

The use of other situation as a protected characteristic in the Equal Treatment Authority's application of the law

EBH Booklets 3

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Budapest
2017

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Published by Equal Treatment Authority
1013 Budapest, Krisztina krt. 39/B, Hungary

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Illustrations: flickr.com, pixabay.com

Press: Pauker Holding Kft.

HU ISSN 2498-5732

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Egyenlő Bánásmód Hatóság
Equal Treatment Authority



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THE USE OF OTHER SITUATION AS A PROTECTED CHARACTERISTIC IN THE EQUAL TREATMENT AUTHORITY'S APPLICATION OF THE LAW

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Introduction

In 2015, the tenth year since its founding, the Equal Treatment Authority decided to create a series of publications on issues that are of interest to the wider public. The first in the series of Equal Treatment Authority Booklets was published on the subject of workplace harassment and the second addressed the issue of harassment in school. The booklets in the series are available on the Authority's website.

One of the most frequently arising issues in the Authority's procedures is the question of how to interpret the concept of „other situation, characteristic or feature” in Section 8 (t) of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities. That is why we decided to devote the present publication to a discussion of the concept of other situation and its appearance and interpretation in the Authority's application of the law.

Though our previous publications have discussed the concept of discrimination and the Authority's operations, before turning to the topic of this booklet, we will briefly review these important concepts again.

1. About the Authority

The Equal Treatment Authority (Egyenlő Bánásmód Hatóság (EBH), hereinafter referred to as the Authority) is responsible for monitoring the implementation of the principle of equal treatment, and its jurisdiction extends across Hungary. The Authority is an independent and autonomous administrative body, subject only to the laws. It is not subject to instructions regarding its functions, and it discharges its responsibilities separately from other bodies and free of outside influence. Its responsibilities must be set out in law. The President of the Equal Treatment Authority is nominated by the Prime Minister and appointed by the President of the Republic for a term of nine years.

The Authority's first and main responsibility is to investigate complaints and reports filed concerning cases involving alleged discrimination. The Authority conducts its investigations based on the rules governing public administration procedures, and its work is helped by a nationwide network of equal treatment consultants.

The legal framework for the activities of the Equal Treatment Authority is set out in Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (hereinafter referred to as the Ebtv following the Hungarian abbreviation).

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2. The concept of discrimination in the Authority's procedure

We refer to violations of the principle of equal treatment as discrimination. According to the law, the principle of equal treatment is violated and discrimination is realised if someone suffers a disadvantage as a result of a so-called protected characteristic listed in the law.

3. What we call protected characteristics

The law holds out the possibility of legal remedies in situations when someone suffers discrimination in connection with a protected characteristic. The protected characteristics are the characteristics and features enumerated in the Ebktv. The law considers discrimination on the basis of these characteristics unlawful because it runs afoul of the principle of equal treatment.

The protected characteristics listed in the Ebktv are the following:

- a) gender,
- b) race,
- c) skin colour,
- d) nationality,
- e) belonging to a national or ethnic minority,
- f) mother tongue,
- g) disability,
- h) health condition,
- i) religious or ideological conviction,
- j) political or other opinion,
- k) family status,
- l) motherhood (pregnancy) or fatherhood,
- m) sexual orientation,
- n) gender identity,
- o) age,
- p) social origins,
- q) financial situation,
- r) limited term or part-time duration of employment or other form of work contract,
- s) membership in a trade union,
- t) other situation, characteristic or attributes.

As is apparent, the Ebktv tends to extend protection to characteristics that are typically innate, permanent, and which either cannot be changed by the individual or are difficult to change for him/her. In line with international practice, the characteristics protected by the Ebktv tend to be those that pertain to an essential feature of human personality; that may serve as the basis of group formation; that may be used as a basis of prejudice; and which are associated with some type of underprivileged situation.

Other situation as a protected characteristic

The enumeration of protected characteristics in the law is open-ended, the last one mentioned is „other situation, characteristic or feature“ in Section 8 (t). This does not imply, however, that the law affords protection based on any characteristic or situation that might conceivably apply to an individual, for that would render the regulation meaningless. The range of characteristics and situations protected under this concept must be similar to the explicitly listed characteristics in the law.

4. Historical overview of the interpretation of other situation

Since the lawmaker did not define the concept of other situation, it was left up to the institutions applying the law to sketch the contours of this concept. Looking back at the Authority's history over the decade that has passed since it was launched, it must be pointed out that in its early years it tended to construe the concept of other situation much more expansively than it does today. In the early years, the Authority's decisions did not explain why it recognised as a protected characteristic a given situation or characteristic that was not expressly designated as such in the Ebktv. During this early period, the Authority often tended to make a determination that discrimination had occurred in cases in which the complainant was subject to grossly unfair or unlawful treatment due to some characteristic or situation that applied to him/her, and it did so without examining specifically whether the given situation or characteristic underlying the unfavourable treatment that the complainant had been subjected to was, in terms of its character, similar to the protected characteristics explicitly protected by the Ebktv. The so-called Advisory Board, which was made up of legal experts with expertise in the given legal area and used to operate alongside the Authority to help the latter in its application of the law, issued a Position Paper in 2010 concerning the definition of the concept of other situation.

In the following, we cite a non-exhaustive selection of passages from the Advisory Board Position Paper that are frequently referenced in the Authority's decisions.

The Advisory Board Position Paper No. 288/2/2010 (IV.9) on the definition of other situation (hereinafter referred to as Advisory Board Position Paper)

„Based on Act CXXV of 2003 on equal treatment and the promotion of equal opportunities (abbreviated as Ebktv in Hungarian), persons who are in the territory of the Republic of Hungary are entitled to protections from violations of the principle of equal treatment if the infringement (disadvantage) affecting them is connected to a characteristic specified in Section 8 of the Ebktv. The evidentiary rules laid down in Section 19 of the Ebktv, which are used in procedures investigating alleged instances

of discrimination, apply to petitioners who have a characteristic enumerated in Section 8. Persons without such a characteristic can use other legal procedures to assert their rights against adverse treatment."

„Since by defining the protected characteristics in its Section 8 the Ebktv has already performed an expansive incorporation of constitutional and international legal norms, the range of characteristics, particular features and life situations that qualify as other situations must be construed narrowly. A broad interpretation of this provision would result in an undue expansion of the favourable evidentiary rules, which would contravene the Ebktv’s objective."

„The concept of other situation changes dynamically, but its definitional core is that the existence of the given situation must be objectively verifiable; that it must be able to serve as a basis for the formation of homogeneous groups; that it must lend itself as a basis for the formation of stereotypes; and that it must be sustained by social prejudice. The essence of the legal protection against discrimination with respect to cases involving a protected other situation is that the disadvantage suffered by the petitioner is not primarily a result of his or her own behaviour but of his or her affiliation with the given group."

„The constrictive interpretation ensures that the procedure does not lead to a determination that the principle of equal treatment was violated in cases in which the legal dispute concerns a general violation of human dignity, a misuse or an abuse of rights."

„...in the jurisprudence of the Hungarian Constitutional Court a characteristic that is not an essential feature of human personality does not fall under the scope of the concept of other situation. There is only one instance among the characteristics specifically mentioned in the Ebktv’s Section 8 when the (European Community) legislator sought to protect a non-essential characteristic: that is the type of employment contract."

„...the concept of other situation must be construed narrowly, otherwise there is a risk that the protection provided by the specifically listed protected characteristics will become devalued and the Authority will expand its activities beyond the scope specified by the Ebktv. The other situation cannot be identical with the disadvantage suffered, in other words the difference between [the petitioner/s] and the person/group in a comparative situation cannot be merely that one has suffered a disadvantage while the other has not."

„In the case of discrimination concerning an essential feature of human personality, the Authority must launch proceedings even if the underlying protected characteristic is not expressly mentioned in the Ebktv’s Section 8. The Authority has no margin

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of appreciation in instances when the characteristic in question is protected by the Constitution or by an international agreement, or if it serves as a basis for acts of preferential treatment (by the state)."

„The definitional core of other situation: The concept of other situation was included in the Ebktv by necessity, for society continuously changes and evolves. The inclusion of a flexible category among the protected characteristics facilitates the application of the law. This category serves the protection of persons/groups that the lawmaker could not yet consider at the time when the Ebktv was drafted.

It is precisely on account of the dynamic changes in society that other situation cannot be precisely defined. However, its definitional core is that it is objectively verifiable; that it may serve as the basis for the formation of homogeneous groups; that it must be potentially suitable for serving as the basis of a stereotype; and that it can serve as a basis of prejudice.

Correspondingly, as a general rule, other situation as a protected characteristic cannot be applied to a singular characteristic that is not typical of anyone else and applies only to one person. In the case of other situation, too, the essence of the legal protection against discrimination stems from the fact that the disadvantage suffered by the petitioner is not primarily the result of his or her own behaviour but of his or her affiliation with a group."

„It follows from the preamble of the Ebktv and the relevant community legislation that groups which are underprivileged in society at large are at the centre of the protections afforded by the law, and this logic also extends to the interpretation of the concept of other situation. At the same time, however, it is important to point out that in some exceptional cases a certain characteristic or group feature that can only be construed as such at the regional or local level may also serve as the basis for discrimination, even if the same characteristic does not qualify as an indication of underprivileged status in society at large."

„The characteristic associated with the disadvantage suffered must therefore be examined at several levels. A disadvantage affecting persons who are affiliated with a group that is not specifically mentioned in the Ebktv but is commonly known to be in a socially underprivileged situation is likely to fall within the scope of the concept of other situation as it is laid down in the Ebktv."

„Generally, the concept of other situation does not apply if the disadvantage suffered is associated with a petitioner's individual circumstances – if it is based on the employer's personal antipathy, for example, or on a difference in opinion or personal conflict between a manager and a subordinated employee. The latter are special situations that are similar to discrimination and primarily occur in the areas of labour law, public education or social law, and they all involve hierarchical relations, dependence and vulnerability. These dependencies render the disadvantage suffered especially grievous. However, they do not primarily stem from social

processes, prejudice or discrimination, but from the hierarchical arrangement of the given legal relationship. Hence, insofar as the disadvantage at hand does not result from a comparatively different treatment of two distinct groups in society but is a result of individual circumstances, then the violation that is realised is not a violation of the principle of equal treatment in connection with a protected other situation but another type of infringement – this may be a violation of human dignity, the superior's misuse of its rights as an employer, an abuse of rights, etc."

„According to the Ebktv's Section 19, a reversed (shared) burden of proof applies in procedures initiated in connection with the alleged violation of the principle of equal treatment, which includes procedures conducted by the Equal Treatment Authority. This type of evidentiary procedure makes a procedure before the Equal Treatment Authority attractive also for aggrieved parties who have experienced a general violation of human dignity, some form of misuse or abuse of rights, or who are the victims of arbitrary decisions (e.g. by their employer)."

In practice, a continuously growing share of complaints filed with the Authority concern alleged violations of the law in which the petitioners do not designate a specific protected characteristic from among those listed in subsections a) through s) of the Ebktv's Section 8. Though it is generally commendable that the law does not limit protection from discrimination to a few characteristics, the open-endedness of the list of protected characteristics raises serious challenges in the application of the law. This openness is namely liable to blur the distinctions between behaviours and actions that run afoul of the prohibition of discrimination on the one hand and those that violate other legal provisions on the other, as the table below illustrates in the context of employment relationships."

„It is important to point out in this context that the reference to the protection of political or other opinions in the Ebktv's Section 8 (j) does not extend to specific opinions on a given issue, but to manifestations of an ideological conviction that is systemic, has a longstanding history and broadly satisfies a test relating to the essence of this characteristic. In other cases – for example when a difference of opinion arises between the employer and the employee in the assessment of a specific workplace issue – then the employer's alleged abuse of rights may be remedied by filing a labour lawsuit or a civil lawsuit."

„There are countless situations in the labour market when there is a deterioration in the relationship between a workplace superior who has the power to decide on the termination of an employee's work contract and his/her subordinated colleague. The underlying reasons can be varied, but frequent causes include personal antipathy, local conflicts, previous rivalry (for instance competing applications for a management position), or the employee's legal claims (lawsuits) against the employer which are unrelated to discrimination. In these cases, the measures taken by the manager cause

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disadvantage to the employee, but the underlying reason is rooted in the damaged relationship between them. Even though in such cases employees who suffer a disadvantage often turn to the Authority citing discrimination, the reasons that lead to the deterioration of the relationship between the parties cannot qualify as protected characteristics within the scope of the concept of other situation because, in line with the principles and considerations enunciated above, these characteristics are not essential features of human personality nor at they group-specific features."

5. The Authority's application of the law

Since the publication of the previously cited Position Paper, the Authority's application of the law has consistently taken the latter into consideration in its interpretation of the concept of other situation as a protected characteristic. Several judicial decisions have affirmed the Authority's approach in this context.

Since the Position Paper was issued, the Authority has adopted a constrictive interpretation of the concept of other situation. It typically only accepts situations and characteristics that satisfy the criteria laid out in the Position Paper as protected characteristics. The protection offered by Section 8 t) of the Ebktv must therefore be an essential feature of human personality; it must be objectively verifiable; it must be able to serve as a basis for the formation of homogeneous groups; it must lend itself as the basis for the formation of stereotypes; it must serve as a basis of social prejudice; and it must be associated with an underprivileged situation. Apart from situations where the aforementioned criteria apply, the Authority only recognises specific situations and characteristics as protected other characteristics when certain statutory provisions so require (e.g.: an individual's status as a temporary agency worker).

We must also point out in this context that the Authority's application of the law differs from the jurisprudence of the European Court of Human Rights (ECHR). In some situations the ECHR has recognised certain characteristics and situations as other situations that qualify as the basis of discrimination (e.g. military rank) that would likely not qualify as such in the Authority's more constrictive interpretation of the concept.

Even though a coherent practice of sorts has emerged on the basis of which the Authority typically recognises certain characteristics and situations as protected characteristics within the scope of the concept of protected other situation, one can nevertheless not assert with general effect about any type of situation or characteristic that the Authority will definitely accept it as a protected characteristic within the scope of other situation, nor that it will with absolutely certainty reject a claim filed with reference to this concept. In some cases, for example, in light of the specific circumstances that apply to the given case a criminal record will satisfy the criteria defined in the Advisory Board Position Paper and will hence be recognised as a protected other situation. At the same time, however, this does not imply that anyone who commits a criminal offence will automatically enjoy the special protections afforded by the Ebktv. Instead, this determination must be made specifically within the context of each case, and it must involve

an assessment of whether the situation, the circumstances and the characteristic as presented by the complainant satisfy the criteria laid out in the Advisory Board Position Paper, as well as an assessment of whether the mechanical and all too rigid application of these criteria would result in an overly restrictive interpretation of the concept in the case at hand.

In chapter 5.1 of his 2015 book entitled *The Hungarian Jurisprudence Concerning the Application of the Principle of Equal Treatment in the Area of Labour Law*, Márton Leó Zaccaria notes that „an expansion of the scope of other characteristics – a dynamic adaptation of the concept – could conceivably involve the notion of recognising so-called lifestyle-based characteristics – such as smoking, alcohol consumption, motorcycle riding, tattoos, sharing information on social media – as protected characteristics. However, in addition to the unequivocal prohibition of such an expansive interpretation, it is my assessment that such an interpretation of the aforementioned characteristics is, for the time being, questionable, even when considering the aforementioned international and EU legal acts.”

We emphasise that – in terms of its current application of the law – the Authority does not recognise the abovementioned lifestyle-based characteristics as protected characteristics. The Authority typically does not recognise the practice of a certain occupation, a specific profession or an educational attainment as protected characteristics, either. Nor does it regard physical appearance, styles of clothing or hairstyles, or a given sense of fashion as qualifying in and of themselves as protected characteristics.

6. Some typical examples of changes in the Authority’s application of the law

A typical example worth noting is that while prior to the publication of the Advisory Board Position Paper the Authority tended to view a pending lawsuit between the petitioner and the subject of the complaint as a protected characteristic falling within the scope of the concept of other situation, it no longer did so after the Position Paper came out. There are still some cases among those published on the Authority’s website in which the Authority determined that an infringement had occurred because the institution complained against had treated the complainant unfavourably compared to others because of a series of lawsuits initiated by the petitioner against them (e.g. case EBH/109/2008). Since the publication of the Position Paper, the Authority has consistently rejected this type of complaint for lack of a protected characteristic. Another example worth mentioning is the case in which the workplace superior treated an employee who had filed a complaint unfavourably when compared to other colleagues because the petitioner had previously applied and competed with the superior for the same management position now held by the latter (Case No. 704/2007). Before the Advisory Board Position Paper, the Authority regarded it as a protected characteristic if an employee had previously been a rival of his/her own boss. Since the publication of the Position Paper, the Authority has consistently

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rejected this type of complaint citing the absence of a protected characteristic. Though this does not rule out the possibility that another type of infringement applies in such cases – typically a labour law or personality rights infringement – but these does not qualify as discrimination.

The Authority's application of the law has also markedly changed with respect to its assessment of an individual's place of residence as a protected characteristic. At this time, the Authority takes a very constrictive view of place of residence as a protected characteristic (cases 1/2007, 419/2007, 807/2008).

7. Judicial practice

The Authority's constrictive interpretation was affirmed on multiple occasions by judicial verdicts. In a decision discussed in more detail below (Kfv. II.37.615/2015./4), Hungary's high court, the Curia, shared the Authority's assessment that even though the list of protected characteristics in the law is not closed because the last one mentioned is „other situation, characteristic or feature”, this does not imply „that the law considers each and every kind of differential treatment of a person or a group based on each and every kind of characteristic or situation to be discrimination. International and domestic jurisprudence alike consider that, as a general rule, the protection afforded under the concept of other

situation can be applied to characteristics that are essential features of human personality; are objectively verifiable; may serve as a basis for the formation of homogeneous groups; may lend themselves to the formation of stereotypes; and may serve as a basis for prejudice. The concept of other situation must be construed narrowly because a failure to do so would result in the risk of devaluing the protections expressly provided by the law. Both the Preamble of the Ebktv and the EU legislation underlying the law suggest that socially underprivileged groups ought to be at the centre of the protections [offered by the law], including the interpretation of other situation.”

In reviewing the judicial practice, it is worth noting the Curia’s labour law decision of principle 5/2012 (EBH 2012. M.5.) argues that in order to qualify as a protected other situation, the underlying characteristic which must be an essential feature of an individual’s personality, in other words a feature that is incorporated into his/her personality. In the specific case, the group of employees who were subject to a disadvantage worked at a site operated by the employer in a certain municipality. The decision noted that the fact that „...they worked at the company’s site in the municipality of K, which was subsequently closed, does not qualify as an essential feature of their personality. An essential feature of an individual’s personality may be some type of ability, skill, characteristic, way of expression, habit, etc. At the same time, a situation that defines the geographic location of an individual’s place of work, place of residence, place of leisure, etc., is not a part of his or her personality, and hence does not become an essential component thereof. This is true even if many persons work in the given locality or a certain part thereof. As a result, the fact that the bus drivers whom the plaintiff referred to all used to work in the municipality of K cannot be seen as an essential feature of their personalities ...”

The Curia also addressed the issue in its labour law decision of principle No. 19/2014 (EBH 2014. M.19). In that case, a civil servant cited the unlawfully high job grade level of a colleague (whose mother also worked at the government agency) in asking that his own job grade level be adjusted in accordance with the principle of equal pay for equal work. Referring to the Advisory Board Position Paper, the decision of principle noted that „other situation as a protected characteristic specified in Section 8 (t) cannot be construed expansively. It must apply to specific and essential features of human personality. The plaintiff had failed to indicate any such specific essential feature, and the fact that his colleague’s mother works at the government agency, while his does not, cannot be classified as such a characteristic.”

The Curia’s labour law decision of principle No.22/2014 (EBD 2014. M.22) also touches on the concept of other situation, when it states that „in the case of a personal conflict that has arisen between an employee and his/her superior, the resulting conflict can be assessed as falling within the scope of a misuse of the employer’s rights. The employee’s prior management experience does not qualify as a protected other characteristic in the course of assessing whether the principle of equal treatment has been violated. ...The protected other characteristic designated in Ebktv’s Section 8 (t) must be related directly to the essence of the individual’s personality, it must be a characteristic that is associated with the person.”

Some typical areas within the scope of other situation

8. Citizenship

The Authority typically views citizenship as a protected characteristic falling within the scope of protected other situation (cases 1408/2006, 56/2007, 1408/2007, 178/2009, 713/20010, 1054/2010 and 317/2012). Though citizenship is not expressly listed among the protected characteristics in the Ebktv, in many respects it is similar to the characteristics that are explicitly mentioned, while at the same time it also largely satisfies the criteria established by the Advisory Board Position Paper. Moreover, the acceptance of citizenship as a protected characteristic also has a broad basis in international law. The Treaty establishing the European Community (EC Treaty), for example, stipulates in its Article 12 that „[w]ithin the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”

9. Homelessness

Homelessness, or a person's lack of a registered home address, is also typically considered a protected characteristic in the Authority's case-law (Case Nos. 13/2007 and 559/2008). These situations usually satisfy the criteria set out in the Advisory Board Position Paper, for they are objectively verifiable; they may serve as a basis for the formation of homogeneous groups; they give rise to social prejudice; they are associated with a socially underprivileged situation; and they have an essential impact on an individual's personality.

10. Place of residence

A frequently recurring issue in the cases investigated by the Authority is the question when a place of residence can be regarded as a protected characteristic within the scope of other situation. In previous years, the Authority had often accepted place of residence as a protected characteristic (Case Nos. 1/2007, 419/2007, 807/2008), but these days it takes a more constrictive approach towards the concept of place of residence. The municipality, county, neighbourhood, etc., in which a person lives or works cannot in and of itself be regarded as a protected characteristic, nor can the fact that someone does not reside in a given municipality but somewhere else. This interpretation of the concept is also supported by the Curia's previously cited decision No. EBH 2012. M.5. At the same time, however, that does not preclude the Authority from looking at a place of residence as a protected characteristic in cases when this

satisfies the criteria set out in the Advisory Board Position Paper, in other words when it may serve as a basis for group formation, when it can serve as the grounds for prejudice, etc. In such cases, any of the protected characteristics expressly mentioned in the Ebktv can also serve as the grounds for launching proceedings (e.g. ethnicity, financial situation), and as a result the Authority's proceedings in such cases are not based on a protected other situation but rather on a protected characteristic specifically named in the law.

11. Temporary agency worker

Under the heading „The principle of equal treatment“, the provisions in Act I of 2012 on the Labour Code (hereinafter referred to as Mt following the Hungarian abbreviation) governing the specialised rules applicable to the borrowing of temporary workers (Chapter XVI of the Mt) stipulate that for the duration of their temporary employment, temporary agency workers must be provided with the same working and employment conditions as those offered to regular employees working for the borrowing employer. This must be respected especially with regard to the amount and protection of the salary and of other non-pay benefits (Section 219 (1) of the Mt). Based on the above cited provisions in the Mt, the Authority regards a status as a temporary agency worker as a protected characteristic within the scope of the concept of protected other situation, regardless of whether this characteristic otherwise satisfies the set of criteria laid out in the Advisory Board Position Paper. (Let us note here that Section 8 of the Ebktv, which enumerates the protected characteristics, already includes a characteristic that is exceptional when compared to the other protected characteristics listed in the law. This protected characteristic is part-time or fixed-term employment (Section 8 (r)), which was included among the protected characteristics as a result of an EU directive). In cases involving the petitioner's status as a temporary agency worker, the Authority investigates the responsibility of both, the temporary work agency and the borrowing employer. Typically, these procedures tend to result in decisions holding that the principle of equal treatment was violated because even if there was no pronounced difference between the respective wages paid to temporary workers and the employer's own employees, they were treated differently in terms of their non-pay benefits (Case Nos. 449/2013 and 173/2015).

12. Special needs education

With respect to children, the Authority generally recognises as a protected characteristic the need for special treatment in education or for special needs education as determined by the competent expert committee. In such cases, the Authority typically conducts the proceedings with reference to the protected characteristics of disability or health condition, which are expressly listed in the law, since the need for special treatment or special needs education frequently overlaps with these characteristics. In cases, however, in which the need for special treatment or special education does not coincide with the petitioner's disability or health condition, the Authority qualifies the underlying protected characteristic as an other situation (Case Nos. 554/2012, 554/2012, 133/2015).

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Case-law

In the following, we will present some typical examples from the Authority's case-law in the past few years. In proceedings launched to investigate violations of the principle of equal treatment in cases when an other situation was cited as a protected characteristic, the Authority made far fewer determinations that the principle of equal treatment had been violated than in earlier years. Typically, these cases were concluded by rejecting the petitions in question.

13. The sibling of the investigative reporter was harassed

(Decision rejecting the petition)

The petitioner complained by way of a legal representative that an institution of higher education had harassed her in connection with a protected other situation or characteristic that applied to her. By so doing, thus the petitioner, the educational institution had violated the principle of equal treatment.

The submission revealed that the petitioner lived in one of the colleges attached to the educational institution. The college was visited by two investigative reporters working for an online newspaper, one whom was the petitioner's sibling. The journalists received information from several students in the college, including the petitioner, which they used in writing a very critical article. In his capacity as a journalist, the petitioner's sibling began



Source: flickr.com

a correspondence with the management of the college about the problems they had observed while visiting the college. The management asked the petitioner to intervene and to try to stop the article from being written or published. The petitioner had to participate in various meetings where several people blamed her for the article. They emphasised that the public dissemination or publication of the article could have severe adverse consequences for the institution and the noble goals it aspires to realise. All these made the petitioner feel highly uncomfortable. She viewed these actions as harassment as defined in the Ebktv, and she assessed that they were causally linked to a protected other situation applicable to her within the meaning of the Ebktv's Section 8 (t).

According to the Ebktv, harassment is realised when a given person suffers from a behaviour that violates his or her human dignity and which concerns one of the protected characteristics enumerated in the Ebktv. In other words, a protected characteristic is an essential element of the offence of harassment, and it is incumbent on the petitioner to specify a protected characteristic and to render probable that it applies to him/her.

As a protected characteristic, the petitioner invoked an other situation or characteristic listed in Section 8 (t) of the Ebktv and argued that she had suffered the grievance in question because her sibling had criticised the college in the article impugned by the college management.

The Authority first investigated whether the factors referred to as the reasons underlying the aggrieved actions match the criteria of other situation as laid down in Section 8 (t) of the Ebktv, and whether the petitioner is entitled to the legally defined protections in that context.

The Authority's position was that the circumstances outlined by the petitioner – namely that the petitioner's sibling had written a critical article about the college – do not satisfy the criteria set out in the Advisory Board Position Paper. The circumstances are only characteristic of the petitioner, they do not lend themselves to the formation of homogeneous groups; they do not serve as a basis of social prejudices; and they cannot be regarded as essential feature of an individual's personality. In other words they are decidedly associated with individual circumstances. In light of the aforementioned, they do not fall into the range of other situations as specified in the Ebktv. Furthermore, the article in question and the critical comments therein also had no bearing on any of the protected characteristics. According to the law, harassment cannot be realised in the absence of a protected characteristic, which is why the Authority rejected the petition and did not investigate the other elements of the case.

14. The police officer was not hired as a driver because he lived in the municipality of „X“

(Decision rejecting the petition)

The petitioner applied for a position as a driver at a company. When he informed the company's managing director that he is a resident of the municipality of „X“, and that he used to be a policeman and a soldier, the managing director rejected his application. He invoked that he previously employed someone who was a former policeman and resided

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in the municipality of „X“, and there had been problems with that employee. The petitioner complained that he had been subject to discrimination in connection with a protected other situation that applied to him. As a protected characteristic, the petitioner referred to an other situation as laid down in Section 8 (t) of the Ebktv, specifically citing his previous service as a soldier and a policeman, as well as his residence in the municipality of „X“, which is his hometown.

As in every case when the petitioner cites his or her other situation or characteristic, the Authority first investigated whether the circumstances indicated by the petitioner can be construed as a protected characteristic within the scope of Section 8 (t) of the Ebktv – also with a view towards the relevant opinion in the Advisory Board Position Paper.

According to the Advisory Board Position Paper, the definitional core of other situation as defined in the law is, inter alia, that it must be able to serve as the basis of homogeneous group formation and stereotypes; that it must be sustained by social prejudices; that, as a general rule, it must related to an essential feature of the individual's personality; and that the protection it extends is focused on socially underprivileged groups.

The personal sympathies or antipathies of a given employer or his/her preferences based on individual value judgments and experiences concerning persons with certain characteristics or of a given background do not in and of themselves give rise to social prejudice and do not result in societal discrimination.

It is widely known that no social prejudice or underprivileged status attaches to a personal history of having worked as a police officer or as a soldier, while at the same time these characteristics also cannot be viewed as essential features of an individual's personality.

That is why they cannot be construed as falling under the concept of other situation in Section 8 (t) of the Ebktv. The Authority rejected the petition.

15. The government agency failed to address his case because of his sense of truth

(Decision rejecting the petition)

The petitioner et al. complained against a government agency arguing that an application they had submitted was not handled within the legal deadline. They assessed that they had been discriminated against. They asked for the termination of the unlawful situation and for effective legal remedies, and they also requested that the Authority file an official request to obtain their previous submissions to the government agency. The Authority informed the complainants in writing that they had failed to indicate a protected characteristic and that as a result their petition cannot be investigated. Subsequently, the petitioners submitted a new petition in which they complained that their case had not been decided in the proper official form by the Authority. As a protected characteristic, they referred to the Ebktv's Article 8 (t) (other situation). They argued that their situation stems from their status as „direct stakeholders, since as creditors they are party to several

liquidation procedures undertaken through several companies, and they are also involved in this case in their quality as public interest petitioners/clients.”

The Authority rejected the petition without holding a hearing because it determined that, according to the Advisory Board Position Paper, the petitioners did not have a protected characteristic.

A lawyer for one of the petitioners appealed the Authority’s decision in the Budapest Court of Public Administration and Labour. He invoked that his sense of truth, and his desire that „the untruth of things considered to be untrue be revealed ... [and that] truth considered to be the truth be stated as such” are an essential feature of his personality. The court rejected the appeal in its decision No. 20.K.31.996/2014/15. In its decision No. Kfv.III.37.615/2015./4, the Curia, Hungary’s high court, upheld the effect of the Budapest court’s legally binding decision. Among other things, it explained that the plaintiff had designated his „sense of truth” as his protected characteristic („that the untruth of things considered to be untrue be revealed, while truth considered to be the truth be stated as such”). Whether someone has a sense of truth, and how keen their sense of truth is, is a matter of individual assessment and is not under any circumstances an objective, factual and rationally verifiable characteristic (feature or situation) that is liable to serve as a basis for group formation or as the basis for prejudice, and can therefore not be regarded as a protected characteristic in the sense that the Ebktv construes the term.

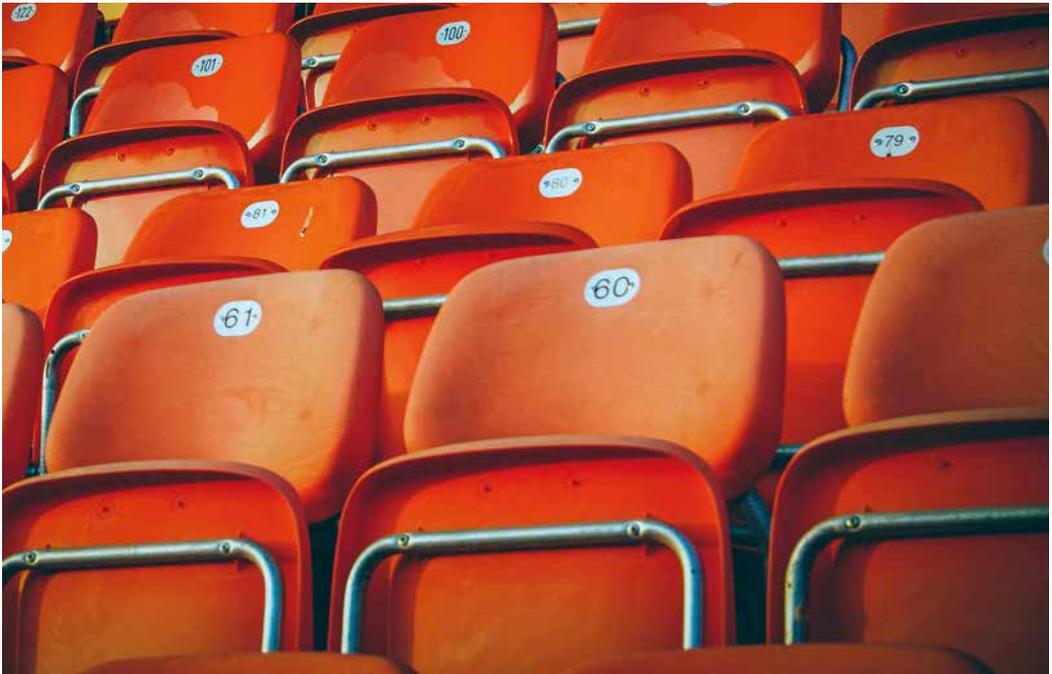
The Curia found that the plaintiff’s position arguing that the Authority and the lower instance court had failed to fully investigate the facts of the case was unfounded. With regard to this claim, the Curia pointed out that the Equal Treatment Authority is limited to investigating violations of the principle of equal treatment and lacks the jurisdiction to investigate other infringements. In the plaintiff’s case it was apparent that the characteristic invoked (sense of truth) cannot be regarded as a protected characteristic in the sense that the law defines the concept. When there is no protected characteristic, discrimination cannot occur. Once the Authority made this determination it did not have to proceed any further in investigating the facts of the case and in examining other aspects thereof.

16. The fans of a team are identified by a palm vein scanner

(Decision rejecting the petition)

Some fans of a football team complained that the only way the sports facility designated in the complaint allowed them to watch their football team in the sector of the stadium designated for fans of the team was if they were in possession of a so-called „fan card.” To obtain the card, they needed to allow the performance of a so-called palm vein scan – the collection of biometric data from the palm’s vein pattern. When entering a sports event, they have to identify themselves with a palm vein scan in addition to presenting the fan card. In light of the fact that those seated in the guest sector reserved for the fans of the opposing teams were allowed to attend the same events without having to identify themselves with a vein scanner, the petitioners assessed that the company organising the

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Source: flickr.com

sports events in question was discriminating against them. In support of their petition, the petitioners presented fan cards in their names and tickets and passes for sector „C“ in the stadium.

In its decision rendered in this case, the Authority held that the enumeration of protected characteristics in Section 8 of the Ebktv does not include the quality of being a „fan.“ Hence, the first issue that the Authority had to weigh was whether being a fan – in other words the desire to see a specific sports organisation perform successfully, the preference for visiting that team’s games and cheering its players – qualified as a protected characteristic. The Authority juxtaposed this characteristic with the criteria defined in the Advisory Board Position Paper. It held that one could not argue that the fans constituted a homogeneous and socially underprivileged group, or that there were prevalent negative prejudices in society against the fans of the team in question. Furthermore, the individual’s everyday existence is clearly not influenced by his or her choice of team to root for. It is based on his/her individual decision and is not an unalterable feature; the existence of this preference is not essential and it typically has no externally visible features.

In its decision, the Authority’s also explained that treating preferences that are similar to being a „fan“, i.e. various preferences or pastimes involving tastes, culture or leisure – such as for example being a collector, or having a passion for a style of music or band – as protected characteristics would deprive the range of potential discrimination investigations of any reasonable boundaries, and would devalue the protections offered by the

protected characteristics enumerated in the law. As the Advisory Board Position Paper also points out, the listing of protected characteristics in the Ebktv is not open-ended because of a desire to extend the scope of the law to all types of adverse treatment or violations involving all situations, characteristics or features. Doing so would render any reference to protected characteristics superfluous. The list in the law is open-ended because ongoing social changes necessitate that protections be extended to – disadvantaged – groups that the legislator was not yet able to consider at the time when the law was enacted. In its decision IV/988-8/2015, the Constitutional Court also adopted this line of reasoning. This decision argued that the reference to „a distinction based on other situations” in the ban on discrimination laid down in Article XV (2) of the Fundamental Law „endows the Constitutional Court with the possibility to react to ongoing changes in society and to define what the vulnerable groups in society are, in other words to identify those groups whose members may be considered vulnerable, excluded, or subject to ongoing and undue disadvantages.” In the Authority’s assessment, the fans of the football team in question are not subject to social vulnerability or exclusion, they do not have an underprivileged social status, and hence the recognition as a protected characteristic of their quality as fans is unwarranted.

In its decision, the Authority held that a protected characteristic did not apply and – partly for this reason – it rejected the petition.

The petitioners appealed the Authority’s decision in court, but the Budapest Court of Public Administration and Labour shared the Authority’s assessment and rejected the plaintiff’s action. In its judgment, the court explained that „in addition to the protected characteristics enumerated in Section 8 (a)-(r) of the Ebktv, Subsection (t) of said section makes clear that ... the range of protected characteristics cannot be comprehensively pre-defined. Hence, it is obvious based on Subsection (t) that the foregoing list is illustrative. By formulating Subsection (t) in a general form, the legislator gave the [public bodies] applying the law the opportunity to weigh the specific situation as well as the discrimination in question to identify characteristics that the legislator would also have identified as protected characteristics. Nevertheless, the margin of appreciation in such situations is not unlimited. [...] Based on the above, the status of the plaintiffs as fans cannot be regarded as a quality that is an essential feature of their personalities, even though it is indisputably a factor underlying group formation, and even if the court accepts that for the plaintiffs it is a key individual characteristic. As previously explained, it is not connected to an ideological system that impacts numerous other aspects of life, which is what stops it from qualifying as a characteristic that is an essential feature of a personality. Correspondingly, the respondent was right in its assessment that the quality of being a fan is based on an individual decision, is not an unalterable feature, and its existence is not unavoidable, nor is it typically linked to any obvious external marks. Nor can the court identify a social prejudice that attaches to a person’s quality of being a fan, which marks a clear line of demarcation between characteristics that are protected and those that do not [enjoy the Ebktv’s] protection.” In its judgment, the court also referred to the Curia’s decision No. Kfv. II.37.615/2015/4, which we also cited several times in the present booklet.

17. They wanted to fill the position with a local resident

(Decision rejecting the petition)

On 18 January 2016 the petitioner applied for a job advertised by the subject of the procedure. The position advertised was for the performance of team leader responsibilities at the outdoor pool of the municipality of B. Based on the vacancy notice attached to the petition, a secondary school diploma was a requirement for the position advertised, while the advertisement also stated that a residency in the municipality was considered one of the advantageous but non-essential selection criteria.

The petitioner lived 5 kilometres from the municipality of B, in another municipality. His job application was rejected because the subject of the procedure wished to fill the position with an applicant whose permanent residence is in the same municipality. The petitioner complained that his application had been rejected because he did not reside in the municipality of B. He specified his other (i.e. protected) situation as the lack of a residency in the municipality of B.

The list of protected characteristics in Section 8 of the Ebktv does not refer to place of residence, nor to the absence of residence in a given municipality. Hence, for the Authority the primary issue to decide in this case was whether the circumstance that the petitioner was not a resident of the municipality of B can be construed as a protected characteristic under Section 8 (t) of the Ebktv.

In its decision, the Authority pointed out that its consistent practice has been to use Decision No. 288/2/2010. (IV.9.) TT of the Equal Treat Advisory Board (hereinafter referred to as the Advisory Board Position Paper) as its starting point in cases when the situation, characteristic or feature cited by the petitioner cannot be clearly classified as one of the characteristics expressly protected by the Ebktv.

According to the Advisory Board Position Paper, the concept of other situation must be construed narrowly in light of the broad range of protected characteristics expressly mentioned in the law. This approach serves to prevent determinations that the principle of equal treatment was violated in situations when the issue at hand is an actual or presumed general violation of human dignity, or a misuse or abuse of rights. Furthermore, such a constrictive interpretation also wishes to avert a devaluation of the protections offered in the case of expressly mentioned protected characteristics.

According to the Advisory Board Position Paper, the definitional core of other situation is that its existence must be objectively verifiable; that it must be able to serve as a basis for the formation of homogeneous groups; that it must lend itself as a basis for the formation of stereotypes; that it must be sustained by social prejudice; that the groups at the centre of the protection it extends must be socially underprivileged; and, further, that it – generally – pertains to essential features of human personality.

The Advisory Board Position Paper specifically mentions the place of residence and the issue of geographical distance, and does not rule out the possibility that these may be construed as protected characteristics. When these are invoked as protected characteristics, however, further conditions need to apply which must always be examined if the

petitioner refers to a protected other situation under the law. To wit, the Authority must examine whether the specific situation cited gives rise to a homogeneous group in society that is underprivileged and whether this group is subject to social prejudice.

The Authority's position was that, generally speaking, those who are not residents of a given municipality do not make up a homogeneous group. Persons who reside outside of municipality B are obviously not part of a homogenous group. Nor was it possible to make a determination that there is some sort of uniform prejudice that applies to persons who do not reside in municipality B. An attachment to one's own place of residence, a sense of local patriotism, cannot be regarded as such. The claim that, with respect to their position in society overall, the residents of other municipalities are underprivileged as compared to the residents of municipality B definitely does not obtain. Moreover, the petitioner's place of residence is part of the same Balaton region as the municipality B. The two municipalities are adjacent, which is why one cannot argue that there is a regional difference or even a geographic distance between them that could be construed as the basis for the underprivileged situation of the other municipality. Based on the aforementioned, the circumstance that the petitioner is not a resident of municipality B does not constitute a situation that matches the set of criteria outlined in the Advisory Board Position Paper, and hence it cannot be regarded as a protected other situation specified in the Ebktv Section 8 (t).

In addition to the above, the Supreme Court's decision No. Mfv.I.10.055/2011/3 also held that the circumstances that define the geographical location of an individual's place of residence do not become a part of his or her personality, and hence cannot be regarded as an essential feature of said personality. This decision reaffirms the Authority's position that, in and of itself, a petitioner's place of residence, or lack of residence in a given municipality, does not provide sufficient grounds for a determination that a protected other situation as specified in Section 8 (t) of the Ebktv applies.

Based on the above, the Authority held that the fact that the petitioner is not a resident of the municipality B cannot be considered a protected characteristic, and correspondingly it rejected the petition for lack of a protected characteristic.

18. She failed history because of her blond hair and her parent's actions

(Decision rejecting the petition)

The legal guardian of the underage petitioner argued that a situation which she considered detrimental for the petitioner (she failed history) was linked to the following: her blond hair; her being constantly called upon in class with a disciplinary and educational intent; and the parents actions in standing up for their child. Since these factors are not listed among the protected characteristics expressly mentioned in Section 8 of the Ebktv, the Authority investigated whether they qualify as a protected other situation pursuant to Section 8 (t).

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In its decision in this case, the Authority pointed out that other situation as specified in Section 8 (t) of the Ebktv must be construed narrowly based on the previously cited Advisory Board Position Paper. According to the Position Paper, a protected other situation may be made out to apply if its existence is objectively verifiable; if it can serve as the basis of homogeneous group formation and stereotypes; and if it is focused on socially underprivileged groups. Furthermore, the other situation may not be identical with the grievance itself, that is a characteristic that does not implicate an essential feature of the individual's personality cannot be a protected other characteristic.

Neither the parents' behaviour nor the teacher's methods in calling on the student allow for the conclusion that there is a clearly delineated, homogeneous group in society that has the characteristics described by the petitioners, that there are social prejudices against this group and that this group is in an underprivileged position. Hair colour also does not qualify as such a characteristic.

The Authority therefore found that the circumstances presented by the petitioner's representative do not qualify as protected characteristics under Section 8 (t) of the Ebktv. In the absence of a protected characteristic, the Authority did not examine whether the circumstances invoked by the petitioner are indeed connected to her grievances.

19. She was not accepted to the acting school on account of unique character

(Decision rejecting the petition)

The petitioner participated in an entrance examination for admission to an acting school. She was previously informed that there are no admission requirements concerning the applicants' physical attributes. Following the exam, she was told together with other applicants that they had not been accepted. The two other applicants were rejected because the successful applicants had performed much better at the exam than they had, while the petitioner was rejected because those administering the exam assessed that her character is so unique that it renders her ill-suited for the role of protagonists. In explaining their decision, the examiners did not refer to the petitioner's lack of talent or her lacking suitability for such a career, nor did they argue that they could enrol no more students at the institution for lack of space. The petitioner submitted that she is 175 centimetres high and weighs 55 kilograms, which qualifies as a normal body build based on the relevant body-mass index figure. She has waist length hair and had dressed elegantly for the exam. She argued that the examiners' assessment was subjective. She asked for the Authority to intervene against the subjective manner in which she felt the entrance examination had been conducted, and argued that the members of the faculty should not abuse their right to decide who will be admitted to the applied acting school.

The Authority rejected the petition. Generally, the Ebktv protects characteristics that are essential features of an individual's personality. The situations and characteristics

that legal practice tends to recognise as protected other situations are those that can be objectively verified; that may serve as a basis of group formation; that may serve as the basis of stereotypes; and that can give rise to social prejudice. With respect to other situation as defined in the law, the essence of the legal protection against discrimination also stems from the assessment that a complainant with a protected characteristic suffers a disadvantage that owes not to her individual behaviour but to her affiliation with a given group. Those who do not have a protected characteristic can enforce their claims regarding discriminatory treatment through other types of legal procedures.

In reviewing the petition, the Authority determined that the petitioner had not invoked any of the expressly protected characteristics enumerated in Section 8 of the Ebktv, nor was it possible to construe her petition as indirectly invoking any of these characteristics. She referred to her unique character and her physical appearance as the grounds for the discrimination against her. However, this cannot be regarded as a protected other situation that has emerged as a result of a history of legal practice and which has been refined by the latter. The reason is that a generalised reference to character or to physical outlook is not an essential feature of an individual's personality; it does not lend itself either to the formation of homogeneous groups or to the development of stereotypes; and most importantly it does not involve a protected characteristic that gives rise to social prejudice.

20. The job grade level of the special needs educator did not change even after she obtained her Master's degree

(Decision rejecting the petition)

The petitioner, who has worked for decades as a special needs educator in a special needs school, attained a Master's degree and a qualification as a certified teacher of inclusive education. She complained that in its capacity as her employer, the school district complained against had failed to adjust her salary in line with the job grade level that was commensurate with his degree. The school district did not recognise her diploma as a university degree, and she continued to receive her pay in line with the classification of someone with a technical college degree. As far as the petitioner was aware, the same diploma held by teachers working for other educational institutions in the same district was recognised as a university-level degree. She assessed that she had been treated unfavourably when compared to these teachers because as a special needs educator she was not regarded as being equal in status with other teachers. In her petition, she referred to her qualification as a special needs educator as the protected characteristic based on the Ebktv's Section 8 (t) (other situation, characteristic or feature).

In this case, too, the Authority pointed out that the Equal Treatment Authority is a specialised forum that exclusively reviews cases involving discrimination based on the characteristics laid down in Section 8 of the Ebktv. Generally speaking, the Ebktv protects

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characteristics that are essential features of an individual's personality. The situations and characteristics that tend to be recognised as protected other situations in the application of the law are those that can be objectively verified; that may serve as a basis for the formation of homogeneous groups; that may serve as the basis for stereotypes; and which may give rise to social prejudice.

The fact that the petitioner's profession is that of a special needs educator cannot be considered an essential feature of her personality, nor does it encompass a protected characteristic that is liable to be the subject of societal prejudice. Consequently, it cannot be regarded as a protected other situation pursuant to Section 8 of the Ebktv.

The Authority determined that at the time when the aggrieved situation occurred, the petitioner did not have a protected characteristic as defined in Section 8 (t) of the Ebktv (other situation, characteristic or feature), and hence it rejected the petition.

21. The bank did not open a bank account for the „sex workers“

(Decision finding an infringement)

The NGO acting as a petitioner complained against a bank because of the latter's failure to enter into a bank account agreement with the organisation. The petitioner submitted that its representative had gone to a branch of the bank with the intention of opening a bank account for the organisation. He filled out the necessary forms and submitted them together with the organisation's documentation. The clerk informed him that they would forward the documents to the bank's headquarters by fax, and that they would call him the next day to arrange a time to open the account. Roughly 45 minutes after his visit to the bank he received a phone call informing him that – for reasons of business policy – the bank does not wish to conclude an agreement with the organisation. The petitioner assessed that the reason for denying his organisation the possibility to enter into a contract with the bank may have been that its work involves support for sex workers and persons who are forced to work as prostitutes – a line of activity that is already apparent in the organisation's name. Its view is that the bank had discriminated against the organisation because of its name, the presumed occupation of its members, their presumed sexual identity and their presumed social background. The bank stated during the proceedings that it had decided to reject the petitioner's application for a bank account for reasons of business policy. At the same time, however, the bank reviewed the relevant documents again and found that during its initial review of the organisation's request „it had weighed certain risk factors erroneously and had arrived at the wrong conclusion“ when it refused to open an account for the petitioner. It offered the petitioner the possibility to open an account, but the organisation no longer wanted this.

At the hearing held in this case, the bank's representative submitted that pursuant to Act CXXXVI of 2007 on the prevention and combating of money laundering and terrorist financing (hereinafter referred to as the Pmtv following the Hungarian abbreviation) the

bank was obliged to vet the organisation in question. This law looks at the activities of NGOs and other organisations from a different perspective than the court that registers them as civil organisations. As a result of the financial institution's vetting, it sometimes happens that civil organisations or natural persons are flagged and the bank does not end up entering into an agreement with them. The employee who had performed the vetting of the NGO in question had erred by overrating the risks in this case. The bank stated that they had not refused to open a bank account for the NGO because of the organisation's name. The employee – who no longer worked at the bank – drew a „sweepingly wrong conclusion“ from the organisation's charter, arguing that the NGO „maintains contacts with groups that potentially realise activities that run afoul of the Criminal Code.“

The petitioner stated that in light of the foregoing events it does not wish to avail itself of the bank's services and does not want to conclude a settlement in this case.

The Authority agreed that as a result of its name and its activities in the interest of sex workers, the petitioning NGO has a characteristic/feature that is a protected characteristic under the Ebktv's Section 8 (t). It is well-known that even though it is legal to offer sexual services in Hungary – in line with the conditions specified in law – the general public tends to harbour prejudices against prostitutes; this social group is subject to various risks and can be considered an underprivileged group in society. In light of the fact that the petitioner works to promote the interests of sex workers, its situation can be construed as falling under the scope of the Ebktv's Section 8 (t). The Authority held that the petitioner had suffered a disadvantage when the subject of the procedure refused to provide it with a bank account.

The bank itself unequivocally acknowledged that its conclusion concerning the risks of money laundering with respect to the NGO's activities was unwarranted. The Authority's position was that it was not sufficient for the bank to invoke the provisions of the Pmtv in general when arguing that it had complied with the principle of equal treatment, or to note that other organisations and private persons, too, had been flagged during the vetting procedure with the result that their request to open accounts with the bank was rejected. The subject of the procedure must specifically name the circumstances on which it bases the discharge of its burden of proof, and these circumstances must be shown to apply – yet the bank failed to do so during the proceedings despite the Authority's express call to this effect.

The Authority held that the bank complained against had violated the principle of equal treatment in connection with a protected other situation that applied to the petitioner. Among the sanctions it applied in this case, the Authority assessed a fine of 1,000,000 HUF. Neither party appealed the Authority's decision in court.

22. The temporary agency worker received less pay and less benefits

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(Decision finding an infringement)

The petitioner turned to the Authority because as a temporary agency worker his pay and other benefits were lower than what the company paid those employees whom it directly employed for the performance of the same responsibilities. The Authority launched proceedings against both the temporary work agency and the borrowing employer and examined whether they had complied with the principle of equal treatment in terms of their respective treatments of the petitioner.

In its defence, the borrowing employer invoked that the Authority's scope of competence does not apply to this case because the issue falls into the labour court's jurisdiction. Pursuant to the Ebktv, the Authority is authorised to conduct proceedings to investigate whether the principle of equal treatment was violated. Correspondingly, it was competent to perform an investigation in this case. Section 2 of the Ebktv provides that provisions concerning the principle of equal treatment in other statutes – thus including Act I of 2012 on the Labour Code (hereinafter referred to as Mt following the Hungarian abbreviation) – must be applied in compliance with the Ebktv's provisions. Under the heading „The principle of equal treatment,” Subsections (1) and (2) of the Mt's Section 219 mandate that for the duration of the temporary agency employment, the pay and other benefits of the temporary agency worker must be determined based on the same conditions that govern the working/employment conditions of those employees who are directly employed by the borrowing employer. In other words, the Authority's investigation in this case concerns the question whether the principle of equal treatment was complied with in the aforementioned context. According to the Ebktv's Section 8 (t), any unfavourable treatment based on a protected other situation – beyond the protected characteristics expressly enumerated in the law – may qualify as discrimination. Having regard to the above, based on the joint application of the Ebktv and the Mt, the Authority determined that it is competent to investigate whether the employers had complied with the principle of equal treatment in the context of their respective treatment of temporary agency workers and their own employees.

The borrowing employer also invoked that the petitioner did not have a protected characteristic. Having regard to the Mt's previously discussed provisions under the heading „The principle of equal treatment”, the Authority assessed, however, that the petitioner's status as a temporary agency worker qualifies as a protected other situation under the Ebktv's Section 8 (t).

Since as a result of his status as a temporary agency worker the petitioner had received a lower salary and a lower amount of non-pay benefits than the borrowing employer's own employees, the Authority determined that both employers had violated the principle of equal treatment. The Authority barred the subjects of the procedure from future manifestations of the infringing conduct and, in addition to ordering the publication of its decision, it also obliged both employers to pay a fine.

Neither party appealed the Authority's decision in court. (At the same time we should note that in a similar case, in which the subject of the procedure that had been sanctioned by the Authority appealed the decision, the court rejected the employer's appeal.)

23. The school failed to provide special needs classes for the



Source: flickr.com

children suffering from learning disorders

(Decision finding an infringement)

A parent filed a complaint with the Authority because the school failed to provide the necessary special education classes for her children who suffer from leaning disorders. In light of the children's severe learning disorders (dyslexia and dysgraphia) the expert prescribed special needs classes in early 2014. Yet, according to the development diary, the school only began offering such classes starting in the academic year 2014/2015.

The expert opinions did not suggest that the underage petitioners were in any way disabled or that they suffered from a health condition, which is why disability or health condition did not apply as potential protected characteristics in this case. The expert opinion determined that the children had special needs based on Section 4 (25) of Act CXC of 2011 on National Public Education. In line with the provisions of the Advisory Board Position Paper, the Authority construed the children's special education needs and learning disorders as a protected other situation pursuant to Section 8 (t) of the Ebkvt.

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The Authority determined that by failing to provide the children with special needs classes prescribed by the relevant expert opinion, the school complained against had violated the principle of equal treatment in connection with a protected other situation that applied to the underage petitioners. In addition to barring the subject of the procedure from such violations, the Authority also levied a modest pecuniary fine. Neither party appealed the Authority's decision in court.

24. German pensioners must pay full price for using the spa

(Decision finding an infringement)

The petitioner turned to the Authority because as a pensioner with German citizenship he was only allowed to avail himself of the services offered by the spa complained against if he purchased a full price ticket, unlike Hungarian pensioners who receive a discount. In the petitioner's assessment, the spa's treatment of him violated the principle of equal treatment in connection with his citizenship.

The spa complained against invoked that the pensioner discount can only be offered to persons whose status as a pensioner can be verified. It also noted that several European countries have no uniform type of identification to verify one's status as a pensioner. It noted further that „it wishes to continue its practice – which had been in place already before Hungary's accession to the European Union” of offering all pensioners (including those who receive a pension because of a disability or due to early retirement) who are Hungarian citizens discounted tickets to the spa. It argued that such a discount cannot be offered by making it contingent on a certain age because the reference to an average retirement age would result in the undue preferential treatment of a wide range of EU citizens. The spa assessed that its procedure does not violate the principle of equal treatment.

The Authority pointed out that pursuant to the EC Treaty's Article 12, 46 and 49, as well as numerous judgments of the European Court of Justice (e.g. C-45/93, C- 388/01) any type of discrimination based on citizenship is prohibited in the areas regulated by the Treaty, which includes the provision of services. Moreover, the Ebktv also prohibits discrimination based on citizenship. The principle of equal treatment is violated in a situation in which any person or group of persons are treated less favourably than another person or group of persons in a comparable situation, and if an objective assessment does not reveal any rational justification for the differential treatment.

In the case at hand, the Authority determined that citizenship qualifies as a protected other situation pursuant to the Ebktv's Section 8 (t), and that the spa had violated the principle of equal treatment with regard to the petitioners' other situation.

Having regard to the fact that the Authority had already determined the spa's violation of the Ebktv in an earlier procedure, it obliged the spa to pay a fine of one and a half million forints, in addition to enjoining it from future infringements and ordering the publication of the Authority's decision.

25. The bank rejected the petitioner's credit application

(Decision finding an infringement)

The petitioner turned to the Authority with the complaint that a bank had discriminated against him when it rejected his credit card application because of his status as a pensioner.

During the proceedings, the bank submitted that the credit card application had not been processed because of an error by a bank employee who had presumably failed to record it. In its procedure, the Authority investigated whether, in rejecting the petitioner's request for banking services, the financial institution had violated the principle of equal treatment with regard to a protected other situation that applies to the petitioner (his status as a pensioner).

First, the Authority examined whether the petitioner has a protected characteristic. It found that his status as a pensioner can be objectively verified; that it is a characteristic that may serve as a basis for the formation of homogeneous groups; that lends itself to the formation of stereotypes and as a basis for social prejudice; and that for the aforementioned reasons it can be considered a protected characteristic in the case at hand. It also emphasised that the stereotype of lower performance attaches to this status.

The Authority held that the petitioner met the conditions for a credit card. The Authority rejected the bank's argument that the credit application was not recorded due a mistake by a bank employee because the bank itself had attached a screenshot of the recorded credit application. The bank failed to provide evidence of the error that had allegedly occurred even though it bore the burden of proof.

The Authority determined that the bank had violated the principle of equal treatment in connection with a protected other situation that applied to the petitioner, namely his status as a pensioner. As a sanction, it barred the financial institution from future infringements and obliged it to pay a fine in the amount of 1,000,000 forints. It further ordered the publication of its anonymised decision for a period of 30 days. Neither party appealed the decision in court.