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Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

11 September 2018 (*)

(Reference for a preliminary ruling — Social policy — Directive 2000/78/EC — Equal treatment — Occupational activities within churches and other organisations the ethos of which is based on religion or belief — Occupational requirements — Acting in good faith and with loyalty to the ethos of the church or organisation — Definition — Difference of treatment on the basis of religion or belief — Dismissal of an employee of the Catholic faith performing managerial duties due to a second, civil marriage entered into after a divorce)

In Case C-68/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decision of 28 July 2016, received at the Court on 9 February 2017, in the proceedings

IR

v

JQ

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, T. von Danwitz, J.L. da Cruz Vilaça, A. Rosas and J. Malenovský, Presidents of Chambers, E. Juhász, M. Safjan, D. Šváby, A. Prechal, F. Biltgen (Rapporteur), K. Jürimäe, M. Vilaras and E. Regan, Judges,

Advocate General: M. Wathelet,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 27 February 2018,

after considering the observations submitted on behalf of

- IR, by B. Göpfert, Rechtsanwalt, M. Ruffert and G. Thüsing,
- the German Government, by T. Henze, J. Möller and D. Klebs, acting as Agents,
- the Polish Government, by B. Majczyna, A. Siwek and M. Szwarc, acting as Agents,
- the European Commission, by D. Martin and B.-R. Killmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 31 May 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The request has been made in a dispute between JQ and his employer, IR, in respect of the lawfulness of JQ's dismissal, which was justified by an alleged infringement of the duty of good faith and loyalty to IR's ethos.

Legal context

European Union law

3 Recitals 4, 23, 24 and 29 of Directive 2000/78 state:

‘(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.

...

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

(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.

...

(29) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.’

4 Article 1 of that directive provides:

‘The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.’

5 Article 2(1) and (2) of that directive states:

‘1. For the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

...’

6 Article 4 of that directive is worded as follows:

‘1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 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 at the date of adoption of this Directive 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 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. This difference of treatment shall be implemented taking account of Member States’ constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

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.'

7 Article 9(1) of Directive 2000/78 provides:

'Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.'

8 Article 10(1) of that directive states:

'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

German law

Basic Law

9 Article 4(1) and (2) of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law of the Federal Republic of Germany) of 23 May 1949 (BGBl. 1949 I, p. 1; 'the GG') states:

'(1) Freedom of belief and of conscience and freedom to profess a religious or philosophical creed shall be inviolable.

(2) Every person shall have the right to practise his religion without interference.'

10 In accordance with Article 140 of the GG, the provisions of Articles 136 to 139 and 141 of the Weimarer Reichsverfassung (Weimar Constitution) of 11 August 1919 ('the WRV') are an integral part of the GG.

11 Article 137 of the WRV provides:

'(1) There shall be no State church.

(2) Freedom of association to form religious societies shall be guaranteed. There shall be no restrictions on the ability of religious societies to form associations within the territory of the State.

(3) Each religious society shall organise and administer its affairs independently within the limits of the law that applies to all persons. It shall appoint its officers without any interference on the part of the State or the civil municipal authorities.

...

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

12 According to the case-law of the Bundesverfassungsgericht (Federal Constitutional Court, Germany), the right of self-determination, guaranteed by Article 140 of the GG in conjunction with Article 137(3) of the WRV, is enjoyed not only by churches themselves as religious communities, but also by all institutions specifically affiliated to them, if and to the extent that they are required, in accordance with the church's faith-defined self-perception and with their own purpose or mission, to undertake and fulfil the church's mandate and mission.

Law on Protection against Dismissal

13 Paragraph 1 of the Kündigungsschutzgesetz (Law on Protection against Dismissal) of 25 August 1969 (BGBl. 1969 I, p. 1317), in the version applicable to the dispute in the main proceedings, provides:

‘Socially unjustified dismissals

(1) The dismissal of an employee whose employment relationship has continued for more than six months without interruption with the same business or undertaking shall be void where it is socially unjustified.

(2) A dismissal is socially unjustified when it is not based on reasons relating to the person or conduct of the employee, or is due to urgent operational requirements that preclude the employee's continued employment with the business. ...’

General Law on Equal Treatment

14 The Allgemeines Gleichbehandlungsgesetz (General Law on Equal Treatment) of 14 August 2006 (BGBl. 2006 I, p. 1897; ‘the AGG’) transposed Directive 2000/78 into German law.

15 Paragraph 1 of the AGG, which sets out the objective of the law, states:

‘The objective of this law is to prevent or eliminate discrimination on grounds of race, ethnic origin, sex, religion or belief, disability, age or sexual identity.’

16 Paragraph 7(1) of the AGG provides:

‘Workers shall not be discriminated against on any of the grounds mentioned in Paragraph 1; this also applies where the person responsible for the discrimination merely assumes in the course of the discriminatory conduct that one of the grounds mentioned in Paragraph 1 exists.’

17 Under Paragraph 9 of the AGG:

(1) Without prejudice to Paragraph 8 [of this law], a difference of treatment on grounds of religion or belief in connection with employment by religious communities, institutions affiliated to them, regardless of their legal form, or associations that devote themselves to the communal nurture of a religion or belief shall also be permitted if a particular religion or belief constitutes a justified occupational requirement, having regard to the self-perception of the religious society or association concerned, in view of its right of self-determination, or the nature of the activities engaged in.

(2) The prohibition of a difference of treatment on grounds of religion or belief shall not affect the right of the religious communities mentioned in subparagraph 1, institutions affiliated to them, regardless of their legal form, or associations that devote themselves to the communal nurture of a

religion or belief, to require their employees to act in good faith and with loyalty in accordance with their self-perception.’

Canon law

18 According to Canon 1085 of the Codex Iuris Canonici (Code of Canon Law):

‘(1) Marriage by a person bound by the bond of a prior marriage, even if not consummated, is invalid.

(2) Even if the prior marriage is invalid or dissolved for whatever reason, the person concerned shall not on that account be permitted to contract another marriage before the nullity or dissolution of the prior marriage is established lawfully and definitively.’

19 Article 1 of the Grundordnung des kirchlichen Dienstes im Rahmen kirchlicher Arbeitsverhältnisse (Basic regulations on employment relationships in the service of the Church) of 22 September 1993 (*Amtsblatt des Erzbistums Köln 1993*, p. 222; ‘the GrO 1993’) states as follows:

‘Basic principles of service in the Church

All persons working in an institution of the Catholic Church shall work together, irrespective of their employment status, to ensure that the institution can play its part in the mission of the Church (community of service). ...’

20 Article 4 of the GrO 1993, headed ‘Duty of loyalty’, reads as follows:

‘(1) Catholic employees are expected to recognise and observe the principles of Catholic doctrinal and moral teaching. In pastoral, catechetical and educational work in particular, as well as among employees who are working on the basis of a *missio canonica* [canonical mission], employees shall conduct themselves in a manner consistent with the principles of Catholic doctrinal and moral teaching. This also applies to employees performing managerial duties.

(2) Non-Catholic Christian employees shall be expected to respect the truths and values of the Gospel and to contribute to giving them effect within the organisation.

...

(4) All employees shall refrain from acting in a manner that is contrary to the Church. They must not, by their personal life and their conduct at work, undermine the credibility of the Church and the institution by which they are employed.’

21 Article 5 of the GrO 1993, headed ‘Breaches of the duty of loyalty’, states:

‘(1) If an employee no longer complies with the requirements for employment, the employer shall attempt to counsel the employee to remedy this shortcoming on a lasting basis. ... Dismissal shall be considered as a last resort.

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

— ...

– entering into a marriage that is invalid according to the Church’s teachings and its legal system,

– ...

(3) In the case of [employees] occupying managerial posts, conduct generally considered to be a possible ground for dismissal in accordance with paragraph 2 shall rule out any possibility of continued employment. In exceptional cases, dismissal may be avoided if there are serious reasons in the individual case indicating that such dismissal would be excessive.’

22 The Grundordnung für katholische Krankenhäuser in Nordrhein-Westfalen (Basic regulations for Catholic hospitals in North Rhine-Westphalia, Germany) of 5 November 1996 (*Amtsblatt des Erzbistums Köln*, p. 321) states as follows:

‘A. Assignment to the church

...

(6) The [GrO 1993], adopted on the basis of the statement issued by the German bishops on service in the Church, as amended and supplemented, shall be binding on the body responsible. Employees occupying managerial posts within the meaning of the abovementioned basic regulations include members of hospital management and heads of department.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

23 IR is a limited liability company established under German law. Its purpose is to carry out the work of Caritas (the international confederation of Catholic charitable organisations), as an expression of the life and nature of the Roman Catholic Church, through, among other things, the operation of hospitals. IR is primarily a non-profit organisation and is subject to the supervision of the Archbishop of Cologne (Germany).

24 JQ is of the Roman Catholic faith. He trained as a doctor and began working in 2000 as Head of the Internal Medicine Department of an IR hospital pursuant to an employment contract concluded on the basis of the GrO 1993.

25 JQ was married in accordance with the Roman Catholic rite. His first wife separated from him in 2005, and their divorce was granted in March 2008. In August 2008, JQ married his new partner in a civil ceremony without his first marriage having been annulled.

26 Having learned of the second marriage, IR dismissed JQ, by letter dated 30 March 2009, with effect from 30 September 2009.

27 JQ brought an action against the dismissal before the Arbeitsgericht (Labour Court, Germany), claiming that his remarriage was not a valid ground for the dismissal. In JQ’s view, the dismissal was an infringement of the principle of equal treatment because, under the GrO 1993, the remarriage of a head of department of the Protestant faith or of no faith would not have had any consequences for the employment relationship between that person and IR.

28 IR asserted that JQ’s dismissal was socially justified. Given that JQ occupied a managerial post within the meaning of Article 5(3) of the GrO 1993, by entering into a marriage that is invalid under canon law, he had clearly infringed his obligations under his employment contract with IR.

29 The Arbeitsgericht (Labour Court) upheld JQ's application. As the appeal lodged by IR against that decision was dismissed by the Landesarbeitsgericht (Higher Labour Court, Germany), IR then brought an application for review on a point of law before the Bundesarbeitsgericht (Federal Labour Court, Germany), which dismissed the application, by judgment of 8 September 2011, holding, in essence, that JQ's dismissal was not justified, as IR would not dismiss employees occupying the same post as JQ who were not of the Roman Catholic faith in the event of their remarriage.

30 IR brought the case before the Bundesverfassungsgericht (Federal Constitutional Court, Germany). By order of 22 October 2014, that court set aside the judgment of the Bundesarbeitsgericht (Federal Labour Court) and referred the case back to the latter court.

31 The Bundesarbeitsgericht (Federal Labour Court) considers that the outcome of the dispute in the main proceedings depends on whether JQ's dismissal by IR is lawful under Paragraph 9(2) of the AGG. However, that court observes that that provision must be interpreted in accordance with EU law and that, consequently, the outcome of the dispute depends on the interpretation of the second subparagraph of Article 4(2) of Directive 2000/78, which was transposed into national law by Paragraph 9(2) of the AGG.

32 More specifically, the referring court is uncertain, in the first place, whether, as a private limited company owned by the Catholic Church, IR falls within the scope of the second subparagraph of Article 4(2) of Directive 2000/78 and is, therefore, entitled to require its employees to act in good faith and with loyalty to the ethos of that church. According to that court, it cannot be ruled out that EU law precludes such a company, which is established under private law, active in the healthcare sector and applies market practices, from invoking rights that are specific to the Church.

33 In that respect, the referring court is uncertain whether churches or other public or private organisations the ethos of which is based on religion or belief may themselves definitively determine what constitutes acting in good faith and with loyalty 'to the ethos of the organisation' within the meaning of the second subparagraph of Article 4(2) of Directive 2000/78, and whether in that regard they may also — as they are permitted under German constitutional law — independently impose a scale of loyalty requirements for the same managerial positions that takes into account only the denominational affiliation of the employee.

34 In the second place, the referring court notes that, after the Court has interpreted the second subparagraph of Article 4(2) of Directive 2000/78, it will be required, taking into account all the rules of national law and applying the interpretation methods recognised by that law, to decide whether and to what extent Article 9(2) of the AGG can be interpreted in a manner consistent with Article 4(2) of Directive 2000/78 and, if that provision of national law does not lend itself to such consistent interpretation, whether that provision must be disapplied in whole or in part.

35 The referring court is uncertain whether the prohibition of discrimination on grounds of religion or belief enshrined in Article 21(1) of the Charter of Fundamental Rights of the European Union ('the Charter') confers an individual right on a person that can be enforced by that person before the national courts and which, in disputes between private individuals, requires those courts not to apply national provisions that are incompatible with that prohibition. While it is aware that the Charter entered into force only on 1 December 2009 and the dismissal at issue in the main proceedings occurred in March 2009, the referring court notes that it is arguable that, prior to the entry into force of the Charter, a prohibition of all discrimination on grounds of religion or belief

already existed as a general principle of EU law. In accordance with the principle of the primacy of EU law, that law takes precedence over national law, including constitutional law.

36 In the third place, the referring court seeks to ascertain which criteria are to be used to determine whether the requirement to act in good faith and with loyalty is consistent with the second subparagraph of Article 4(2) of Directive 2000/78.

37 In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling.

‘(1) Is the second subparagraph of Article 4(2) of [Directive 2000/78] to be interpreted as meaning that the [Catholic] Church can decide with binding effect that an organisation such as the defendant in the present proceedings is to differentiate, in connection with the requirement that employees in managerial positions act in good faith and with loyalty, between employees who belong to the same church and those who belong to another faith or to none at all?

(2) If the first question is answered in the negative:

(a) Must a provision of national law, in this case Article 9(2) of the [AGG], under which unequal treatment of this kind, based on the employee’s religious affiliation, is justified by reference to the Church’s self-perception, be disapplied in these proceedings?

(b) What conditions apply, in accordance with the second subparagraph of Article 4(2) of [Directive 2000/78], in respect of the requirement that employees of a church or one of the other organisations mentioned in that provision act in good faith and with loyalty to the organisation’s ethos?’

Consideration of the questions referred

The first question and the second part of the second question

38 By its first question and the second part of its second question, which it is appropriate to consider together, the referring court asks, in essence, whether the second subparagraph of Article 4(2) of Directive 2000/78 must be interpreted as meaning that a church or other organisation the ethos of which is based on religion or belief and which manages a hospital in the form of a private limited company can definitively decide to subject its employees performing managerial duties to a requirement to act in good faith and with loyalty that differs according to the faith or lack of faith of such employees and, if that is not the case, what criteria are to be used to determine whether, in each individual case, such a requirement is consistent with that provision.

39 In the light of the explanation provided by the referring court in connection with its first question, it is necessary to determine, in the first place, with regard to the scope *ratione personae* of the second subparagraph of Article 4(2) of Directive 2000/78, whether the fact that, in the case in the main proceedings, the entity requiring that its employees act in good faith and with loyalty is a private limited company, is sufficient to prevent that company from relying on that provision.

40 In that respect, given the general nature of the terms used in the second subparagraph of Article 4(2) of Directive 2000/78 to define the scope *ratione personae* of that provision, namely ‘churches and other public or private organisations’, considerations as to the nature and legal form of the entity concerned cannot affect the applicability of that provision to a situation such as that in

the main proceedings. In particular, the reference to private organisations covers establishments that, like IR, are established under private law.

41 That said, it must be noted, first, that the provisions of Article 4(2) of Directive 2000/78 apply only to churches and other public or private organisations ‘the ethos of which is based on religion or belief’.

42 Second, the second subparagraph of Article 4(2) of Directive 2000/78 refers to ‘individuals working’ for such churches or organisations, which means that the scope of that provision, like that of the first subparagraph of Article 4(2), covers the occupational activities of such individuals.

43 In the second place, with regard to the question of review by national courts of the application of the second subparagraph of Article 4(2) of Directive 2000/78, it must be noted that the Court has held, in a case relating to the interpretation of the first subparagraph of Article 4(2) of that directive, that the latter provision must be interpreted as meaning that, where a church or other organisation whose ethos is based on religion or belief asserts, in support of a decision or act such as a decision or act rejecting an application for employment with it, that, by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be subject, if need be, to effective judicial review by which it can be ensured that the criteria set out in that provision are satisfied in a particular case (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 59).

44 Furthermore, the fact that the first subparagraph of Article 4(2) of Directive 2000/78 refers to national legislation in force at the date of adoption of the directive and national practices existing at that date cannot be interpreted as authorising the Member States not to include compliance with the criteria set out in that provision in the scope of effective judicial review (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 54).

45 The reasons given by the Court in support of that requirement for effective judicial review, which are based on the objective of Directive 2000/78, on the context of Article 4(2), on the safeguards required from Member States, in Article 9 and 10 thereof, in order to ensure that the duties arising under that directive are complied with and the persons who consider themselves to be victims of discrimination are protected, and on the right to effective judicial protection enshrined in Article 47 of the Charter (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraphs 47 to 49) similarly apply in circumstances, such as those in the main proceedings, where a private organisation claims, in support of a decision to dismiss one of its employees, that the latter failed to act in good faith and with loyalty to the ethos of that organisation, within the meaning of the second subparagraph of Article 4(2) of the directive.

46 Unlike the first subparagraph of Article 4(2) of that directive, the second subparagraph stipulates that one of the occupational requirements that a church or other public or private organisation whose ethos is based on religion or belief can impose on its employees is the requirement that those individuals act in good faith and with loyalty to the ethos of that church or organisation. As is apparent from, *inter alia*, the clause ‘provided that its provisions are otherwise complied with’, that right must be exercised in a manner consistent with the other provisions of Directive 2000/78 and, in particular, the criteria set out in the first subparagraph of Article 4(2) of the directive, which must, where appropriate, be amenable to effective judicial review, as pointed out in paragraph 43 above.

47 Contrary to what is maintained by, in particular, IR and the German government, the lawfulness of a requirement to act in good faith and with loyalty imposed by a church or other organisation whose ethos is based on religion or belief cannot be examined by reference only to national law, but must take into account the provisions of Article 4(2) of Directive 2000/78 and the criteria set out therein, it not being possible to exclude the question of compliance with those criteria from effective judicial review.

48 Article 17 TFEU cannot invalidate that conclusion. First, the wording of that provision corresponds, in essence, to that of Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Treaty of Amsterdam. The fact that Declaration No 11 is expressly mentioned in recital 24 of Directive 2000/78 shows that the EU legislature must have taken that declaration into account when adopting the directive, especially Article 4(2) thereof, since that provision refers specifically to national legislation and practices in force on the date of adoption of the directive. Second, while it is true that Article 17 TFEU expresses the neutrality of the European Union towards the organisation by the Member States of their relations with churches and religious associations and communities, that article is not such as to exempt compliance with the criteria set out in Article 4(2) of Directive 2000/78 from effective judicial review (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraphs 56 to 58).

49 In the third place, with regard to the conditions for the application of the second subparagraph of Article 4(2) of Directive 2000/78, it is to be noted, in the light of what was stated in paragraph 46 above, that a difference of treatment in respect of the requirement to act in good faith and with loyalty to the ethos of the employer, such as that at issue in the main proceedings, which the parties agree is based solely on the faith of the employees, must comply, *inter alia*, with the criteria set out in the first subparagraph of Article 4(2) of that directive.

50 In that regard, the Court has found that it is clear from that provision that it is on the basis of the ‘nature’ of the activities concerned or the ‘context’ in which they are carried out that religion or belief may, in certain circumstances, constitute a genuine, legitimate and justified occupational requirement in the light of the ethos of the church or organisation concerned within the meaning of that provision. Thus the lawfulness, in the light of that provision, of a difference of treatment on grounds of religion or belief depends on the objectively verifiable existence of a direct link between the occupational requirement imposed by the employer and the activity concerned. Such a link may arise either as a result of the nature of the activity, for example where it involves taking part in the determination of the ethos of the church or organisation in question or contributing to its evangelising mission, or of the circumstances in which the activity is to be carried out, for instance, where it is necessary to ensure that the church or organisation is presented in a credible fashion to the outside world (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraphs 62 to 63).

51 More specifically, with respect to the three criteria laid down in the first subparagraph of Article 4(2) of Directive 2000/78, the Court has stated, first of all, that the use of the adjective ‘genuine’ means that professing the religion or belief on which the ethos of the church or organisation is founded must be necessary because of the importance of the occupational activity in question for the promotion of that ethos or the exercise by the church or organisation of its right of autonomy, as recognised by Article 17 TFEU and Article 10 of the Charter (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraphs 50 and 65).

52 The Court then noted that use of the term ‘legitimate’ shows that the EU legislature intended to ensure that the requirement of professing the religion or belief on which the ethos of the church or organisation is founded is not used to pursue an aim that has no connection with that ethos or

with the exercise by the church or organisation of its right of autonomy (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 66).

53 Lastly, the term ‘justified’ implies not only that a national court can review whether the criteria laid down in Article 4(2) of Directive 2000/78 are being complied with, but also that the church or organisation imposing the occupational requirement is obliged to show, in the light of the factual circumstances of the individual case, that the alleged risk of undermining its ethos or its right of autonomy is probable and substantial, so that the imposition of such a requirement is necessary (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 67).

54 In that regard, the requirement in the first subparagraph of Article 4(2) of Directive 2000/78 must be consistent with the principle of proportionality, which means that the national courts must ascertain whether the requirement in question is appropriate and does not go beyond what is necessary for attaining the objective pursued (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 68).

55 It follows from the considerations set out in paragraphs 49 to 54 above that a church or other public or private organisation the ethos of which is based on religion or belief can treat its employees in managerial positions differently, as regards the requirement to act in good faith and with loyalty to that ethos, depending on their affiliation to a particular religion or adherence to the belief of that church or other organisation only if, bearing in mind the nature of the occupational activities concerned or the context in which they are carried out, the religion or belief is a genuine, legitimate and justified occupational requirement in the light of that ethos.

56 In that regard, while it is ultimately for the national court, which has sole jurisdiction to appraise the facts, to determine whether requiring only employees in managerial positions who share the religion or belief on which the church or organisation concerned is based to act in good faith and with loyalty is in fact a genuine, legitimate and justified occupational requirement within the meaning of the first subparagraph of Article 4(2) of Directive 2000/78, the Court may nevertheless provide guidance, based on the file in the main proceedings and the written and oral observations submitted to it, in order to enable the national court to give judgment in the particular case before it.

57 In the present case, the requirement at issue in the main proceedings concerns the respect to be given to a particular aspect of the ethos of the Catholic Church, namely the sacred and indissoluble nature of religious marriage.

58 Adherence to that notion of marriage does not appear to be necessary for the promotion of IR’s ethos, bearing in mind the occupational activities carried out by JQ, namely the provision of medical advice and care in a hospital setting and the management of the internal medicine department which he headed. Therefore, it does not appear to be a genuine requirement of that occupational activity within the meaning of the first subparagraph of Article 4(2) of Directive 2000/78, which is, nevertheless, a matter for the referring court to verify.

59 The finding that adherence to that aspect of the ethos of the organisation concerned cannot, in the present case, constitute a genuine occupational requirement is corroborated by the fact, which was confirmed by IR during the hearing before the Court and referred to by the Advocate General in point 67 of his Opinion, that positions of medical responsibility entailing managerial duties, similar to that occupied by JQ, were entrusted to IR employees who were not of the Catholic faith and, consequently, not subject to the same requirement to act in good faith and with loyalty to IR’s ethos.

60 Next, it should be noted that, in the light of the documents submitted to the Court, the requirement at issue in the main proceedings does not appear to be justified within the meaning of the first subparagraph of Article 4(2) of Directive 2000/78. However, it is for the referring court to verify whether IR has established that, in the light of the circumstances of the main proceedings, there is a probable and substantial risk of undermining its ethos or its right of autonomy (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 67).

61 It follows from the foregoing considerations that the answer to the first question and the second part of the second question is that the second subparagraph of Article 4(2) of Directive 2000/78 must be interpreted as meaning:

- first, that a church or other organisation the ethos of which is based on religion or belief and which manages a hospital in the form of a private limited company cannot decide to subject its employees performing managerial duties to a requirement to act in good faith and with loyalty to that ethos that differs according to the faith or lack of faith of such employees, without that decision being subject, where appropriate, to effective judicial review to ensure that it fulfils the criteria laid down in Article 4(2) of that directive; and
- second, that a difference of treatment, as regards a requirement to act in good faith and with loyalty to that ethos, between employees in managerial positions according to the faith or lack of faith of those employees is consistent with that directive only if, bearing in mind the nature of the occupational activities concerned or the context in which they are carried out, the religion or belief constitutes an occupational requirement that is genuine, legitimate and justified in the light of the ethos of the church or organisation concerned and is consistent with the principle of proportionality, which is a matter to be determined by the national courts.

The first part of the second question

62 By the first part of its second question, the referring court essentially asks whether, under EU law, a national court is required, in a dispute between individuals, to disapply a provision of national law that cannot be interpreted in a manner that is consistent with the second subparagraph of Article 4(2) of Directive 2000/78.

63 It must be recalled that it is for the national courts, taking into account the whole body of rules of national law and applying methods of interpretation recognised by that law, to decide whether, and to what extent, a national provision, such as Paragraph 9(2) of the AGG, can be interpreted in a manner that is consistent with Article 4(2) of Directive 2000/78, without having recourse to an interpretation *contra legem* of the national provision (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 71 and the case-law cited).

64 The Court has held, moreover, that the requirement to interpret national law in a manner that is consistent with EU law includes the obligation for national courts to change their established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 72 and the case-law cited).

65 Consequently, a national court cannot validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 73 and the case-law cited).

66 In the present case, therefore, it is for the referring court to ascertain whether the national provision at issue in the main proceedings lends itself to an interpretation that is consistent with Directive 2000/78.

67 In the event that it is impossible to interpret the national provision at issue in the main proceedings in a manner that is consistent with EU law, it should be noted, first, that Directive 2000/78 does not itself establish the principle of equal treatment in the field of employment and occupation, which originates in various international instruments and constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds, including religion and belief, as may be seen from its title and from Article 1 (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 75 and the case-law cited).

68 On the other hand, a national court that finds itself in the situation referred to in the paragraph above is under an obligation to provide, within the limits of its jurisdiction, the legal protection which individuals derive from EU law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to the principle prohibiting discrimination on grounds of religion or belief (see, with regard to the principle prohibiting discrimination on grounds of age, judgment of 19 April 2016, *DI*, C-441/14, EU:C:2016:278, paragraph 35).

69 Before the entry into force of the Treaty of Lisbon, which conferred on the Charter the same legal status as the treaties, that principle derived from the common constitutional traditions of the Member States. The prohibition of all discrimination on grounds of religion or belief, now enshrined in Article 21 of the Charter, is therefore a mandatory general principle of EU law and is sufficient in itself to confer on individuals a right that they may actually rely on in disputes between them in a field covered by EU law (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 76).

70 Accordingly, in the main proceedings, if it considers that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law, the referring court must disapply that provision.

71 In the light of the foregoing considerations, the answer to the first part of the second question is that a national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in a manner that is consistent with Article 4(2) of Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from the general principles of EU law, such as the principle prohibiting discrimination on grounds of religion or belief, now enshrined in Article 21 of the Charter, and to guarantee the full effectiveness of the rights that flow from those principles, by disapplying, if need be, any contrary provision of national law.

Costs

72 Since these proceedings are, for the parties to the main proceedings, a step in the action before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. The second subparagraph of Article 4(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning:

– **first, that a church or other organisation the ethos of which is based on religion or belief and which manages a hospital in the form of a private limited company cannot decide to subject its employees performing managerial duties to a requirement to act in good faith and with loyalty to that ethos that differs according to the faith or lack of faith of such employees, without that decision being subject, where appropriate, to effective judicial review to ensure that it fulfils the criteria laid down in Article 4(2) of that directive; and**

– **second, that a difference of treatment, as regards a requirement to act in good faith and with loyalty to that ethos, between employees in managerial positions according to the faith or lack of faith of those employees is consistent with that directive only if, bearing in mind the nature of the occupational activities concerned or the context in which they are carried out, the religion or belief constitutes an occupational requirement that is genuine, legitimate and justified in the light of the ethos of the church or organisation concerned and is consistent with the principle of proportionality, which is a matter to be determined by the national courts.**

2. A national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in a manner that is consistent with Article 4(2) of Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from the general principles of EU law, such as the principle prohibiting discrimination on grounds of religion or belief, now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union, and to guarantee the full effectiveness of the rights that flow from those principles, by disapplying, if need be, any contrary provision of national law.

[Signatures]

* Language of the case: German.