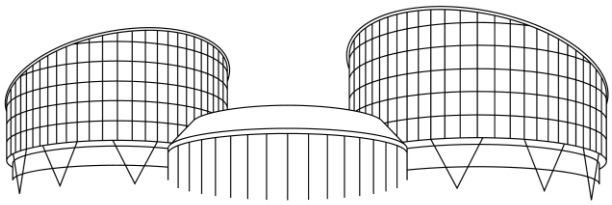

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF SCHÜTH v. GERMANY

(Application no. 1620/03)

JUDGMENT
(Merits)

This version was rectified in accordance with Rule 81 of the Rules of Court on 10 May 2011

STRASBOURG

23 September 2010

FINAL

23/12/2010

This judgment became final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Schüth v. Germany**,**

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Peer Lorenzen, *President,*
Renate Jaeger,
Rait Maruste,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 31 August 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 1620/03) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Bernhard Josef Schüth ("the applicant"), on 11 January 2003.

2. The applicant was represented by Ms U. Muhr, a lawyer practising in Essen. The German Government ("the Government") were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, Federal Ministry of Justice.

3. The applicant alleged that the refusal by employment tribunals to annul his dismissal by the Catholic Church had breached Article 8 of the Convention.

4. On 18 March 2008 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided that the Chamber would rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

5. The Government and the applicant both filed written observations. Written comments were also received from the Catholic Diocese of Essen, which had been given leave by the President for that purpose (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court). The parties replied to those comments (Rule 44 § 5).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1957 and lives in Essen.

A. Background to the case

7. On 15 November 1983 the applicant took up the position of organist and choir master at the Catholic parish church of Saint Lambertus ("the parish church") in Essen.

8. Article 2 of his contract of employment dated 30 January 1984 stipulated, *inter alia*, that the Ecclesiastical Employment and Remuneration Regulations (see paragraph 37 below), as currently in force, formed an integral part of the contract and that any serious breach of the Church's principles constituted a material ground for termination of contract without notice, in accordance with Article 42 of the Regulations.

9. After the contract had been approved by the Bishop's Vicar General, the applicant took the following oath:

> "I hereby undertake to discharge my professional duties and to fulfil and observe ecclesiastical obligations".

10. From 1 January 1985 onwards he also held the position of head musician in the deanery and was paid a gross monthly salary of 5,688,18 marks (about 2,900 euros (EUR)).

11. In 1994 the applicant left his wife, who was the mother of his two children. The separation was made public in January 1995. Since then the applicant has been living with his partner, who has also been his representative before the employment tribunals and the Court.

12. On 2 July 1997, after the applicant's children had told people at their kindergarten that their father was going to have a another child, the Dean for the parish discussed the matter with the applicant.

13. On 15 July 1997 the parish church dismissed the applicant with effect from 1 April 1998 on the ground that he had breached his duty of loyalty under Article 5 of the Catholic Church's Basic Regulations (the "Basic Regulations" – see paragraph 38 below). In the light of the Catholic Church's fundamental principles enshrining the sanctity of marriage, the applicant, by having an extra-marital relationship with another woman, who was expecting his child, was accused not only of committing adultery but also of bigamy.

14. Following the applicant's dismissal his wife petitioned for divorce, which was granted on 13 August 1998.

B. Decisions of lower employment tribunals

15. On 24 July 1997 the applicant took his case to the Essen Employment Tribunal.

16. On 9 December 1997 the Employment Tribunal granted the applicant's claim and found that the dismissal of 15 July 1997 had not terminated his contract of employment. Recalling the findings of the Federal Employment Court's judgment of 9 April 1997 (see *Obst v. Germany*, no. 425/03, §§ 12-19, 23 September 2010), which had applied the principles set out by the Federal Constitutional Court in its leading decision of 4 June 1985 (see paragraph 35 below), it took the view that the applicant's conduct did not yet (*noch nicht*) justify his dismissal, under section 1(1) of the Protection from Dismissal Act (see paragraph 36 below). In the Tribunal's view, he had not been bound by heightened duties of loyalty (*gesteigerte Loyalitätsobliegenheiten*) because he did not perform pastoral or catechistic duties, did not have a canonical mandate (*missio canonica*) and was not a member of the managerial staff (*leitender Mitarbeiter*) within the meaning of Article 5 § 3 of the Basic Regulations. In the Tribunal's view, the respondent had not proved that the applicant's duties as head musician of the deanery were equivalent to managerial office; accordingly, pursuant to Article 5 §§ 1 et 2 of the Basic Regulations, the parish church should first have summoned him for a clarification interview (*klärendes Gespräch*) or issued him with a warning (*Abmahnung*) before having recourse to the most serious of the disciplinary measures available, his dismissal, especially on account of his length of service in the parish church (fourteen years) and the fact that he had practically no chance of finding work as an organist on the labour market outside the Church. The Employment Tribunal observed that an employer could only be dispensed from the obligation to issue a warning in the first instance where the employee could not expect his or her conduct to be tolerated by the employer in view of the seriousness of the breach, or where or she was not inclined to perform, or capable of performing, his or her professional duties.

17. In the Tribunal's view, in so far as the parish church reproached the applicant for having fathered a child out of wedlock, such a shortcoming, after fourteen years of service, did not attain a level of seriousness that justified dismissal on that ground alone without prior warning. Article 5 § 4 of the Basic Regulations expressly required consideration of the question whether a staff member opposed the precepts of the Catholic Church or, whilst recognising its precepts, had not succeeded in complying with them in practice. The Tribunal added that the parish church had failed to prove that the applicant had told the Dean he did not wish to put an end to his new relationship.

18. On 13 August 1998 the Düsseldorf Employment Appeal Tribunal dismissed an appeal by the parish church. It endorsed the findings of the

Employment Tribunal, observing that the reason for dismissal had not been the applicant's paternity of a child born out of wedlock but rather his long-term extramarital relationship. The tribunal pointed out that, whilst the applicant's duties in the Church did not fall under Article 5 § 3 of the Basic Regulations, his dismissal nevertheless remained possible under Article 5 § 4, in view of the proximity between his work and the Church's proclamatory mission. However, after formally hearing evidence from the applicant as a party to the proceedings, the Appeal Tribunal reached the conclusion that the dismissal had been vitiated by a procedural omission, as the parish church had failed to prove that the Dean had first sought to induce the applicant to put an end to his extramarital relationship. In view of the fundamental significance of the case, the tribunal granted leave to appeal on points of law before the Federal Employment Tribunal.

C. Judgment of the Federal Employment Tribunal

19. On 12 August 1999 the Federal Employment Tribunal quashed the judgment of the Appeal Tribunal. It took the view that Article 5 § 1 of the Basic Regulations, which required a clarification interview, applied not only to dismissals decided under paragraph 2 of that Article (dismissal as the ultimate measure for a serious breach) but also to those based on paragraph 3 (exclusion from post as a matter of principle, and possibility of waiving dismissal on an exceptional basis). The difference between the two paragraphs being merely a question of degree, a clarification interview would be necessary in all cases. In the case before it, the Federal Tribunal took the view that considering the lack of clarity of the ecclesiastical provisions applicable to the applicant as to whether or not his functions entailed heightened duties of loyalty, it had not been clearly established that the applicant could have known with sufficient foreseeability that his dismissal would fall under Article 5 § 3 of the Basic Regulations. If the holding of a clarification interview had been mandatory in the applicant's case, the absence of such an interview was thus capable of rendering his dismissal wrongful (*sozialwidrig*). However, the Federal Employment Tribunal observed that the Employment Appeal Tribunal had been mistaken in finding that no interview had been conducted with the applicant. On that point it took the view that the Appeal Tribunal had wrongly omitted to hear evidence also from the Dean, as a party to the proceedings, in order to establish whether or not he had attempted to induce the applicant to put an end to his extramarital relationship and that, accordingly, the judgment appealed against was to be quashed. However, since the facts had not yet been sufficiently established, the Federal Employment Tribunal was not in a position to rule on the question whether the applicant's dismissal had been justified. As a result, it referred the case back to the Employment Appeal Tribunal.

20. The Federal Employment Tribunal further observed that, where an employing church entered into employment contracts, it used not only the freedom of contract (*Privatautonomie*) provided for under ordinary domestic labour law, but also the institutional guarantee of autonomous management enjoyed by the Churches. Church labour law was therefore applicable in conjunction with the ordinary domestic law. The enactment of the Basic Regulations, in particular Articles 4 and 5, reflected the principle of the Catholic Church's autonomy, as provided for in Article 137 § 3 of the Weimar Constitution (see paragraph 34 below). The application of domestic labour law could not call into question the specificity of ecclesiastical service, which was protected by the Constitution. The Catholic Church was therefore entitled to base its contracts of employment on the model of a Christian service community and, in particular, to require its Catholic employees to recognise and comply with the principles of Catholic religious and moral precepts, as provided for in Article 4 § 1 of the Basic Regulations. As the credibility of the Church might depend on its employees' conduct and respect for the ecclesiastical order, including in their day-to-day lives, Articles 4 and 5 of the Basic Regulations stipulated the applicable criteria on which to assess contractual duties of loyalty and the seriousness of any breach of such duties.

21. The Federal Employment Tribunal added that the specificity of the duties of loyalty lay in the fact that they concerned not so much occupational duties as conduct falling within secondary duties or even private life. It noted that the sanctity of marriage formed an integral part of the basic principles of the Catholic Church's religious and moral precepts. The case concerned not only a relationship and a contract but also a sacrament. Even though adultery was no longer an offence since the new version of the 1983 Code of Canon Law, marriage had retained its indissoluble, perpetual and exclusive nature.

22. The Federal Employment Tribunal noted that, when employment tribunals applied ordinary labour law, they were bound by the precepts of religious denominations in so far as those precepts took account of the criteria recognised by established Churches. However, in applying those precepts the employment tribunals' decisions could not run counter to the fundamental principles of law, which included the concepts of "morality" and "public order". According to the case-law of the Federal Constitutional Court (see paragraph 35 below), it was for the employment tribunals to ensure that religious denominations did not impose excessive requirements of loyalty on their employees. The Federal Employment Tribunal found that the beliefs of the Catholic Church regarding fidelity in marriage were not at odds with the fundamental principles of law. Marriage enjoyed special protection under Article 6 of the Basic Law and adultery was regarded as a serious fault in a civil law context. The Tribunal observed that it had, moreover, already found in its judgment of 24 April 1997 that adultery

constituted a serious fault in the view of the Catholic Church (see *Obst*, cited above, § 15).

23. The Federal Employment Tribunal concluded that the Employment Appeal Tribunal had rightly considered that the applicant's conduct could be characterised as a serious personal moral fault, within the meaning of Article 5 § 2 of the Basic Regulations, and that it therefore constituted a ground for dismissal for the purposes of section 1(2) of the Protection from Dismissal Act. It noted that the applicant's opinion that only a new marriage – which, according to the Catholic Church's belief would be null and void – could be regarded as a serious breach was not substantiated by any provision of the Basic Regulations or other instruments.

D. Proceedings after remittal of the case

24. On 3 February 2000, after the case had been referred back to it, the Düsseldorf Employment Appeal Tribunal upheld the parish church's appeal against the judgment of the Employment Tribunal of 9 December 1997. After hearing evidence from the Dean as a party to the proceedings, and with the applicant having acknowledged that he had, at his interview of 2 July 1997 with the Dean, described as permanent his new relationship with his lawyer, the Tribunal held that the parish church had dismissed him in accordance with Article 5 § 1 of the Basic Regulations. According to the Dean's statements at the hearing – which the Tribunal found more credible than those of the applicant – there had indeed been an interview between the two parties. In view of the applicant's inflexible position as regards his new relationship, the Dean and the parish church had rightly considered that a prior warning would be superfluous.

25. The Employment Appeal Tribunal added that it was not unaware of the consequences of the applicant's dismissal, which would most likely prevent him from exercising his profession and from paying the same amount in child maintenance. However, it admitted that the parish church could not continue to employ the applicant without losing all credibility in relation to the mandatory nature of its religious and moral precepts. In this connection it was necessary to take into account the fact that, even if the applicant was not among those members of staff that were bound by heightened duties of loyalty under Article 5 § 3 of the Basic Regulations, his activity was closely related to the Church's proclamatory mission. It was thus hardly conceivable *vis-à-vis* the general public that the applicant and the Dean could continue to perform the liturgy together. According to the Employment Appeal Tribunal, the interests of the parish church prevailed by far over those of the applicant.

26. On 29 May 2000 the Federal Employment Tribunal found inadmissible a request by the applicant to appeal on points of law.

27. On 8 July 2002 the Federal Constitutional Court disallowed a constitutional complaint by the applicant (no. 2 BvR 1160/00) on the ground that it had insufficient chances of succeeding. In the Federal Court's opinion, the decisions appealed against did not raise any constitutional issues in the light of its 4 June 1985 judgment (see paragraph 35 below).

28. Since September 2002 the applicant has been employed as choirmaster for a Protestant church in Essen and he also directs three choirs on a voluntary basis.

E. Other proceedings

29. On 22 December 1997 the parish church issued a second dismissal with effect from 1 July 1998. On 4 December 1998 the Employment Tribunal rejected an application for annulment lodged by the applicant. To date those proceedings are still pending before the Düsseldorf Employment Appeal Tribunal.

II. RELEVANT DOMESTIC AND EUROPEAN UNION LAW AND PRACTICE

A. General context

1. Status of Churches and religious societies in German law

30. The status of Churches and religious societies is governed mainly by Articles 137 to 141 (known as the "Church Articles" – *Kirchenartikel*) of the Weimar Constitution of 11 August 1919, as incorporated into the Basic Law by Article 140 of that Law. A large number of Churches and religious societies, including the Catholic Church (about 24.9 million members) and the Protestant Church of Germany (about 24.5 million members), commonly known as the two "big Churches" (*Grosskirchen*), have the status of public-law entity but are not, however, part of government. Other religious denominations have legal capacity under civil law. The status of public-law entity enables the Churches concerned, among other things, to receive church tax and to employ public servants.

31. The Catholic Church and the Protestant Church employ over one million individuals, particularly in their charities, making them the second largest employer in Germany after the State. The two main charities alone, *Caritas* (Catholic) and *Diakonie* (Protestant), employ respectively almost 500,000 and 450,000 "staff members". Their activities concern mainly the running of hospitals, schools, kindergartens, homes for children and the elderly and advice centres (for HIV sufferers, migrants, victims of domestic violence). The Catholic and Protestant Churches regard their social

activities as being part of their proclamatory mission and a way of putting the "love thy neighbour" commandment into practice.

32. The law governing employment relationships between Churches and their public servants is based on civil service law. As regards other employees, the ordinary domestic labour law will apply, but with a certain number of exceptions stemming from the Churches' right of autonomy. As a result of that right they may, among other things, impose specific duties of loyalty on their employees (see below). Moreover, in terms of industrial relations law, Churches and their institutions are not bound by the domestic right of employee participation. Considering that their activities, especially charity work, are based on the model of a Christian service community, formed by the whole body of staff, they do not accept legal structures based in principle on an opposition between employer and employee. The Catholic Church and most of the Protestant denominations thus refuse to enter into collective agreements with trade unions, and the right to strike or lock-out are non-existent in their institutions. However, they have created their own systems of representation and staff participation in management.

33. As regards their financing, Churches and religious societies having the status of public-law entity are entitled to receive church tax, which constitutes a significant portion (about 80%) of their total budget. Church tax is levied by the State tax authorities on behalf of Churches and religious societies, which in return pay the State 3 to 5% of their tax revenue. This is based on income tax, amounting to between 8 and 9% thereof. It is paid directly to the Treasury by the taxpayer's employer together with income tax. In this connection municipal authorities issue "wage-tax cards" (*Lohnsteuerkarte*) that employees are required to give their employers. The card contains various information about the employee, including the tax regime, rebates for dependent children and membership of a Church or religious society entitled to receive church tax.

2. The Basic Law

34. Article 140 of the Basic Law provides that Articles 136 to 139 and 141 of the Weimar Constitution of 11 August 1919 form an integral part of the Basic Law. Article 137 reads as follows:

Article 137

"(1) There shall be no State church.

(2) The freedom to form religious societies shall be guaranteed. ...

(3) Religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all. They shall confer their offices without the involvement of central government or local authorities.

(4) Religious societies shall acquire legal capacity in accordance with the general provisions of civil law.

(5) Religious societies shall remain entities under public law in so far as they have enjoyed that status in the past. Other religious societies shall be granted the same rights upon application, if their constitution and size of membership provide guarantees of long-term existence ...

(6) Religious societies that are entities under public law shall be entitled to levy taxes on the basis of the civil taxation rolls in accordance with the law of the *Land*.

(7) Associations whose purpose is to foster a philosophical belief in the community shall have the same status as religious societies.

(8) Such further regulation as may be required for the implementation of the present provisions shall be a matter for the legislature of the *Land*."

3. Judgment of the Federal Constitutional Court of 4 June 1985

35. On 4 June 1985 the Federal Constitutional Court delivered a leading judgment on the validity of dismissals of church employees on the grounds of a breach of their duty of loyalty (nos. 2 BvR 1703/83, 1718/83 and 856/84, judgment published in the *Reports of Judgments and Decisions* of the Federal Constitutional Court, volume 70, pp. 138-173). The subject-matter of the constitutional complaints was, on the one hand, the dismissal of a doctor practising in a Catholic hospital on account of view he had expressed on abortion, and on the other, the dismissal of a commercial employee of a youth home run by a Catholic monastic order because he had left the Catholic Church. The two dismissed employees had been successful in proceedings before the employment tribunals and the church employers had then taken their cases to the Federal Constitutional Court, which allowed their complaints.

The Federal Constitutional Court observed that the right of religious societies to manage their affairs autonomously within the limit of the general law, as enshrined in Article 137 § 3 of the Weimar Constitution, applied not only to the Churches, but also, regardless of legal form, to any institution associated with them and participating in their mission. This constitutional guarantee included the right for the Churches to choose the staff they needed for the fulfilment of their mission and, accordingly, to enter into employment contracts. When the Churches chose to exercise their freedom of contract, like everyone else, then ordinary domestic labour law became applicable. However, the applicability of labour law did not have the effect of removing employment relations from the domain of a Church's own affairs. The constitutional guarantee of autonomy (*Selbstbestimmungsrecht*) afforded to Churches affected the content of contracts of employment. A State could thus, in the interest of its own credibility, base its contracts of employment on the model of a Christian service community, and, accordingly, require its employees to respect the general principles of its dogmatic and moral doctrines and the basic duties applicable to all its members. That did not mean, however, that the legal status of a Church's employee became "clericalised". It merely concerned

the nature and scope of duties of loyalty stemming from employment contracts. The civil-law employment relationship was not thereby transformed into an ecclesiastical status that subsumed the employee and dominated his entire private life.

The Federal Constitutional Court further observed that the freedom of the Churches to manage their own affairs was circumscribed by the general law, including those provisions that granted protection against wrongful dismissal such as section 1 of the Protection from Dismissal Act and Article 626 of the Civil Code. However, those provisions did not automatically prevail over the so-called "Church Articles" of the Weimar Constitution. It was thus appropriate to balance the different rights, with particular weight being accorded to the Churches' interpretation of their own faith and legal order. The Federal Constitutional Court continued as follows:

> "It follows that, whilst the constitutional guarantee of the Churches' right to manage their affairs autonomously permits them to base their contracts of employment on the model of a Christian service community and to lay down the basic ecclesiastical duties, such guarantee must be considered in terms of constitutional law and its scope must be stipulated when it comes to applying the provisions concerning protection against dismissal to dismissals for a breach of duties of loyalty. An application of labour law that did not take account of the duties of church employees to respect the fundamental principles of Christian life that the Churches are entitled to impose would be at odds with their constitutional right of autonomy.
>
> Consequently, in the event of a dispute, the employment tribunals must apply the criteria laid down by the Churches concerning the assessment of the contractual duties of loyalty since the Constitution affords to Churches the right to decide on such matters autonomously. It is thus in principle for the established Churches (*verfasste Kirchen*) to determine what is required by 'the credibility of the Church and its proclamation', what 'specific ecclesiastical tasks' are, what 'proximity' to the Church means, what 'the basic principles of religious and moral precepts are' and what constitutes a breach – a serious breach in some cases – of its precepts. Matters governed by the Churches' right of autonomy also include the question whether and how a scale of duties of loyalty must be applied to staff members working in the service of a church.
>
> In so far as such principles correspond to the criteria laid down by the established Churches, a question that must be referred by the tribunal to the church authorities in case of doubt, the employment tribunals will be bound by them, unless by applying them they put themselves in conflict with the fundamental principles of law, such as the general prohibition of arbitrariness, the principle of morality, and public order. It is therefore a matter for the domestic courts to ensure that ecclesiastical institutions do not impose on their staff unacceptable demands of loyalty that might, in some cases, be at odds with the very principles of the Church ...
>
> If the tribunal reaches the conclusion that there has been a breach of such duties of loyalty, it must ascertain whether that breach objectively justifies dismissal under section 1 of the Protection from Dismissal Act and Article 626 of the Civil Code ..."

B. Provisions on dismissal

36. Section 1(1) and (2) of the Protection from Dismissal Act (*Kündigungsschutzgesetz*) provides, in particular, that a dismissal is socially unjustified unless based on reasons related to the employee himself or his conduct.

Article 626 of the Civil Code allows each party to the contract to terminate the employment relationship without notice on serious grounds.

C. Rules of the Catholic Church

1. Ecclesiastical Employment and Pay Regulations

37. Article 2 § 2 (b) of the Ecclesiastical Employment and Pay Regulations (*Kirchliche Arbeits- und Vergütungsverordnung*) for the Dioceses (or Archdioceses) of Aachen, Essen, Cologne (*Köln*), Münster (part of North Rhine-Westphalia) and Paderborn, dated 15 December 1971, as in force until 1 January 1994, required that the way of life of the employee and the members of his household be compliant with the basic principles of the religious and moral precepts of the Catholic Church.

Article 6 provided that respect, manifested in words and deeds, for the principles of the Catholic Church, and a conduct in line with that required by ecclesiastical staff members, formed part of the employee's duties.

Article 42 § 1, in the version currently in force, provides in particular that a serious ground justifying dismissal without notice is constituted by a patent breach (*großer äusserer Verstoß*) of ecclesiastical principles, for example the fact of leaving the Church (*Kirchenaustritt*).

2. Basic Regulations of the Catholic Church

38. Articles 4 and 5 of the Basic Regulations of the Catholic Church for ecclesiastical service in the context of ecclesiastical employment relationships (*Grundordnung der Katholischen Kirche für den kirchlichen Dienst im Rahmen kirchlicher Arbeitsverhältnisse*), which were adopted by the Episcopal Conference of German Bishops on 22 September 1993 and which entered into force in the Diocese of Essen on 1 January 1994, in so far as relevant for the present case, read as follows:

Article 4

Duties of loyalty

"1. Catholic employees (*Mitarbeiterin und Mitarbeiter*) are required to respect and comply with the basic principles of the Catholic Church's religious and moral precepts. The example of personal life led in conformity with those principles is seen as important in particular for employees who perform pastoral, catechistic or educational duties, or who have a canonical mandate (*missio canonica*). These duties also apply to senior management staff.

...

4. Employees shall refrain from any hostile attitude towards the Church. They shall not undermine, by their personal way of life or professional conduct, the credibility of the [Catholic] Church and of the institution for which they work."

Article 5

Breaches of duties of loyalty

"1. Where an employee no longer satisfies the employment criteria, the employer shall seek by discussion to prevent the breach in question with permanent effect. The employer will have to ascertain whether, to put an end to the said breach of duty, a clarification interview (*klärendes Gespräch*), a warning (*Abmahnung*), a formal reprimand, or any other measure (relocation, contractual amendment) would be appropriate. Dismissal may be envisaged in the last instance.

2. The Church shall regard as serious and as justifying dismissal on specifically ecclesiastical grounds (*Kündigung aus kirchenspezifischen Gründen*) the following breaches of the duty of loyalty:

– a breach of the duties provided for in Articles 3 and 4 hereof, in particular the fact of leaving the Church and public defence of positions that run counter to the Catholic Church's guiding principles (for example those concerning abortion), and serious personal moral misconduct (*schwerwiegende persönliche sittliche Verfehlungen*);

– the fact of entering into a marriage that is null and void in the light of the Church's faith and legal order, as interpreted thereby ...

3. The existence of one of the forms of conduct referred to under paragraph 2 of the present Article, and which are regarded as a general rule as grounds for dismissal, shall preclude the possibility of maintaining an employee in his or her post if the employee performs pastoral or catechistic duties, is a member of the managerial staff, or has a canonical mandate (*missio canonica*). The employer may, on an exceptional basis, waive dismissal where the circumstances of the case indicate that such a measure is inappropriate.

4. Where the employee belongs to one of the categories referred to in paragraph 3 [of the present Article], the possibility of maintaining the employee in his or her post will further depend on the circumstances of the case, in particular the extent of the risk that the credibility of the Church or its institution might be called into question, the burden placed on the ecclesiastical service community, the nature of the institution and its task, the institution's proximity to the Church's proclamatory mission, the employee's position within the institution and the nature and seriousness of the relevant breach of the duties of loyalty. It will also be necessary to consider whether the employee has opposed the precepts of the Church or whether, whilst recognising those precepts, has not succeeded in complying with them in practice."

D. The Protestant Church's rules concerning church musicians

39. Under section 2(3) of the Ecclesiastical Law on Religious Music[1] of 15 June 1996, a church musician employed by the Protestant Church must

[1] *Kirchengesetz über den kirchenmusikalischen Dienst in der Evangelischen Kirche der Union (EKU) (Kirchenmusikgesetz)*.

in principle be affiliated with a denomination which is a member of the Protestant Church of German or part of an ecclesiastical union therewith. Under section 21(2) of that Law, in conjunction with section 7(1) of the implementing law of 13 November 1997[1], a person not fulfilling this condition may nevertheless be appointed, on an exceptional basis, to a post of church musician in secondary employment (*Nebenamt*) if he or she is affiliated with a Christian denomination that is part of the Labour Association of Christian Churches in Germany (*Arbeitsgemeinschaft christlicher Kirchen in Deutschland*), to which the Roman Catholic Church belongs. Under the Regulations of 18 November 1988 governing the employment of church musicians[2], the average working week of such musicians in secondary employment represents less than eighteen hours.

E. Equality legislation

1. Directive 2000/78/EC of 27 November 2000

40. Directive 2000/78/EC of the Council of the European Union of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, reads as follows:

Recital 24

"The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity."

Article 4

Occupational requirements

"1. ... Member States may provide that a difference of treatment which is based on a characteristic related to [religion or belief] shall not 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.

2. Member States may maintain national legislation in force ... or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute

[1] *Kirchengesetz zur Ausführung und Ergänzung des Kirchengesetzes über den kirchenmusikalischen Dienst in der EKU (Ausführungsgesetz zum Kirchenmusikgesetz)*.
[2] *Ordnung für den Dienst nebenamtlicher Kirchenmusiker*.

discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. ...

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos."

2. General Equal Treatment Act

41. The German legislature transposed the directive into national law by enacting the General Equal Treatment Act (*Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung – Allgemeines Gleichbehandlungsgesetz*) of 14 August 2006, of which section 9 reads as follows:

"(1) Without prejudice to the provisions of section 8 [hereof], a difference in treatment based on religion or belief shall also be admitted in the case of employment by religious societies, by institutions affiliated therewith, regardless of legal form, or by associations whose purpose is to foster a religion or belief in the community, where a justified occupational requirement is constituted by a given religion or belief, having regard to the employer's own perception, in view of the employer's right of autonomy or by reason of the nature of its activities.

(2) The prohibition of differences in treatment based on religion or belief shall not affect the right of the religious societies, institutions affiliated therewith, regardless of legal form, or associations whose purpose is to foster a religion or belief in the community, as referred to in the previous subsection, to require their employees to demonstrate loyal and sincere conduct within the meaning of their own perception."

42. On 31 January 2008 the European Commission sent a letter of formal notice to the Federal Republic of Germany (procedure no. 2007/2362) concerning the transposition of Directive 2000/78/CE into German law and concerning, among other things, "dismissals not covered by anti-discrimination law". It noted that, whilst the Directive permitted a difference in treatment only if the religion or belief constituted a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos, section 9(1) of the General Equal Treatment Act also provided for different treatment when the religion or belief constituted an occupational requirement on the basis of its right of autonomy and the religious society's or association's own perception, without necessarily having regard to the nature of the activity. According to the European Commission, such a difference not being covered by the terms of the directive, this manner of transposition did not fulfil the directive's objectives. Such transposition would enable a religious society to define an occupational requirement purely on account of its right of autonomy, without the requirement undergoing a proportionality test in the light of the

actual activity. In addition, whilst Article 4 § 2 of the Directive presented the question in terms of genuine and determining occupational requirements, section 9(1) of the General Equal Treatment Act had reduced that notion to one of justified occupational requirements, which was a weaker standard than that of the Directive. The European Commission further observed that, whilst an organisation's particular ethos played a role in determining the occupational requirement, it should not be the sole criterion, otherwise German legislation might not guarantee such a difference in treatment and, even as regards ordinary assistance activities, specific requirements related to religious affiliation might be imposed.

On 29 October 2009 the European Commission sent a reasoned opinion to Germany. It was stated in a press release published on the same day (IP/09/1620) that in its opinion the Commission had pointed out, among other things, that protection against discriminatory dismissals was not covered by German anti-discrimination law. The Government's reply to the letter of formal notice, the Commission's reasoned opinion and the Government's reply to that opinion have not been made public to date.[1]

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

43. The applicant complained that he had been dismissed from his post solely on the ground that he was in an extramarital relationship with his new partner. He relied on Article 8 of the Convention, the relevant part of which reads as follows:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of the rights and freedoms of others."

44. The Government disputed that complaint.

A. Admissibility

45. The Court observes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It moreover

[1] Rectified on 10 May 2011. In the previous version of the judgment this sub-paragraph read as follows: "On 29 October 2009 the European Commission sent a reasoned opinion to Germany in which it pointed out that protection against discriminatory dismissals was not covered by German anti-discrimination law. The reasoned opinion and the German Government's reply have not been made public to date."

considers that no other ground for declaring it inadmissible has been established and therefore declares it admissible.

B. Merits

1. The parties' submissions

(a) The applicant

46. The applicant submitted that the employment tribunals had carried out an insufficient assessment and balancing of the interests at stake. This was consistent with an automatic judicial policy that existed in such matters for the benefit of the Churches, which, in his view, enjoyed a privileged status in German law that was not granted to any other charity-type association. His rights to respect for his private life or his private sphere had not been examined by the employment tribunals. In the applicant's submission, Article 8 of the Convention conferred on him the right to discontinue a particular way of life and to begin a new one. He argued that, whilst he did not call into question the right of the Churches to manage their affairs autonomously, that right could not go as far as forcing their employees to observe precepts outside the occupational sphere. He asserted that the employment tribunals had extended their case-law in a totally unforeseeable manner, as until then a dismissal had only been endorsed in the event of remarriage, and not on account of a private extramarital relationship. In view of the large number of ecclesiastical precepts, there was a lack of foreseeability in this connection and the decision to dismiss ultimately depended solely on the view of each human resources manager. The role of the employment tribunal was thus limited to upholding the wishes of the employing Church. According to the applicant, as a consequence of this tendency the employer and the employment tribunal were increasingly scrutinising the employee's private life in order to establish and assess the facts on which the dismissal was based. Moreover, the fact that a particular employee failed to comply with certain ecclesiastical precepts to the letter would not undermine the credibility of the Church, but would merely be a manifestation of the individual's human condition.

47. The applicant pointed out that he had not renounced his private sphere by signing a contract of employment with the Catholic Church. Referring to the authority vested in any employer when appointing a new recruit, he added that in any event he had not been able to obtain the deletion of Article 2 from his contract, and that it was merely a standard clause. Moreover, he asserted that at the time he signed the contract, in 1983, he had not been in a position to predict that one day he would leave his wife. In any case, as he was neither an ecclesiastical public servant nor a cleric, but a mere staff member within the liturgical service, having no

pastoral mission, he was not bound by any heightened duties of loyalty. He did not deny the fact that music played a particular role in the liturgy, but in his view each worshipper performed the liturgy with singing and prayers to the same degree as the organist. He further observed that the Basic Regulations had not entered into force until ten years after the signing of his contract of employment. Accordingly, those Regulations were not part of his contract and thus could not constitute a legal basis for his dismissal.

48. Furthermore, the applicant asserted that, unlike the complainants in the cases leading to the judgment of the Federal Constitutional Court (see paragraph 35 above), he had not publicly opposed a moral principle and had not shown any hostility towards the Catholic Church or its moral precepts. On the contrary, he would continue to be a Catholic and would not call into question the sacramental nature of marriage in the eyes of the Catholic Church. However, the unavoidable (*schicksalhaft*) separation from his wife for strictly personal reasons fell exclusively within his private sphere. He had not in fact remarried. It could not be demanded of him, as canon law did, that following his separation and divorce he would lead a life of abstinence until the end of his days. He would accept the internal consequences of his choice within the Church (he would no longer be able to take communion), but his dismissal was an excessively harsh consequence. The applicant lastly argued that the margin of appreciation relied upon by the Government did not exist because the general public in Germany was becoming less and less sensitive to cases of remarriage, and that European Directive 2000/78/EC dealt only with the question of appointment and not that of dismissal after many long years of service. Referring to his training as a Catholic musician, he also argued that it was difficult for him to find employment outside the Catholic Church. As regards his current employment in a Protestant Church, he indicated that he could now only work part time because he was a Catholic.

(b) The Government

49. The Government argued that the Catholic Church, to which the parish church of Saint Lambertus belonged, in spite of its status as a public-law entity, was not part of government. Therefore there had not been any interference with the applicant's rights on the part of the public authorities. The alleged shortcomings of the employment tribunals could therefore be examined solely in terms of the State's positive obligations. They submitted that since there was no common practice in this area among the member States, the margin of appreciation should be broad, especially as the issue was related to religious feelings, traditions and domains. The Government pointed out that the European Commission on Human Rights (in *Rommelfanger v. Germany*, no. 12242/86, Commission decision of 6 September 1989, Decisions and Reports 62, p. 151) had in fact confirmed the findings of the Federal Constitutional Court, as set out in its judgment of

4 June 1985, to which the Federal Employment Tribunal had referred in the present case.

50. The Government further stated that the employment tribunals, having to settle a dispute between two persons who enjoyed certain rights, had been required to balance the applicant's interest with the Catholic Church's right to manage its affairs autonomously under Article 137 of the Weimar Constitution. In their submission, the employment tribunals, in applying the statutory provisions on dismissal, had been bound to take account of the principles laid down by the Catholic Church, because it was for the Churches and religious communities themselves, through their right of autonomy, to define the duties of loyalty that their employees had to observe in order to safeguard the credibility of those Churches and communities. The Government observed that, nevertheless, the consideration given to ecclesiastical precepts was not unlimited and a domestic court could not apply a precept that ran counter to the general principles of law. In other words, in their view, whilst employing churches could impose duties of loyalty on their employees, it was not for those employers to determine the grounds for dismissal, as that depended on the interpretation by the courts of the statutory provisions concerning protection from dismissal.

51. The Federal Employment Tribunal and, subsequently, the Employment Appeal Tribunal, had applied those principles in the present case and had duly weighed up the interests at stake, particularly taking account of the nature of the post held by the applicant, the seriousness of the breach according to the perception of the Catholic Church and the loss of credibility for the Church if it had maintained him in his post. The Government added that, whilst dismissal indeed constituted the harshest penalty (*ultima ratio*) in German labour law, a more lenient measure, such as a warning, had not been appropriate in the present case as, in their opinion, the applicant could not have been unaware that his employer would not tolerate his conduct. They emphasised that the applicant, in signing his contract of employment of his own accord, had freely agreed to the limitation of his rights, as was apparently possible under the Convention (according to *Rommelfänger*, decision cited above), and had thus accepted the risk of professional sanctions resulting from certain conduct. The Government were convinced that, in view of his length of service, the applicant had been aware of the fundamental importance for the Catholic Church of the sanctity of marriage and of the potential consequences of his adultery. The fact that the duties might have repercussions for his private life was a feature of contracts between employing churches and their staff. The Government lastly asserted that the applicability of the Basic Regulations, which did not in fact lay down particularly extensive duties of loyalty, had not been discussed before the domestic courts and could not therefore be called into question before the Court. Although it was true that

the Regulations had not entered into force until September 1993, paragraphs 2 and 6 of the Regulations on Ecclesiastical Employment and Remuneration of 15 December 1971 (see paragraph 37 above), whose applicability to the employment contract was not in doubt for the Government, had already referred to the fundamental principles of the religious and moral precepts of the Catholic Church, and had subsequently also referred to the 1993 Basic Regulations. Moreover, the applicant had apparently found new employment, this time in a Protestant Church in Essen.

(c) Third-party intervener

52. The Catholic Diocese of Essen endorsed the Government's submissions in the main, further indicating that the finding of a violation of the Convention would be seen as a serious interference with consequences not only for the Diocese, but also for all the contracts of employment (which it claimed totalled 1.2 to 1.4 million) of the Catholic and Protestant Churches. In the Diocese's opinion, the employing churches would then find themselves no longer able to require their employees to comply with particular occupational duties corresponding to their specific missions. The Diocese pointed out that the applicant's separation from his wife and his relationship with another woman were not consonant with the sanctity of marriage in the eyes of the Catholic Church. More than a mere contract, marriage was a sacrament, resulting in an indissoluble bond and a life-long community. The Diocese also emphasised the special function of music in the Catholic liturgy, far from simply being an aesthetical background. The choice of person responsible for the music, in view of its proximity to the Church's proclamatory mission, should thus be a matter for the Church alone, to be decided according to its own criteria, including moral requirements, and this was moreover a manifestation of religious freedom. The Diocese added that, with the adoption of its Basic Regulations, the Catholic Church had introduced a graded system. Decisions taken under those regulations were, moreover, fully subject to the scrutiny of the ordinary domestic courts.

2. The Court's assessment

53. The Court reiterates that the notion of "private life" is a broad concept, not susceptible to exhaustive definition. It covers the physical and moral integrity of the person and sometimes encompasses aspects of an individual's physical and social identity, including the right to establish and develop relationships with other human beings, the right to "personal development" or the right to self-determination as such. The Court further reiterates that elements such as gender identification, names, sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see *E.B. v. France* [GC], no. 43546/02, § 43, 22 January 2008, and *Schlumpf v. Switzerland*, no. 29002/06, § 100, 8 January 2009).

54. In the present case, the Court first observes that the applicant has not complained about an action of the State but about a failure on its part to protect his private sphere against interference by his employer. In this connection, it reiterates that the Catholic Church, despite its status of public-law entity in German law, does not exercise public authority (see *Rommelfänger*, cited above; also, *mutatis mutandis*, *Finska Församlingen i Stockholm and Teuvo Hautaniemi v. Sweden*, Commission decision of 11 April 1996, no. 24019/94, and *Predota v. Austria* (dec.), no. 28962/95, 18 January 2000).

55. The Court further observes that, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition, but the applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance which has to be struck between the general interest and the individual interests; and in both contexts the State enjoys a certain margin of appreciation (see *Evans v. the United Kingdom* [GC], no. 6339/05, §§ 75-76, ECHR 2007-I, and *Rommelfanger*, cited above; see also *Fuentes Bobo v. Spain*, no. 39293/98, § 38, 29 February 2000).

56. The Court reiterates, moreover, that the margin of appreciation afforded to the State is wider where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it. There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or different Convention rights (see *Evans*, cited above, § 77).

57. The main question which arises in the present case is thus whether the State was required, in the context of its positive obligations under Article 8, to uphold the applicant's right to respect for his private life against his dismissal by the Catholic Church. Accordingly, the Court, by examining how the German employment tribunals balanced the applicant's right with the Catholic Church's right under Articles 9 and 11, will have to ascertain whether or not a sufficient degree of protection was afforded to the applicant.

58. In this connection, the Court reiterates that religious communities traditionally and universally exist in the form of organised structures and that, where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which

safeguards associative life against unjustified State interference. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. The Court further observes that, but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate (see *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, §§ 62 and 78, ECHR 2000-XI). Lastly, where questions concerning the relationship between State and religions are at stake, questions on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making body must be given special importance (*Leyla Şahin v. Turkey* [GC], no. 44774/98, § 109, ECHR 2005-XI).

59. The Court would first note that, by putting in place both a system of employment tribunals and a constitutional court having jurisdiction to review their decisions, Germany has in theory complied with its positive obligations towards citizens in the area of labour law, an area in which disputes generally affect the rights of the persons concerned under Article 8 of the Convention. In the present case the applicant was thus able to bring his case before an employment tribunal, which had to determine whether the dismissal was lawful under ordinary domestic labour law, while having regard to ecclesiastical labour law, and to balance the competing interests of the applicant and the employing Church.

60. The Court further observes that the Federal Employment Tribunal, in its judgment of 12 August 1999, referred extensively to the principles established by the Federal Constitutional Court in its judgment of 4 June 1985 (see paragraph 35 above). The Federal Employment Tribunal observed, among other things, that the applicability of domestic labour law did not have the effect of removing employment relations from the sphere of the Church's own affairs. Accordingly, the Catholic Church was entitled to base its employment contracts on the model of a Christian service community and to require its employees to recognise and comply with the fundamental principles of its religious and moral precepts, because its credibility might depend on their doing so. The Federal Employment Tribunal pointed out, however, that the employment tribunals were bound by those fundamental principles only in so far as the precepts took account of those laid down by the established Churches and were not inconsistent with the fundamental principles of law, which – in the Court's view – generally include the fundamental rights and liberties guaranteed by the Convention and, more specifically, the right to respect for private life.

61. Regarding the application of those criteria to the applicant's case, the Court observes that, in the Employment Tribunal's view, the Church was not entitled to decide on the applicant's dismissal without first imposing a lesser penalty, as required by the Basic Regulations. The Tribunal reasoned

that the applicant's breach of duty, namely, the fathering of an extra-marital child, was not sufficiently serious to justify dismissal on that ground alone. The Employment Appeal Tribunal, while upholding the judgment of the tribunal below, found that the applicant's alleged misconduct was his long-standing extra-marital relationship, which constituted a serious personal act of moral misconduct within the meaning of Article 5 § 2 of the Basic Regulations, and justified his dismissal on account of the proximity of his work to the Church's proclamatory mission. The Employment Appeal Tribunal found that the applicant, through his functions, certainly contributed to the solemn celebration of the Eucharist, which was the Catholic Church's central act of liturgy.

62. The Court notes that whilst the Federal Employment Tribunal, for its part, quashed the judgment of the Employment Appeal Tribunal, it nonetheless upheld the latter's conclusions regarding the characterisation of the applicant's conduct under the Basic Regulations. On that point the Federal Employment Tribunal reiterated that the Catholic Church's conception of marital fidelity was not inconsistent with the fundamental principles of law because marriage was also of pre-eminent importance in other religions and was specially protected under the Basic Law. It also considered that there was no support in either the Basic Regulations or any other relevant provisions for the applicant's submission that only remarriage could be regarded as a serious breach.

63. The Court lastly notes that the Employment Appeal Tribunal, after the case had been referred back to it, emphasised that it did not disregard the consequences of dismissal for the applicant. Nevertheless, the Appeal Tribunal found that, even if the applicant did face the possibility of no longer being able to practise his profession, the Church could not continue employing him as an organist without losing all credibility regarding the binding nature of its religious and moral precepts: the applicant's activity was so closely connected to the Church's proclamatory mission that it was barely conceivable for the general public that he and the Dean could continue performing the liturgy together.

64. Regarding the applicant's claim that the Basic Regulations were not applicable to his case, the Court notes that the applicability of that instrument, unlike that of other ecclesiastical provisions relied on by the Church during the dismissal procedure, was not challenged before the employment tribunals, which, in the case of the Essen Employment Tribunal and the Employment Appeal Tribunal, had in fact applied the Regulations in the applicant's favour by observing that the dismissal had not terminated the employment contract. The Court further notes that the Regulations on Ecclesiastical Employment and Remuneration, which, as the Government pointed out, referred to the fundamental principles of the religious and moral precepts of the Catholic Church, formed an integral part of the employment contract.

65. Regarding the finding of the employment tribunals that the dismissal was justified under the Basic Regulations, the Court reiterates that it is in the first place for the national courts to interpret and apply domestic law (see *Griechische Kirchengemeinde München und Bayern e.V. v. Germany* (dec.), no. 52336/99, 18 September 2007, and *Miroļubovs and Others v. Latvia*, no. 798/05, § 91, 15 September 2009). It would reiterate, however, that, whilst it is not the Court's task to substitute its own opinion for that of the domestic courts, it must nonetheless ascertain whether the effects of the domestic court's findings are compatible with the Convention (see, *mutatis mutandis*, *Karhuvaara and Iltalehti v. Finland*, no. 53678/00, § 49, ECHR 2004-X; *Miroļubovs and Others*, cited above, § 91; and *Lombardi Vallauri v. Italy*, no. 39128/05, § 42, 20 October 2009).

66. As regards the application to the applicant's specific case of the criteria reiterated by the Federal Employment Tribunal, the Court cannot but note the brevity of the employment tribunals' reasoning regarding the conclusions they had drawn from the applicant's conduct (contrast *Obst*, cited above, § 49). The Employment Appeal Tribunal had confined itself to explaining that the applicant's functions as organist and choirmaster did not fall within the scope of Article 5 § 3 of the Basic Regulations, but were nonetheless so closely connected to the Catholic Church's proclamatory mission that the parish church could not continue to employ this musician without losing all credibility and that it was barely conceivable for the general public that he and the Dean could carry on performing the liturgy together.

67. The Court would first observe that, in their findings the employment tribunals made no mention of the applicant's *de facto* family life or of the legal protection afforded to it. The interests of the employing Church were thus not balanced against the applicant's right to respect for his private and family life guaranteed by Article 8 of the Convention, but only against his interest in keeping his post (see also, in this connection, the findings of the Federal Constitutional Court in its judgment of 4 June 1985 – paragraph 35 above).

The Court also notes that under the wage-tax card system (see paragraph 33 above), an employee is unable to conceal from his employer events relating to his civil status, for example a divorce or the birth of a child. Consequently, an event liable to amount to a breach of the duty of loyalty is in all cases brought to the attention of the employing Church, even if the case has had no media coverage or public repercussions.

68. The Court further observes that, by characterising the applicant's conduct as a serious breach within the meaning of Article 5 § 2 of the Basic Regulations, the employment tribunals regarded the employing Church's view as decisive in this connection and that, according to the Federal Employment Tribunal, the applicant's contrary opinion was not supported by the Basic Regulations or any other ecclesiastical provisions. It finds that

this approach does not in itself raise a problem with regard to its case-law (see paragraph 58 above).

69. The Court would note, however, that the Employment Appeal Tribunal did not examine the question of the proximity between the applicant's activity and the Church's proclamatory mission, but appears to have reproduced the opinion of the employing Church on this point without further verification. As the case concerned a dismissal following a decision by the applicant concerning his private and family life, which attracts the protection of the Convention, the Court considers that a more detailed examination was required when weighing the competing rights and interests at stake (see *Obst*, cited above, §§ 48-51), particularly as in this case the applicant's individual right was weighed against a collective right. Whilst it is true that, under the Convention, an employer whose ethos is based on religion or on a philosophical belief may impose specific duties of loyalty on its employees, a decision to dismiss based on a breach of such duty cannot be subjected, on the basis of the employer's right of autonomy, only to a limited judicial scrutiny exercised by the relevant domestic employment tribunal without having regard to the nature of the post in question and without properly balancing the interests involved in accordance with the principle of proportionality.

70. The Court points out in this connection that Germany's transposition of Directive 2000/78/EC into its domestic law was[1] the subject, in relation to certain points, of a complaint by the European Commission on comparable grounds (see paragraphs 40-42 above).

It notes in addition that, according to the principles established by the Federal Constitutional Court, a Church may require its employees to observe certain fundamental principles but this does not mean that the legal status of its employees is "clericalised" or that the employment relationship based on civil law acquires a special ecclesiastical status which subsumes the employee and dominates his entire private life (see paragraph 35 above).

71. The Court acknowledges that, in signing his employment contract, the applicant accepted a duty of loyalty towards the Catholic Church, which limited his right to respect for his private life to a certain degree. Such contractual limitations are permissible under the Convention where they are freely accepted (see *Rommelfänger*, cited above). The Court considers, however, that the applicant's signature on the contract cannot be interpreted as a personal unequivocal undertaking to live a life of abstinence in the event of separation or divorce. An interpretation of that kind would affect the very heart of the right to respect for the private life of the person concerned, particularly since, as the employment tribunals found, the applicant was not bound by heightened duties of loyalty (contrast *Obst*, cited above, § 50). In this connection the applicant submitted that he had

[1] Rectified on 10 May 2011: changed from the present to past tense.

been unable to avoid his separation from his wife, for strictly personal reasons, and that he was unable to live a life of abstinence for the rest of his days as required by the Catholic Church's Code of Canon Law.

72. The Court observes, moreover, that the employment tribunals, except for the Essen Employment Tribunal, gave only marginal consideration to the fact that, unlike the cases brought before the Federal Constitutional Court concerning, *inter alia*, dismissal of an employee for statements he had made publicly against the moral position of his employing Church (see *Rommelfänger*, cited above), the applicant's case had not received media coverage, that, after fourteen years of service for the parish church, he did not appear to have challenged the stances of the Catholic Church, but rather to have failed to observe them in practice (see Article 5 § 4 of the Basic Regulations – paragraph 38 above), and that the impugned conduct in the present case went to the very heart of the applicant's private life.

73. The Court lastly notes that the Employment Appeal Tribunal merely stated that it did not disregard the consequences of dismissal for the applicant but it failed, however, to explain the factors it had taken into consideration in that connection when weighing up the interests involved (contrast *Obst*, cited above, §§ 48 and 51). In the Court's opinion, the fact that an employee who has been dismissed by a Church has limited opportunities of finding another job is of particular importance. This is especially true where the employer has a predominant position in a given sector of activity and enjoys certain derogations from the ordinary law, as is the case of the two big Churches in certain regions of Germany, notably in the field of social activities (for example, kindergartens and hospitals – see paragraphs 30-32 above), or where the dismissed employee has specific qualifications that make it difficult, or even impossible, to find a new job outside the Church, as is the case for the applicant. In this connection the Court notes that the Protestant Church's rules concerning church musicians (see paragraph 39 above) stipulate that the Church may employ non-Protestants only in exceptional cases and solely in the context of secondary employment. The applicant's case moreover confirms this. The Court reiterates that, as a result of the wage-tax card that an employee must present and which contains certain personal data (see paragraph 33 above), an employer is automatically informed, to some extent, of the employee's personal and family situation.

74. The Court is therefore of the view that the employment tribunals did not sufficiently explain the reasons why, according to the findings of the Employment Appeal Tribunal, the interests of the Church far outweighed those of the applicant, and that they failed to weigh the rights of the applicant against those of the employing Church in a manner compatible with the Convention.

75. Consequently, having regard to the particular circumstances of the case, the Court finds that the German authorities did not provide the applicant with the necessary protection and that there has, accordingly, been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

77. The applicant claimed 323,741.45 euros (EUR) in respect of pecuniary damage, corresponding to his loss of salary since 1 July 1998, less the unemployment benefit received and the salary paid to him since 1 September 2002 for his part-time job in a Protestant Church. The applicant provided a breakdown of these sums. He further claimed EUR 30,000 in respect of non-pecuniary damage.

78. The Government submitted that, in the event of a finding by the Court that the employment tribunals should not have endorsed the dismissal, the State was not required to reimburse the applicant for his loss of salary over all those years. In the Government's view, should a violation be found, firstly the applicant would be able to seek the re-opening of the proceedings in the domestic courts and, secondly, it could not automatically be assumed that his contract of employment with the Church of Saint Lambertus would have lasted for many years to come.

B. Costs and expenses

79. The applicant also claimed EUR 752.35 for the costs and expenses he had incurred in the proceedings before the Federal Constitutional Court and EUR 876.73 in respect of the proceedings before this Court. He further requested the reimbursement of translation expenses and costs that would be incurred by him in the event of a hearing being held before the Court.

80. The Government did not comment on the claims under this head.

C. Conclusion

81. In the circumstances of the case, the Court considers that the question of the application of Article 41 of the Convention is not ready for decision. Consequently, it must be reserved and the subsequent procedure

fixed taking due account of the possibility of an agreement between the respondent State and the applicant (Rule 75 § 1 of the Rules of Court). The Court allows the parties three months, from the date of the present judgment, in which to reach such agreement.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds* that the question of the application of Article 41 is not ready for decision, and accordingly,
   (a) *reserves* it in whole;
   (b) *invites* the Government and the applicant to notify the Court, within three months from the date of the present judgment, of any agreement that they may reach;
   (c) *reserves* the further procedure and delegates to the President of the Chamber the power to fix the same if need be.

Done in French, and notified in writing on 23 September 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President