

## TATTOOS – THE NEW DISCRIMINATION GROUND IN EMPLOYMENT RELATIONS?

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**Abstract:** The presented article is focused on the issue of protection against discrimination in employment relationships with regard to body modifications, mainly tattoos. The article deals with the need for a new discriminatory ground in the case of a person who has been the victim of discrimination due to his/her tattoo. Furthermore, the author analyzes the position of employees with tattoos in both the Slovak and European contexts, as this issue is not yet clearly regulated in any legislation. The authors are of the opinion that discrimination on the grounds of body modifications is not permissible. However, the current legal standards are only partially sufficient to protect employees against such type of discrimination compared to Norwegian legal standards.

**Keywords:** employee; employer; discrimination; tattoo; piercing; labor relations.

### INTRODUCTION

When protecting against discrimination in labor relations in the Slovak Republic, one must proceed according to two basic legal regulations, namely Act no. 311/2001 Coll. the Labor Code as amended (hereinafter also referred to as the “Labor Code”) and Act no. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination and on the Amendment of Certain Acts (hereinafter referred to as the “Anti-Discrimination Act”). In case of discrimination or violation of the principle of equal treatment a person can claim protection of his or her rights in court. Discriminatory grounds are given in Slovak legislation, similarly to the legislation of the European Union, only by a demonstrative calculation and do not include the appearance of the subject modified by tattooing. Thus, is it possible in the Slovak legal system for a discriminated employee to use legal means of protection against discrimination, even if in his case the specific discriminatory grounds were not fulfilled? The question raised has long divided experts in labor law and it is not possible to answer it unequivocally even in the European context. This article is aiming to outline the answer and present considerations *de lege ferenda* in order to eliminate inconsistencies in this area through the analysis of legal regulations and literature as well as comparison with Norwegian legal standards.

### I. TATTOO DISCRIMINATION IN LABOR RELATIONS – SLOVAK AND EUROPEAN APPROACH

Historically, tattooing is considered to be one of the oldest forms of art, dating back to 5,000 BC.<sup>1</sup> Tattoos used to be associated with tribes as well as social classes. In modern

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<sup>1</sup> BUCKOVÁ, M. Polynézské umenie. Profánna a sakrálna funkcia tetovania [Polynesian art. Professional and sacral function of tattoos]. *História*. 2018, Vol. 17, No. 1, pp. 33–36.

history, tattoos have been considered a symbol of belonging to piracy, cults, or gangs.<sup>2</sup> In the 21<sup>st</sup> century, such stigmatization is inadmissible. Studies show that around 12% of the European population has tattoos, with tattoos being the most popular among Italian and Swedish citizens, where up to 47% of the population have tattoos.<sup>3</sup> According to Eurostat,<sup>4</sup> the population of the European Union is up to 447 million, with 12% of the population being around 53.5 million. This is a significant number of European Union citizens who have opted for body modification in the form of tattoos. Studies to distinguish between the forms or visibility of tattoos have not yet taken place. Still, we believe that, regardless of the location of the tattoo, it is essential that people with and without tattoos are treated the same. Discrimination, especially in pre-contractual relations, is difficult to prove, and it is therefore essential that the standards of anti-discrimination law be set broadly enough to protect jobseekers and workers with physical modifications of their own choosing.

The legal basis for the prohibition of discrimination in the European Union can be considered the EU Charter of Fundamental Rights,<sup>5</sup> which in Article 21 prohibits all forms of discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion, or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. It is a demonstrative calculation of discriminatory grounds, most of which do not have a legal definition. The EU directives<sup>6</sup> as well as the Labor Code and the Anti-Discrimination Act in the Slovak Republic regulate in more detail the prohibition of discrimination in labor relations. However, no legal norm of the European Union or the Slovak Republic currently regulates tattoos as a discriminatory ground in access to work or employment. Despite the large number of subjects affected by possible discrimination on the grounds of tattoos, such a discriminatory ground is absent. The author is of the opinion that the absence of a new discriminatory ground has two levels that need to be considered.

Firstly, the possibility of subsuming discrimination due to tattoos under the so-called general discriminatory grounds. In Slovak legislation, there is a discrimination ground referred to as a “*different status*”, which includes all untitled grounds of discrimination. The different status of the employee has no legal definition; it subsumes all possible special discriminatory grounds, which are not explicitly stated in the legislation and could be at the expense of the job seeker or the employee. According to the judgment of the Constitutional Court of the Slovak Republic 18<sup>th</sup> of October 2005, file no. PL. ÚS. 8 / 04-202 “*Discrimination is generally defined as any form of treatment, including refusal to treat*

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<sup>2</sup> Ibid.

<sup>3</sup> Where Tattoos are Most popular. In: *The Statista* [online]. [2024-07-05]. Available at: <<https://www.statista.com/chart/13942/where-tattoos-are-most-popular/>>.

<sup>4</sup> In: *Eurostat* [online]. [2024-10-05]. Available at: <<https://ec.europa.eu/eurostat/databrowser/view/TPS00001/bookmark/table?lang=en&bookmarkId=c0aa2b16-607c-4429-abb3-a4c8d74f7d1e>>.

<sup>5</sup> HAMULÁK, O. The Charter of Fundamental Rights of the European Union and the Social Rights. *Estudios constitucionales*. 2018, Vol.16, No.1, pp. 167–186.

<sup>6</sup> See e.g. DIRECTIVE (EU) 2019/1158 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on work-life balance for parents and carers or DIRECTIVE 2006/54/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

a person who is less favorable to that person than to others with regard to race, ethnicity, sexual orientation and other constitutional characteristics.” Like other norms, the Constitution of the Slovak Republic does not define tattoo as a discriminatory ground but uses the term “other characteristics”. There is, however, the possibility to extend discriminatory grounds, which was also confirmed by the Constitutional Court of the Slovak Republic in its judgment.<sup>7</sup> This is a relatively wide range of reasons, which can *de lege ferenda* develop very progressively based on the progress of science or technology. The author is of the opinion that keeping the calculation of discriminatory grounds open is in favor of the matter, as a closed calculation of discriminatory grounds would not necessarily correspond to real working conditions and could disadvantage jobseekers or employees in the future. Subsuming unnamed discriminatory grounds under existing discriminatory grounds, such as age or social origin, leads to stereotyping, which the author considers inadmissible in the 21<sup>st</sup> century in any legal or social relationship. This also applies to the tattoo itself, which some authors consider to be a manifestation of discriminatory grounds of age, social origin, or ethnicity.<sup>8</sup> Despite the fact that young people or members of ethnic groups also have tattoos, their possible discrimination by the employer does not lie in discrimination due to tattoos at their age or origin but in the existence of the tattoo itself. Tattoos cannot be universally described as an expression of age or origin, and therefore it is important that *de lege lata* it shall be considered as a different discriminatory ground.

Secondly, the real applicability of the discriminatory ground “*different status*” in practice is problematic. This discriminatory ground does not have a legal definition, it subsumes an incalculable number of discriminatory grounds that may arise now or in the future. Employers and employees should, in all circumstances, act in accordance with the principle of non-discrimination against anyone as well as the principle of good morals. Likewise, the information that employers require from jobseekers should be exclusively related to the performance of work and it is necessary for supervisory authorities to closely monitor compliance with the rights of jobseekers. However, if there is already a case where a jobseeker or employee becomes a victim of discrimination, his or her protection options are considerably limited in terms of discrimination on an unnamed ground compared to discrimination on a specific discriminatory ground. Despite the existence of a reversed burden of proof in anti-discrimination disputes, the plaintiff must state the facts and evidence on the basis of which the court will consider the action to be reasonable in order to act in the case. In the case of “*different status*”, there is no settled case law, which may result in the difficult or impossible application of the right by discriminated jobseekers or employees in court. To achieve legal certainty as well as protection of the weaker party, it will be necessary *de lege ferenda* to continue to define discriminatory grounds in the legislation sufficiently broadly and at the same time to identify discriminatory areas that will fall under discriminatory ground “*different status*”.

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<sup>7</sup> BARANCOVÁ, H. a kol. *Zákonník práce. Komentár [Labor Law. Commentary]*. Bratislava: C. H. Beck, 2019, p. 1520.

<sup>8</sup> See e. g. DRAZEWSKI, P. *Tattoo Stigma and Job Discrimination*. Illinois: Illinois State University, ISU ReD: research and eData. 2013, p.12.

One could argue that having a tattoo is not appropriate in some professions. The European Court of Justice decided in joined Cases C-804/18 and C-341/19 WABE and MH Müller Handel stated that “... A prohibition on wearing any visible form of expression of political, philosophical, or religious beliefs in the workplace may be justified by the employer’s need to present a neutral image towards customers or to prevent social disputes.”. Analogously, it can therefore be deduced that if the employer has a workplace where he wants his employees to appear neutral towards his clients, he can introduce an appropriate dress code. The introduction of a dress code does not conflict with European legislation and may be subject to stricter national regulation. The introduction of a dress code is not currently prohibited in the Slovak Republic. If the employer has a dress code and requires that the employee does not have visible tattoos during work, it is possible to cover them with clothes or makeup. However, it is necessary for the employer to inform the future employee about this fact within the framework of pre-contractual relations, so that the future employee can also decide whether he wants to work at such a workplace. The dress code or the rule of covering tattoos while performing work cannot be in our opinion considered as a legal reason for refusing to hire a person with tattoos, as long as he agrees to comply with the rules set by the employer.

Tattoos as a discriminatory ground in employment relations can also be related to the entry of a new generation into the labor market. American authors William Strauss and Neil Howe refer to the next generation as Generation Z, which is characterized by the use of technology and the Internet. Generation Z is a generation of people born between 1996 and 2009 and is the next generation of “millennials” also known as Generation Y. For the previous generation, the central tool was a mobile phone, but for the current Generation Z, the Internet, drones, or even virtual reality are significant. The entry of this generation into the labor market brings not only new challenges for labor law theorists but especially for everyday labor law practice. These authors, who were the first to describe the concept of defining generations in the labor market based on significant elements and resources they use in their lives, also review the different habits of a given generation, their expectations from an employment relationship, a high degree of flexibility or job hopping. According to William Strauss and Neil Howe, this is a generation that does not suit stereotypes, deviates from the current standards of employees and will have completely different expectations from their employment.<sup>9</sup> It is therefore appropriate for the European Union, as well as the individual Member States, to address the issue of equal access to work and employment conditions and to eliminate possible discriminatory grounds or discrimination as well as provide effective protection for discriminated employees. The issue of discrimination due to physical modifications or manifestations will have an increasing trend. The regulation of the prohibition of discrimination or its extensive protection should not be left to employers’ decision. There would be large regional differences as well as differences between domestic and foreign employers, as we can already see in the Slovak Republic today in terms of gender discrimination.<sup>10</sup> The right to

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<sup>9</sup> CARTER, T. preparing Generation Z for Teaching Profession. *SRATE Journal*. Vol. 27, No. 1, 2018, pp.1-8.

<sup>10</sup> See e.g. The European Commission in Slovakia. In: *The European Commission* [online]. [2024-07-05]. Available at: <[https://ec.europa.eu/slovakia/sites/default/files/prezentacia\\_cr\\_2020.pdf](https://ec.europa.eu/slovakia/sites/default/files/prezentacia_cr_2020.pdf)>.

legal certainty is one of the fundamental principles of the rule of law, and it is therefore necessary to approach discrimination on grounds other than “standard” grounds in a uniform and systematic way.

The issue of tattoos and possible discrimination in employment is currently addressed mainly by American authors.<sup>11</sup> In the European Union, there are smaller studies that have addressed the issue of discrimination in employment relationships due to tattoos. It is a German study concerning mainly pre-contractual relations in labor law, i.e., job seekers.<sup>12</sup> The results of the study agree with the statement of the author of the presented article and show that discrimination on the grounds of tattoos in employment relationships exists and has an increasing tendency with the growing popularity of tattoos.<sup>13</sup> As well as more comprehensive studies, the case law of the European Court of Justice and the European Court of Human Rights in the field of discrimination on the grounds of tattoos is absent. Until now, the European Court of Justice has in its judgments dealt with tattoos exclusively in relation to animals and their marking.<sup>14</sup> The European Court of Human Rights has dealt with the issue of tattoos, in particular the rights of prisoners or marketing and advertising.<sup>15</sup>

## II. NORWEGIAN MODEL AND REFLECTIONS *DE LEGE FERENDA*

Slovak but also European legislation provides protection against discrimination on the grounds of “*different status*”. The author of this article is of the opinion that different status is a very broadly conceived discriminatory ground, which has its justification and should be preserved in the legislation. It serves to protect against discrimination in cases that cannot be foreseen in advance, and it is therefore necessary that it be enshrined in legislation and applied by law enforcement authorities in the event of discrimination. However, the author is of the opinion that this discriminatory ground is not specific enough for the already existing reasons for which job seekers and employees are discriminated against, and it would be appropriate to extend the calculation of discriminatory grounds so as to preserve the protection of workers as well as jobseekers.

The good practice model for the legislation of the Slovak Republic as well as the European Union can be the Norwegian legislation, which, despite the relatively broadly conceived discriminatory grounds, provides more specific guidelines for unnamed discriminatory grounds. Norway is not a member of the European Union, which is why anti-discrimination legislation differs in part. Norway’s original gender equality legislation is the Equality and Anti-Discrimination Act. The primary goal of the Equality and An-

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<sup>11</sup> See e. g. FRENCH, T. M., MORTENSEN, K., TIMMING, R. A.: Are tattoos associated with employment and wage discrimination? Analyzing the relationship between body art and labor market outcomes. *Human Relations*. 2019, Vol. 72, No. 5, pp. 962-987.

<sup>12</sup> JIBUTI, D. *Discrimination against workers with visible tattoos: experimental evidence from Germany*. Prague: Charles University, Center for Economic Research and Graduate Education (CERGE) and Economics Institute of the CAS. 2018, p. 37.

<sup>13</sup> JIBUTI, D. *Discrimination against workers with visible tattoos: experimental evidence from Germany*. p. 26.

<sup>14</sup> See e. g. C-101/12.

<sup>15</sup> See e. g. Case Of Sekmadienis Ltd. v. Lithuania Application no. 69317/14 or Case Of Denizci and Others v. Cyprus Applications nos. 25316-25321/94 and 27207/95.

ti-Discrimination Act is to promote equality between women and minorities. Discriminatory grounds are defined as “gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or other significant characteristics of a person”.<sup>16</sup> This is an open calculation of discriminatory grounds, which leaves the courts a lot of room to invoke unnamed discriminatory grounds, which can only be characteristic of certain persons. It is the definition of unnamed discriminatory grounds through gender expression or other significant characteristics of a person that the author considers more appropriate than using only the term different status. At present, it is no longer possible to say that tattoos, piercings, hair color or other body modifications are something exceptional and non-standard. This is also confirmed by a study on the prevalence of tattoos in Norway, which clearly showed that up to 20.8% of the Norwegian population has at least one tattoo, with tattoos being significantly more preferred by women, up to 23.8% compared to 17.9% in men.<sup>17</sup> Thus, it cannot be said that body modification in the form of a tattoo is something exceptional or non-standard. This is a common physical modification of jobseekers not only in Norway but also in the European Union. Therefore, anti-discrimination legislation should define other significant characteristics of a person as a discriminatory reason, similar to the Norwegian model. However, the author does not consider it appropriate to specify the discriminatory ground mentioned in more detail, but on the contrary, to keep it as broad as possible, following the example of the Norwegian legislation, to cover not only physical manifestations and characteristics but also mental ones.

The Norwegian Anti-Discrimination Tribunal appears to be an effective tool for monitoring equal treatment in the labor market within the Norwegian system of law enforcement agencies. The Norwegian Anti-Discrimination Tribunal acts exclusively on the written request of the party to the dispute, and the proceedings are free of charge. However, the parties to the dispute are not forced to be represented by a lawyer. The Norwegian Anti-Discrimination Tribunal has the right to issue binding and enforceable decisions, urgent and precautionary measures as well as to impose an obligation to pay damages or non-pecuniary damage. The advantage of proceedings before the Norwegian Anti-Discrimination Tribunal over general courts is the speed and economy of the proceedings as well as the expertise of its members.<sup>18</sup> In Slovakia, delays in proceedings as well as the legal inability of judges to specialize undermine the principle of legal certainty in such sensitive matters as anti-discrimination disputes and significantly reduce the effectiveness of enforcing the rights of injured employees as well as discriminated persons in general.

Since the legislation is vague, employers often take the initiative in this area. Some companies allow their employees to have visible tattoos when in contact with the client,

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<sup>16</sup> Gender Equality in Norway. In: *Kilden* [online]. [2024-05-24]. Available at: <<https://gender.no/legislation/the-gender-equality-act>>.

<sup>17</sup> SAGOE, D., PALLESEN, S., ANDREASSEN, S. C. Prevalence and correlates of tattooing in Norway: A large-scale cross-sectional study. *Scandinavian Journal of Psychology*. 2017, Vol. 58, pp. 652–570.

<sup>18</sup> The Norwegian Antidiscrimination Tribunal. In: *Diskrimineringsnemnda* [online]. [2024-09-24]. Available at: <<https://www.diskrimineringsnemnda.no/spr%C3%A5k/1230>>.

while other companies insist on overlapping tattoos when in contact with the client.<sup>19</sup> It must be stated that the employer must not unduly interfere with the rights of his employees and, if he decides to impose restrictions on the workplace, these must apply to all and must be reasonable and justifiable. This can be justified by analogy with the ruling of the European Court of Justice in case C-157/15 *Achbita*. If an employer decides to issue a ban on wearing religious symbols in the workplace, such a ban must be part of the employer's general policy for all employees. It is important to note that if an employer wants to introduce rules regarding tattoos in the workplace, he must apply them equally to all employees, regardless of whether they work with customers or not. Measures should be proportionate and justified and should not unduly interfere with the personal sphere of employees or endanger their health,<sup>20</sup> e. g. regulations for covering tattoos with long clothes when working in high temperatures.

Similarly, the ruling of the European Court of Justice in Case C-236/09 *Test-Achats*, where the European Court of Justice has ruled that a job advertisement in which an employer discourages members of a minority from applying in advance for a given position, is already discriminatory in nature, as it may discourage potential candidates for the position.<sup>21</sup> Therefore, employers should not state in job offers that they will only accept an employee without physical modification in the form of a tattoo. They should, in accordance with European directives and national legislation, focus exclusively on those characteristics and characteristics of the candidate which are related to the performance of the work. Tattoos do not endanger the lives or health of other employees or the employer's customers in any way, unlike, for example, smoking, and therefore, in our view, such an advertisement would have to be assessed by the national courts as discriminatory.

The Norwegian system of protection of the rights of discriminated employees can serve as an example of good practice for amending anti-discrimination legislation both in the Slovak Republic and in the European Union. The introduction of a discriminatory ground for *other significant characteristics of a person*, in addition to a discriminatory ground for different status, would, in the author's view, facilitate the exercise of the rights of discriminated jobseekers and employees in court. At the same time, the existence of a special anti-discrimination tribunal can also help to effectively protect the rights of victims of discrimination as well as a greater will to speak out and defend their rights. The guarantee of professional assistance and faster action without the necessary costs can also contribute to a greater willingness of discriminated persons to defend their rights.<sup>22</sup> *De lege ferenda*, it can therefore be stated that it is necessary to introduce more effective protection of the rights of jobseekers and employees with body modifications in the form of tattoos, analogously also to piercings, hair color or other body modifications chosen by jobseekers or employees. The extension of discriminatory grounds, the strengthening

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<sup>19</sup> In: *Attwells* [online]. [2024-05-24]. Available at: <<https://www.attwells.com/site/news-and-events/employment-discrimination-tattoos>>.

<sup>20</sup> The Judgement of the European Court of Justice in case C-157/15 *Achbita*, par. 30-44.

<sup>21</sup> The Judgement of the European Court of Justice in case C-236/09 *Test-Achats*, par. 19-35.

<sup>22</sup> ŠIMÁČKOVÁ, K., HAVELKOVÁ, B., ŠPONDROVÁ, P. (eds.). *Mužské právo. Jsou právní pravidla neutrální? [The male law. Are the legal rules neutral?]* Praha: Wolters Kluwer, 2020, p. 1076.

of judicial protection and the information campaign for the general public are the basis for combating discrimination on the grounds of tattoos.

## CONCLUSION

Discrimination in the labor market is a widespread but undesirable phenomenon that the Member States of the European Union are trying to combat through extensive legislation and case law. However, the labor market is dynamically evolving, and it is essential that legislation and case law also flexibly reflect the needs of application practice. As the presented article we has shown, discrimination on the grounds of tattoos is not a new phenomenon and, according to the statistical information provided, is still on the rise in the European population. It is, therefore, necessary to provide job seekers as well as all employees with effective protection against discrimination due to this physical modification. The introduction of a new discriminatory ground *other significant characteristics of a person* would contribute to the protection not only of job seekers and employees with tattoos, but also of all others with other bodily modifications or differences. There is a very wide range of imminent discrimination, including aesthetic and plastic medical procedures, but these are not usually obvious and visible. That is why this article is focused primarily on discrimination on the grounds of tattoos, which in most cases is obvious at first sight and can have negative consequences for its bearer in the labor market without any legal reason or justification.