

Labour Court Hamburg

Verdict

In the name of the people

Reference number: 20 Ca 105/07

In case:

Claimant

Process authority:

*Sebastian Busch Attorney at Law
Lawyers and Tax Office in Schanzenhof
Schanzenstraße 75
20357 Hamburg*

vs

**Church Municipality Work Hamburg
Federal Association of Inner Missions registered Association
Represented by the Executive Committee
Königstraße 54
22767 Hamburg**

Defendant

Process authority:

*Duvigneau & Scholz
Attorneys at Law
Rothenbaumshaussee 5
20148 Hamburg*

Pronounced: 04 December 2007

Gurk
Documentalist employee

Chamber 20 of Labour Court Hamburg, based on the oral procedure of 04 December 2007 represented by the judges of the Labour Court, honourable Judge _____ and honourable Judge _____ has decided:

The Defendant is sentenced to pay EUR 3,900.00 to the Claimant.

The costs of the legal procedure are covered by the Defendant.

The dispute limit is set at EUR 3,900.00.

Case background:

The Claimant requests compensation for religion related discrimination by the Defendant in a process for taking up a position as a social pedagogue for a partial project of EQUAL Development Partnership of the North German Network for Professional Integration of Migrants (NOBI).

The Defendant, who is the federal association of the Church Municipality Work responsible for Hamburg, is as such part of the North-Elbe Evangelist-Lutheran Church (NEK) and with that also of the Evangelist Church of Germany (EKD). The Church Municipality represented by the Defendant in the Hamburg operational territory understands itself as the direct declaration for life and being of the Christian Church. Accordingly the statute preamble says:

„The Church has the mission, to witness God’s love for the world embodied in Jesus Christ to everyone. The Church Municipality is the embodiment of this witness and reaches out especially to people in dire need, spiritual distress and socially unjust circumstances. It also seeks to remedy the causes of these needs. It reaches out in ecumenical scale to individuals and groups close and far, Christians and non-Christians. Because distance from God is the deepest distress for people and their health and wellbeing belong together inseparably, the Church Municipality provides complete service for the people in word and action.

The Church Municipality Work in Hamburg is aware of their commitment to this mission of Jesus Christ.”

The Council of EKD has approved in the „guidelines of the Council of the Evangelic Church in Germany”, as per Article 9b of the Basic Regulation on the facilitation of private legal professional work in the Evangelist Church in Germany and of the Church Municipality work of EKD for the territory of EKD and NEK, among others the following stipulations:

„§2

The basic principles of Church service

- (1) The service of the Church is defined by the mission to bear witness to the Gospel in word and action. Every woman and man, who is actively involved in the conditions for employment of the Church and Church Municipality, contribute in different ways so that this mission may be realised. This mission serves as basis for rights and obligations for the employer and also for the employees...

§3
Professional requirement
in the justification of employment relations

- (1) The professional work in the Evangelist Church and in its Church Municipality basically stipulates the affiliation to one of the member churches of the Evangelist Church in Germany or of a Church with which the Evangelist Church in Germany has affiliations with.
- (2) For tasks not related to declaration of faith, spiritual guidance, counselling or leading may deviate from paragraph 1 when not other suitable colleagues are to be recruited. In this case also people not belonging to one of the other member churches of the working community of Christian churches in Germany to the unity of Evangelist Free Churches may be employed. The employment of people not meeting the requirement of paragraph 1 has to be examined in individual cases under consideration of the size of the service area or the establishment and its other staff and also of the perceivable tasks of the respective area. § 2 paragraph 1 sentence 1 stays unaffected...”

The Claimant is German of Turkish origin and does not belong to a Christian church.

With the job advertisement of 30 November 2006 (page 17, the Author) the Defendant was seeking for a social pedagogue for the social and ecumenical executive committee / professional area migration and securing of existence for the partial project „Integration Pilot Hamburg” of the Equal Development Partnership NOBI – North German Network for the Professional Integration of Migrants as of 01 February 2007 regarding the project by 30 December 2007.

The job advertisement says among others the following:

„This project is an education and information offer for the multipliers in the area of professional integration of adult immigrants.

The tasks related to this position involve the elaboration of contents in the column „professional information”, compilation of information material, preparation and implementation of programs as well as working in the structures and committees of the professional area for migration and securing of existence.

The candidates should possess completed studies in sociology, social pedagogy (or similar), experience in project work as well as experience and competence in the fields of migration, labour market and inter-culturalism. They also have solid IT and internet skills. It should be evident for them to work on their own and also constructively in team.

As a Church Municipality organisation we stipulate the affiliation to a Christian church.

...”

The Claimant, who has no completed college studies, applied for this position with the application of 24 December 2006 (page 22, the Author, annexes page 18-21). As reply to her application the Claimant received a call from one of the employees of the Defendant on 02 January 2007 who explained the Claimant that her application was very interesting but left the question of religious affiliation unanswered. After the explanation of the Claimant, saying that she does not practise any religion but was, being a Turkish person, a born Muslim, the employee of the Defendant asked if the Claimant was willing to consider joining the Church as it is an absolute requirement for the job. The Claimant replied again that she did not consider this of importance as the position did not show any religious connection.

The Defendant rejected the application of the Claimant with their letter of 06 February 2007 (page 23, the Author).

With the letter of her process authority of 21 February 2007 (page 24 – 26, the Author) the Claimant requested compensation from the Defendant in accordance with § 15 of AGG (General Law on Equal Treatment) with regard to her discrimination when occupying the position because of her religion and ethnic origin. This was rejected by the Defendant in their letter of 01 March 2007 (page 27, the Author) and declared that the affiliation with a Christian Church represented in accordance with of § 9 of AGG a legally justified professional requirement for working for the Church Municipality Work.

The Claimant believes that she was negatively discriminated by the Defendant during the application procedure because of her religion and also because of her ethnic background consequently she is entitled to claim compensation from the Defendant in the amount of three months gross salary. The salary of the Claimant in the advertised position would have been EUR 1,300 gross per month.

In individual the Claimant argues that:

The criterion of Church affiliation in between is not permitted according to legal points of view.

The EQUAL-program of the EU stepped in for the professional integration of unprivileged groups and was co-financed by the means of European Social Funds.

The development partnership NOBI made claim for support for different projects with the Federal Labour and Social Ministry, which is responsible for the distribution of EU funds as the national organisation for coordination. The distribution of funds happens through an allowance decision of the ministry to the development partnership NOBI. This allowance decision contains the following reference to the allowance recipient.

„Reference:

The main concept of the Community initiative EQUAL should be considered during the procedure of employment. In particular it is urgently recommended not to make any limitations reducing the scope of applicants and the selection of employees should be carried out bearing this in mind as well.”

The occasion for this reference was a dispute with a church operator in 2002 in which case it was also about religious criteria related to projects subsidised by EQUAL.

The Federal Ministry also has the concept regarding the job advertisement here disputed that the criterion of religious affiliation constitutes an unreliable limitation to the scope of applicants and therefore stopped financing the position not long ago and also did not acknowledge the applicable costs in the framework of the NOBI-allowance decision.

The criterion of church affiliation counteracts the aim of the projects „Integration Pilot” by which obviously all migrants should be targeted regardless of their religious affiliations. For this goal setting it is a drawback to link integration efforts with missionary attempts, as it could present a barrier to access for all who wish to receive professional counselling without indicating their religion.

The Defendant explicitly does not deal with the targeted integration of Christian migrants in the Integration Pilot Project. Much rather all migrants should be targeted independently from their religious affiliations. There is no reference to be found to religious activity in the practice of the project.

The Defendant waived in this respect their right for self definition when they requested state funding in order to facilitate a „secular” goal setting as it would be in contradiction with the aims and criteria of EQUAL-Project.

The Defendant does not have the right for self definition regardless from the foreign financing utilised by them either.

The European norms for protection against discrimination and also the requirement of European right conform transposition limited the self-government of the Church.

Article 4 of the guideline 2000/78/EG stipulates no comprehensive exemption for the Church from the prohibition of discrimination. Unequal treatment is only permitted, if according to the ethics of the organisation, the religion of the person represents a significant and rightful professional requirement regarding the type of activity or the circumstances of their practice. Accordingly the European Law orders the Church tendency protection but to such an extent which correspond right for self definition in the German understanding so far.

According to the German legislator's concept as well, and also as it is obvious from the justification of the law to § 9 of AGG, the right for self-definition of the Church declared in § 9 of AGG should not be used as basis which is permitted as per Article 4 of the guideline. As a result of this, discrimination because of religion in the decision even by a Church operator is only permissible if it is required based on the concrete function of the position.

It is not the case here. As obvious from the job description (attachment B 2 pages 110 to 113, the Author) the occupant of the position does not represent the Church Municipality Work in any associations. Consequently the position includes no authority and shows neither declaration nor counselling powers. Working in the committees is limited to the participation in the committees of NOBI and working in the structures and committees of the professional areas of migration and securing of existence of the Defendant itself. In reality the Defendant does not consider that the person to be employed should embody different values or behave in a certain way, it is only about the formal criterion of affiliation to a Christian Church.

The Defendant fulfils a state task with state funds, which could also be carried out by a non-religious operator just as well.

The Church Municipality is going in the direction by expanding their scope of tasks also to employ non-Christians, depending on availability on the labour market. They only stipulate as compulsory in their tariff regulations that the evangelic principles of the Church Municipality work should be appreciated and the employees should not contradict these principles with their behaviour. The membership in a Church is merely put forward as a requirement, it should allow for exemptions.

The Claimant demands that

the Defendant should be sentenced to pay the Claimant a proportionate compensation in accordance with § 15 of AGG in an amount set by the Court.

The Defendant demands that

the claim should be rejected.

The Defendant has the concept that the Claimant is not entitled to the compensation claim made legally binding and in individual declares:

The complaint because of inappropriate discrimination due to ethnic origin is ruled out because the Defendant did not have this lead motif neither in the framework of the published job advertisement nor later by making their decisions and finally the position in question was given to a born Indian.

The limitation of applicants considered as adequate in the job advertisement to people who could prove their affiliation to a Christian Church may be applied in accordance with § 9 Abs of AGG and therefore it did not constitute a clash with the prohibition of discrimination of AGG.

The only measure of the appropriateness of the Defendant's action should be the regulations of AGG through which the legislator of the Federal Republic transposed the EG guidelines in national law. The self-explanatory requirement of the transposition of national law in accordance with the guidelines does not mean that the European Law and with this the guideline in question is the only or significant guide for the implementation of § 9 of AGG. Primarily the implementation should direct on national law, in particular on the constitution with its special guarantee regarding the self identification right of the Church (Article 140 of GG (Primary Law) in relation with. § 137 of WRW (Weimar Constitution)).

Also the European legal context of § 9 of AGG leads in all other aspects to no other judgement. Through explanation Nr 11 in the Treaty of Amsterdam and also most of all through the consideration reason 24 making reference to this explanation of the EG-guideline in question it is clarified that the Community Law, does not want in any way to impair the national status of the Churches and the specific powers imposed on them or interfere in any way with the autonomy and freedom of decision of national legal orders within the Churches.

§ 9 Abs 1 of AGG entitles the Defendant to define the affiliation to a Christian church as a „job requirement” for any of the tasks within their scope of activity and make it a prerequisite of employment.

The setting of this regulation is to be oriented exclusively on how far and in what way the Defendant respectively the NEK and EKD are legitimated as Christian Church considering their self-understanding to set up requirements for the employees in church service. With regard to the Church right for self definition guaranteed by the constitution the Church is only authorised to define more accurately and stipulate what should be considered for them as „professional requirements” in their scope of effect. The totality of the church service people will be understood as service community, in which each individual provides inseparable services referring to the self understanding of the Church, thereby contributing directly to the „existence and life declarations” of the Church. This general connection between the activity of each Church employee and the perception of comprehensive Church missions should not be questioned independently from the eventual and concrete task performed. Much rather the Church should have the liberty to make stipulations autonomously regarding the area of the activities carried out in their scope of effect, which also unfolded within the direct obligations of the secular legal order. The obligatory norms bearing relevance here found their repercussion in the guideline of the council of the Evangelist Church in Germany. The practice for selection and employment of the Defendant orients itself on the professional requirements for taking up of an activity in the service of the Church regulated there in § 3. Only 5 of employees of the Defendant did not belong to the Evangelist or Catholic Church among the 207 employees including the affiliated aid work of NEK. The result of these exemptions is that in the scope of effect of the Defendant it is only possible to fulfil certain tasks with exactly such people who do not belong to the Christian religion or that the situation on the labour market made it necessary to employ people of non-Christian faith.

Concerning the type of activity in the position under dispute as well, the affiliation to a Christian Church should be acknowledged as a legally justified professional requirement.

The project „Integration Pilot Hamburg” it is not primarily about the entrusted employee should show particular nearness to the circle of migrants affected based on their own person. The purpose and aim of the project to exactly to guide the integration of migrants in the local society what can only be provided regularly by someone with a background which does not correspond that of the migrants to be advised.

The Defendant as leading association of the Church Municipality follows the mission of the Church not in the ways of declaration or missionary activity but by way of „word and action” offering „complete service for the people” also by way of the actual brotherly love.

The tasks in the project Integration Pilot Hamburg for the social pedagogue employed there are directly connected to the perception of the Church Municipality mission of the Defendant. Regarding content the project is defined by countering the structural and institutional reasons of the discrimination and disadvantage of migrants, strengthening their possibilities for participation and achieving the equalisation and same rights of migrants. This mission oriented itself on the frame concept „Migration, Integration and Escape” of the Church Municipality work of the EKD and it brought the Church Municipality profile into the professional work. The project therefore explicitly presented itself as such of the Defendant and with that of EKD and NEK.

According to the job description, the tasks of the social pedagogue include representing the Defendant in public events, committees, negotiations in particular against the representatives of authorities, institutions and associations and also against communal, national and international organisations. With that the activity received an unmistakably religious and Church Municipality impact which made the affiliation to a Christian Church for the employee indispensable as a landmark of identification with the leading motif of the Defendant.

The fact that the project is involved in an initiative by the European Union as if financed by it and federal funds respectively did not render the ordering of activities relative. The fund providers on European and national level are aware that supporting projects, implemented by a Church or Church Municipality operator, are governed by the view of the reservation derived from the self definition right of the Church. Accordingly the allowance decisions did not really make the neutral selection of employees for the Defendant a legally enforceable condition, but it is treated by a mere „reference” in the sense of a recommendation applicable regarding the self identification right of the Church. The whole subvention-allowance right, as part of the public rights, has to recognise the constitution guarantee from Article 140 of GE in connection with Article 137 paragraph 3 of WRV, which the Defendant can make reference to without limitation.

To complete the case matter the observations exchanged between the parties in addition to the supplements which were made subject of the oral procedure, and also the total content of the file will be referred to.

Grounds for decision:

The claim is permissible and justified.

The Claimant is entitled to a claim for compensation from the Defendant in the amount of EUR 3,900.00 according to §15 paragraph 1 sentence 1, paragraph 2 of AGG in relation with §§ 7 paragraph 1,3 paragraph 1 of AGG.

- 1.) The rejection of the Claimant's application to the job advertisement for a social pedagogue for the partial project „Integration Pilot Hamburg” of 30 November 2001 constitutes a contradiction with the prohibition of discrimination stipulated in § 7 paragraph 1 in relation with. §§ 1,2,3 of AGG.
 - a) The application of the Claimant to the position in question was undisputedly not considered by the Defendant because of the religion of the Claimant.
Such discrimination of the Claimant in the employment procedure is not permitted.
The different treatment of the Claimant because of her religion does not meet the requirements of exceptional regulation in § 9 paragraph 1 of AGG.

In accordance with §9 paragraph 2 of AGG a different treatment because of religion in case of employment by religious communities and establishments associated with them regardless to their legal form or by associations, setting the community practice of religion as their task, is permissible if a particular religion is subject to the self interpretation of the particular religious community or unity concerning their right for self identification or represent a legally justified professional requirement regarding the type of activity.

- aa) With the regulation of §9 of AGG the legislator makes use of the options for arrangement of different treatment due to religion in Church establishments, as stipulated by the guidelines 2000678/EG of the Council of 27 November 2000. Article 4 paragraph 2 RL 2008/78/EG says:

„The Member states can, with reference to professional tasks within the Churches and other public or private organisations, whose ethics relies on religious basic principles or world views, make decisions by observing the legal regulations valid at the time of accepting this guideline or expected in future legal regulations and decisions reflecting

the state-specific usual habits existing at the time of accepting this guideline, and according to which a non-equal treatment because of the religion of a person represents no discrimination, if the religion or the world view of this person constitutes a significant, rightful and legally permitted professional requirement regarding the type of these activities or the circumstances of their practice and considering the ethics of the organisation. One such unequal treatment has to consider the constitutional legal dispositions and basic principles of the Member States and also the general basic principles of the community law and makes legal no discrimination due to other reason."

The protection clause contained therein declares it permissible to let the national state Church law prevail. The existing state specific customs do not have to be adjusted. However the exemptions regarding professional activity in religious organisations made by Member States may not exceed the permitted maximum as per Article 4 paragraph 2 (Rust/Falke Labour Code Commentary § 9 marginal note 25).

The consideration reason Nr 24 of the guideline changes nothing on it either. It refers to explanation Nr 11 attached to the Treaty of Amsterdam in the final clause in which the European Union made it explicitly acknowledged regarding the status of Churches and world view committees, that they respect and not impair the status which the Churches and religious associations or communities enjoy in the Member States in accordance with their legal regulations.

Explanation Nr 11 is a political declaration of view which is not contained in the text of a Union treaty itself, and as such possesses no legally binding character (Thüsing, Church Labour Right, p. 222).

The powers of the Member States will be made concrete by Article 4 paragraph 2 of the guideline. An further reaching exemption from prohibition of discrimination, not in itself contained in the text of the guideline cannot be deducted from a reason consideration, which merely gives foundation in general the permission of exemptions (Erfurter Kommentar 7th edition Schlachter § 9 of AGG marginal note 3).

The guideline makes a differentiation according to religion by considering if these types of activities or the circumstances of their execution represent a significant, rightful and legally justified professional requirement with regard to the ethics of the organisation. The justification effect has a reference to activity, which makes the undifferentiated support as per religious affiliation problematic (Erfurter Kommentar, 7th edition, Schlachter, § 9, marginal note 1).

The national law should be laid out in accordance with the guidelines, in order to avoid contradiction with the European Law.

bb) The Defendant is addressed by the regulation of § 9 paragraph 2 of AGG.

Article 104 of GG in relation with Article 137 paragraph 3 of WRV guarantees the religious companies, also the Church the freedom to order and govern their affairs independently within the limitations of the law applicable to all.

The self order and self government guarantee is not provided to Churches and their legally independent parts only, but also all organisations associated with the Church in a defined way without consideration to their legal form, if they are found appropriate to their purpose and tasks as per Church self understanding, to perceive and fulfil part of the order of the Church (Federal Constitutional Court, Resolution of 04 June 1985 – 2 Federal Constitutional Judge 1703, 1718/28 and 856/84 – E 70, p. 138 f).

The Church Municipality work of EKD belongs without doubt to such organisations of the Evangelic Church.

cc) The self understanding of the Defendant as an organisation of the Evangelic Church has to be laid out in conformity with the guidelines.

As per self understanding of the Evangelic Church the practice of religion does not only include the area of belief and Church service, but also the freedom to develop and be useful in the world, as it corresponds with their religious and Church Municipality tasks.

The constitutional guarantee of the Church self definition right permits the Churches to decide which services should be present in their organisation and in what legal forms they should be implemented. Thereby the Churches are not limited to develop special organisational forms for their Church service, they can also decide in private autonomy available for everyone to found and regulate a service relationship. The power of order contained in the self definition right of Churches is not valid only for Church office organisation but for the order of the Church service in general. If Churches serve, as everyone of private autonomy, for founding work relationships, state labour law is applicable. The inclusion of Church work relationships in the state labour law however does not waive their belonging to the "own affairs" of the Church. Therefore it is not allowed to question the peculiarity of the Church service protected by constitutional guarantee. The constitutional guarantee of the self definition right of the

Church remains significant when laying out these work relationships. The freedom of implementation for Church employers as per Article 37 paragraph 3 sentence 1 of WRV for the work relationships grounded on contract level is under reservation for the law of general validity. The reciprocal effect of Church freedom and barrier purpose is to be carried out under appropriate goods consideration. Thereby special emphasis is attached to the self understanding of Churches which is also to be considered in the interpretation of individual labour rights. (Federal Constitutional Court at place indicated).

The range of privilege existing for the Church, also regarding their decision in particular, is defined on the basis of the decision if the employees employed by them have to belong to a Christian Church or not, based on their self understanding only. It is followed by the Defendant as well in their concept represented in this legal case.

The unlimited application of the jurisdiction of the Federal Constitutional Court for the exemption clause of § 9 of AGG however meets substantial critic in the literature pertaining to labour law.

Accordingly the term self understanding in the context of § 9 paragraph of AGG has to be interpreted newly and with more restriction in order to be guideline-conformal. By laying out the effects of self understanding it has to be taken into consideration that the privilege of the Church employees deriving from § 9 paragraph 1 refers to substantial professional requirements. This limitation included in Article 4 paragraph 2 of the frame guideline but not in § 9 paragraph 1 clarifies that from the "self understanding" no general demand for different treatment is to be derived. Such a thing can only limit itself to "substantial" core area of professional fields, which regarding their content are directly connected to the transmission of religious contents or serve the direct practice of belief or a view. Such a layout is also supported by consideration reason 23 of the guideline, which speaks explicitly only of "very limited conditions", under which a "different treatment can be legally justified".

Because of this background the self understanding of a religious community cannot be an absolute and definite measure for the evaluation of admissibility of a different treatment (Wedde in Däubler/Bertzbach, AGG Commentary § 9 marginal note 35, 41 with other references).

Starting out from these considerations which are in their entirety upheld by the decision making Chamber, the Church and with it the Defendant, contrary to their concept, are not free

to define professional requirements for an activity in their sphere and set conditions for employment, without being subject to a specific justification for the different treatment resulting from it. Concerning the concrete activity, the self understanding of the Defendant may only play a decisive role if this is directly linked to it.

Under attention of the so understood self understanding of the Church, the judgment should evaluate if the religion of the employee represents a justified professional requirement with regard to the self understanding of the Church or the type of the activity.

dd) For the position in question here as a social pedagogue in the framework of a partial project „Integration Pilot Hamburg” the affiliation to a Christian Church and the Christian religion with it is neither a legally justified job requirement nor a view on the Defendant’s right to define themselves.

The self definition right having its direct origins in Article 137 paragraph 3 of WRV, contains the right of the Church to formulate all own affairs legally in accordance with specific Church order points of view (Rust/Falk at place indicated § 9 marginal note 53). Reference is made to the executions of the Federal Constitutional Court cited above.

These far-reaching powers however do not authorise the Church to stipulate, that each activity, regardless from the concrete activity reference may only be carried out by the members of the Church community. Such a definition stands in obvious contradiction with the default of the frame guideline, as per which merely substantial professional requirements may be stipulated (Wedde at place indicated marginal note 52).

In case of guideline-conform interpretation implementation it is permissible for the Church employer, by exercising their self definition right, as long as it is about the religious dimension of the Church service, to make employment dependent on Church affiliation (Rust/Falke at place indicated marginal note 110). It affects all activities which are declaration and announcement oriented, the so called "near announcement range". Also certain open positions e.g. managing director positions of church-operated hospitals or schools representing a kind of world view may fall in this category (Wedde at place indicated marginal note 51). Positions however with no connection to announcing the message of the Christian Church (so called "far from announcement range" are not affected. So far no interests of the Church in need of protection exists, which could justify the different treatment (Bauer/Göpfert/Krieger AGG Commentary § 9 marginal note 15).

The Defendant understands itself based on their preamble as representative of the Evangelic Church and its centre of belief of Christian contents. Their Church Municipality effect is practising religion. It is therefore fundamentally justified, to define the significant contents of the professional requirements themselves. The Defendant makes reference so far to the guidelines of the Council of EKD. In § 3 paragraph 1 the affiliation to an Evangelic Church is basically made requirement for the professional employment in EKD and in its Church Municipality. As per paragraph 2 there can be differences made regarding tasks which are not attributed to declaration, soul concern, instruction or leading, if there are no appropriate employees to be recruited.

It relies on the guidelines of the Council of EKD. There, in § 3 paragraph 1, the affiliation to an Evangelic Church is basically made a requirement for professional employment with EKD and its Church Municipality. As per paragraph 2 however exemptions may be made for tasks not related to religious declaration, spiritual counselling, guidance or leading, if there are no other appropriate employees to be recruited. In this case also people belonging to another member church of the Work Community of Christian Churches in Germany or of the Association of Evangelic Free Churches may be employed. The possibility of employing people of different religions is not explicitly mentioned. The Defendant definitely employs people in particular cases who neither belong to the Evangelic nor the Catholic Church eventually to a Free Church or the Greek Orthodox Church.

Consequently the guideline and also the practice of the Defendant underlines the claim a bit further, that the affiliation to a Christian Church does not have to be a requirement for employment within the scope of activities not closely linked to religious declaration.

Regarding the here disputed position the Defendant failed to present it in a credible way, that it is to be allocated to the area closely related to religious declaration in the above sense, in particular no concrete dispositions were made as to how far the position was to be allocated to the area of religious declaration, spiritual counselling, guidance or leading. The points of reference, that it is an outstanding position, which makes the identification with the contents of declaration of the Christian Church are neither evident nor in other respects declared by the Defendant.

ee) The affiliation to a Christian Church is no legally justified professional requirement, also with regards to the type of activity to be carried out by a social pedagogue within the framework of the partial project "Integration Pilot Hamburg".

Only requirements, arising directly from the interaction of religious or world view understanding and concrete professional requirements for particular kinds of activities are relevant. In conformity with law these requirements are to be stipulated closely. To that extent it has to be proven that it is about significant requirements which are inevitable in order to carry out certain kinds of activities under consideration of the aims of the religious community (Wedde at place indicated, marginal note 54).

The Defendant makes reference to the job advertisement for validation, stating that the tasks related to the position in question include representation in public against different authorities, in different committees, institutions or associations, as well as against communal, national or international organisations.

With this the activity receives and obviously religious – Church Municipality character. It does not turn out, neither from the job description nor from the communication of the Defendant how these public appearances are conducted or if in the course of these appearances a communication, publication or actual practising of the Christian religion is taking place. So far the job advertisement makes reference to "organisation and implementation of programs in the framework of the partial project Integration Pilot Hamburg"; from the wording it is much rather to be supposed that in the course of appearances the communication content of the partial project and not the religious background of the Defendant is focused on. The Defendant fails to justify their statement that the reason and the aim of the project, i.e. to follow through the integration of migrants in the local community, can only be carried out by a person who has a background not corresponding that of the migrants. Even if it were the case, it is not evident, why should only people with an affiliation to the Church be capable of doing it.

With this the Defendant failed to meet the statement and proof obligations incumbent on them as per § 22 of AGB (Labour Code).

Not considering this the comprehensive foreign financing of the project Integration Pilot and also the urgent recommendation in the allowance decision talk about not setting any criteria

limiting the scope of applicants and carry out the selection of employees neutrally, decided against the Christian character of the position in question. If the fund provider on European and national level, as the Defendant claims, really has the concept, that the implementation of a project financed by them on the part of a Church Municipality recipient is under reservations of the Church self definition right, the recommendation can only be interpreted as an urgent appeal to give it up in case of the project in question.

b) The Claimant was not discriminated due to her ethnic background.

§ 1 of AGG explicitly differentiates between discrimination due to ethnic background and due to religion. "Ethnic background" draws itself by common origin, history, culture or feeling of belonging together. A subcategorising of religion under the features indicating ethnic origin had as a consequence that it would be no longer possible to make a distinction between the two features. If a differentiation due to religion is only put forward in order to conceal an actual discrimination on purpose based on ethnic background, it can be an indirect discrimination in the form of a hidden discrimination due to ethnic background. (compare Schlachter at place indicated § 1 marginal note 4).

It is not the case here. The Defendant expressed it clearly that it is indeed about the affiliation to a Christian Church. It is confirmed by the fact that after their unequivocal declaration the advertised position was given to a native Indian.

It was not basically against the Claimant.

2) As the Defendant discriminated negatively the Claimant because of her religion in the employment procedure after all, the Claimant is entitled to compensation from the Defendant in accordance with § 15 paragraph 2 of AGG.

When setting the compensation the starting point should be the unequivocal declaration of the Claimant about a monthly salary of EUR 1,300.00 for the advertised position. The compensation is to be set based on consideration of the concrete circumstances of the particular case as per seriousness of the impairment, motive and reason of the action and a possible law contradicting disposition. The preventive points of view are also to be considered (Bücker in Rust-Falke at place indicated § 15 marginal note 43).

Starting from these principles the Chamber considers a compensation of EUR 3,900.00 as appropriate due to the following reasons:

The Claimant did leave the fact unconsidered that she has non-finished studies in social science/social pedagogy and with this she does not completely meet the requirements in the

profile of the position in question to have good chances of getting the position. After the unequivocal declaration of the Claimant the employee of the Defendant Mrs Kind considered the application of the Claimant so interesting that she suggested joining the Church to her, even though it was not a condition for the position. Such an unjustified demand regardless if the Defendant identifies herself at all with the values and contents of the Christian Church is only comprehensible if there was indeed serious interest in employing the Claimant.

The discrimination of the Claimant because of her religion is even more serious because with this the Defendant knowingly disregards the recommendation of the allowance provider for the project Integration Pilot, to carry out the selection of employees neutrally, and with that a readiness to comply with the European norms in protection against discrimination.

The Claimant validated their compensation claim with her letter of 21 February 2007 on time within the two months deadline of § 15 paragraph 4 of AGG after receiving the rejection of the Defendant of 06 February 2007.

As recognised it was to be decided after all.

The decision about the costs follows from § 46 Abs. 2 of ArbGG (Labour Court Law) in relation with. §91 of ZPO (Civil Process Order).

The stipulation of the disputed amount relies on § 61 Abs. 1 of ArbGG in relation with. § 3 of ZPO.

Legal remedy:

The Defendant can submit an appeal at the State Labour Court Hamburg against this verdict. There is no legal redress for the Defendant against this verdict.

The deadline for submitting the appeal is one month. The deadline begins with the delivery of the verdict in full format, as latest however with the expiry of five months after publication. The petition of appeal has to arrive at the State Labour Court Hamburg before the deadline. The petition of appeal has to make reference to the verdict against which it is directed and contain the explanation that there is an appeal submitted against this verdict. The contested verdict or a certified copy thereof is to be attached to the petition of appeal.

The appeal has to be supported by observations. The deadline for the appeal is two months. It begins with the delivery of the verdict in full format, as latest however with the expiry of five months after publication. The reasoning for the appeal has to arrive at the State Labour Court Hamburg before the deadline. The reasoning for the appeal has to contain in what ways is the verdict appealed against what amendments of the verdict are requested and also what new facts, proof and proof speeches the appeal relies on. The reasoning for appeal furthermore has to contain the definite description of individual reference reasons of contestation. The deadline for reasoning may be prolonged by the State Labour Court or by the chairman of the State Labour Court upon request once, if based on their conviction the legal dispute is not hindered by the prolongation or if substantial reasons are presented by the party. These reasons have to be made feasible.

The Petition of appeal and the reasoning for appeal has to be signed by

- a) an attorney at law admitted by a German Court, or
- b) a representative of a trade union, an association of employers or of a union of such associations, if the representative is authorised or has full authority to represent or the union, association, or their members are parties in the case. Agents are also authorised to represent if

acting as employees of legal persons having substantial share in the economic property of one organisations mentioned previously, when the legal person performs exclusively the legal advising and representation of the members of the organisation in the procedure corresponding with their statute and when the organisation takes responsibility for the action of the authorised agents. The members of the organisations named earlier may be represented by a representative of another association or union of comparable organisation; this goes for the employees of legal persons previously named as well.

The address and seat of the federal court Hamburg is as follows:

Osterbekstraße 96, 22083 Hamburg

The Federal Court in Hamburg requests the submission of the petition of appeal, the reasoning for appeal and the other exchanged observations in 5 copies.

Zemlin