

Denmark D

2021

Statement for Defendant

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## D. Statement of Relevant Facts

### Claim 1

1. Ms. Anna performs work according to the Mobile Working Guideline.
2. On 8 October 2020 Ms. Anna was working from home.
3. Ms. Anna's supervisor does not know when Ms. Anna's working day finishes or ends as a result of Ms. Anna's flex-time agreement.
4. On 8 October 2020, the supervisor calls Ms. Anna at 9 p.m. in order to talk through the details of the following day's important internal meeting held at the premises of XY Austria.
5. Ms. Anna knew there was an important internal meeting on 9 October 2020 that she had to attend.
6. Ms. Anna realises that her supervisor is trying to reach her.
7. Nothing stops Ms. Anna from answering the phone, she simply chose not to respond to the phone call of her supervisor.
8. Ms. Anna does not contact the supervisor any time before the important internal meeting.
9. At the important internal meeting, Ms. Anna's view is not aligned with the supervisor's position.
10. The supervisor realises Ms. Anna is not fully prepared at the important internal meeting.
11. As a result of the incidents, Ms. Anna's supervisor dismisses Ms. Anna with immediate effect.

### Claim 2

12. Mr. Ferdinand is an employee at XY Austria.
13. On 2 November 2020 Mr. Ferdinand was injured in an unfortunate accident.
14. After the accident, Mr. Ferdinand consults an expert physician.
15. In the physician's opinion, Mr. Ferdinand's condition may well continue for an indefinite period.
16. In the physician's opinion, Mr. Ferdinand's work environment needs to be adapted so that he can achieve a reasonably normal work output.

17. Mr. Ferdinand proposes two solutions; he wishes either to be supplied with a single office at XY Austria's premises or to have an individual home office agreement where XY Austria provides work equipment, including an ergonomically appropriate chair, desk, monitor, PC, lighting, shading and air-conditioning, as if he were performing work at the premises of XY Austria.
18. XY Austria finds both proposals unreasonable.
19. At XY Austria only members of the Board of Management have a single office.
20. There are no single free-standing offices available at XY Austria.
21. XY Austria finds that costs for a separate office seem very high.
22. XY Austria has carefully designed and invested in an office space with an open floor spirit.
23. A solution with additional single offices would destroy the carefully designed office space.
24. Mr. Ferdinand not only requires a permanent home office but also requires the home office to be equipped with an ergonomically appropriate chair, desk, monitor, PC, lighting, shading and air-conditioning.
25. XY Austria proposes to supply Mr. Ferdinand with in-ear headphones. The in-ear headphones are chosen because they are noise-cancelling.
26. XY Austria also proposes to supply Mr. Ferdinand with mobile panels around his workspace. The mobile panels provide optical shields to the front and the two sides of Mr. Ferdinand's workspace at the premises of XY Austria.
27. Mr. Ferdinand brings an action at the local Court for Labour and Social Matters Vienna.

### **Claim 3**

28. Mr. Josef is a highly qualified IT expert.
29. Originally, Mr. Josef is from Estonia.
30. Mr. Josef only takes on jobs that he likes.
31. Usually, Mr. Josef tends to move on after some years, pursuing an internationally mobile lifestyle.
32. Mr. Josef works on a freelance basis, also at XY Austria.
33. Mr. Josef has been connected with XY Austria for four years.

34. Mr. Josef has worked on different projects and is one of the leading coders XY Austria engages with.
35. Mr. Josef is free to choose where to perform the work tasks.
36. He is under no obligation to perform the tasks at the premises of XY Austria.
37. One of Mr. Josef's sources of income is from XY Austria.
38. Mr. Josef has the opportunity to outsource his work to others.
39. Mr. Josef claims that his remuneration does not adhere to the Collective Agreement 2020.
40. Mr. Josef brings an action at the local Court for Labour and Social Matters Vienna.

## 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.

#### 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: 6

### 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: *101 (1), 153 and 155*

#### 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: *30 and 47*

## 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 and 21*

Relevant Article: *5*

## Telework Agreement

The Telework Agreement is a collective agreement at European level concluded by the European social partners: ETUC, UNICE, UEAPME and CEEP. The Telework Agreement establishes at European level a general framework for the employment conditions of teleworkers and a framework for reconciling the needs for flexibility and security shared by employers and workers. It grants teleworkers, who by definition work outside the employer's premises, the same overall level of protection as workers who do carry out their activities at the employer's premises.

## **3. Austrian legislation**

### Austrian Arbitration Act

The Austrian Arbitration Act is a part of the Austrian Code of Civil Procedure. It is based on UNCITRAL Model Law on International Commercial Arbitration.

Relevant section: *592 (1)*

### Austrian Civil Code

The Austrian Civil Code is the national civil code of Austria. It governs the different kinds of contracts and the completion of the contracts as well as the right to compensation.

Relevant sections: *1293 and 1295*

### 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: *6 (1a), 7b (1) (6), 7g (4) and 7k*

## 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: *27 (1), 27 (4) and 29*

## **4. Austrian Collective Agreements**

### Collective Agreement 2020

The Collective Agreement 2020 is an agreement reached by negotiation between Austrian Professional Association of Management Consultancy, Accounting and Information Technology of the Austrian Economic Chambers, on one hand, and 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), 9 section IV (1), 15 and 20

### 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. Was the dismissal unlawful?
2. If the dismissal was unlawful, what is the correct amount of compensation?

### **Claim 2**

1. Does the Court for Labour and Social Matters Vienna have jurisdiction to handle this case?
2. Are XY Austria's proposed solutions appropriate?
3. Are the solutions proposed by Mr. Ferdinand a disproportionate burden to XY Austria?

### **Claim 3**

1. Does the Court for Labour and Social Matters Vienna have jurisdiction to handle this case?
2. Is Mr. Josef covered by the Collective Agreement 2020?
3. Is the Collective Agreement 2020 a violation of TFEU Article 101 (1)?
4. What is XY Austria obliged to pay Josef under the Collective Agreement 2020?
5. Is XY Austria obligated to pay Mr. Josef's salaries according to the Collective Agreements for 2019 and 2018?

## G. Summary of Arguments

### **Claim 1**

The Defendant submits that the dismissal was lawful. Firstly, the facts of the case show that the termination is lawful under Austrian law as Ms. Anna's actions justify an immediate dismissal. Secondly, the Defendant states that the dismissal is perfectly in line with Austrian Law as well as EU law.

The Defendant states that XY Austria is not obligated to pay Ms. Anna full compensation. Firstly, there is no legal basis for compensation as the dismissal was lawful. If the dismissal was unlawful, the Defendant, secondly, submits that the amount of compensation would only constitute the contractual salary which would be reduced as Ms. Anna has not observed her duty of mitigation.

### **Claim 2**

The Defendant firstly and separately argues that claim 2 should be dismissed in its entirety. The facts of the case show that the Claimant has failed to comply with the procedure of dispute resolution by submitting the case to the Court for Labour and Social Matters instead of submitting the case for mediation proceedings before the Federal Office of Social Affairs and Disability in accordance with the prescribed procedure in §7k of the Disability Employment Act. Observance of the prescribed mediation procedure is a prerequisite for the Court for Labour and Social Matters to have jurisdiction in this dispute. Consequently, the Court for Labour and Social Matters should dismiss the case and refer it to the Federal Office of Social Affairs and Disability, in accordance with the procedure prescribed in the Disability Employment Act § 7k.

Should the Court find that the case should not be dismissed, the Defendant alternatively submits that XY Austria is not obligated to provide any of Mr. Ferdinand's two solutions.

The expert physician states that surrounding noise and visual distractions need to be minimized. Mr. Ferdinand's proposals are unreasonable as they place a disproportionate burden on XY Austria. The Defendant submits that the proposals by XY Austria are appropriate, as they meet the requirements for accommodation.

### **Claim 3**

The Defendant firstly and separately argues that claim 3 should be dismissed entirely. According to the Collective Agreement 2020 there is a duty to submit a claim for mediation, cf. Article 20. Mr. Josef has failed to comply with the procedure of the dispute resolution of the collective agreement by submitting the case to the Court for Labour and Social Matters. Consequently, the Court should dismiss the case and refer it to the committee as the Court lacks jurisdiction.

Should the Court decide not to dismiss the claim, the Defendant alternatively submits that XY Austria is not obligated to pay Mr. Josef any compensation in accordance with the Collective Agreement 2020. Salary provisions in collective agreements cannot be concluded between undertakings according to TFEU Article 101 (1). Mr. Josef is, according to Austrian law, a freelancer. However, the facts of the case show that Mr. Josef in fact is a self-employed service provider, i.e., an undertaking under EU law. Therefore, the Collective Agreement 2020 cannot apply to Mr. Josef, as this would infringe EU competition law.

Should the Court find that the Defendant is obligated to pay compensation, the Defendant most alternatively submits that XY Austria is only obligated to pay the shortfall of Mr. Josef's compensation from the 1 of January 2020, as the Collective Agreement 2020, which includes freelance workers, first entered into effect on 1 January 2020.

## H. Arguments

### Claim 1

#### 1.1 The dismissal is lawful

The events that unfolded on 9 of October 2020 establish a clear and unacceptable pattern of disloyalty and insubordination from Ms. Anna which justified an immediate dismissal.

The following line of argumentation will pertain to the ways in which XY Austria lawfully terminated the employment of Ms. Anna on 9 October 2020, and therefore is not obligated to pay any compensation.

##### *1.1.1 Important reasons to dismiss Ms. Anna with immediate effect*

The Defendant argues that Ms. Anna is guilty of an act which justifies a dismissal with immediate effect.

The White Collar Act § 27 states that an employer is entitled to immediate dismissal of employees, when there is an important reason. Section (1) and (4) prescribe such important reasons:

*‘if the employee (...) is guilty of an act which makes him/her appear unworthy of the confidence of the employer’<sup>1</sup>*

and

*‘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’<sup>2</sup>*

In the light of the circumstances surrounding the 8 and 9 October 2020, the Defendant submits that Ms. Anna’s behaviour simply were reasons sufficiently important to make an immediate dismissal lawful in accordance with the White Collar Act § 27. It is apparent from § 27, that

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<sup>1</sup> The White Collar Act § 27 (1)

<sup>2</sup> The White Collar Act §27 (4)

the presence of one reason is enough to justify an immediate dismissal. During the overall chain of events during those dates, Ms. Anna did not only act in a way that made her unworthy of the confidence of the employer,<sup>3</sup> cf. the White Collar Act § 27 (1). Ms. Anna also deliberately failed to perform her services,<sup>4</sup> and induced others to disobey the supervisor,<sup>5</sup> cf. the White Collar Act § 27 (4). Thus, not only one but all three reasons which can justify immediate dismissal were present.

*1.1.1.1 The act of the Claimant made her unworthy of her employer's confidence – § 27 (1)*

The White Collar Act § 27 (1) states that in particular, an act '*which makes her appear unworthy of the confidence of the employer*' would substantiate a lawful immediate dismissal. It is important for an employer to have confidence in the employees, as this is fundamental and a prerequisite for a well-functioning employment relationship.

There is an apparent pattern in the fact that Ms. Anna avoided talking with her supervisor before the meeting, and she unexpectedly attacked her supervisor's authority at the meeting in front of her co-workers. Ms. Anna's supervisor did call her on the day before the scheduled important internal meeting, in order to talk through the details, but Ms. Anna *chose* not to answer the phone call from her supervisor.

Important factors are that Ms. Anna has admitted that she *saw* the call, she *knew* it was the supervisor who wanted to talk to her, and she *did*, in fact, have time to answer the call. These are uncontested facts. Nothing hindered her in answering the phone call: She simply *chose* not to respond to the call of her superior, despite the fact that she was attending an important meeting the very next morning.

The following morning at the important meeting, Ms. Anna once again *chose* to go against her supervisor. Ms. Anna's opposing view was brought up in front of the whole team, rather than in a confidential space with her supervisor. Ms. Anna *chose* to participate in the discussion with contributions that were clearly and incontestably *not* aligned with her supervisor's views.

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<sup>3</sup> See section 1.1.1.1

<sup>4</sup> See section 1.1.1.2

<sup>5</sup> See section 1.1.1.3

XY Austria is not against employees having their own and opposite opinions. What makes this situation particularly harmful, and thus warrants an immediate dismissal, is how Ms. Anna's choices escalated the situation.

Ms. Anna avoided contact with her supervisor by not returning her call in the morning, even though there is a duty to return a supervisor's call as soon as possible – especially before an important meeting. There was time to do so before the important meeting started. Ms. Anna could have talked it through with the supervisor before the meeting, telling the supervisor about her opinion tête-à-tête and thus involved the supervisor in Ms. Anna's considerations. She could have chosen one of many other completely acceptable and peaceful ways of handling disagreements in a professional manner at a workplace. However, she *chose* not to engage in any of these.

Choosing to act in this manner, Ms. Anna has proven herself to be disloyal to her supervisor, and thus to XY Austria. An employee who is not loyal to the employer is unworthy of the employer's confidence; she simply cannot be trusted. It is impossible to uphold the confidence in employees displaying such patterns of obstructive behaviour. Thus, the immediate dismissal was lawful, cf. the White Collar Act § 27 (1).

*1.1.1.2 Ms. Anna refused to, or at least failed to, perform her services – § 27 (4)*

XY Austria submits that Ms. Anna's actions on 8 and 9 October 2020 not only amounts to actions that made her unworthy of the confidence of the employer, cf. the White Collar Act § 27 (1), but that she also failed to perform her services for a considerable period of time by neither picking up the phone nor returning the call, and furthermore, by being obstructive at the meeting, cf. the White Collar Act § 27 (4).

Ms. Anna is under a contractual obligation to answer the phone or *at least* to get back to her supervisor when there is an important meeting at the company.

According to Ms. Anna's employment contract, the timeframe for the flex-time period is 7 a.m. until 9 p.m.<sup>6</sup> This means that Ms. Anna's working day does not end before 9:01 p.m. Ms. Anna's supervisor calls at 9 p.m. the evening before the important meeting and Ms. Anna

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<sup>6</sup> See Annex II, Ms. Anna's Employment Contract section 5b

chooses not to pick up her phone. Further, according to Ms. Anna's employment contract section 5b, she is to allocate her working hours taking into account urgent business needs. Therefore, the contract obliges her to be available for work when the supervisor calls at 9 p.m.

Ms. Anna's contract includes a fictitious working period of '*(...) 40 hours per week (...) allocated (...) Monday through Friday 9.am through 5.30pm, with a daily lunch-break of 30mins*'.<sup>7</sup>

This is a model for allocating working time, but it is not a limit for the working time. The fictitious period is, as it is called, merely fictitious. It is, and was only, meant to be a possible model for allocating working time as it follows from the word '*fictitious working hours*'.

Despite the flex-time agreement, the employment contract section 5b still states that Ms. Anna must be available when there are urgent business needs. The following day, on 9 October 2020, Ms. Anna had an important meeting scheduled at the premises of XY Austria at 8 a.m. Ms. Anna knew there would be an important meeting. With the flex-time agreement, XY Austria has given Ms. Anna freedom with responsibility and can therefore expect her to be more flexible when there are urgent business needs like in this situation.

The supervisor had already called Ms. Anna, and therefore indicated that a talk before the important meeting was needed. Ms. Anna was therefore expected to return the call before the meeting. The employer does not decide when employees on flex time arrangements work but expects them to perform their duties. This is a high level of trust in the employees. This trust must be met by a high level of flexibility and diligence from the employee's side. The duty was to be available for pre-consultation before the important meeting. This was clearly indicated by the phone call of her supervisor. Ms. Anna failed to ensure that her duties were fulfilled. Being prepared for a meeting, especially an important one, is a part of the normal and expected duty of an employee. As there was an important meeting, Ms. Anna has not met the contractual obligation to allow for urgent business needs when she decides to conclusively end her working day on 8 October 2020 at 6 p.m.

Should Court find that the call at 9 p.m. was outside Ms. Anna's working time schedule, Ms. Anna was still obligated to return the phone call in the morning before the meeting in the time between 7 a.m. and 8 a.m. However, she *chose* not to, and thus she chose not to, and thus she

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<sup>7</sup> See Ms. Anna's Employment Contract section 5d

chose to do nothing to prepare herself for the important meeting. She simply failed to fulfil her obligations.

Choosing to act in this manner, Ms. Anna has failed to perform her services for a considerable period of time, and therefore the immediate dismissal was lawful, cf. the White Collar Act § 27 (4).

#### *1.1.1.3 Ms. Anna attempted to induce other employees to disobey – § 27 (4)*

XY Austria submits that Ms. Anna, with her actions, also attempted to induce other employees to disobey. The White Collar Act § 27 (4) states that in particular attempting to induce other employees to disobey the employer, is an important reason to dismiss someone with immediate effect.

To *'induce'*, means to influence or motivate someone to act in a certain way.

Ms. Anna's view was not aligned with her supervisor's position at the meeting, and Ms. Anna knew this. Avoiding the call about the meeting and exposing their disagreement in front of the whole team is a clear pattern of defiance. This is an act of disloyalty towards Ms. Anna's supervisor and thus also towards XY Austria.

Furthermore, Ms. Anna's opposing opinion has the potential of diverging the team and influencing or motivating some of her co-workers to disobey their employer. It risks destroying the team spirit that is so essential to XY Austria's DNA.

#### *1.1.2 EU law does not limit XY Austria's right to dismiss Ms. Anna*

The Defendant argues that there is no existing limitation to the right of dismissal in EU law, as there does not exist a general EU principle on this matter.

A principle that limits the employer's right of dismissal has yet to be acknowledged. The CJEU must establish and acknowledge the existence of a general EU principle before a principle can become effective. Furthermore, such a principle cannot be based on TEU or TFEU, as none of the Treaties mention such a principle.

Even though CFREU Article 30 states that *'every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices'*, the

CJEU has not yet established that the CFREU Article 30 is a general principle of EU law. On this basis, the content of CFREU Article 30 cannot be given direct effect against private parties.

In summary the Defendant argues that EU law does not apply as there is no general principle on this matter and as CFREU Article 30 does not have direct effect.

Should the Court find that there exists a general principle, such principle cannot be invoked in this case. The CJEU has determined, in case C-149/77 *Defrenne*, that the fundamental rights and principles of EU law can only be invoked in regard to EU regulated areas, cf. the principle of conferral.<sup>8</sup> As the right to dismiss employees is not an area regulated by EU law, the existence of a general principle is secondary, as such a general principle cannot be invoked.

On these grounds, EU law does not limit XY Austria's right to dismiss Ms. Anna.

#### *1.1.3 Ms. Anna cannot claim compensation*

Since the dismissal was lawful, there is no fault. The Defendant is therefore not obligated to pay any compensation to Ms. Anna.

According to the Austrian Civil Code § 1295 anyone is entitled to claim compensation for damage caused by the injuring party by the injuring party's own fault. The Austrian Civil Code § 1293 defines damage as '*different from the loss of profit that someone has to expect according to the usual course of events*'.<sup>9</sup>

As stated above in section 1.1.1, the immediate dismissal was lawful. As there is no fictitious notice period in regard to immediate dismissals, there is no period for which the dismissed employee can plead compensation. Therefore, *no compensation* is the usual course of events in this matter. Accordingly, by the definition of damages in § 1293 there is no damage, and thus, Ms. Anna is not able to claim compensation with reference to § 1295.

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<sup>8</sup> TEU Article 5

<sup>9</sup> The Defendant's emphasis

## 1.2 The Defendant is only obligated to pay basic salary as compensation

Should the Court determine that the dismissal is unlawful, the Defendant submits that Ms. Anna is only entitled to parts of her basic salary. The following line of argumentation will pertain to the ways in which XY Austria is not obligated to pay Ms. Anna further compensation.

The employment contract does not entitle Anna to any benefits apart from her basic salary.

Article 9, section IV (1) of the Collective Agreement 2020 states that the employer must provide necessary work equipment for remote workers for as long as the remote workplace exists. Ms. Anna has not worked in the fictitious period for which she seeks compensation. The Defendant argues that as a result an actual '*workplace*', i.e. place of work, has not existed. As the workplace did not exist in this period, Ms. Anna is not entitled to compensation for the value of her work equipment. Furthermore, the Collective Agreement 2020 does not grant the employee a right to use the equipment for purposes other than work. Therefore, the fact that XY Austria did not provide work equipment in a fictitious notice period does not entitle Ms. Anna to compensation.

Ms. Anna has a duty to reduce her losses by acquiring other employments, cf. the White Collar Act § 29. Ms. Anna has the burden of proof for having applied for relevant jobs. She has not satisfied the burden of proof of her having applied for relevant jobs or tried to find other employment after it became clear to her that XY Austria would not reconsider the dismissal. Ms. Anna has not adhered to her duty of mitigation and therefore the final compensation must be proportionately reduced.

On these grounds, the defendant submits that XY Austria is not obligated to pay full basic salary in the fictitious notice period.

## Claim 2

The Defendant submits, firstly and separately, that the case should be dismissed. Mr. Ferdinand has not followed the correct procedure prescribed in the Collective Agreement 2020. Mr. Ferdinand has chosen not to refer the case to the Federal Office of Social Affairs and Disability for peaceful mediation proceedings to find a mutual and beneficial solution to the dispute before involving the judicial system. Instead, Mr. Ferdinand has taken the matter directly to the local Court for Labour and Social Matters which does not have jurisdiction.

Alternatively, the Defendant submits that XY Austria's is not obligated to provide one of the two solutions proposed by Mr. Ferdinand. The two solutions proposed by Mr. Ferdinand pose a disproportionate burden on XY Austria and are therefore not reasonable. However, the solution proposed by XY Austria XY Austria is appropriate and will fulfil the duty of accommodation. Mr. Ferdinand has given no indication that he is willing to try the solution proposed by XY Austria. Instead, Mr. Ferdinand immediately claims another solution and brings the case before the court.

### 2.1 The case should be dismissed due to procedural faults

The Defendant claims, firstly and separately, that the entire case should be dismissed, as a consequence of the local Court for Labour and Social Matters' lack of jurisdiction. This claim is a preliminary objection and shall therefore be addressed prior to any other claims.

The Disability Employment Act § 7k states:

*'Claims under section 7e to 7i can only be asserted before the ordinary courts if the matter has previously been the subject of mediation proceedings before the Federal Office of Social Affairs and Disability'.*

Parties with claims under section 7e to 7i of the Disability Employment Act, have an *obligation* to use the dispute resolution procedure in the Disability Employment Act § 7k, by going to mediation as the first way of resolving a dispute. The main purpose of this provision is – as this case clearly illustrates – to find a mutual and beneficial solution to the dispute before involving the judicial system. Mediation proceedings are the first dispute resolution method in order to maintain peace and preserve cooperation at the workplace.

Mr. Ferdinand's wishes to have the same work output as other employees, and therefore the dispute concerns Mr. Ferdinand's right to the same working conditions. He brings an action before the local Court for Labour and Social Matters in order to obligate XY Austria to choose one of his proposals as he otherwise believes he would be discriminated against. His claim, therefore, falls within the scope of the Disability Employment Act § 7g (4).

A claim under § 7g can only be assessed by the ordinary courts if the matter has previously been subject to mediation proceedings before the Federal Office of Social Affairs and Disability, cf. the Disability Employment Act § 7k. The procedure found in §7k is especially relevant to such claims as Mr. Ferdinand's. Negotiation is a way to strike a balance between the legitimate interests of XY Austria and Mr. Ferdinand. A mediation process with dialogue is a much better tool to achieve balance than a court case where there is inherently little room for compromise. It is therefore important to follow the correct procedure as the court case is premature and there is room for negotiation.

As observance of the procedure in the Disability Employment Act § 7k is a prerequisite for the Court for Labour and Social Matters' jurisdiction in disputes regarding claims under section 7e to 7i, there is a procedural fault.

On these grounds, the Defendant urges the Court to dismiss the case and to maintain the well-established procedure of the Disability Employment Act.

**2.2 XY Austria is not obligated to provide either of Mr. Ferdinand's two solutions**  
Should the Court find that the case should not be dismissed, the Defendant claims that XY Austria is not obligated to provide one of Mr. Ferdinand's two solutions. Firstly, Mr. Ferdinand's solutions are beyond what is reasonable for an employer, and secondly the solution provided by XY Austria is appropriate, as they will meet the needs of Mr. Ferdinand after his unfortunate accident.

The Disability Employment Act § 6 (1a) states:

*'employers shall take appropriate and, in a specific case, necessary measures to enable persons with disabilities to have access to employment (...) unless such measures would impose a disproportionate burden on the employer'.*

The CJEU has stated that national law must be interpreted in accordance with EU law.<sup>10</sup> Therefore the determination of what is reasonable and appropriate accommodation within the Disability Employment Act § 6 (1a) must be interpreted in the light of the content of Article 5 in Directive 2000/78. Further, the CJEU has determined that Directive 2000/78 must be interpreted in consistency with the CRPD.<sup>11</sup>

### 2.2.1 No duty to provide the best solution

According to the expert physician's opinion, surrounding noise and visual distractions can *best* be minimized by Mr. Ferdinand being able to occupy a single office. This does not result in XY Austria being obligated to provide a single office, as there is no duty to provide the *best* solution. Article 5 of Directive 200/78 states '*that employers shall take appropriate measures*' in order to enable a person with a disability to participate in working life.

I joined cases C-335/11 and C-337/11 *HK-Denmark* the CJEU stated:

*'As that article states [Article 5 of directive 2000/78], the employer is required to take appropriate measures in particular to enable a person with a disability to have access to, participate in, or advance in employment.'*<sup>12</sup>

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

*'The second sentence of Article 5 of that directive provides that employers must take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.'*<sup>13</sup>

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<sup>10</sup> C-14/83 *Von Colson*, paras 26-27

<sup>11</sup> Joined cases C-335/11 and C-337/11 *HK Denmark*, paras 31-32

<sup>12</sup> *Ibid.*, para 49 (The Defendant's emphasis)

<sup>13</sup> C-397/18 *Nobel Plastique*, para 63 (The Defendant's emphasis)

Nowhere, neither in legislation nor case law from the CJEU, is it stated that there is a duty to provide Mr. Ferdinand with the best solution. As long as the solution is appropriate to alleviate the needs for adjustment, it is sufficient. Therefore, XY Austria is not under an obligation to offer *the best* solution. Providing Mr. Ferdinand with one of his two solutions would be the same as choosing a Ferrari, rather than a Ford Fiesta, to transport one from point A to B. Both would be appropriate; however, the Ferrari goes beyond the need.

On these grounds, the Defendant argues that XY Austria is not obligated to choose the best solution.

### 2.2.2 Mr. Ferdinand's proposals

The Defendant argues that Mr. Ferdinand's two proposals - a single office or a permanent home office with various equipment - are both unreasonable because they pose a disproportionate burden on XY Austria.

It follows from Article 5 of the Directive 2000/78 that:

*'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. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.'*

This has been confirmed by the CJEU in the joined cases C-335/11 and C-337/11 *HK-Denmark*: *'(...) the accommodation persons with disabilities are entitled to must be reasonable, in that it must not constitute a disproportionate burden on the employer'* <sup>14</sup>

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

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<sup>14</sup> Joined cases C-335/11 and C-337/11 *HK-Denmark*, para 58

*'(...) 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'*

The same follows from settled case law, see in particular joined cases C-335/11 and C-337/11 *HK-Denmark*<sup>15</sup>, C-312/11 *Commission v Italy*<sup>16</sup> and later in case C-397/18 *Nobel Plastique*, where the CJEU 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'*<sup>17</sup>

Consequently, according to EU law accommodation measures must be appropriate, i.e., effective and practical measures to adapt the workplace to the disability, and reasonable, i.e. not pose a disproportionate burden on the employer.

The Defendant argues that Mr. Ferdinand's proposals are not reasonable which will be elaborated in the following.

#### *2.2.2.1 Single office at XY Austria's premises*

Firstly, single offices only exist for members of the Board of Management. The current offices cannot be made available, as it is important for the organisation that the single offices are occupied by board members only. The board members have the need for more confidentiality for important business meetings as well as meetings regarding company strategies. In a high-tech company like XY Austria, with a fast-moving workflow, it is important to have space available

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<sup>15</sup> Ibid, para 60

<sup>16</sup> C-312/11 *Commission v Italy*, para 60

<sup>17</sup> C-397/18 *Nobel Plastique*, para 65

for the managers to exchange views. Therefore, it is necessary to separate the members of the Board of Management from other employees by giving them a separate office.

Secondly, costs for a new separate office would be very high. At the time there were no single free-standing offices or equivalent premises in the building, as the only other option available for XY Austria would be to build an entirely new single office space somewhere in the building, just for *one* person. The extra office space would severely undermine the changes in the company that XY Austria has implemented with the New Mobile Working Guideline. The entire purpose of introducing the Mobile Working Guideline was to save office space and to enable the company to move into a more modern location. Thus, it is not just the costs of establishing another single office that makes the proposal unreasonable: Space for another single office can simply not be found and establishing more space would require an expansion of the premises which would be very costly.

On these grounds, the Defendant argues that the solution of a single office poses a disproportionate burden on XY Austria and is therefore unreasonable and not part of the duty of accommodation of XY Austria.

#### *2.2.2.2 Permanent home office*

The permanent home office arrangement goes beyond the accommodation duty of the employer.

Firstly, it is questionable whether or not Mr. Ferdinand's proposal for a home office is appropriate. The individual arrangement would create severe difficulties for Mr. Ferdinand himself as it hinders him from full and effective work output. A digital solution would complicate conversation and hinder effective idea development. A part of developing new ideas is to talk about all possible opportunities with your co-workers. When speaking online, some ideas and views are lost. The communication standards are lowered, and it will severely damage the team dynamic which is an important part of XY Austria. Onsite commuting with co-workers is not only important for Mr. Ferdinand's own enjoyment but is simply an essential element of being able to work in a creative and high-tech company like XY Austria. Furthermore, the solution is Mr. Ferdinand's own proposition. The expert physician has not recommended this solution.

Secondly, it poses a disproportionate burden on XY Austria and is therefore not reasonable. The permanent home office arrangement goes beyond the duty of the employer, as it poses a disproportionate burden on XY Austria. Mr. Ferdinand not only requires a home office: He demands a mini version of the premises of XY Austria in his own home. Mr. Ferdinand requires the home office to be equipped with an ergonomically appropriate chair, desk, monitor, PC, lighting, shading and air-conditioning, all in accordance with the new building features of the office. This is by far beyond what can be expected in any home office.

There is no duty to provide permanent home office arrangements to any employee in neither the Telework Agreement, the Collective Agreement 2020 nor in the New Mobile Working Guideline.

Mr. Ferdinand is covered by the Collective Agreement 2020, cf. Article 2 (1) (c) of the Collective Agreement 2020, according to which Mr. Ferdinand only has the right to necessary computing and communications equipment for remote work, cf. the Collective Agreement 2020 Article 9 section IV (1). An ergonomically appropriate chair, desk, lighting and shading and air-conditioning is not to be seen as ‘necessary computing and communications equipment. Furthermore, a need for such equipment is not supported by the expert physician’s opinion.

The Defendant understands that Mr. Ferdinand would like to have these material goods. However, while these features are nice to have, Mr. Ferdinand does not need to have them in order for him to provide his services. They are not necessary, cf. the Disability Employment Act § 6 (1a). It will pose a disproportionate burden on XY Austria if they were obligated to provide these material goods. Therefore, they are unreasonable.

On these grounds, the Defendant argues that the solution of a permanent individual home office arrangement will pose a disproportionate burden on XY Austria, and therefore are to be seen as unreasonable.

### *2.2.3 XY Austria’s proposal is appropriate*

The following line of argumentation will pertain to the ways in which XY Austria’s obligation to provide appropriate accommodation will be fulfilled with their proposal.

Directive 2000/78 states that appropriate measures are ‘(...) *effective and practical measures to adapt the workplace to the disability (...)*’.<sup>18</sup> In the joined cases C-335/11 and C-337/11 *HK-Denmark* the CJEU determined that the concept must be understood as referring to ‘*the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers*’.<sup>19</sup>

The definition is settled case law and has been confirmed by the CJEU in case C-397/18 *Nobel Plastique*, where the CJEU stated that appropriate measures can be:

*‘(...) 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 (...)*’<sup>20</sup>

The employer is required to take appropriate measures. Recital 20 in the preamble to Directive 2000/87 gives a *non-exhaustive* list of such measures, which may be physical, organisational and/or educational.<sup>21</sup>

The expert physician has stated that Mr. Ferdinand’s work environment needs to be adapted. Particularly, surrounding noise and visual distraction need to be minimized. Of course, XY Austria recognises the expert’s assessment; the proposal by XY Austria does, in fact, effectively meet the expert physician’s opinion as Mr. Ferdinand will be provided with noise-cancelling in-ear headphones and 60 cm high mobile panels that would minimize visual distractions.

Furthermore, the solution is effective as XY Austria is adapting the premises and equipment of the workplace in a way that eliminates the barriers that hinder the full and effective participation of Mr. Ferdinand.

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<sup>18</sup> Directive 2000/78 recital 20

<sup>19</sup> Joined cases C-335/11 and C-337/11 *HK Denmark*, para 54

<sup>20</sup> C-397/18 *Nobel Plastique*, para 65

<sup>21</sup> Joined cases C-335/11 and C-337/11 *HK Denmark*, para 49

The Defendant argues that noise-cancelling in-ear headphones and 60 cm high mobile panels will minimize surrounding noise and visual distraction sufficiently. Therefore, the solution will eliminate the barriers that hinder Ferdinand's full and effective participation at the workplace and put Mr. Ferdinand on an equal basis with other workers in the same job.

Furthermore, Mr. Ferdinand has not provided any indication that he is willing to try the solution proposed by XY Austria. Instead, Mr. Ferdinand immediately claims another solution and brings the case before the court. This underlines that he is not interested in any mediation with XY Austria to find an appropriate solution. At least the solution proposed by XY Austria should be tested before the Court can determine if it is sufficient or not.

On these grounds, the Defendant argues that the solution proposed by XY Austria is appropriate and fulfils their duty to reasonable accommodation. As XY Austria is not obligated to choose the *best* solution they are not obligated to choose one of the solutions proposed by Mr. Ferdinand.

Should the Court find that XY Austria's proposals are not appropriate, XY Austria will not be obligated to provide one of the solutions proposed by Mr. Ferdinand. It is simply not a solution provided for by Austrian law. XY Austria will, in that situation, only be obligated to pay Mr. Ferdinand compensation for the personal detriment suffered according to Austrian law, cf. the Disability Employment Act § 7g (4), cf. the Disability Employment Act § 7b (1) (6).

### **Claim 3**

The Defendant claims, firstly and separately, that the case should be dismissed. In support of this claim the Defendant argues that the Claimant has not followed the correct procedure in Article 20 of the Collective Agreement 2020.

Alternatively, the Defendant claims that the Defendant is not obligated to pay Mr. Josef any compensation. As Mr. Josef is in fact a self-employed service provider, he is an undertaking. Including Mr. Josef in the Collective Agreement 2020 would therefore severely infringe EU competition law, cf. TFEU Article 101.

Most alternatively, the Defendant claims that the Defendant is only obligated to pay the shortfall of Mr. Josef's salary compared to the level provided for in the Collective Agreement 2020 for the last year. As the collective agreement came into effect as of 1 January 2020, and Mr. Josef has failed to satisfy the burden of proof for potential retroactive effect.

#### **3.1 The case should be dismissed due to procedural faults**

The Defendant claims, first and separately, that the entire case should be dismissed as a consequence of lack of jurisdiction of the local Court for Labour and Social Matters. This claim is a preliminary objection and shall therefore be addressed prior to any other claims.

According to Article 20 of the Collective Agreement 2020 *'a committee must deal with settling trade disputes that arise from the interpretation of this collective agreement (...) before calling on the Federal Arbitration Board for another arbitration board'*.

Mr. Josef is a freelancer who claims to be covered by the Collective Agreement 2020, as he is seeking a judgment that would oblige the Defendant to pay the shortfall of his compensation compared to the level provided in the Collective Agreement 2020. The dispute in question concerns the interpretation of a "freelance worker", cf. the Collective Agreement 2020 Article 2 (1) (c), and therefore falls within the scope of Article 20 of the collective agreement.

Mr. Josef is obligated to follow the dispute resolution method in Article 20 of the Collective Agreement 2020. It is a natural consequence that being covered by material provisions results

in also being covered by procedural provisions. Mr. Josef cannot cherry-pick between provisions. It is a part of the overall balancing of provisions, that disputes must be attempted to be settled elsewhere first. Therefore, Mr. Josef cannot only claim to be covered by the salary scales and not also by the procedural obligations of the Collective Agreement 2020. Mr. Josef has not argued any reasons that Article 20 of the Collective Agreement 2020 would not apply to him. Nor is his access to justice limited as a consequence of the procedure in Article 20 of the Collective Agreement 2020, cf. CFREU Article 47 and ECHR Article 6.

Even if Mr. Josef was to dispute that Article 20 applies, this would still be for the Federal Arbitration Board to decide on, since it is a question of interpretation itself. This follows from the doctrine of kompetenz-kompetenz, cf. the Austrian Arbitration Act section 592 (1). This underlines why it is important that the procedure in Article 20 is followed.

On these grounds, the Defendant argues that the case should be dismissed due to a procedural fault, as the local Court for Labour and Social Matters lacks jurisdiction as the first instance for claims, cf. Article 20 of the Collective Agreement 2020.

### 3.2 XY Austria is not obligated to pay Mr. Josef any compensation

Should the Court find that it has jurisdiction, the Defendant argues that the Collective Agreement 2020 does not apply to Mr. Josef, as he is a self-employed service provider and therefore an undertaking. XY Austria is therefore not obligated to pay the shortfall of Mr. Josef's compensation when compared to the level provided for in the collective agreement.

Article 2 (1) (c) of the Collective Agreement 2020 states that the salary scales are also applicable to freelance workers. However, according to EU competition law such provision is prohibited between undertakings. Under Austrian law Mr. Josef is incontestably qualified as a freelancer. Therefore, the Court must determine how the term "freelancer" fits the already established definitions of employment terms.

#### 3.2.1 *Mr. Josef is a self-employed service provider*

Neither the collective agreement, nor national law defines the term "freelancer". Thus, the term is open for interpretation.

As national law does not provide any interpretational factors, the Court must find such factors within EU Law. The Defendant argues that Mr. Josef, as a freelancer worker, is a self-employed service provider, and therefore an undertaking.

According to settled CJEU case law the essential feature of an employment relationship is that a person for a certain period of time performs services for and under the direction of another person and in return for this receives remuneration.<sup>22</sup> The features which are typically associated with the functions of an independent service provider are namely; more leeway in terms of choice of the type of work and tasks to be executed, of the manner in which that work or those tasks are to be performed, and of the time and place of work, and more freedom in the recruitment of his own employees.<sup>23</sup> Any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity.<sup>24</sup>

Mr. Josef is working as one of the leading coders for XY Austria. He is free to work wherever he chooses and has no obligation to work at the premises of XY Austria. Furthermore, Mr. Josef works for several employers, and he has the opportunity to outsource his work to others only with prior approval. This approval is not connected to XY Austria's authority to direct and control Mr. Josef. It is therefore not a limitation of Mr. Josef's independence as a service-provider. The approval is only necessary as an issue of confidentiality and copyrights.

The Defendant argues that Mr. Josef is not under any subordination as he himself decides the place of his work and is able to outsource his work to others. Mr. Josef can accept or decline assignments as he wishes, and therefore he independently determines his own conduct on the market. Therefore, he does not bear any financial or commercial risk arising out of XY's Austria's business activity and therefore does not form an integral part of XY Austria.<sup>25</sup>

The relationship between XY Austria and Mr. Josef is therefore considered to be of a commercial nature and a relation between two undertakings. As Mr. Josef's activity must be classified

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<sup>22</sup> See judgment in C-270/13 *Haralambidis*, paras 28-29

<sup>23</sup> *Ibid.*, para 33

<sup>24</sup> See joined cases C-151-152/04 *Naxin and Nadin-Lux*, para 31

<sup>25</sup> See case C-413/13 *FNV Kunsten Informatie en Media*, para 33

as an activity performed outside a relationship of subordination, he must be classified as a self-employed service provider as opposed to a freelance worker.

As a self-employed service provider, Mr. Josef is not covered by the Collective Agreement 2020 as the agreement, in connection to Mr. Josef, would infringe EU competition law.

Self-employed service providers are undertakings within the meaning of TFEU Article 101 (1), as they offer their services for remuneration on a given market and perform their activities as independent economic operators in relation to their principal.<sup>26</sup> According to TFEU Article 101 (1) there is a prohibition of:

*'(...) all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market (...)'*

Although TFEU encourages dialogue between labour and management, it does not, however, contain provisions like TFEU Articles 153 and 155 encouraging self-employed service providers to open a dialogue with the employers to which they provide services under a works or service contract and, therefore, to conclude collective agreements with a view to improving their terms of employment and working conditions.<sup>27</sup>

The Defendant, therefore, argues the Collective Agreement would infringe TFEU Article 101 (1) (a), if Mr. Josef were to be covered by the Collective Agreement 2020, as it is directly fixing minimum basic salary prices in Article 15. Since this is a so-called 'hardcore restriction', Article 15 of the Collective Agreement cannot benefit from the Commission's De Minimis Notice.<sup>28</sup> Mr. Josef can thereby not invoke Article 15 of the Collective Agreement 2020, as this would infringe TFEU Article 101 (1) (a)

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<sup>26</sup> See judgment in C-413/13 *FNV Kunsten Informatie en Media*, para 27

<sup>27</sup> *Ibid.*, para 29

<sup>28</sup> Notice on agreements of minor importance which do not appreciably restrict competition under Article 101 (1) of the Treaty on the Functioning of the European Union (De Minimis Notice), 2014/C 291/01

### 3.3 XY Austria is not obligated to pay the shortfall for all three years

Should the Court find that Mr. Josef is in fact covered by the Collective Agreement 2020 as a “freelance worker”. The Defendant argues that XY Austria is only obligated to pay the shortfall of compensation compared to task group “ST2 experienced level”, from the 1 January 2020, cf. Article 15, section II of the Collective Agreement 2020.

Article 3 (1) of the Collective Agreement 2020 clearly states *‘The Collective Agreement will come into effect as of 1 January 2020’*.

Mr. Josef has been working for XY Austria for four years but has not been covered by a collective agreement for all those years, as the Collective Agreement 2020 came into effect as of 1 January 2020. Mr. Josef is therefore not covered by either the Collective Agreement 2019 or the Collective Agreement 2018, both of which only covers employees and not “freelance workers”. Furthermore, Mr. Josef carries the burden of proof in regard to the scope of the previous collective agreements. He has not satisfied the burden of proof that the previous collective agreements covered “freelance workers”.

Furthermore, there is no explicit provision or even a slight indication within the Collective Agreement 2020 that the agreement has retroactive effect. Mr. Josef carries the burden of proof in regard to any retroactive effect and he has failed to satisfy the burden of proof. Mr. Josef is therefore only covered by the Collective Agreement as of 1 January 2020, cf. Article 3 (1) of the Collective Agreement.

On these grounds, the Defendant argues that XY Austria is only obligated to pay the shortfall of Mr. Josef’s salary compared to the level provided for to task group “ST2 experienced level”,<sup>29</sup> from the 1 January 2020, cf. Article 15, section II of the Collective Agreement 2020.

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<sup>29</sup> Mr. Josef is within the task group “ST2 experienced level” as Mr. Josef is one of XY Austria’s leading coders and has worked for the company for four years.

# I. Pleadings

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

1. XY Austria terminated the employment of Ms. Anna lawfully, and therefore XY Austria is not obligated to pay any compensation to Ms. Anna.
  - a. Alternatively, XY Austria is not obligated to pay full compensation.
  
2. The case should be dismissed.
  - a. Alternatively, XY Austria is not obligated to provide one of the two solutions proposed by Mr. Ferdinand.
  
3. The case should be dismissed.
  - a. Alternatively, XY Austria is not obligated to pay Mr. Josef any compensation.
  - b. Most alternatively, XY Austria is only obligated to pay the shortfall of Mr. Josef's salary compared to the level provided for in the Collective Agreement 2020 for the last year.