Case C-258/24

Request for a preliminary ruling

Date lodged:

12 April 2024

Referring court:

Bundesarbeitsgericht (Germany)

Date of the decision to refer:

1 February 2024

Defendant, appellant, respondent and appellant in an appeal on a point of law:

Katholische Schwangerschaftsberatung

Applicant, respondent, appellant and respondent in an appeal on a point of law:

JB

BUNDESARBEITSGERICHT
(FEDERAL LABOUR COURT)

…

In the Name of the People!

Delivered on

1 February 2024

ORDER

…

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In the case of

Katholische Schwangerschaftsberatung

Defendant, appellant, respondent and appellant in an appeal on a point of law,

… [v]

JB

Applicant, respondent, appellant and respondent in an appeal on a point of law,

On the basis of the hearing of 1 February 2024 … the Second Chamber of the Bundesarbeitsgericht has ordered as follows:

I. The Court of Justice of the European Union shall be asked to answer the following questions, pursuant to Article 267 TFEU:

1. Is it compatible with EU law, in particular Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Directive 2000/78/EC) in light of Articles 10(1) and 21(1) of the Charter of Fundamental Rights of the European Union,

if a national provision provides that a private organisation whose ethos is based on religious principles,

may require of its staff that they do not to leave a particular church during the employment relationship,

or may make it a condition of the continuation of the employment relationship that a member of staff who has left a particular church during the employment relationship rejoin said church,

if it does not also require its staff to belong to that church

and the member of staff does not openly act in a manner that is contrary to the church?

2. If the first question is answered in the affirmative: What, if any, further requirements apply under Directive 2000/78/EC in light of Articles 10(1) and 21(1) of the Charter in order to justify such a difference of treatment on grounds of religion?

II. The proceedings in the appeal on a point of law shall be stayed pending a ruling of the Court of Justice of the European Union on the request for a preliminary ruling.

Grounds

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A. Subject matter of the main proceedings

The parties dispute the validity of two notices of termination for leaving the church and associated payment claims.

The defendant association is a women's professional association within the Catholic Church in Germany, which is dedicated to helping children, young people, women and their families in particular circumstances. Its tasks include counselling pregnant women. The defendant has guidelines for pregnancy counselling, which the applicant has undertaken to comply with. They read, in extract, as follows:

> 'The protection of human life from its beginning to its end is a commandment of God. On this basis, the Catholic Church provides counselling and assistance … This counselling activity is part of the Catholic Church's self-conception and its own mission. … The Church's commitment to the protection of unborn life and the offering of counselling and assistance for pregnant women in situations of need and conflict will continue to be upheld. …
>
> Paragraph 1 Objective and tasks
>
> (1) The aim of counselling is to protect the unborn child by supporting the woman (and her family) in all phases of pregnancy and after the birth of the child.
>
> (2) The counselling shall be guided by the endeavour to encourage the woman to continue the pregnancy and to accept her child and to open up prospects for a life with the child, especially if she is in a situation of need and conflict. …
>
> Paragraph 12 Church recognition of counselling centres
>
> (1) Catholic counselling centres shall require Church recognition. …
>
> Paragraph 13 Obligation of the employees
>
> All employees working in the Catholic counselling centres shall undertake in writing to comply with these guidelines. That declaration (Annex 1) is to be included in the personnel files. Non-compliance with these guidelines shall have consequences under labour law.
>
> Paragraph 15 Entry into force
>
> (1) These guidelines shall enter into force on 1 January 2001.'

In Germany, abortion is not punishable only after the pregnant woman in a situation of need or conflict has received counselling from a recognised

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counselling centre under the conditions set out in Paragraphs 218 and 219 of the Strafgesetzbuch (German Criminal Code). On the basis of a papal brief addressed to the Bishop of Limburg in 2002, the defendant – unlike other counselling centres in Germany – does not issue counselling certificates, which are a requirement for abortion not to be punished.

The applicant is the mother of five children and has been employed by the defendant since 2006, initially as a project-related counsellor in pregnancy counselling. From 11 June 2013 to 31 May 2019, she was on parental leave. Prior to that, she was deployed by the defendant in pregnancy counselling. In October 2013, the applicant gave notice to a local authority, as the public authority responsible for her, that she had left the Catholic Church.

Under German law, leaving the Church constitutes permissible termination of State-registered church membership. When it takes effect, all obligations based on personal affiliation to the organised church cease to apply to the State part of 'Canon law'. Any previous church tax liability of the person leaving finishes at the end of the month in which the notice to leave takes effect. The local authority notifies both the tax authorities and the church, religious or philosophical and non-confessional organisation concerned of the notice to leave. The employer of the person who has left only becomes aware of that fact because the tax authorities provide it with the employee's changed tax details (cessation of church tax liability).

As a result of reference in the employment contract, the 'Basic regulations on employment relationships in the service of the Church' form part of the employment relationship. In the version of the resolution of the General Assembly of the Association of Dioceses in Germany of 27 April 2015 applicable in this case, they ('the Regulations') read, in extract, as follows:

> 'Article 1 Basic principles of service in the Church
>
> All persons working in an institution of the Catholic Church shall work together, irrespective of their employment status, to ensure that the institution can play its part in the mission of the Church (community of service). …
>
> Article 4 Duty of loyalty
>
> (1) Catholic employees are expected to recognise and observe the principles of Catholic doctrinal and moral teaching. …
>
> (2) Non-Catholic Christian employees shall be expected to respect the truths and values of the Gospel and to contribute to giving them effect within the organisation.

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(3) Non-Christian employees must be willing to perform the tasks assigned to them in an ecclesiastical institution in the spirit of the Church.

(4) All employees shall refrain from acting in a manner that is contrary to the Church. …

Article 5 Breaches of the duty of loyalty

(1) If an employee no longer complies with the requirements for employment, the employer shall attempt to counsel the employee to remedy this shortcoming on a lasting basis. In the individual case, it shall be examined whether such a discussion to clarify the matter or a warning, a formal reprimand or another measure (e.g. transfer, notice of amendment) is appropriate to counter the breach of duty. Dismissal shall be considered as a last resort.

(2) For dismissal on grounds relating specifically to the Church, the following breaches of the duty of loyalty within the meaning of Article 4 in particular shall be regarded by the Church as serious:

1. For all employees:

(a) publicly opposing the fundamental principles of the Catholic Church (for example promoting abortion or xenophobia), …

2. In the case of Catholic employees:

(a) defection from the Catholic Church, …

(3) If there is a serious breach of the duty of loyalty within the meaning of paragraph 2, the possibility of continued employment shall depend on the circumstances of the individual case. The self-conception of the church must be accorded special weight, without the interests of the church outweighing those of the employee in principle. Due account shall be given, inter alia, to the employee's awareness of the breach of duty of loyalty committed, the interest in retaining the job, age, length of employment and prospects of re-employment. In the case of employees who are employed in a pastoral or catechetical capacity, on the basis of a missio canonica or other written episcopal commission, the existence of a serious breach of duty of loyalty within the meaning of paragraph 2 shall generally rule out the possibility of continued employment. In those cases, dismissal may, in exceptional circumstances, be avoided if there are serious reasons in the individual case indicating that such dismissal would be excessive. The same shall apply to the defection of an employee from the Catholic Church.'

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The defendant terminated the employment relationship after the end of the applicant's parental leave by letter of 1 June 2019 without notice, or alternatively with notice as of 31 December 2019. Prior to that, the defendant had unsuccessfully endeavoured to persuade the applicant to rejoin the Catholic Church. At the time of the notice of termination, the defendant employed four employees in the pregnancy counselling service who belonged to the Catholic Church and two employees who belonged to the Protestant Church.

Both lower courts upheld the action for unfair dismissal. In addition, the Landesarbeitsgericht (Higher Labour Court) dismissed the defendant's appeal against its order at first instance to pay compensation for discrimination in the amount of EUR 2 314.22 and also compensation for non-acceptance for the period from 1 June 2019 to 31 May 2020. By its appeal on a point of law, the defendant is continuing to pursue its form of order seeking dismissal.

B. Relevant German law

I. Constitutional law and case-law of the Bundesverfassungsgericht (Federal Constitutional Court)

Article 4(1) and (2) of the Basic Law of the Federal Republic of Germany (Basic Law) …:

> '(1) Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.
>
> (2) The undisturbed practice of religion shall be guaranteed.'

Article 140 of the Basic Law:

> 'The provisions of Articles 136, 137, 138, 139 and 141 of the German Constitution of 11 August 1919 shall be an integral part of this Basic Law.'

First sentence of Article 137(3) of the German Constitution of 11 August 1919 (Weimar Imperial Constitution):

> 'Each religious society shall arrange and administer its affairs independently within the limits of the law that applies to everyone.'

According to the case-law of the Bundesverfassungsgericht, Article 4(1) and (2) of the Basic Law also protects corporate religious freedom. A fundamental part of this is determining the specific nature of the ecclesiastical work. Its formulation is the sole responsibility of the churches *(judgment of the Bundesverfassungsgericht of 22 October 2014 – 2 BvR 661/12 –, paragraph 101, BVerfGE 137, 273).* This encompasses all measures which serve to ensure the religious dimension of the activity in terms of the church's self-conception and the preservation of the direct

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connection between the work and the church's fundamental mission. If the churches or their institutions made use of private autonomy to establish employment relationships, State labour law applies to those employment relationships as a result of the choice of law. However, the inclusion of employment relationships at church institutions, inter alia, in State labour law does not change the fact that they are the Church's 'own affairs' *(judgment of the Bundesverfassungsgericht of 22 October 2014 – 2BvR 661/12 –, paragraph 110, BVerfGE 137, 273)*. Churches can therefore base their ecclesiastical work on a special mission statement of a Christian community made up of all its employees, even if said work is regulated by employment contracts *(judgment of the Bundesverfassungsgericht of 4 June 1985 – 2BvR 1703/83, 2 BvR 1718/83, 2 BvR 856/84 – as regards B II 1 d of the grounds, BVerfGE 70, 138)*. In the case of disputes in employment relationships involving religious institutions, the national courts should consider the rules of the church in question, in particular its self-conception and the specific nature of its ecclesiastical work, as a benchmark on which their evaluations and decisions are to be based, as long as these are not contrary to fundamental constitutional guarantees *(judgment of the Bundesverfassungsgericht of 22 October 2014 – 2 BvR 661/12 –, paragraph 118, BVerfGE 137, 273)*. Special legal provisions which define legal relationships in church employment relationships do not exist in national law – in so far as they are of interest here.

II. Provisions of law

1. Allgemeines Gleichbehandlungsgesetz (General Law on Equal Treatment; 'the AGG') of 14 August 2006 (*BGBl. I, p. 1897*), as most recently amended by Articles 14 and 15 of the Law of 22 December 2023 (*BGBl. I, No 414*):

> 'Paragraph 1 Purpose of the Law
>
> The purpose of this Law is to prevent or stop any 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 Law, any discrimination within the meaning of Paragraph 1 shall be inadmissible in relation to:
>
> 1. …
>
> 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,
>
> …

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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. …

(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 the grounds referred to under Paragraph 1.

…

Paragraph 8 Permissible different treatment on grounds of occupational requirements

(1) A difference of treatment on one of the grounds referred to in Paragraph 1 shall be permitted where, by reason of the nature of the activity to be carried out or of the context in which it is carried out, that ground constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

…

Paragraph 9 Permissible difference of treatment because of religion or belief

…

(2) The prohibition of difference of treatment on grounds of religion or belief shall not affect the right of the religious societies, institutions affiliated to them regardless of their legal form, or associations which devote themselves to the communal nurture of a religion or belief, mentioned in subparagraph 1, to be able to require their employees to act in good faith and loyalty in accordance with their self-conception.’

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2. Paragraph 134 of the Bürgerliches Gesetzbuch (Civil Code) in the version published on 2 January 2002 *(BGBl. I, p. 42, corrigendum, p. 2909 and BGBl. 2003 I, p. 738)*:

> 'Paragraph 134 Statutory prohibition
>
> Any legal act contrary to a statutory prohibition shall be void except as otherwise provided by law.'

C. European Union law

In the view of the Second Chamber, the following are relevant in EU law:

- Articles 1, 2(2), 3(1)(c) and 4 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation *(… 'Directive 2000/78/EC')*,
- Article 17 of the Treaty on the Functioning of the European Union *(… 'TFEU')* and
- Articles 10(1) and 21(1) of the Charta of Fundamental Rights of the European Union *(… 'the Charter')*.

D. Need for the decision of the Court of Justice of the European Union and explanation of the questions referred

I. The first question

1. In the view of the Second Chamber, the applicant is directly discriminated against by the defendant's notices of termination of 1 June 2019 on grounds of religion within the meaning of the first sentence of Paragraph 3(1) of the AGG, in conjunction with Paragraph 1 thereof. That amounts to direct discrimination on the grounds of religion within the meaning of Article 2(2)(a) of Directive 2000/78, in conjunction with Article 1 thereof.

(a) Discrimination on one of the grounds listed in Paragraph 1 AGG is unlawful under Paragraph 2(1)(2) of the AGG in relation to, inter alia, reasons for dismissal. The termination of an employment relationship is such a reason for dismissal. Directive 2000/78/EC is applicable under Article 3(1)(c) thereof.

(b) The applicant, who does not work in a pastoral or catechetical capacity, on the basis of a missio canonica or other written episcopal commission, is discriminated against by the defendant's notices of termination *(first sentence of Paragraph 3(1) of the AGG)* and thus directly on the grounds of religion *(Paragraph 1 of the AGG)* in comparison with other employees on the basis of her original affiliation to the Catholic Church.

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(aa) Paragraph 1 of the AGG uses the term ‘religion’, which is the same as that used in Directive 2000/78. The directive itself does not define this term, but in the second sentence of the first recital of the directive, the EU legislature referred, inter alia, to the fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘the ECHR’), signed in Rome on 4 November 1950. This is also covered by Article 9 of the ECHR, according to which everyone has the right to freedom of thought, conscience and religion; this right, according to the case-law of the European Court of Human Rights, includes not only the freedom to manifest one’s religion or belief, either alone or in community with others and in public or private, but also covers negative freedom of religion *(judgment of the ECtHR of 25 June 2020 – 52484/18 –, paragraphs 43 et seq.; and of 6 April 2017 – 10138/11, 16687/11, 25359/11, 28919/11 –, paragraphs 77 et seq.)*. Article 9 of the ECHR thus also guarantees the freedom not to belong to a religion *(judgment of the ECtHR of 18 March 2011 – 30814/06 –, paragraph 60)*. Article 10(1) of the Charter contains identical wording. As is apparent from the explanations relating to the Charter *(OJ 2017 C 303, p. 17)*, the right guaranteed in Article 10(1) thereof corresponds to the right guaranteed in Article 9 of the ECHR; and, in accordance with Article 52(3) of the Charter, has the same meaning and scope *(see judgments of the Court of Justice of the European Union of 15 July 2021 – C-804/18 and C-341/19 – [WABE and MH Müller Handel], paragraph 48, and of 14 March 2017 – C-157/15 – [G4S Secure Solutions], paragraphs 25 et seq.)*. This should therefore include the right to terminate membership of a church or religious community.

(bb) The defendant argues that, in accordance with the provisions of the Regulations referred to in the employment contract, it may dismiss employees who – under State law – have left the Catholic Church and do not rejoin it solely because they have left the church. The discrimination against the applicant resulting from her dismissal is directly linked to her exercising her negative freedom of religion. The dismissal of an employee who has never been a member of the Catholic Church cannot be based on Article 3(4) or Article 5(2)(2)(a) of the Regulations. The resulting difference of treatment in comparison with persons who terminate their membership of other religious communities and those who have never belonged to them is therefore based directly on grounds of religion within the meaning of the first sentence of Paragraph 1(3) of the AGG.

(cc) There is therefore no merely indirect difference of treatment of the applicant on the grounds of religion or merely indirect discrimination within the meaning of Article 2(2)(b) of Directive 2000/78/EC. The defendant does not differentiate on the basis of ‘an apparently neutral provision, criterion or practice’, but directly and exclusively on the basis of whether an employee has given up his or her membership of the Catholic Church in accordance with State law. It also does not consider it relevant whether or not the employee, having left the Catholic Church, continues to respect the truths and values of the Gospel and to contribute to giving them effect within the organisation in accordance with the expectation for non-Catholic Christian employees set out Article 4(2) of the Regulations, or whether after his or her departure he or she is willing to perform the tasks assigned to him

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or her in the spirit of the Church in accordance with the expectation for non-Christian employees set out in Article 4(3) of the Regulations.

2. Relevance of the question to the decision

An answer from the Court of Justice of the European Union ('Court of Justice') to the first question referred is necessary so that the Second Chamber can assess whether the difference of treatment of the applicant is justified under either Paragraph 8 or Paragraph 9 of the AGG. Only then can the Second Chamber rule on invalidity of the dismissals, which must be determined as a matter of priority.

(a) The Second Chamber assumes that no other grounds for invalidity asserted against the validity of the dismissals of 1 June 2019 obtain. In particular, the case-by-case analysis required under the fifth and sixth sentences of Article 5(3) of the Regulations from the employer effecting the dismissal cannot provide grounds for the invalidity of the dismissal. Those regulations merely authorise the employer to refrain from dismissal in individual cases. However, that decision is not subject to any related judicial review.

(b) The Second Chamber therefore considers it relevant to the decision whether the direct discrimination against the applicant resulting from the dismissal on the basis of her leaving the Catholic Church can be justified in the light of the requirements of EU law.

(aa) Under national law, Articles 8 or 9 of the AGG are to be interpreted in light of the most recent case-law of the Bundesverfassungsgericht. According to that case-law, leaving the Church is not compatible either with its credibility or with the cooperation in good faith it requires between the contracting parties *(see judgment of the Bundesverfassungsgericht of 4 June 1985 – 2 BvR 1703/83, 2 BvR 1718/83, 2 BvR 856/84 – at B II 4 c of the grounds, BVerfGE 70, 138).*

(bb) However, Paragraph 9 of the AGG implements the first subparagraph of Article 4(2) of Directive 2000/78/EC and Paragraph 8 of the AGG, inter alia, Article 4(1) thereof *(BT-Drs. 16/1780, p. 35).*

Both provisions of national law are therefore to be interpreted, in so far as possible, in conformity with EU law *(judgment of the Court of Justice of 11 September 2018 – C-68/17 – [IR], paragraphs 63 et seq., and of 17 April 2018 – C-414/16 – [Egenberger], paragraphs 71 et seq.).*

(1) According to the case-law of the Bundesverfassungsgericht, the Basic Law, by the authorisation contained in the second sentence of Article 23(1) of the Basic Law to transfer sovereign rights to the European Union, also permits the granting of primacy to EU law set out in the Law ratifying the Treaties. In principle, this also applies with regard to conflicting national constitutional law and, in the event of a conflict, generally results in the inapplicability of national law in the specific case *(judgment of the Bundesverfassungsgericht of 21 June 2016 – 2 BvE 13/13 and Others – [OMT programme], paragraph 118).*

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(2) Directive 2000/78 is a specific expression, within the field that it covers, of the general principle of non-discrimination now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union *(judgments of the Court of Justice of 21 October 2021 – C-824/19 – [Komisia za zashtita ot diskriminatsia], paragraph 32, and of 26 January 2021 – C-16/19 – [Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie], paragraph 33).* The Second Chamber takes the view – contrary to isolated voices of national academic writers close to the churches – that EU law as interpreted by the Court of Justice is not, for its part, inapplicable in Germany. It is neither based on an act *ultra vires* nor does it affect the constitutional identity of the Federal Republic of Germany within the meaning of the case-law of the Bundesverfassungsgericht *(see, in that respect, the detailed reasoning in judgment of the Bundesarbeitsgericht of 20 February 2019 – 2 AZR 746/14 –, paragraphs 48 et seq.).*

(cc) Whether Paragraph 9 of the AGG can be understood as meaning the obligation not to leave a certain religious community during an employment relationship or to rejoin it after leaving can be a justified requirement of loyalty if, at the same time, persons are employed for whom the termination of their membership of another religious community or their complete absence from such a community goes unpunished, therefore depends on whether the first and second subparagraphs Article 4(2) of Directive 2000/78/EC permit such an interpretation in light of Article 21 of the Charter. According to the wording of the directive, that is at least doubtful. As far as can be seen, there is no relevant case-law from the Court of Justice to date. Should Paragraph 9 of the AGG, considering EU law, be unable to justify the difference of treatment of the applicant on the basis of her leaving the Catholic Church, it would depend on whether Article 4(1) of the directive permits such an interpretation of Paragraph 8 of the AGG.

(dd) The Second Chamber has no doubt that the defendant is a private organisation the ethos of which is based on religion within the meaning of the first and second subparagraphs of Article 4(2) of Directive 2000/78. This is clear from the influence of the Bishop of the Diocese of Limburg ensured by the defendant's statutes.

(ee) Article 4(2) of Directive 2000/78 distinguishes between justifying difference of treatment firstly on the grounds of a justified occupational requirement *(first subparagraph)* and secondly on the grounds of a requirement of loyalty *(second subparagraph).*

(1) The first subparagraph of Article 4(2) of Directive 2000/78 mentions religion, among other things, as a possible justified occupational requirement. This does not cover, at least according to the wording, the requirement to have not left a particular religious community, or to rejoin it. Moreover, according to this provision, a person's religion or belief can only constitute a 'genuine, legitimate and justified occupational requirement' depending on the nature of the occupational activity concerned or the circumstances in which it is carried out *(see*

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also, in that respect, judgment of the Court of Justice of 17 April 2018 – C-414/16 – [Egenberger]).

(a) In the present case, the defendant does not make performance of the work dependent on membership of a particular organised church or religious community. It does not require that its staff belong to the Catholic Church. It demands only that employees have not left the Catholic Church, in accordance with the requirements set out in the Regulations. Moreover, provided they have not left, they may belong to another church or religious community, or to none at all.

(b) However, the Second Chamber does not consider it impossible that, having regard to the autonomy of churches and other organisations whose ethos is based on religious principles or beliefs, as protected by Article 17 TFEU and Article 10(1) of the Charter *(see, in this regard judgment of the Court of Justice of 17 April 2018 – C-414/16 – [Egenberger], paragraph 50)*, the first subparagraph of Article 4(2) of Directive 2000/78/EC may be interpreted, in a manner going beyond its wording, to the effect that not only belonging to a particular religion, but also not having left a particular religious community or willingness to rejoin it may constitute a justified occupational requirement. According to Article 3(4) of the Regulations, anyone who has left the Catholic Church is unsuitable to work in any service of the Church. Under canon law, leaving the Church is one of the most serious offences against the faith and the unity of the Church *(see judgment of the Bundesverfassungsgericht of 4 June 1985 – 2 BvR 1703/83, 2 BvR 1718/83, 2 BvR 856/84 – at B II 4 c of the grounds, BVerfGE 70, 138)*. The first question referred therefore concerns whether, in the absence of other circumstances, the departure of an employee from the Catholic Church, notified in accordance with State law, renders the person concerned unsuitable for service with an employer forming part of the Church.

(c) In the course of the dispute, the applicant claimed that she had left the Catholic Church because the Diocese of Limburg charges – in addition to the State church tax –a special church levy on persons who – like the applicant – live with a high-earning spouse in an 'interfaith marriage'. The defendant argued that, because she had left the Catholic Church, it had no confidence that the applicant would take account of its ethical requirements in her work and still feel bound by the teachings of the Catholic Church. By leaving, she had signalled to the outside world that she no longer wanted to have anything to do with the Catholic Church.

(d) In the view of the Second Chamber, the termination of membership of the Catholic Church under State law alone cannot justify the difference of treatment on the grounds of religion under Article 4(2)(1) of Directive 2000/78/EC which results from the dismissal of a former Catholic employee.

Non-compliance with the ethical-religious requirements of an employer forming part of the Church may provide grounds for the employee's unsuitability. However, leaving in itself is not a sufficient basis for such an assumption. The

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reasons for terminating membership do not have to be based on ethical-religious grounds – as in the case of the applicant's argument, which has not been contradicted – but can also stem from the private sphere, which is not subject to assessment by the employer. Therefore, there is no factual basis at all for the assumption that the employee will fail to fulfil the professional requirements applicable to him or her as before solely on the basis of his or her notice to leave. This applies equally to the employer's assertion that it had lost confidence in the employee performing her duties properly on the basis of the mere termination of membership. Instead, the employer must show that, on the basis of verifiable facts, there are doubts as to whether the employee is still willing or able to fulfil the corresponding professional requirements of his or her employer as a result of a change in beliefs or ethical principles. If, on the other hand, the defendant's view were to be accepted *(paragraph 35)*, the assessment of the employee's alleged lack of suitability would be excluded from effective judicial review. This is especially the case in as much as the employees in the counselling centre had to undertake to comply with the defendant's Regulations in their employment contracts in accordance with Article 13 thereof *(paragraph 2)*.

(2) Nor can the termination of State membership of a church justify difference of treatment resulting from a dismissal under the second paragraph of Article 4(2) of Directive 2000/78/EC in the absence of special circumstances.

(a) Unlike the first subparagraph of Article 4(2) of that directive, the second subparagraph stipulates that one of the occupational requirements that a church or other public or private organisation whose ethos is based on religion or belief can impose on its employees is the requirement that those individuals act in good faith and with loyalty to the ethos of that church or organisation. As is apparent from, inter alia, the clause 'provided that its provisions are otherwise complied with', that right must be exercised in a manner consistent with the other provisions of Directive 2000/78 and, in particular, the criteria set out in the first subparagraph of Article 4(2) of the directive, which must, where appropriate, be amenable to effective judicial review *(judgment of the Court of Justice of 11 September 2018 – C-68/17 – [IR] paragraph 46)*. In this respect, any justification of direct discrimination must be examined on the basis of the criteria established by the Court of Justice in its judgments of 17 April 2018 *(– C-414/16 – [Egenberger])* and of 11 September 2018 *(– C-68/17 – [IR])*.

(b) In the view of the Second Chamber, termination of membership of an organised church in accordance with State law does not in itself constitute disloyal conduct on the part of an employee. This also applies if the employee is in an employment relationship with an employer forming part of the Catholic Church. If the employer employs members of other Christian religions or beliefs or non-Christians, an employee who is a member of the Catholic Church is under no obligation arising from the employment relationship to maintain membership of the Catholic Church. This applies even having regard to the obligation arising from canon law to preserve the communion of the Church *(Canon 209(1) of the Codex Iuris Canonici (Code of Canon Law) [CIC])*. Such a contractual obligation

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could only be effectively established by the regulations if it were justified by the professional requirements in the individual case. Otherwise, it would lead to an additional obligation in comparison with non-Christian employees, for which there are essentially no professional reasons. Similarly, the obligation under the law of the Catholic Church to make a financial contribution to the performance of the Church's task *(Canon 222(1), in conjunction with Canon 1263 of the CIC, p. 354 of the preliminary files)* does not mean that a Catholic employee must permanently maintain his or her membership under church law as a subsidiary obligation arising from the employment relationship. Nor can a financial contribution to the tasks of the Catholic Church, which only exists for Catholic employees, be demanded by an employer forming part of that church.

(c) In addition, the notice of termination of membership of the Catholic Church is made before a State authority. Under national law, only the church concerned and the employer are informed thereof.

The employer is only informed so that it can take account of the relevant tax details and correctly calculate the remuneration and related deductions. No further publicity is associated with the termination of membership. Only if the departure were disseminated by the employee in public and in an inappropriate manner could that constitute action contrary to the Church and thus disloyal conduct which – as with other employees – could lead to dismissal based on conduct-related grounds under Article 5(2)(1) of the Regulations.

(d) That notwithstanding, the wording of the second paragraph of Article 4(2) of Directive 2000/78/EC could permit differentiation between acting in good faith and with loyalty to the ethos of the church or organisation and acting in good faith and with loyalty to the organisation as employer.

For example, an employee may have acted in bad faith towards the Church by terminating his or her membership, but that may not necessarily mean acting in bad faith towards the employer, whose ethos the employee must observe in his or her work.

(e) The judgment of the Court of Justice of 11 September 2018 *(– C-68/17 – [IR])* does not render the interpretation of the second subparagraph of Article 4(2) of Directive 2000/78/EC requested by the Second Chamber obsolete. That judgment does not concern the present situation where a private organisation, whose ethos is based on religious principles, requires members of its staff not to leave the Church during the employment relationship or to rejoin it after leaving. Instead, the decisive factor in the decision was that entering into a second civil marriage was not permitted under church law. However, different criteria could apply in this case by virtue of the possibly relevant distinction between acting with loyalty towards the church and acting with loyalty to the ethos of the church.

(ff) According to Article 4(1) of Directive 2000/78/EC, a difference of treatment which is based on a characteristic related to any of the grounds referred to in

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Article 1 is not to constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. The requirement not to have left a particular religious community could be such a 'related characteristic' for religion *(on the distinction from the ground on which the difference of treatment is based, see judgment of the Court of Justice of 21 October 2021 – C-824/19 – [Komisia za zashtita ot diskriminatsia], paragraph 44 and of 7 November 2019 – C-396/18 – [Cafaro], paragraph 59).* However, the question whether there is a genuine and determining occupational requirement and also a legitimate objective and a proportionate requirement within the meaning of Article 4(1) of Directive 2000/78/EC should not, according to the wording of the provision, unlike under the second subparagraph of Article 4(2) of Directive 2000/78/EC, be answered with regard to the 'ethos of the organisation'. A further argument against this is the fact that the term 'genuine and determining occupational requirement' within the meaning of Article 4(1) of Directive 2000/78 refers to a requirement which cannot cover subjective considerations of the employer, but which is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out *(judgment of the Court of Justice of 14 March 2017 – C-188/15 – [Bougnaoui and ADDH], paragraph 40).* It is not objectively necessary to remain a member of the Catholic Church in order to work in pregnancy counselling. However, it does not appear entirely inconceivable that the ethos of an organisation based on religious principles could be considered as an objective requirement within the meaning of Article 4(1) of Directive 2000/78, which can be sufficiently distinguished from merely subjective considerations, in which case the above differentiation between ethos and self-conception would also have to be taken into account. In this context, too, the autonomy of churches and other organisations whose ethos is based on religion or belief, as protected by Article 17 TFEU and Article 10(1) of the Charter, might also have to be taken into consideration (*on Article 4(2) of Directive 2000/78/EC, see judgment of the Court of Justice of 17 April 2018 – C-414/16 – [Egenberger], paragraph 50).* However, in so far as it allows a derogation from the principle of non-discrimination, Article 4(1) of Directive 2000/78, read in the light of recital 23 thereto, which refers to 'very limited circumstances' in which such a difference of treatment may be justified, must be interpreted strictly *(judgment of the Court of Justice of 21 October 2021 – C-824/19 – [Komisia za zashtita ot diskriminatsia], paragraph 45, and of 15 July 2021 – C-795/19 – [Tartu Vangla], paragraph 33).*

II. The second question

If the first question referred is answered in the affirmative, the question arises as to which, if any, further requirements apply in order to justify the difference of treatment on grounds of religion at issue here. Since the Second Chamber cannot assess, without the interpretation by the Court of Justice requested in the first question, whether a justification under the first and second subparagraphs Article 4(2) of Directive 2000/78/EC or Article 4(1) of Directive 2000/78/EC in

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light of Article 10(1) and Article 21(1) of the Charter may be considered, it is unclear whether and, if so, which further requirements for a justification must be met.

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