

WATSON FARLEY & WILLIAMS

UK: EMPLOYMENT INSIGHT TATTOOS IN THE WORKPLACE DECEMBER 2016

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The number of people with tattoos seems to be increasing, perhaps due to their more prominent place in popular culture, including amongst sports, movie and pop stars. However, they are often frowned upon in the workplace. How should employers approach this and what are the risks?

Employers can prescribe a minimum standard of dress and appearance for their staff, including a requirement to cover tattoos. The Metropolitan Police made the headlines in 2014 for banning employees from having “visible tattoos” and requiring them to register body art with their managers as they were perceived to damage its professional image. A number of other police forces followed suit.

However, in September 2016, the conciliation service, ACAS, told employers that rejecting candidates because they have tattoos was wrong. It said employers could be missing out on talent by letting outdated attitudes get in the way of recruitment. ACAS also commented that if such prejudices were held, the pool of potential recruits would be narrowed because so many young people now have body art.

ACAS did not, however, go so far as to say that a ban on tattoos is illegal. Indeed, there is no specific protection under UK discrimination law for those who have a tattoo. Under the Equality Act 2010 (Disability) Regulations 2010, tattoos and body piercings are expressly carved out of the definition of disability. They are not “severe disfigurements that are treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities”. Although this would suggest that employers have free reign to issue outright bans, the generational

differences with tattoos might have to be taken into account. There are no definitive figures available, but it is estimated that as many as 30% of under 30s have a tattoo, whilst fewer than 5% of over 65s have a tattoo. If reliable statistics could be obtained to show a disadvantage to their particular age group, it is possible that someone who was turned down for a job because of their tattoo could bring an age discrimination claim. The claim would be one of indirect discrimination, i.e. a claim that the employer had applied a provision, criteria or practice (in this case no visible tattoo) that placed the candidate, because of their age, at a particular disadvantage. It is also possible to envisage a situation where there might be potential for a religion or belief discrimination claim if the tattoo had spiritual significance, or a race discrimination claim if it was part of a group's culture. This can be seen in different scenarios, for example, it is common for brides and some guests at Asian weddings to have henna applied prior to the ceremony (albeit this is temporary and therefore leads to different questions). However, although the job applicant could probably clear the first hurdle for a claim and establish the particular disadvantage, an employer is likely to succeed in establishing that the rule on tattoos is justifiable on the grounds of promoting a professional or corporate image.

While the chances of an unsuccessful candidate bringing a discrimination claim on the basis of their tattoo appear slight, what would be the position of an employee dismissed for having a tattoo, once they had sufficient service to bring an unfair dismissal claim?

The prohibition on tattoos is usually contained in the company dress code. Whether dismissal for infringement of a dress code is fair depends on the employee's type of work. In *Eales v Halfords Ltd*, a tribunal said the employer had overestimated the degree of smartness required to serve in a bicycle shop when it insisted that Mr Eales wore sensible dark shoes, dark conservative trousers, a collar and tie. In *Higham v International Stores*, however, the company had been justified in dismissing Mr Higham for wearing sandals, no socks and no tie to work as his dress was likely to alienate customers. Clearly, employees can offend customers only if they come into contact with them. In *King v Moody Graphics & Translation Centre Ltd*, Mr King's dismissal for sporting a "bizarre" haircut and wearing makeup on the grounds that customers would be offended was not justified as Mr King worked mostly out of the public eye in a dark room. A tribunal would presumably adopt the same approach to someone being dismissed for having a visible tattoo. However, the position for employees with temporary tattoos or markings might present a different type of dilemma and an employer may need to consider making temporary adjustments.

As the number of young people with tattoos coming into the job market increases, it will be interesting to see if anyone who is turned down for a job pursues an age discrimination claim. However, with more and more people sporting tattoos, perhaps perceptions will change and employers will be more accepting.