

Tattoos in the workplace



A recent story carried by many news outlets has put the spotlight on tattoos in the workplace. *Chontelle McGoldrick*, a 21 year old woman applied for a job with Qantas and Emirates. Her application was rejected because of a small tattoo about 2cm across on her ankle. She was told that if she had the tattoo removed she would be given the job.

Not hiring an applicant because of a tattoo or piercing

Employers can apply their own criteria when deciding not to hire a candidate provided that they do not refuse to hire because of a “protected attribute”.

It is usually lawful to decide not to hire for any criteria that are not protected attributes – for example, experience, qualifications and even physical appearance.

Anti-discrimination legislation and the Fair Work Act list some attributes that are protected – such as ethnicity, nationality and religion.

It is unlawful to decide not to hire someone because of a protected attribute.

Sometimes the issues are more complex, however. A tattoo or body piercing may be used for cultural or religious reasons. An inflexible policy against hiring employees with any tattoo or body piercing may have an unlawful consequence of ruling out a higher proportion of persons with particular cultural or religious backgrounds.

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To summarise:

1. Employers should exercise caution before refusing to hire a candidate only because of tattoos or piercings.
2. An Employer that does not want to hire workers who have tattoos or piercings should consider:
 - a. Ensuring it has a reasonable basis for having the requirement
 - b. Ensuring that the job posting clearly states whether or not applicants may have visible tattoos and/or piercings
 - c. Ensuring that the criteria are consistently applied to all candidates; and
 - d. Discussing with the applicant whether he/she is willing to make accommodations, for example, by removing piercings whilst at work or having their tattoos surgically removed.

Firing an employee because of a tattoo or piercing

When a decision is being made about terminating an employee it is also important to be mindful of the “unfair dismissal” laws. A dismissal will be “unfair” if it is “harsh, unjust or unreasonable”.

A dismissal of an employee due to a tattoo or piercing will not always be unfair.

In *Woolworths Ltd v Brown* an employee was dismissed because of his failure to comply with a request by the employer to remove an eyebrow piercing. Woolworth had a policy which prohibited all jewellery except for ear sleepers. The employee instead covered it with a band aid. The Fair Work Commission accepted the employer’s argument on appeal that the policy and direction were reasonable and justified because:

- the employer had a valid business reason to require its employees to present in a certain way when dealing with the public; and
- the employee worked in the deli section and the piercing or the band aid may fall into food and cause contamination.

This case provides some indication of when a tattoo or piercing may be a valid reason to dismiss an employee.

Generally, it will be necessary to show:

1. That there’s a policy prohibiting the employee from showing tattoos or piercings.
2. That the employee has a legal obligation to comply with the policy. Usually this will be created by their employment agreement or enterprise agreement.
3. That the employee knew about the policy.
4. That the policy is “reasonable” and “rationally related” to the employer’s business.
5. That the employee’s breach of the policy was “sufficient to justify dismissal”.

The fact that an employee breaches a policy by having a tattoo or piercing done won’t usually be enough to justify dismissal on its own. An employer must also show that there is a good reason for having the policy and that the breach of the policy is of a serious enough nature that the dismissal is justified. This may depend on, for example, whether the employee has a customer facing role, whether there is a business reason for requiring the absence of tattoos/piercings, and whether there are health and safety concerns, among other reasons. The employer must also follow a process that gives the employee fair opportunity to improve.

Firing or not hiring because of tattoos can be a legal and emotional minefield and we recommend caution in this area. This article is a guide only and you should seek legal advice early

McKays legal team can assist both employers and employees. Our employment lawyers have the experience to guide you through the complexities of discrimination and employment law, and please contact us:

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