

EMPLOYMENT LAW ALERT

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Think before you ink: How your tattoos could affect your employment

Discrimination based on one's appearance is an ever-changing area of law that impacts employees and potential candidates worldwide. Subconscious appearance preferences that are founded on societal norms lead to employees and potential candidates being the subject of discrimination when they fail to meet certain, unilaterally imposed standards. In a country that has a constitutionally guaranteed right to personal autonomy and freedom of expression, one has to wonder how Minister of Police Bheki Cele's comments about tattoos are viewed.



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On 11 July 2022, the Minister addressed the media and announced the recruitment of 10,000 additional police officers. In his address, the Minister ran through a list of requirements for these new officers and stated: *"When you have a tattoo, we don't hire you because you have a tendency of being a gangster."* His comments caused several adverse reactions.

PERSONAL APPEARANCE DISCRIMINATION

The enactment of the Constitution of the Republic of South Africa, 1996 introduced several important rights in the sphere of labour relations which now allow for the protection against various previously unrecognised grounds of discrimination. One ground that Minister Cele's comments touched on is discrimination on the grounds of personal appearance.

TATTOOS DISCRIMINATION

Tattoos have traditionally been associated with fringe personalities who don them as a way of signifying their outsider status and rejection of mainstream society. With the exception of outrightly offensive tattoos that are, for example, racist or sexist, tattoos in modern times have become more common and accepted in society. Tattoos are a mutable characteristic, meaning that they do not automatically qualify for legal protection. Tattoos and piercings are commonly dealt with in an employer's dress code and grooming standard. However, the recent increase in litigation in other jurisdictions coupled with the public outcry to Minister Cele's comments warrants a focus on discrimination on the basis of tattoos.

TATTOO DISCRIMINATION IN THE US

In the US, no specific federal law exists governing personal appearance discrimination in employment. As a result of this gap, individual states and districts have enacted prohibitions on personal appearance discrimination – which extend to a person's manner or style of dress, and manner or style of grooming. In areas where no anti-discrimination law against personal appearance exists, employees are often required to link the appearance discrimination to a protected category of discrimination that is already in existence. This solution, though appealing, has been predominantly unsuccessful when placed before the courts. The court in *Riggs v City of Fort Worth* 229 F Supp 2d 572 ND Tex [2002], when faced with tattoo discrimination on the

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basis of freedom of expression, sided with a police department and held that the employee's tattoos were extensive enough to be regarded as unprofessional. In *Cloutier v Costco Wholesale Corp* 390 F 3d 126 1st Cir [2004] the court dealt with tattoo discrimination justified by freedom of religion. The court rejected the employee's claim that her clear eyebrow stud should be allowed for religious reasons, stating that it went beyond reasonable accommodation. Where the employee succeeded, the grounds of discrimination that ultimately resulted in the court's decision was discrimination on the basis of sex and not appearance. In *Hub Folding Box Company v Massachusetts Commission Against Discrimination* 52 Mass App Ct 1104 [2001] the court agreed that a female employee being required to cover up her tattoos when her male colleague was not expected to amounted to discrimination, not on the basis of appearance, but on the basis of sex.

Appearance discrimination in the US is still an issue which has not been fully dealt with. Where it has been challenged, employees have had to implicate a listed ground of discrimination and have, in general, been quite unsuccessful.

TATTOO DISCRIMINATION IN THE UK

In the UK, employees who have been or are being discriminated against based on their appearance are usually not afforded automatic legal protection. Thus, employees have had to link the discrimination they are enduring to a listed ground in order to bolster their claim.

TATTOO DISCRIMINATION IN SOUTH AFRICA

Much like the USA and UK, South Africa does not have any express provisions in section 9(3) of the Constitution or section 6(1) of the Employment Equity Act 55 of 1998 prohibiting appearance based on tattoo discrimination. As such,

employees will need to base their claims on a listed ground. Thus, to succeed, an employee would have to argue that personal appearance should be protected under freedom of expression or personal dignity.

Unlike in the USA and UK, however, South African courts have reaffirmed their commitment to values of dignity, freedom of religion, opinion and expression, and equality over restrictions on a person's personal appearance. In *IMATU v City of Tshwane Metropolitan Municipality* [2014] ZAGPPHC 412 the court, dealing with two female metro police officers who refused to cut their hair, ruled that individual expression in this case trumped the business needs which rendered the training agreements unlawful. In *Department of Correctional Services v POPCRU* [2012] (2) BLLR 110 (LAC) the court held that if one's hairstyle does not impede one's ability to perform a job, then a policy requiring an employee

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to change their hairstyle could infringe rights such as the right to religion. In *Dlamini v Green Four Security* [2006] (11) BLLR 1074 (LC) the court, despite agreeing that the policy to have trimmed beards was an inherent requirement of the job, reiterated the importance of policies being deferent to Constitutional rights.

CONCLUSION

Minister Cele's statement regarding the hiring of candidates with tattoos triggers several potential rights infringements due to South Africa's race, ethnic, religious and cultural diversity. This fact is highlighted by judicial decisions in South Africa

which have refused to follow the international approach to appearance discrimination. Thus, even though South Africa's legislation does not expressly provide for the right not to be discriminated against based on one's tattoos, the courts have, in general, taken the side of the employee where a policy limits a chosen appearance that is connected to religion, expression or dignity. As such, the minister's statement if put into practice could, if challenged on the basis of a Constitutional right or the provisions of the Labour Relations Act 66 of 1995, be considered discriminatory and thus unlawful.

**HUGO PIENAAR, ASMA CACHALIA
AND OLIVER MARSHALL**



The Legal 500 EMEA 2022 Results graphic features a dark blue background with a grid of light blue lines. The text is white and bold. It lists three recommendations from The Legal 500 EMEA 2022.

The Legal 500 EMEA 2022 recommended our Employment practice in Tier 1 for employment.

The Legal 500 EMEA 2022 recommended **Fiona Leppan** and **Aadil Patel** as leading individuals for employment.

The Legal 500 EMEA 2022 recommended **Hugo Pienaar, Gillian Lumb, Anli Bezuidenhout, Imraan Mohamed, Jose Jorge and Njeri Wagacha** for employment.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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