employees to work from home more, so they can save office space. XY

Austria is achieving this by introducing the Mobile Working Guideline which *forces* the employees to work from home. This means that employees working from home is clearly not a burden for XY Austria in the same way it might be for other companies.

Furthermore, working from home will not hinder Mr. Ferdinand from taking part in meetings or social activities with his co-workers, as otherwise stated by XY Austria. There are many online platforms that make taking part in meetings possible. This further underpins that the solution does not place a disproportionate burden on XY Austria.

In case C-397/18 *Nobel Plastique*, the CJEU has stated:

> *'As set out in recitals 20 and 21 of Directive 2000/78, the employer must take appropriate measures, i.e. effective and practical measures to adapt the workplace to the disability, for example by adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources, without imposing a disproportionate burden on the employer, taking account, in particular, of the financial and other costs entailed, the scale and financial resources of the undertaking and the possibility of obtaining public funding or any other assistance'.*[18]

Mr. Ferdinand wishes for XY Austria to provide an ergonomically appropriate chair, desk, monitor, PC, lighting, shading and air-conditioning, all in accordance with the new building features of the office.

Mr. Ferdinand is covered by the Collective Agreement 2020, cf. Article 2 (1) (c). According to Article 9 section IV (1) of the Collective Agreement 2020, XY Austria is obligated to provide all necessary computing and communication equipment for remote work. XY Austria is therefore legally bound to accommodate these wishes. Already for this reason alone, Mr. Ferdinand's demands of such kind can therefore not be regarded as a disproportionate burden.

As for the Claimant's other demands, the costs should be compared to the scale and financial resources of XY Austria, as stated by the CJEU in C-397/18 *Nobel Plastique*.[19] XY Austria is

[18] C-397/18 *Nobel Plastique*, para 65

[19] Ibid.

a part of an international company and services business in Austria, Germany, Switzerland and the CEE region. They are a highly profitable company, and therefore the price for the other demands will not pose a *disproportionate* burden.

On these grounds, the two solutions provided by Mr. Ferdinand, are appropriate and reasonable.

2.3 The solution proposed by XY Austria is not appropriate

The following line of argumentation will pertain to the ways in which XY Austria's solutions are not appropriate, bearing in mind the content of appropriate measures as examined above in section 2.2 above, and therefore do not fulfil the duty of accommodation.

According to the expert physician, Mr. Ferdinand needs surrounding noise and visual distractions to be *minimized* in order for him to achieve a reasonably normal work output.

XY Austria has proposed to supply Mr. Ferdinand with noise-cancelling in-ear headphones and mobile panels 60 cm high that would provide *some* optical shield to the front and the two sides of Mr. Ferdinand's workspace.

With regards to noise-reduction, XY Austria has failed to point to any evidence to what extent the noise-cancelling in-ear headphones will reduce the surrounding noise. In C-397/18 *Nobel Plastique* the CJEU states that the measure has to *eliminate* the barriers to be appropriate. They should not only reduce the various barriers that hinder the full and effective participation of the involved employee.[20] The burden of proof for the solution being appropriate rests on XY Austria. XY Austria has not satisfied the burden of proof.

Furthermore, XY Austria's solution is not effective, as it would inflict a great deal of discomfort for Mr. Ferdinand: In-ear headphones are rather uncomfortable to wear, especially for a longer duration. With this solution, he would be expected to wear in-ear headphones for the whole workday, i.e. 8 hours per day, every single day. The purpose of the accommodative measures is to eliminate barriers that hinder full and effective participation of persons with disabilities in professional life on an equal basis with other workers but wearing uncomfortable

[20]Ibid., see in particular para 64

in-ear headphones 8 hours every single workday does not ensure full participation in professional life *on an equal basis* with other workers. As the in-ear headphones do not fulfil the purpose of the accommodative measures, they are not appropriate.

As for minimizing the visual distractions, the panels provide *some* optical shield for Mr. Ferdinand. The Claimant submits that the visual shielding provided by panels just 60 cm high does not meet the requirement of being appropriate. The shields do not in any way suffice to *minimize* the visual distractions as required according to the expert physician. The amount of shielding depends on how far away from Mr. Ferdinand they are placed. In order to shield from people walking by, the panels must be placed rather close to Mr. Ferdinand, which may cause inconveniences when solving his tasks and, furthermore, make Mr. Ferdinand cooped up.

As XY Austria has chosen to have non-individualized desks that can be chosen and used every day on a first-come first-serve basis, Mr. Ferdinand would have to set up the panels every morning and take them down every evening, which makes the solution not effective for Mr. Ferdinand. The solution does not place him on an equal basis as the other employees, as he will have to struggle every day with handling shields several times per day. As the panels are not effective, they are not appropriate measures.

On these grounds, the Claimant argues that XY Austria's proposal is not appropriate. According to CJEU case law, not providing accommodation and at the same time rejecting appropriate accommodation is direct discrimination.[21] As XY Austria's proposal is not appropriate, XY Austria is discriminating against Mr. Ferdinand, as they have not accommodated one of the solutions proposed by Mr. Ferdinand.

[21] C-397/18 *Nobel Plastique*, para 72

Claim 3

The Claimant argues that XY Austria is obligated to pay the shortfall of Mr. Josef's salary for the last three years compared to the level provided for in the collective agreements for 2020, 2019 and 2018. In support of this claim, the Claimant firstly argues that Mr. Josef is covered by the Collective Agreement 2020 as he is a worker at XY Austria. To exclude Mr. Josef from the Collective Agreement 2020 would be a breach of his right to free movement within the Union, cf. TFEU Article 45. Alternatively, the Claimant argues that Mr. Josef is covered by the Collective Agreement 2020 because he is a freelance worker. These arguments are elaborated in the following.

It is important to underline the fact that Article 20 of the Collective Agreement 2020 does *not* prohibit the Claimant from bringing an action before the local Court of Labour and Social Matters. The Collective Agreement 2020 has been concluded by a trade union federation and a trade association. Mr. Josef is an individual who has decided not to organise in a union. Article 20 of the Collective Agreement 2020 is a generic provision, and it does not specifically cover individuals. In *Sigurjónsson*[22], the ECtHR has stated that:

> *'(...) Article 11 must be viewed as encompassing a negative right of association. It is not necessary for the Court to determine (...) whether this right is to be considered on an equal footing with the positive right'* [23]

As Mr. Josef has chosen not to organise, it would infringe his freedom of association, if Mr. Josef was required to allow a union to represent him in accordance with Article 20 of the Collective Agreement 2020, even though he is not a member of any union, cf. ECHR Article 11.

[22] *Sigurjónsson v Iceland*, Application no. 16130/90, ECtHR judgment of 30 June 1993,24/1992/369/443.

[23] Ibid., para 35

3.1 The Claimant is covered by the collective agreement as a 'worker' within the meaning of TFEU Article 45

The following line of argumentation will pertain to the ways Mr. Josef is covered by the Collective Agreement 2020 as he is a 'worker' within the meaning of TFEU Article 45.

Mr. Josef is an EU citizen, originally from Estonia, who has taken residence in Austria for the purpose of working. Mr. Josef performs a cross-board activity. Therefore, TFEU Article 45 is applicable. The CJEU has concluded that TFEU Article 45 is sufficiently clear, precise and unconditional and therefore has horizontal direct effect.[24] Furthermore, the CJEU has determined that collective agreements must be in compliance with TFEU Article 45.[25] Therefore, Mr. Josef can invoke his right after TFEU Article 45 against XY Austria at the Court for Labour and Social Matters.

3.1.1 The concept of 'worker' within the meaning of TFEU Article 45

According to the CJEU the term 'worker' is an autonomous and independent EU term regardless of the Member States' formal designation of the employment relationship and must not be interpreted narrowly.[26] The fact that XY Austria determines Mr. Josef as a "freelancer" has no legal relevance in relation to whether or not Mr. Josef is a worker within the meaning of TFEU Article 45.[27]

The CJEU has defined a 'worker' as the following:

> *'Any person who pursues activities which are real and genuine, the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'.*[28]

[24] C-281/98 *Angonese*, para 34

[25] See in particular C-36/74 *Walrace and Koch*, paras 17-18; C-172/11 *Erny*

[26] See in particular, C-66/85 *Lawrie-Blum*, paras 16-17; C-188/00 *Kurz*, para 32; C-544/11 *Petersen*, para 30

[27] See in particular C-256/01 *Allonby*, para 71; C-413/13 *FNV Kunsten Informatie en Media*, para 35

[28] See in particular, C-66/85 *Lawrie-Blum*, paras 16-17; C-188/00 *Kurz*, para 32; C-544/11 *Petersen*, para 30

The crucial factor is that Ms. Josef for a certain period of time performs a service for and under the direction of XY Austria, for which service he receives remuneration. Whether a relationship of subordination exists must be assessed on the basis of all the factors and circumstances characterizing the relationship between Mr. Josef and XY Austria.

The CJEU has declared that if an individual lacks the features typically associated with the functions of an independent service provider, there exists a relationship of subordination.[29] These features have been declared by the CJEU as namely: More leeway in terms of choice of the type of work to execute, the manner in which the work is to be performed, and more freedom in terms of recruitment of his own staff.[30] For instance, the CJEU has determined that when an individual can send another person in his or her place without consent from the employer, there is no relationship of subordination and therefore that individual cannot be seen as a 'worker' within the meaning of EU law.[31]

The Claimant argues that there does, in fact, exist a relationship of subordination between Mr. Josef and XY Austria when he works with the general and specific solutions that XY Austria offers their customers.

Firstly, Mr. Josef has no employees himself and he cannot outsource jobs without XY Austria's consent.

Secondly, Mr. Josef is one of the leading coders at XY Austria and has been there for four years. As a leader, Mr. Josef is leading on behalf of XY Austria for each task the company wants to conclude. Furthermore, Mr. Josef is not free to make his own choices but must deliver to the desire of XY Austria. He is expected to continually adjust and align the project with the overall choices of the management.

Thirdly, with the new Mobile Working Guideline XY Austria has made it possible for every employee to work from home. As a result, Mr. Josef does not enjoy more independence and flexibility than other employees at XY Austria. Therefore, choosing when and where to work

[29] C-270/13 *Haralambidis*, paras 29-34

[30] Ibid., para 33

[31] C-692/19 *Yodel*, paras 38-43

does not prevent Mr. Josef from worker status in itself.

In return for Mr. Josef's performed services, he receives a remuneration equalling to 90% of his total income. Mr. Josef is therefore economically dependent on XY Austria and is therefore not fully independent.

The CJEU has stated that even a limited remuneration and productivity would be enough to be seen as a worker.[32] Mr. Josef is clearly above this threshold.

Mr. Josef pursues an activity that is real and genuine, as Mr. Josef for a certain period of time has performed a service for and under the direction of XY Austria in return for which he receives remuneration.

Today's economy and society does not make it easy to establish the status of either a worker or a self-employed. However, on the above-mentioned grounds, in this specific situation, Mr. Josef is a worker within the meaning of TFEU Article 45.

3.1.2 The prohibition of non-discriminatory restrictions

The CJEU has declared that TFEU Article 45 (2) contains a prohibition against rules and practices which are non-discriminatory but impede access of workers to the labour market.[33]

Provisions that preclude or deter an EU citizen from leaving his country of origin in order to exercise his right of free movement, constitutes a restriction to that freedom even if they are non-discriminatory. The CJEU has determined that restrictions with this effect impact workers' access to the labour market.[34]

The Court is obligated to interpret the Collective Agreement 2020 in accordance with TFEU Article 45.[35] A collective agreement that does not cover all workers within the EU definition of a worker will preclude or deter Mr. Josef from exercising his right of free movement. This

[32] C-456/02 *Trojani*, para 16

[33] See in particular C-415/93 *Bosman*; C-464/02 *Commission v. Denmark (Company Cars)*

[34] See in particular C-415/93 *Bosman*, para 96; C-464/02 *Commission v. Denmark (Company Cars)*, paras 33-36

[35] See in particular C-36/74 *Walrave and Koch*, paras 17-18; C-172/11 *Erny*

is the case if Mr. Josef is not covered by the Collective Agreement 2020, as he will not have the same rights in regard to salary level as other workers covered by the Collective Agreement 2020.

If the Collective Agreement 2020 does not cover Mr. Josef, he would not have the same rights as other employees that work in the IT sector. Therefore, the Collective Agreement 2020 will restrict the access of workers to the labour market in Austria. The Collective Agreement is therefore a breach of the obligation under TFEU Article 45 .

On these grounds, the Court has to interpret Article 2 (1) (c) of the Collective Agreement 2020 in a way that Mr. Josef is covered by the collective agreement.

3.1.3 XY Austria is obligated to pay compensation for the shortfall of Mr. Josef's salary for the last three years

XY Austria is obligated to pay the shortfall of Mr. Josef's salary for the last three years, compared to the level provided for task group ST2 Experienced level, cf. Article 15 section II of the Collective Agreement 2020.

As stated in section 3.1.1 and 3.1.2 Mr. Josef is covered by the Collective Agreement 2020. Article 15 of the Collective Agreement 2020 provides Mr. Josef with a right to a minimum salary from the period of 1 January 2020 and forward.

Before the period of the Collective Agreement 2020, there were two previous collective agreements: Collective Agreement 2019 and Collective Agreement 2018. These collective agreements provided Mr. Josef with a right to a minimum salary, given that Mr. Josef as a worker was covered by both collective agreements.

Mr. Josef is a highly qualified freelancer whose qualifications are uncontested. Mr. Josef is trained in both the UK and Germany, has particular responsibilities and performs the work independently. Mr. Josef has been working for XY Austria for four years on both general and specific solutions that XY Austria offers.

The Claimant argues that Mr. Josef must be assigned to the corresponding task group "ST2 experienced level" in Article 15 section section II of the Collective Agreement 2020. Mr. Josef

is within the same task group for all three years and all three collective agreements. However, the Claimant acknowledges that XY Austria has a duty to use the pro-rata principle for the hours he has worked for the company.

On these grounds, XY Austria is obligated to pay the shortfall of Mr. Josef's salary for the last three years.

3.2 The Claimant is covered by the Collective Agreement 2020 as a freelance worker on the basis of interpretation of the Collective Agreement 2020

Should the Court find that Mr. Josef cannot be seen as a 'worker' within the meaning of TFEU Article 45, the Claimant argues that Mr. Josef is covered by the Collective Agreement 2020 as a freelancer on the basis of an interpretation of the wording of the Collective Agreement 2020.

Mr. Josef is working as one of the leading coders for XY Austria and his status is a freelancer. Article 2 (1) (c) of the Collective Agreement 2020 states that the salary scales in the collective agreement are also applicable to freelance workers.

On these grounds, Mr. Josef is covered by the Collective Agreement 2020 in regard to the salary scales in accordance with Article 2 (1) (c) of the Collective Agreement 2020.

3.2.1 The Collective Agreement 2020 does not infringe Article 101 TFEU

Should the Court find that Josef is, in fact, not a 'worker' within the scope of TFEU Article 45, the Claimant argues that Mr. Josef cannot be seen as an 'undertaking' within the scope of TFEU Article 101. As Mr. Josef cannot be seen as an 'undertaking', the Collective Agreement 2020 does not infringe TFEU Article 101.

According to TFEU Article 101 (1) there is a prohibition of:

> *'(...) all agreements between undertakings (...) which have as their object or effect the prevention, restriction or distortion of competition within the internal market (...)'*

The CJEU has determined that collective agreements between organisations representing employers and employees are not within the scope of TFEU Article 101 (1).[36]

The term 'employee' for the purpose of EU law must be defined according to objective criterias that characterise the employment relationship, taking into consideration the rights and responsibilities of the person concerned.[37] An 'undertaking' is defined as an individual who offers their services for remuneration on a given market and performs their activities as independent economic operators in relation to their principal.[38]

Today's economy and society does not make it easy to establish the status of neither an employed nor an undertaking. When determining the scope of TFEU Article 101 there is a 'grey area' between who is an employee and who is an undertaking.[39] Therefore, it is not necessary to define Mr. Josef as an employee, but it is sufficient to determine that he is not a genuine 'undertaking' in the understanding of TFEU Article 101.

The Claimant argues that Ms. Josef is not an undertaking within the scope of Article 101 TFEU.

Firstly, Mr. Josef has no employees himself, he cannot outsource jobs without XY Austria's consent, and he works on generally as well as specific solutions that XY Austria offers. The CJEU has determined that when an individual can send another person in his place without the consent of the employer, that individual is an 'undertaking'.[40] However, this is not the case for Mr, Josef, who needs XY Austria's consent before outsourcing assignments.

Secondly, Mr. Josef depends on XY Austria, and XY Austria bears the commercial risk in connection with his work, as Mr. Josef works on the different solutions that *XY Austria* offers to clients.

Thirdly, Mr. Josef can work wherever he chooses. However, with the new Mobile Working

[36] See in particular C-67/96 *Albany*, paras 59-60; C-413/13 *FNV Kunsten Informatie en Media*, paras 22-23

[37] C-413/13 *FNV Kunsten Informatie en Media*, para 34

[38] Ibid., para 27

[39] C-413/13 *FNV Kunsten Informatie en Media*, paras 32 and 35

[40] C-692/19 *Yodel*, paras 38-43

Guideline introduced by XY Austria, Mr. Josef does not enjoy more independence and flexibility than other employees who perform the same activity as him. Therefore, Mr. Josef performs the same activity as XY Austria's employed employees. Mr. Josef has lost his status as an independent trader, as it is clear that he does not determine his own conduct on the market but is dependent on XY Austria just like normal employees.[41]

On these grounds, Mr. Josef cannot be defined as an 'undertaking', and as a result hereof the Collective Agreement 2020 does not infringe TFEU Article 101.

3.2.2 XY Austria is obligated to pay compensation for the shortfall of Mr. Josef's salary

As Mr. Josef is within the scope of application for the Collective Agreement 2020, the Claimant argues that XY Austria is obligated to pay the shortfall of Mr. Josef's salary for the last three years compared to the level provided for in the Collective Agreements 2020, 2019 and 2018. Mr. Josef is within task group ST2 Experienced level in Article 15 section II of the Collective Agreement 2020.

The Collective Agreement 2020 covers freelance workers, and came into effect as of 1 January 2020, cf. Article 3 (1) of the Collective Agreement 2020. As there is no transition provision related to freelance workers in the Collective Agreement 2020, the collective agreement must be interpreted in a way that freelance workers were also covered by the previous collective agreements (Collective Agreement 2018 and Collective Agreement 2019). The specification of freelance workers being covered by the salary scales in the Collective Agreement 2020 is not an expansion of the scope, but a clarification. XY Austria has not provided any evidence that can disprove this presumption.

On these grounds the Claimant submits that XY Austria is obligated to pay Mr. Josef compensation for the shortfall of his salary for the last three years compared to the level provided for in Article 15 section II task group ST2 Experienced level in the Collective Agreement 2020. Should the Court find that Mr. Josef is only covered by the Collective Agreement 2020, the Claimant submits that XY Austria is obligated to pay Mr. Josef compensation for the shortfall of his salary for the last year, according to the same level as mentioned above.

[41] C-413/13 *FNV Kunsten Informatie en Media*, para 33

I. Pleadings

For the above reasons, the Claimant respectfully requests the Court to find that:

1. XY Austria's termination of Ms. Anna with immediate effect was unlawful, and that XY Austria, therefore, is obligated to compensate her for: over-time, work equipment, Christmas and holiday allowance and increased salary, during the fictitious notice period from 9 October 2020 until 30 November 2020.

2. XY Austria is obligated to either supply Mr. Ferdinand with a single office at their premises or provide work equipment in order to let Mr. Ferdinand work from home each day.

3. XY Austria is obligated to pay the shortfall of Mr. Josef's salary compared to the level provided for in the Collective Agreements 2020, 2019 and 2018 for the last three years.
    a. Alternatively, XY Austria is obligated to pay the shortfall of Mr. Josef's salary compared to the level provided for in the Collective Agreements 2020 for the last year.