Anonymised version

Case C-804/18

Request for a preliminary ruling

Date lodged:

20 December 2018

Referring court:

Arbeitsgericht Hamburg (Hamburg Labour Court, Germany)

Date of the decision to refer:

21 November 2018

Applicant:

IX

Defendant:

WABE e. V.

Hamburg Labour Court

Order

[...] In the case of

[...]

Ms

IX

[...]

– Applicant –

[...]

v

Company
WABE e. V.
[...]

– Defendant –

[...]

[Or. 2]

Hamburg Labour Court, 8th Chamber,

makes the following order further to the hearing of 21 November 2018

[...]

I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1. Does a unilateral instruction from the employer prohibiting the wearing of any visible sign of political, ideological or religious beliefs constitute direct discrimination on the grounds of religion, within the meaning of Article 2(1) and Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, against employees who, due to religious covering requirements, follow certain clothing rules?

2. Does a unilateral instruction from the employer prohibiting the wearing of any visible sign of political, ideological or religious beliefs constitute indirect discrimination on the grounds of religion and/or gender, within the meaning of Article 2(1) and Article 2(2)(b) of Directive 2000/78/EC, against a female employee who, due to her Muslim faith, wears a headscarf?

In particular:

(a) Can discrimination on the grounds of religion and/or gender be justified under Directive 2000/78/EC with the employer's subjective wish to pursue a policy of political, ideological and religious neutrality even where the employer thereby seeks to meet the subjective wishes of his customers? **[Or. 3]**

(b) Do Directive 2000/78/EC and/or the fundamental right of freedom to conduct a business under Article 16 of the Charter of Fundamental Rights of the European Union in view of Article 8(1) of Directive 2000/78/EC preclude a national regulation according to which, in order to protect the fundamental right of freedom of religion, a ban on religious clothing may be justified not simply on the basis of an abstract capacity to endanger the neutrality of the employer, but only on the basis of a sufficiently specific risk, in particular of a specifically threatened economic disadvantage for the employer or an affected third party?

II. The proceedings are stayed.

[...] [Signatures]

[Or. 4]

Grounds

In the present case, the interpretation of Articles 2 and 4 of Council Directive 2000/78/EC of 27 November 2000 and of Article 16 of the Charter of Fundamental Rights is relevant to the decision and disputed between the parties, which is why the proceedings are referred to the Court of Justice of the European Union for a preliminary ruling. The proceedings [...] are analogously stayed pending the decision of the Court of Justice of the European Union on this request for a preliminary ruling.

A. Subject matter of the main proceedings

The parties are in dispute regarding a warning.

The defendant runs a large number of child day care centres with more than 600 employees taking care of around 3 500 children. The defendant is non-partisan and non-denominational.

Its website states the following on the subject of diversity and trust:

> *'Gender, background, culture, religion or special needs — we firmly believe that diversity enriches our lives. By being open and curious, we learn to understand one another and to respect differences. Since we welcome all children and parents, this creates an atmosphere in which everyone can feel safe, feel a sense of belonging and can develop trust. This is the basis for a healthy personal development and peaceful social interaction.'*

In its daily work, the defendant follows the Hamburg recommendation for the education of children in day care facilities, published by the Labour, Social Affairs, Family and Integration Authority in March 2012 […]

In extract it reads as follows:

> *'All child day care facilities have the task of addressing and explaining fundamental ethical questions as well as religious and other beliefs as part of the living environment. Child day care centres therefore provide space for children to consider the essential questions of joy and sorrow, health and sickness, justice and injustice, guilt and failure, peace and conflict and with* **[Or. 5]** *the question of God. They support the children in expressing feelings and beliefs on these questions. The possibility of looking at these questions in a curious and inquisitive manner leads to the consideration of subjects and traditions of the religious and cultural orientations represented in the*

group of children. This develops appreciation and respect for other religions, cultures and beliefs. This consideration increases the child's self-understanding and experience of a functioning society. The children also experience and actively contribute to religiously rooted festivals in the course of the year. By encountering other religions, children experience different forms of reflection, faith and spirituality.'

The applicant fully agrees with these Hamburg education recommendations.

The applicant is a special needs carer and has been employed by the defendant on the basis of the contract of employment of 14 April 2014 […] since 1 July 2014, most recently with an average gross monthly income of EUR 2 900.

In the period from 15 October 2016 to 30 May 2018, the applicant was on parental leave. The applicant is of Muslim faith. At the start of 2016, she decided to wear a headscarf. During the applicant's parental leave, the 'instructions on observing the requirement of neutrality' were issued in the defendant's company on 12 March 2018 [...] and made known to the applicant at the end of May 2018.

In extract these read as follows:

[The defendant]

'is non-denominational and expressly welcomes religious and cultural diversity. In order to guarantee the children's individual and free development with regard to religion, belief and politics, [the defendant's] employees are required to observe strictly the requirement of neutrality that applies in respect of parents, children and other third parties. [The defendant] pursues a policy of political, ideological and religious neutrality in respect thereof. In this connection, the following regulations serve as principles for specifically observing the requirement of neutrality in the workplace.

- *Employees shall not make any political, ideological or religious statements to parents, children and third parties in the workplace.* **[Or. 6]**
- *Employees shall not wear any signs of their political, ideological or religious beliefs that are visible to parents, children and third parties in the workplace.*
- *Employees shall not give expression to any resultant customs to parents, children and third parties in the workplace.*
- *[…]'*

The applicant learned of these instructions on 31 May 2018.

The ‘information sheet on the requirement of neutrality’ answers the question of whether the Christian cross, Muslim headscarf or Jewish kippah may be worn as follows:

> *‘No, as the children should not be influenced by the teachers with regard to a religion, this is not permitted. The deliberate choice of religiously or ideologically determined clothing is contrary to the requirement of neutrality.’*

On the day of her return to work following parental leave on 1 June 2018, the applicant was asked to remove her headscarf, which entirely covered her hair. The applicant refused to do so. She was thereupon temporarily released from work by the head of the child day care centre.

On 4 June 2018, the applicant appeared for work again wearing a headscarf. She was given a warning with the same date [...], with which she was warned for wearing the headscarf on 1 June 2018 and asked, with regard to the requirement of neutrality, to perform her work without a headscarf in future. As the applicant also refused to remove her headscarf on 4 June, she was once again sent home and temporarily released. She received a further warning on the same day [...].

The defendant has subsequently also effected the removal of a necklace bearing a cross by a female employee. With the exception of specialist pedagogical consulting, the provisions of the requirement of neutrality do not apply to the defendant’s employees in the company headquarters, as these do not have customer contact. **[Or. 7]**

The applicant is of the opinion that, despite the general ban on visible signs of political, ideological or religious belief, the ban targeted the wearing of the Islamic headscarf. The headscarf ban furthermore exclusively affected women and was therefore also to be examined from the perspective of discrimination on grounds of gender. In addition, a headscarf ban affected women with a migration background with disproportionate frequency, which meant that discrimination on grounds of ethnic origin was also to be considered. According to the Bundesverfassungsgericht (Federal Constitutional Court), prohibiting the wearing of the headscarf whilst working in a child day care centre constitutes serious interference with the affected party’s fundamental right to freedom of faith and belief. Even in the public service, corresponding bans could relate only to a proven, specific risk. Under the Grundgesetz (Basic Law), a general ban on the visible wearing of religious, ideological or political symbols / clothing is not admissible.

It was unclear how the development of the children cared for with regard to appreciation and respect was supposed to take place according to the Hamburg education recommendations if the defendant restricted the freedom of religion of the teachers.

The decision of the Court of Justice of the European Union in *Achbita* (judgment of 14 March 2017, Case 157/15, EU:C:2017:203) also did not preclude her claim for removal of the warning. The correct interpretation by the Court of Justice merely set minimum standards under EU law. The protection against discrimination achieved in Germany through the case-law of the Federal Constitutional Court regarding Article 4(1) of the Basic Law (GG) and by Paragraph 8 of the General Act on Equal Treatment (AGG) should not be reduced. Pursuant to Section 8 AGG, a difference in treatment on the ground of religion was admissible only if, in the nature of the activities concerned or of the context in which they are carried out, this constituted a genuine and determining occupational requirement, provided that the objective was legitimate and the requirement was proportionate.

The applicant requests that the defendant be ordered

> **to remove from the applicant's personnel file and destroy the warning of 4 June 2018 (wearing of headscarf on 1 June 2018) and correspondence relating thereto,**
>
> **to remove from the applicant's personnel file and destroy the warning of 4 June 2018 (wearing of headscarf on 4 June 2018) and correspondence relating thereto. [Or. 8]**

The defendant requests that

> **the action be dismissed.**

The defendant is of the opinion that the warnings were rightly issued. The valid instruction on the requirement of neutrality which was breached by the applicant was legitimate pursuant to the first sentence of Paragraph 106 of the Trade Regulation Act (GewO) in conjunction with Paragraph 7(1), (2) and (3) AGG. These provisions of national law were to be interpreted in accordance with EU law. According to the judgment in *Achbita* of the Court of Justice, a private employer could implement a policy of neutrality as long as he pursued it consistently and systematically and restricted it to those employees who were in contact with customers. Indirect discrimination was not taken to occur if the relevant provision was objectively justified by a legitimate aim and the means of achieving that aim were appropriate and necessary. The Court of Justice considered the employer's desire to pursue, in relations with both public and private sector customers, a policy of political, philosophical and religious neutrality to be fundamentally legitimate. The adopted requirement of neutrality was also appropriate and necessary, as it included only those employees who were in direct contact with parents and children.

The defendant was not able to transfer the applicant to an area without customer contact, as the applicant was employed as a special needs carer, which meant that working without contact with children and parents would not constitute an area of duty and responsibility corresponding to her skills and qualifications.

This case was comparable with that in *Achbita*, as the parents of the facility attached particular importance to the political, ideological and religious neutrality of the child day care centre. Without the requirement of neutrality, parents would remove their children from the care of the defendant; younger siblings would usually no longer be placed in the care of the defendant. The number of registrations would decline. The Court of Justice finally carried out the weighting of the fundamental rights according to the Charter of Fundamental Rights in the case of an employer's requirement of neutrality. As Paragraph 3(2) AGG served to implement EU law, a different weighting of freedom of religion — as carried out by the Federal Constitutional Court under Article 4(1) GG — could not be carried out by the German courts without contravening the primacy of EU law and the principle of interpretation in accordance with EU law. **[Or. 9]**

In the event that, contrary to expectation, with the German case-law, the Court were to demand a specific risk or specific economic disadvantages for the restriction of freedom of religion, these also existed. The applicant's entries on her private Facebook profile, on which she shared various videos on the subject, revealed that she wanted specifically and deliberately to influence third parties. The wearing of the headscarf as a religious symbol in connection with the Facebook content therefore had a targeted, influencing effect. The targeted, influencing effect was in particular to be assessed in view of the particular situation of the children in the child day care centre, who were at an age where they were particularly receptive to influences of any kind and at a stage in which their personality was significantly shaped. These considerations meant that specific operational disruption or economic loss was to be feared. The defendant had to reckon with the applicant influencing the children entrusted thereto in a certain respect, in that she conveyed the wearing of a headscarf as something positive and shared the ideology of Pierre Vogel, a preacher mentioned on her Facebook profile, who has been the focus of investigation by the Federal Office for the Protection of the Constitution on several occasions.

B. National legal framework

1. German constitution

Article 4(1) of the Basic Law for the Federal Republic of Germany (GG) reads as follows:

> 'Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.'

Article 6(2) GG reads as follows:

> *'The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.'*

Article 7 GG reads as follows:

> *'(1) The entire school system shall be under the supervision of the state.*
>
> **[Or. 10]**
>
> *(2) Parents and guardians shall have the right to decide whether children shall receive religious instruction.*
>
> *(3) Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice to the state's right of supervision, religious instruction shall be given in accordance with the tenets of the religious community concerned. Teachers may not be obliged against their will to give religious instruction.'*

For interference with the fundamental right from Article 4(1) GG (freedom of religion), be this in the form of direct or indirect discrimination, the Federal Constitutional Court (BVerfG) demands in established case-law that the restriction must result from the constitution, as Article 4(1) GG — in contrast to other fundamental rights of the German constitution — does not contain a legal reservation. Such limitations inherent to the constitution included the fundamental rights of third parties and community values with constitutional status [...]. The parents' right of education (Article 6(2) GG) and the negative freedom of faith of schoolchildren (Article 4(1) GG) specifically come into consideration here. The requirement of neutrality pursued by the state could not refer to such a community value with constitutional status for the field of child day care, as the state educational mandate (Article 7(1) GG) related only to schools.

In relation to a ban on religious expression by teachers and child day care centres, the BVerfG has ruled that the external religious expression would have to result in a sufficiently specific risk or disruption to the peace in the child day care centre or the neutrality of the public institution [...]. In accordance therewith, a general requirement of neutrality without reference to the tasks to be performed is not capable of justifying interference with Article 4(1) GG.

Pursuant to Paragraph 31 of the Federal Constitutional Court Act (BVerfGG), the decisions of the BVerfG are binding upon the constitutional bodies of the Federal Government and the states and all courts and authorities. The referring court is therefore bound by this interpretation of the limits of freedom of religion pursuant to Article 4(1) by the BVerfG. **[Or. 11]**

2. Ordinary legislation

(a) General Act on Equal Treatment (AGG)

Directive 2000/78/EC has been implemented by the AGG. In extract this reads as follows:

Paragraph 1 Purpose

'The purpose of this Act is to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.'

Paragraph 2 Scope

'(1) For the purposes of this Act, any discrimination within the meaning of Paragraph 1 shall be inadmissible in relation to:

1. conditions for access to dependent employment and self-employment, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of professional hierarchy, including promotion;

2. employment conditions and working conditions, including pay and reasons for dismissal, in particular in contracts between individuals, collective bargaining agreements and measures to implement and terminate an employment relationship, as well as for promotion;

(...)'

Paragraph 3 Definitions

'(1) Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on any of the grounds referred to under Paragraph 1. Direct discrimination on grounds of gender shall also be taken to occur in relation to Paragraph 2(1) Nos 1 to 4 in the event of the less favourable treatment of a woman on account of pregnancy or maternity. **[Or. 12]**

(2) Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons at a particular disadvantage compared with other persons on any of the grounds referred to under Paragraph 1, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'

Paragraph 7 Prohibition of discrimination

'(1) Employees shall not be permitted to suffer discrimination on any of the grounds referred to under Paragraph 1; this shall also apply where the person committing the act of discrimination assumes only the existence of any of the grounds referred to under Section 1.

(2) Any provisions of an agreement which violate the prohibition of discrimination under Subparagraph (1) shall be ineffective.

(3) Any discrimination within the meaning of Subparagraph (1) by an employer or employee shall be deemed a violation of their contractual obligations.'

Paragraph 8 Permissible difference in treatment on grounds of occupational requirements

'(1) A difference in treatment on any of the grounds referred to under Paragraph 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities or of the context in which they are carried out, such grounds constitute a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.'

Paragraph 15 Compensation and damages

'(1) In the event of a violation of the prohibition of discrimination, the employer shall be under the obligation to compensate the damage arising therefrom. This shall not apply where the employer is not responsible for the breach of duty.

(2) Where the damage arising does not constitute economic loss, the employee may demand appropriate compensation in money. This compensation shall not exceed three monthly salaries in the event of non-recruitment, if the employee would not have been recruited if the selection had been made without unequal treatment. **[Or. 13]**

(3) The employer shall only be under the obligation to pay compensation where collective bargaining agreements have been entered into when he or she acted with intent or with gross negligence.'

(b) Trade Regulation Act

Paragraph 106 Right of instruction of the employer

'The employer may, at its discretion, further specify the content, place and time of the work, as far as these working conditions are not determined by the employment contract, provisions of a company agreement, an applicable collective agreement or statutory provisions. This also applies to the order and behaviour of employees in the workplace. In the exercise of discretion, the employer must also take into account disabilities of the employee.'

C. EU legal framework

The questions referred concern the interpretation of Article 2 and Article 4 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation in conjunction with Article 16 of the Charter of Fundamental Rights.

D. Relevance of the questions referred to the decision in the main proceedings

First question referred:

Does a unilateral instruction from the employer prohibiting the wearing of any visible sign of political, ideological or religious beliefs constitute direct discrimination on the grounds of religion, within the meaning of Article 2(1) and Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, against employees who, due to religious covering requirements, follow certain clothing rules? [Or. 14]

(1) In the judgment of 14 March 2017 (*Achbita*, C-157/15, EU:2017:203), the Court of Justice found that an internal rule such as that at issue in the main proceedings did not introduce a difference of treatment that was directly based on religion or belief, for the purposes of Article 2(2)(a) of Directive 2000/78, as the rule was applied equally to all employees. However, this Chamber is of the opinion that direct discrimination shall always be taken to occur when a rule directly relates to a certain characteristic protected by Article 1 of Directive 2000/78. The text of Article 2(2) 2000/78/EC reads as follows:

> *'Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1'.*

According to the definition of Paragraph 3(1) AGG too, direct discrimination was taken to occur in the present case due to the connection between the discriminatory treatment and the characteristic of religion.

(2) In contrast, indirect discrimination shall be taken to occur where an apparently neutral characteristic (such as part-time employment) empirically concerns more people in a group (for example: women). This is not the case in the present case: the regulation explicitly relates to the characteristic of religion, in that it prohibits religious features.

The applicant in the main proceedings would be treated differently (not receive a warning) if she were not religious and were not to demonstrate this through religious expression. She would also be treated differently if she were to have worn a headscarf for reasons of fashion rather than religion. The employer's general requirement of neutrality explicitly connects a characteristic (religion) referred to in Article 1 of Directive 2000/78/EC to a negative consequence (ban on wearing religious features). Voices in the literature therefore consider with convincing reasoning — and contrary to the Court of Justice's comments in *Achbita* — that regulations such as that at issue here constitute direct discrimination on grounds of religious expression [...] **[Or. 15]** [...].

(3) In the opinion of this Chamber, the difference between indirect and direct discrimination can be conditioned not by whether other people with other

(protected or unprotected) characteristics are also treated similarly poorly, but exclusively according to whether or not less favourable treatment explicitly relates to a protected characteristic [...]. According thereto, the individual consideration of whether the person specifically affected is disadvantaged by the treatment because of his or her recognisable religion, in that a direct connection is made to the protected characteristic of religion, would be decisive for direct discrimination pursuant to Article 2(2)(a) of Directive 2000/78/EC. Direct discrimination on grounds of religion does not become indirect discrimination by non-religious employees also being prohibited from performing certain practices. Whether members of a certain category are exclusively disadvantaged is, in contrast, irrelevant to the question of whether direct discrimination is taken to occur [...], since fundamental freedoms apply to individuals, not to collectives. The wording of the directive itself also provides no connecting factor for such a delimitation [...]. A connection to religion cannot be made any more directly than by designating a protected characteristic in the prohibitory regulation itself.

In other words: direct discrimination cannot become indirect discrimination by a further group of employees also being prohibited from doing something. That would lead to general hostility to all religions being perceived as neutrality and not as direct discrimination. **[Or. 16]**

(4) On account of the connection between the unfavourable treatment of the applicant (in this case: the issuing of a warning) and the characteristic of religion, this Chamber is of the opinion that there is direct discrimination in the present case. As direct discrimination within the meaning of Article 2(2)[a] of Directive 2000/78/EC pursuant to Article 4(1) of the directive does not constitute discrimination only where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, the characteristic concerned constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate, the action would have to be allowed. This is because no determining occupational requirement not to wear a headscarf at work results from the applicant's activity as a teacher. The Hamburg education recommendations on the contrary reveal the express wish that children learn about cultural and religious diversity in their social environment.

The defendant in the main proceedings explicitly refers to the fact that its conduct is covered by Directive 2000/78/EC. This Chamber therefore sees itself as prevented from upholding the applicant's action as a result of the grounds for the judgment of the Court of Justice of 14 March 2017 (*Achbita*, C-157/15, EU:2017:203), even though these require interpretation.

Should the Court of Justice answer the first question in the negative, the second question referred is important for resolving the dispute:

Does a unilateral instruction from the employer prohibiting the wearing of any visible sign of political, ideological or religious beliefs constitute indirect

discrimination on the grounds of religion and/or gender, within the meaning of Article 2(1) and Article 2(2)(b) of Directive 2000/78/EC, against a female employee who, due to her Muslim faith, wears a headscarf?

In particular:

(a) Can indirect discrimination on the grounds of religion and/or gender be justified under Directive 2000/78/EC with the employer's subjective wish to pursue a policy of political, ideological and religious neutrality even where the employer thereby seeks to meet the subjective wishes of his customers?

(b) Do Directive 2000/78/EC and/or the fundamental right of freedom to conduct a business under Article 16 of the Charter of Fundamental Rights of the European Union in view of Article 8(1) of Directive 2000/78/EC preclude a national regulation [Or. 17] according to which, in order to protect the fundamental right of freedom of religion, a ban on religious clothing may be justified not simply on the basis of an abstract capacity to endanger the neutrality of the employer, but only on the basis of a sufficiently specific risk, in particular of a specifically threatened economic disadvantage for the employer or an affected third party?

(1) The ban on displaying religious symbols actually affects some religions more than others and the sexes in a different way: religious Jewish women wear a wig, which is usually not recognisable as such. They are therefore allowed to fulfil the religious covering requirement. In contrast, Muslim women — like Jewish men — are prohibited from fulfilling that requirement, as their religious characteristic — the wearing of the headscarf or kippah — is visible. Christians can conceal the wearing of a cross around their neck beneath a further item of clothing. It is therefore possible for them to fulfil this religious requirement even when applying a rule of neutrality. Statistically, the defendant's regulation almost exclusively affects Muslim women, as the majority of teachers in child day care centres are female and the number of religious Jews among the male teachers is extremely small.

In the judgment of 14 March 2017 (*Achbita*, C-157/15, EU:2017:203), the Court of Justice left open the question of whether the requirement of neutrality in the workplace constitutes indirect discrimination on the grounds of religion.

The Court also failed to discuss whether a requirement of neutrality in the workplace is to be regarded as indirect discrimination of women, as this ban concerns (Muslim) women in the vast majority of cases.

(2) Pursuant to Article 2(2)[b][i], indirect discrimination shall be taken to occur unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

In the judgment of 14 March 2017, the Court of Justice stated the following:

> ‘An employer’s wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and is, in principle, legitimate, notably where the employer involves in **[Or. 18]** its pursuit of that aim only those workers who are required to come into contact with the employer’s customers.’

However, for there to be an interference with the fundamental right deriving from Article 4(1) GG (freedom of religion), the Federal Constitutional Court requires, in addition to the existence of a legitimate aim, that the external religious expression must result in a sufficiently specific risk for legally protected interests with constitutional status [...]. The Regional Labour Court of Nuremberg [OMISSIS] understands the case-law of the Court of Justice in the *Achbita* and *Bougnaoui* judgments (judgment of 14 March 2017, ref. C-188/15, ECLI:EU:C:2017:204) to be in line with the view of the Federal Constitutional Court such that the employer’s wish to project an image of neutrality towards customers was, in principle, legitimate only where the lack of this neutrality led to economic disadvantages. Like the defendant in the main proceedings, the referring Chamber is unable to recognise this restriction in the grounds for the decision in the judgment of the Court of Justice of 14 March 2017 (*Achbita*).

However, with the Federal Constitutional Court and the Regional Labour Court of Nuremberg, this Chamber is of the opinion that, with regard to the weight of the fundamental right to freedom of religion and with regard to the requirement of proportionality laid down in Article 52(1) of the Charter of Fundamental Rights, the employer’s fundamental right arising from Article 16 of the Charter cannot be given priority over freedom of religion simply where the employer expresses the wish to appear neutral to customers without the lack of neutrality causing the employer a disadvantage.

This Chamber feels this interpretation to be confirmed by the judgment of the Court of Justice in *Bougnaoui* (judgment of 14 March 2017, C-188/15, EU:C:2017:204), in which the Court of Justice did not recognise the employer’s wish to meet a customer’s wishes to no longer have that employer’s services provided by a female employee wearing an Islamic headscarf as a genuine and determining occupational requirement within the meaning of that provision. This Chamber is unable to see why it should then, however, be admissible to prohibit the same employee from wearing the headscarf when the employer adopts this wish of the customer and prohibits the wearing of the headscarf as a general company philosophy (neutrality), as this Chamber understands the Court of Justice in *Achbita*. **[Or. 19]**

(3) It is true that only minimum requirements are laid down in Directive 2000/78/EC in recital No 28 and Article 8 thereof. This gives the Member States the option of introducing or maintaining more favourable provisions. The implementation of the directive should not serve to justify any regression in relation to the situation which already prevails in each Member State. There are therefore voices in German legal literature who believe that, through the *Achbita*

and *Bougnaoui* judgments, the higher level of protection guaranteed in Germany by Article 4(1) and (2) GG, according to which proof of operational disadvantages in the individual case is required for prohibiting the displaying of religious symbols in the workplace, was not adversely affected by those judgments [...].

However, this Chamber is prevented from upholding the action by the interpretation of Article 16 of the Charter of Fundamental Rights by the Court of Justice, with which the latter finds the employer's wish for religious neutrality of his employees to be sufficient in itself as objective justification for indirect discrimination (as long as this is appropriate and necessary). The defendant in the main proceedings explicitly refers to its right arising from Article 16 of the Charter of Fundamental Rights as interpreted by the Court of Justice in *Achbita*, which means that this question is relevant to the decision in the main dispute. In the opinion of this Chamber, the employer has not demonstrated with sufficient substantiation economic losses or a specific danger to legally protected interests of third parties, which could also justify a different decision in accordance with the conditions of Article 4 GG.

[...] [Remarks on national procedural law]

[...] [Signature]