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Clothing, tattoos, piercings and the like: the new workplace

Prologue

A cabin crew member with tattoos, piercings and a crew cut, a police officer with a Mohawk or eyebrow piercing and a tram driver with a large cross on a necklace around his neck.¹ These are all examples of cases concerning an employee's outward appearance and an employer's wish to impose rules restricting this appearance.

Fortunately, in an ever-evolving society, we encounter people from all different walks of life. These encounters do not stop at the workplace. Although theoretically we all (should) embrace our differences, an employer may have a legitimate interest in preventing employees from fully expressing their individuality in any shape or form.

On the other hand, fundamental rights, such as freedom of religion and physical integrity, restrict the employer's right to regulate an employee's external appearance.²

In this article, we discuss several cases and we determine what may constitute a violation of fundamental rights pertaining to an employee's physical appearance. Based on case law, we determine under what circumstances such violations may be justified. In addition, we provide guidelines for employers who are facing such issues.

Legal frame

The European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) include provisions that protect fundamental human rights. In cases concerning an employee's physical appearance, the employee will likely appeal to fundamental rights, such as the protection of personal privacy, physical integrity, freedom to practice a religion and/ or prohibition of discrimination. In the Netherlands, these

fundamental rights are laid down in the Constitution.

On the other hand, employers may appeal to their right to give instructions to their employees, as laid down in the Dutch Civil Code. This right ensues and emphasises the relationship of authority that an employer has with an employee. The right to give instructions does not pertain to the employment terms and conditions, such as salary, nor to the so-called secondary employment conditions, such as travel allowances. The instructions should pertain to unilateral company rules, such as company policy. A dress code falls within the scope of the right to give instructions, and an employer is, in principle, allowed to issue a dress code for employees.

The right to give instructions is not always expressly mentioned in case law. Usually, the employer may call upon the principle of good employer/good employee, also provided by the Dutch Civil Code. Based on this principle, employees are obliged to conduct themselves as good employees. This principle may serve as assessment criteria in situations where no specific rules of order are in place. The Dutch Supreme Court has deemed that this principle also entails that an employee is bound by discretion and loyalty. In addition, the employee should consider the reasonable requests received by the employer.

Religious beliefs and ideological views versus personal preferences

Based on case law, in principle, a distinction can be made between employees who have in some way altered their appearance in order to express their religious beliefs or ideological views, and employees who just want to express their individuality with their appearance.

In the case of the cabin crew member with the tattoos, piercings and crew cut, the above distinction was clearly made by the Dutch sub-district court. The court considered important that

her appearance was only motivated by her personal preference and not based on religious beliefs or ideological views. The court deemed that, by imposing rules on the outward appearance of its flight attendants, the airline did not violate the employee's fundamental rights.

The administrative court rendered a similar judgment in a case concerning a police officer with an eyebrow piercing. The court did not consider the employer's (in this case, the Dutch Government) prohibition on eyebrow piercings for police officers while on duty as an infringement of the fundamental right of physical integrity. In its judgment, the administrative court took into consideration that wearing the eyebrow piercing did not appear to be a determinative factor or expression of the employee's personal identity.

This does not mean that there can never be a violation of fundamental rights when the outward appearance of an employee is just an expression of individuality. In a case involving a police officer with a mohawk, the Central Appeals Tribunal (for public service and social security matters) did deem the employer's prohibition as an infringement of physical integrity.

In fact, where the police officer with the eyebrow piercing could remove the piercing before going on duty, this would not be the case for the police officer with the mohawk. The tribunal considered relevant that, in order to comply with the employer's rules, the employee would need to alter his hairstyle and this would mean that the prohibition would also impact his personal life when he was off duty.

In the case of the tram driver who was wearing a large cross on a necklace around his neck, the Court of Appeal deemed the employer's prohibition as a violation of the freedom to practice a religion. However, as we will now outline, an infringement by an employer may, under certain circumstances, be deemed justified.

A weighing of interests based on all circumstances

An infringement of an employee's fundamental rights by an employer will be justified when the measure is deemed necessary and proportional, and therefore, the measure meets the requirements of reasonableness. In order to decide whether or not the measure is necessary and proportional, all circumstances should be taken into consideration.

Based on case law, an employer's interests, such as safety, hygiene, professional image and customer contact, may in some circumstances outweigh the employee's interests. In such a case, the ruling may be that there is indeed an infringement of a fundamental right, but under the aforementioned

circumstances, the infringement is considered justified.

In the cabin crew case, the sub-district court did not consider the airline's regulations as an infringement. However, this case may provide employers whose employees wear uniforms and have regular customer contact with a relevant interest that may justify an infringement. The sub-district court found important that it is very common for airlines to impose rules and regulations regarding the physical appearance of their cabin crew. These regulations are in place in order to achieve a uniform business and professional appearance.

A similar argument was successfully used by the Dutch Government in the case of the policeman with the mohawk. Although the tribunal found that there was indeed an infringement of physical integrity, it concluded that this infringement was justified. Based on the available photographs of the employee, the tribunal concluded that the police officer's physical appearance contradicted the criteria of standing and professionalism so much that the infringement was justified.

The case of the tram driver gained a lot of press at the time. Although the Court of Appeal considered the prohibition on wearing a large cross on a necklace an infringement of the fundamental right of freedom of religion, it deemed the infringement justified. The court found the employer's wish for a professional outward appearance of all its employees as a legitimate goal. And the court considered the prohibition as suitable and necessary.

In its ruling, the court also took into account that the employer offered to have a ring made for the employee with a cross. In addition, the court considered that a long necklace while operating a tram may represent a safety risk.

The employee's argument that several female Muslim colleagues were allowed to wear headscarves was rejected. The Court of Appeal found that wearing a necklace with a cross over the uniform disturbed the business, uniform and professional look of the company uniform; instead, the court ruled that headscarves, which were incorporated into the company uniform and provided with the company logo, did not.

The ruling of the Court of Appeal seems to be inconsistent with case law from the ECHR. In 2013, (after the case of the tram driver) the ECHR ruled that the United Kingdom national court gave too much weight to the interest of British Airways in having uniformity in its company uniforms over the employee's interest in expressing her faith by wearing a visible cross.³

The difference in this case was that British Airways had previously been able to adjust its

company uniforms to allow the employee to wear her cross. Therefore, the ECHR considered that the previous prohibition was not of crucial importance for the employer.

From this case and other case law we may also conclude that an employer, who (strictly) upholds company rules on outward appearance, will have a stronger legal position than an employer who decides to impose (existing) rules at will.

Conclusion

Based on case law, we are able to identify several circumstances that may provide an employer with a stronger legal position, should it wish to impose rules regarding its employees' outward appearance.

First, it is important for an employer to have company rules in place with regard to the physical appearance of its employees. These rules should be applied consistently and not at will.

Employers whose employees have frequent face-to-face customer contact usually have a relevant

interest in imposing rules on outward appearance, such as cabin crew. The same applies for employers whose employees have a public function, such as police officers, and employers whose employees perform work during which a certain physical appearance may be a safety hazard, such as tram drivers.

The employer will also have a stronger position in situations where employees just wish to express their individuality with their appearance and their appearance is not a way to express their religious beliefs or ideological views, as in the cabin crew case.

Notes

1. Amsterdam Court of Appeal, ECLI:NL:GHAMS:2010:BM7410 (*employee v GVB*).
2. The closing date for this article was before the verdict of the European Court on 14 March 2017 (case C-157/15). The authors were therefore unable to take this decision into consideration.
3. *Eweida v UK* (2013) ECHR