

THE CONCEPTIONAL SPECIALITIES OF “OTHER CHARACTERISTIC” AS A PROTECTED ATTRIBUTE IN HUNGARIAN LAW*

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ABSTRACT: *The subject of this paper is the analysis of the “other status, attribute or characteristic” as a protected characteristic stated in point t) of art. 8. § of the Ebktv. (Act CXXV of 2003 on equal treatment and the promotion of equal opportunities) in Hungarian law. The paper focuses on the interpretation of “other characteristic” in connection with employment discrimination emphasizing the extensive or narrowing interpretation of this concept. This approach is based on the possibility that “other characteristic” can be interpreted in a special way in relation to employment relationship; furthermore, this protected characteristic is cited very often in employment discrimination cases. But these specialities and possible alternatives have to be synchronized with the general interpretation and application of “other characteristics.” The following examination is based on the Hungarian legal practice, so this way both the legal practice of the Equal Treatment Authority and the judicial practice are analysed in detail. Some problematic cases are also mentioned to highlight the typical differences between the two branches of legal application. The starting point of the paper is that the meaning of “other characteristic” changes from time to time and shows a fragmented picture, so its conceptual analysis is needed.*

KEYWORDS: *equal employment, fundamental rights, labour law, protected characteristics, social protection*

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1. INTRODUCTORY THOUGHTS

In my opinion equal treatment is one of the most important guarantees that appear on the employees’ side in employment, so its social-like protective function is not questionable. Of course, sometimes it is difficult to protect both the employees’ interests – and rights – in general and their equality because of the asymmetrical structure of the

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employment relationship. In Hungarian law equal employment is protected by different kinds of norms and these acts are presented in the Ebktv. which focuses on a relatively long list of protected characteristics. During the creation of this act “other characteristics and situations” made it to this list, therefore we have to take this attribute as serious as all the other parts of this catalogue. This paper analyses its conception, nature, possible problems in interpretation and focuses on the other characteristics in labour law. The paper is part of a bigger research project which is based on the possibilities to synchronize equal treatment and contractual freedom in Hungarian labour law because tendencies and legal practice show that these two fundamental principles can be opposite most of the time. The first part of the research focuses on the social protection of employees and especially on the possibilities of equal employment in Hungarian law and because the other protected characteristics are mostly unambiguous in practice I think it is useful to draft a general conception of this aspect of Hungarian equality law. This way the results can shape the process of the mentioned research project by understanding the real concept behind other characteristics.

The Ebktv. names the other characteristic among the protected characteristics, which serves the aim that attributes and situations that are not listed in the 8. § of the Ebktv. It could also be considered as a protected characteristic, so that the party committing discrimination could not be exempted only because the other party’s protected characteristic cannot be catalogued. This list is exhaustive but discrimination cannot be justified only by the absence of the given characteristic from the list because it can still be another characteristic. At the same time two different approaches are known in legal practice and these approaches are contrary to each other. On the one hand, we cannot exclude the extensive interpretation because this way the original goal of this rule can be achieved (Gyulavári 2009), and it could indeed provide protection against all forms of discrimination in the desired broad circle. On the other hand, the too extensive interpretation could make partly meaningless the special rule of burden of proof because herein the claimant’s or applicant’s presumption on the protected characteristic would be successful every time, according to Gyulavári and Kádár 2009 p. 57-58; it is necessary to limit the content of other characteristic, because otherwise this concept and the protection against discrimination in general would become uncertain. It could also endanger the actual function and existence of the catalogue of the protected characteristics of the Ebktv.; therefore, presuming that something is a protected characteristic, this would become superfluous because any kind of characteristic could be considered protected. This idea gets a new point, if we accept the improper interpretation of art. 19. § of the Ebktv. formed in the judicial practice, because herein the claimant’s successful presumption is almost impossible independently of the protected characteristic. See in connection with this contradiction (Boda 2014). The restrictive interpretation also means that it is not possible for those persons the legislator does not want to guarantee this kind of protection to get protection gratuitously and I think we should accept this viewpoint (Gyulavári and Kádár 2009 p. 57-58). Connected to these different standpoints, a further question of the following analysis is how the other characteristic as a protected characteristic can be interpreted in connection with employment discrimination.

2. THE GROUNDS OF THE RESTRICTIVE INTERPRETATION

The application of other situation or characteristic can be regarded as a guaranteed rule which completes the taxative catalogue of the § 8 of the Ebktv (Gyulavári and Kádár 2009 p. 60-65). At the same time we cannot regard the concept of other situation only as a complementary rule, since Ebktv. could not reach its aim if it could not be applied independently and it would not be possible to state disadvantageous discrimination on the ground of the complainant's other situation.

Altogether the interpretation of other characteristic cannot be too extensive either (Gyulavári 2009), because this way any characteristic or personal attribute of the applicant may be the ground of discrimination, even if they cannot be regarded as a protected attribute.

Position No. 288/2/2010. (IV. 9.) TT. of the Equal Treatment Advisory Board provides significant help in interpreting the concept of other characteristic, because it contains a detailed and deliberate analysis of this concept. Gyulavári and Kádár 2009 p. 58 point out the importance of the Position as follows: in connection with other characteristic the legal practice of the Equal Treatment Authority has not been unified yet, and the uncertain situation can be clarified with this approach. The Position excludes the extensive interpretation because of the following two reasons.¹ On the one hand, Hungarian law has appropriate rules to guarantee equal treatment in general stated in the Basic Law of Hungary² and in the Ebktv., so it would be unjustified to broaden the catalogue of protected characteristics only to guarantee more security for the principle in the legal system. On the other hand, special rules of burden of proof are far more favourable for the employee and by extending the concept these rules would become shoreless, because the presumption of the protected characteristic would be superfluous and this would make the plaintiff's justification stated in 19 § of the Ebktv. disproportionately easier.

This latter argument is supported by the new judicial practice, since in the Position EBD 2014. M 22. the Curia stated that other characteristic as protected attribute cannot be the disadvantage itself, meaning that a protected characteristic cannot be equal with the suffered disadvantage. I think this approach is correct, since according to the 19 § of the Ebktv. the plaintiff or applicant has to prove the existence of the protected attribute and the disadvantage, so this regulation would be hackneyed if there would not be definite difference between them.

Furthermore, some questions of delimitation also emerge, since the Position accepts the narrow interpretation: this interpretation can avoid the violation of the principle of equal treatment can be judged in such cases in which the general violation of the fundamental right to human dignity or abuse of rights emerges in reality.³ In relation to this Gyulavári and Kádár 2009 p. 59 call attention to the fact that the extremely broad interpretation may make the concept of other situation dysfunctional. Furthermore, they add that the (seemingly) authoritative discrimination itself cannot give cause for speaking about discrimination on the basis of a protected characteristic, since even other characteristic has to be much more concrete than this. In other words, it would not be the

¹ Position No. 288/2/2010. (IV. 9.) TT. sz. of the Equal Treatment Advisory Board, 1.

² At the time of the publication of the Position Constitution of the Republic of Hungary was in force.

³ Position No. 288/2/2010. (IV. 9.) TT. sz. of the Equal Treatment Advisory Board, 1.

accepted interpretation, even the behaviour of the complainant could be such characteristic, but this would be disconcerting referring to the essence of the definition of other characteristic. The characteristic has to exist objectively and it has to be capable of creating homogeneous groups to which the party referring to it also belongs due to the party's named other characteristic. The Position adds that this kind of characteristic also comes from social prejudice, namely, because of the detailed catalogue of art. 8. § of the Ebktv. it is difficult to find such an attribute which suits the criteria of the Position and does not belong to any of the named circles of cases. Furthermore, the interpretation should take into consideration that the circle of other characteristics is continuously changing; consequently it is impossible to make a permanent list. Naturally, other characteristic may be the claimant's individual status, circumstance or behaviour,⁴ but only if they belong to the group which is characterized by the given circumstance.⁵

The Position describes the concept and content of other characteristic defined in legal documents of international law, so it is advisable to analyse this aspect briefly as well. Art. 14 of the European Convention on Human Rights is of fundamental importance in this regard, because it lists the most typical protected characteristics in connection with the prohibition of discrimination,⁶ but on the one hand, even the listing is not exhaustive and on the other hand, "other status" is listed as well among the actually named attributes. It means that protection against discrimination cannot be restricted to the most typical protected characteristics. Both Art. 2 of the International Covenant on Civil and Political Rights and Art. 2 of the International Covenant on Economic, Social and Cultural Rights have a very similar approach. Naturally, Hungary ratified all of these conventions,⁷ therefore the Hungarian state has fundamental constitutional obligation to recognize "other status" as a protected characteristic.⁸ All these lead to the constant broadening of the catalogue of the protected characteristics in the European Union as well (Kajtár 2015 p. 31-32), but it must be taken into consideration that this kind of broadening was fulfilled once by the Amsterdam Treaty in 1997. The broadening and dynamic change of the circle of the protected characteristics can lead to so-called lifestyle circumstances – smoking, drinking alcohol, driving a motorbike, wearing tattoos, sharing information on social media (Kajtár 2015 p. 42-45) – being recognized as other characteristics (Kajtár 2016 p. 78-85); I think besides the strict prohibition of extensive interpretation, this kind of interpretation can be questioned at the moment even according to the mentioned international and EU legal sources. In my opinion the function of "other characteristic" defined in international and Union law that the legal protection against discrimination would not be enforced within excessively narrow limits. Importantly, there should be a possibility for persons not having any named protected characteristic but having any other characteristic whose legal nature is similar to the essence of the named characteristics to be able to take a stand against any form of discrimination. Consequently, such

⁴ Related to the typical examples for other characteristic in the resolutions of the Equal Treatment Authority see: Gyulavári and Kádár 2009 p. 60-62. We must keep in mind that these aspects changed with the Position published in 2010.

⁵ Position No. 288/2/2010. (IV. 9.) TT. sz. of the Equal Treatment Advisory Board, 4-6.

⁶ According to Art. 14 of the Convention sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth.

⁷ See act XXXI of 1993, decree law no. 8 of 1976 and decree law no. 9 of 1976.

⁸ Position No. 288/2/2010. (IV. 9.) TT. sz. of the Equal Treatment Advisory Board, 1-4.

characteristics and circumstances⁹ must be regarded as protected characteristics in spite of the fact that they are not listed in the above mentioned catalogue. In the judicial practice this quasi complementary nature also appears with the acceptance of the narrowing interpretation (judgment no. Mfv.III.10.131/2012/5. of the Curia of Hungary).

3. EMPLOYMENT-SPECIFIC “OTHER CHARACTERISTICS”

In the first group cases will be analysed in which the real or supposed ground of the applicant's or plaintiff's reference is such a characteristic or situation which definitely originates from the employment relationship between the parties.

4. THE STATUS OF TEMPORARY AGENCY WORK AS A PROTECTED CHARACTERISTIC

In the practice of the Equal Treatment Authority temporary agency work as a protected characteristic emerges in several cases.¹⁰ It is based on the rules in para.s (1) and (2) of art. 219. § of the Labour Code (Mt.), since these norms dispose of keeping equal treatment referring to temporary agency work.¹¹ In my opinion the standpoint of the authority can be mainly accepted, but I think the employer's obligation itself is not enough justification and the Authority should have described in detail or why this kind of legal status form of employment belongs to the conceptual circle of the other characteristic. Furthermore, another problem arises: can we come to the further general conclusion that the legal status of the person engaged in work is emphasized as an attribute, which is under the scope of point t) of art. 8. § of the Ebktv? In my opinion this conclusion is acceptable but it is solicitous at the same time according to the inner logic of the Ebktv.; that is point r) of art. 8. § of the Ebktv. defines the legal status of part-time workers and fixed-term workers as an ex lege protected characteristics. So I think it would be better to insert the other forms of atypical employment into the circle of the latter regulation and not introduce it to the unstable system of concepts without a better solution.

5. MANAGERIAL POSITION IN LEGAL PRACTICE

Another recurring element of the decisions of this subject is the problem of the employee's managerial position, higher position, or even application for such a position.¹² Judging these problems in practice is ambiguous, since the Authority's declared application for a managerial position is a protected characteristic, but judicial practice is contrary to it. In my opinion judging this question depends on to what extent the judicature insists on the restrictive interpretation of the concept of other characteristic. Supposing that the employee's atypical employment status can be protected attribute, consequently, a managerial position could belong to this circle. At the same time an application for a position itself cannot be a protected characteristic, because the

⁹ Typically, the employee's citizenship also can be such a characteristic (Resolution no. 46/2007. of the Equal Treatment Authority).

¹⁰ See typically resolutions no. 173/2015., 449/2013. and 273/2011. of the Equal Treatment Authority.

¹¹ Resolution no. 173/2015. of the Equal Treatment Authority.

¹² Resolutions no. 704/2007. and 1620/2008. of the Equal Treatment Authority.

application itself has no real effect on the applicant's personality or even on workplace circumstances.

From the Resolution KGD/2011. of the Curia of Hungary¹³ we can come to the conclusion that the employee's higher, managerial position before childbirth is other characteristic.¹⁴ On the employee's return to work after childbirth the employer said that the employee was not able to fulfil her work at the previous level (Lőrincsikné Lajkó 2006). Altogether – in the concrete case besides the plaintiff's motherhood – the position of the employer also can be a protected characteristic, because the managerial position played a very important, integral role in the plaintiff's carrier, everyday working activity and the Curia declared that situation of the employee's status at the workplace can be regarded as other characteristic. Consequently, from the perspective of a working relationship it is suitable to base the belonging to a homogeneous group and can be regarded such a characteristic which is strengthened by the employer's prejudice.¹⁵ So I think it can be regarded as other characteristic in employment relationship, even if it is not sure that it can be according to the general restrictive interpretation of other situation.¹⁶ Importantly, according to another decision of the Curia of Hungary¹⁷ earlier managerial position is not other situation, because it is not such a situation which can be catalogued within the framework of the restrictive interpretation.¹⁸

Another protected characteristic is the situation when the employee applies for a managerial position announced by the employer, since according to the Curia it is suitable that the employee would be discriminated.¹⁹ On the one hand, if we regard a managerial position as a protected characteristic, the same refers to the application, but in this case we again meet a legal interpretation which is contrary to the resolution. On the other hand, an application for a managerial position bears all the characteristics which are present at the fulfilled managerial position (e.g. ambition, the importance of building a carrier), so they can be an integral part of the personality and are applicable to create groups.

With regards to the issue of managerial positions, the new standpoint of the Curia is of high importance²⁰ and on this basis the discussion can be closed. This position discloses that managerial experience can be a protected characteristic in the same way as other situation, because the earlier managerial position cannot be equal with the unified interpretation of other situation in legal practice, since it is not an integral part of the personality, so it could be regarded as a protected characteristic only with a broad interpretation which is not applied in legal practice. However, this approach follows the above introduced restrictive interpretation – so we should agree it – in order to develop the judicial practice in the future the reference to the earlier unified legal practice should be made more precise, since the subject of this paper is the fragmented legal practice.

¹³ According to the resolution no. 1026/2008. of the Equal Treatment Authority, what is the basis of the judgment, higher position fulfilled by the employee before a longer absence or different position can be regarded as other characteristic.

¹⁴ A similar conclusion can be observed in resolution no. 1026/2008. of the Equal Treatment Authority.

¹⁵ Summing up: the employee cannot fulfil the requirements against the leader on returning after a long absence.

¹⁶ Related to declaring the former managerial position as protected characteristic see: Position No. 288/2010. (IV. 9.) TT. sz. of the Equal Treatment Advisory Board, 9.

¹⁷ Judgment no. EBH 2337/2011. of the Curia of Hungary.

¹⁸ The judgment does not contain actual analysis of the concept of other characteristic.

¹⁹ Judgment no. Mfv.I.10.667/2010/38. of the Curia of Hungary.

²⁰ Judgment no. EBD 2014. M.22. of the Curia of Hungary.

6. WORK EXPERIENCE AND QUALIFICATION

It is worth mentioning the employee's work experience and qualifications, because it may happen that somebody suffers discrimination in a working relationship because of these attributes. Similarly to the managerial position we can find different decisions which show that its justification and approach in legal practice is not unified.^{21 22} In my opinion the measure of work experience is not a protected characteristic, because it is fully subjective and depends on the individual and the employer as to what is regarded as a greater or "appropriate" experience. However, education and qualification can be protected characteristics as other situation, because a group of the same education can be defined correctly so it is an applicable situation to create group. Taking into consideration that education has a strong effect on one's whole career; the choice of career can be regarded as an attribute which is an integral part of the personality. I would like to add that according to the decision of the Equal Treatment Authority²³ in case these elements are not the conditions of taking a job it is impossible to regard the qualification as other characteristic.

7. LEGAL DISPUTE BETWEEN THE PARTIES

Judging the legal dispute between the parties is not unified either. Seemingly, a labour lawsuit has no effect on the personality of the party referring to discrimination, but the Authority does not disclose this kind of interpretation.²⁴ In my opinion it cannot be equal to the restrictive interpretation of other situation, since an earlier legal dispute has no real effect on the personality of the employee, and it has an effect on the relationship of the parties, but it is beyond the conceptual circle of other situation.²⁵

Judicial practice is definite and states that²⁶ neither the conduct of the employee or employer nor the labour law suit submitted by the employee can be regarded other situation, since it is independent from the personality and personal circumstances of the employee.

8. FURTHER SITUATIONS IN CONNECTION WITH EMPLOYMENT RELATIONSHIP

In connection with termination it is important to add that according to the Equal Treatment Authority spending notice period is also other characteristic.²⁷ At the same time its grounds are not quite clear and in my opinion this approach does not correspond to the restrictive interpretation. Truly, in such special cases unique issues come to the surface so that a flexible interpretation of other situation is needed, but of course, they come from

²¹ Resolution no. 395/2007. of the Equal Treatment Authority.

²² Resolution no. 831/2007. of the Equal Treatment Authority.

²³ Resolution no. 831/2007. of the Equal Treatment Authority.

²⁴ Resolution of the Equal Treatment Authority without number from 2005.

²⁵ Resolution no. 677/2006. of the Equal Treatment Authority.

²⁶ Resolution no. 61/2015. of the Equal Treatment Authority and Judgment no. Mfv.III.10.105/2012/4. of the Curia of Hungary.

²⁷ Resolution no. 170/2008. of the Equal Treatment Authority.

neither Ebktv. nor the Position. It is also other characteristic if the employer takes an inspection against the employee, which is humiliating, ignominious and disproportionately severe according to the resolutions no. 1/2008. and 719/2006. of the Equal Treatment Authority, and these resolutions show even more broadening interpretation. Finally, notice period is not an attribute which can be an integral part of the employee's personality.

In connection with employment relationship the employee's conduct when the employee stands up for their colleague(s) and expresses an opinion against the employer can also be regarded other situation.²⁸ It is noteworthy that in this case stating other situation happened "at the cost" of another characteristic since according to the Authority this kind of explanation of opinion does not reach the level of opinion or belief as protected characteristic, but equals with the concept of other situation. Altogether we agree with the decision but it is worthless to list into the category of opinion this type of other situation for the sake of easier application.²⁹ In judicial practice similar examples can be found,³⁰ since according to the Curia the employee's conduct which is different from the aspect of the employer is not a protected characteristic, because other situation cannot be the parties' conduct exclusively. I think this approach is consistent with the restrictive interpretation, as well as the approach according to which the opinion of a third person about the employee cannot be other situation, because it has nothing to do with the employee's personality.³¹ Neither can the employee's differing opinion from their colleagues be considered as a protected characteristic.³²

It is interesting that according to the Curia regarding the employee as a "persona non grata" can be other situation if it is not based solely on the parties' deteriorating relationship.³³ However, I think it is contrary to the demand of the Equal Treatment Authority, since according to the Curia of Hungary the protected characteristic was traced back to the employment relationship between the parties which was changed for the worse, and it seems an unjustified broadening interpretation in spite of the fact that the Curia stresses that it is not the parties' deteriorating relationship which defines other situation in this case.³⁴ At the same time it is not other situation if the employee as a safety representative regularly confronts the employer, since it is not an integral part of the employee's personality, and it has an effect only on the relationship between the parties and the latter cannot be regarded as other situation.³⁵ It must be added that the Curia did

²⁸ Resolution no. 1318/2008. of the Equal Treatment Authority.

²⁹ The employee's critical behaviour can be other characteristic according to the same principles (resolution no. 166/2009. of the Equal Treatment Authority).

³⁰ Judgment no. EBH 2012. M.1. of the Curia of Hungary.

³¹ Judgment no. Mfv.II.10.163/2007/2. of the Curia of Hungary.

³² Judgment no. Mfv.II.10.582/2011/4. of the Curia of Hungary with reference to judgment no. BH 194/2010. of the Curia of Hungary.

³³ Judgment no. BH 311/2008. of the Curia of Hungary.

³⁴ Judgment no. BH 348/2013. of the Curia of Hungary should be added here, too. According to it real or supposed victimisation suffered because of the employee's opinion different from the employer's, because the concept of victimisation should be separated from the circle of protected characteristics, and expressing disapproval itself cannot be protected characteristic.

³⁵ Resolutions no. 540/2008., 1869/2009. and 759/2009. of the Equal Treatment Authority and judgment no. Mfv.II.10.671/2013/5. of the Curia of Hungary.

not examine filling this position. However, in my opinion taking such a position could be a protected characteristic in certain cases like membership of a trade union.

In connection with employment relationship-specific attributes I would like to add that the fact that the employee gets an old-age pension belongs to the circle of other situation,³⁶ but the following cannot be regarded protected characteristics: general reference to the other situation,³⁷ the employee's membership in private pension fund,³⁸ and the date of joining the staff of the employer.³⁹

9. REGIONALITY AND LOCALITY

In the following I will analyse some legal cases in connection with residence, place of work, and work in the organizational departments of the employer. There is no unified approach when it comes to designating them as other situation, so examining is necessary.

10. RESIDENCE

The permanent residence of the employee can be a protected characteristic⁴⁰ if the employee receives their wage only after several days of delay and they suffer a disadvantage because of it.⁴¹ It would be difficult to argue that somebody's permanent residence is an integral part of somebody's personality; consequently, it is other situation.⁴²

At the same time the Curia states – overruling the standpoint of the Equal Treatment Authority – that residence is not a protected characteristic.⁴³ On this basis no kind of discrimination can be stated if the plaintiff can suffer disadvantage in comparison to the other applicants, because such an attribute should be presumption on the grounds of *Ebktv.* to which the suffered discrimination can be traced back. However, in the job advertisement living at a certain place was a simple possible advantage and not disclosing condition, so the possibility of its being a protected characteristic can be disclosed. In my opinion this approach is too restrictive because from the essence of the definition of other situation it does follow that an attribute can be regarded as other situation depending on whether the employee suffers disadvantage or not in reality because of the obligatory or not-obligatory feature of the requirement.

³⁶ Resolution no. 234/2009. of the Equal Treatment Authority.

³⁷ Resolutions no. 839/2008. 740/2009. and 60/2015. of the Equal Treatment Authority and judgments no. BH 103/2013., BH 349/2011. and Kfv.IV.37.477/2009/6. of the Curia of Hungary. In the first two judgments the Curia of Hungary says that study contracts cannot be such an attribute because they are not part of the employee's personality.

³⁸ Resolution no. 877/2008. of the Equal Treatment Authority.

³⁹ Judgment no. Mfv.II.10.395/2011/4. of the Curia of Hungary.

⁴⁰ Similarly, the lack of the official permanent address is a protected characteristic according to the resolution no. 595/2008. of the Equal Treatment Authority.

⁴¹ Resolution no. 419/2007. of the Equal Treatment Authority.

⁴² Similar conclusions are drawn in the resolutions no. 819/2008. and 1/2007. of the Equal Treatment Authority.

⁴³ Judgment no. KGD 38/2011. of the Curia of Hungary.

11. PLACE OF WORK

An even more complex circle of issues is represented than permanent residence by the place of work as a protected characteristic, so it is the most discussed circle of cases of the circumstances and attributes belonging to other situation.

Firstly, it is expedient to examine those standpoints which disclose place of work as a protected characteristic.

The Equal Treatment Authority did not regard as a protected characteristic the place of the paediatrician's surgery, the location of which was unfavourable for the doctor employed by agency,⁴⁴ because the employee did not work at that place by the order of the employer and there are no other circumstances that should be taken into consideration to be justified.⁴⁵

The case is similar if the employee and the employer belong to the same organizational unit since it has no connection with human dignity or any attributes of the employee's personality.⁴⁶

Along similar principles the Curia stated that other characteristic can be only be an important feature of the personality, only such an attribute which is built into the given person's personality.⁴⁷ The abilities, knowledge, attributes, ways of expression, habits, etc. of the employee can be built in the personality as other characteristics, but any kind of geographical situation – residence, place of work – itself cannot be a protected characteristic only because several people are staying there at the same time.⁴⁸ In my opinion this legal interpretation is in accordance with the restrictive interpretation of the resolution, and so consequently, we must agree.

The Equal Treatment Authority in the resolution 1784/2009. made a decision contrary to it.⁴⁹ The employer commits indirect disadvantageous discrimination on the ground of other situation, because not every employee working at different places of business receives enrolment support.⁵⁰ The explanation for this decision is that according to the Equal Treatment Authority such attributes of the employee also can be protected characteristics, which are not included in the catalogue of art. 8 § of Ebktv., but they are important attributes of the given person or group.

12. PERSONAL AND SOCIAL CIRCUMSTANCES

Firstly, I'd like to mention "catalyst discrimination",⁵¹ since the Authority stated protected characteristic the fact that earlier the employee's husband filed a claim to the Equal Treatment Authority against the same employer.⁵² It was stated that the employer

⁴⁴ Resolution no. 796/2007. of the Equal Treatment Authority.

⁴⁵ In connection with this see the importance of place of work: Kun 2006 and Kun 2006.

⁴⁶ Resolution no. 809/2009. of the Equal Treatment Authority.

⁴⁷ Judgment no. EBH 2012. M.5. of the Curia of Hungary.

⁴⁸ This conclusion also appears in the judgment no. Mfv. I. 10.993/2011/6. of the Curia of Hungary.

⁴⁹ The Equal Treatment Authority has made a similar decision in connection with work at places different from the employer's place (resolution no. 807/2008. of the Equal Treatment Authority).

⁵⁰ This is stated in the resolution no. 807/2008. of the Equal Treatment Authority as well.

⁵¹ Position No. 288/2/2010. (IV. 9.) TT. sz. of the Equal Treatment Advisory Board, 7.

⁵² Resolution no. 231/2008. of the Equal Treatment Authority.

discriminated against the claimant only because of the relationship between the employees. Therefore her marriage and her husband's previous act were qualified as other characteristic. Furthermore, in this case victimisation as 10. § (3) of the Ebktv. also emerges, but in my opinion it is not necessary because of the different subjects.

The case in which the employee raises a disabled child who needs permanent and intensive care also can be qualified as other characteristic.⁵³ The Authority marked not the claimant's attribute as protected characteristic but the claimant's family situation. Practically, it is another example of "catalyst discrimination".

Otherwise, family relations between the employees or their family model cannot be regarded as other situation,⁵⁴ since these attributes are not applicable to be discriminated. Even the fact that the employees suffered the same disadvantages cannot base that these situations could be qualified other situation.⁵⁵ Family relationship itself or family circumstances are not such personal attributes which can be catalogued as other situation in 8. § of Ebktv. In my opinion family relations as protected characteristic can be relevant in the case of "catalyst discrimination".

Judicial practice also discloses these situations from the circle of other characteristics, since 8 § of Ebktv. did not qualify as a protected attribute the absence of the employee's family relation at the workplace, namely, on comparing the situations of the employee and the employee's colleagues the only difference was that the workmates had a mother – daughter relationship, but the injured plaintiff had no such family relationship at the workplace. Consequently, the plaintiff belongs to the group whose mothers do not work at the same place, but according to the employee they were discriminated against by the employer referring to this characteristic regarding the employer's wage. In the resolution the Curia refers to the resolution of the Equal Treatment Authority analysed above and states that the existence or non-existence of the family relationship at the workplace cannot be considered as a protected characteristic. It is a logical conclusion since this attribute is not a basic feature of the employee's personality and it is not applicable to creating groups.

Similarly, the employee's bad relationship with their mother cannot be qualified as other characteristic even if the employee thinks that – besides the employee's ugliness – it is the only reason for not employing them for a job.⁵⁶ However, in connection with ugliness it should be added that build⁵⁷ is a protected characteristic according to the governing legal practice. Related to discrimination based on build the Judgment C-354/13. *Fag og Arbejde (FOA) v Kommunernes Landsforening* [2014] ECR no. I-5187 of the Court of Justice of the European Union (CJEU) (it has not been published yet in the general Courts Report) in which such question emerged whether the employee's obesity can be protected characteristic as disability, namely, whether discrimination against the employee can be committed on the basis of obesity. According to the CJEU EU law does not state expressis verbis the prohibition of discrimination on the basis of obesity, namely,

⁵³ Resolution no. 1578/2009. of the Equal Treatment Authority.

⁵⁴ According to the resolution no. 519/2006. of the Equal Treatment Authority the employee's childlessness can be other characteristic, because it is such a defining element of privacy that becomes integral part of personality (resolution no. 519/2006. of the Equal Treatment Authority).

⁵⁵ Judgment no. EBH 2014. M.19. of the Curia of Hungary.

⁵⁶ Resolution no. 267/2010. of the Equal Treatment Authority.

⁵⁷ Resolution no. 310/2007. of the Equal Treatment Authority.

neither the primary nor the secondary law of the EU regards it as protected characteristic. In spite of this neither can discrimination be committed in the framework of general prohibition of discrimination, nor it has to be examined whether it could be disability according to 2000/78/EC principle. The CJEU states that it can be disability if it results such diminished state, which is based on some long-lasting bodily, intellectual, mental injury, and together with other obstacles can restrict the employee's role which is effective and equal with the other employee's role in the professional life. But according to the principles applied in Hungarian law – similarly to the case of discrimination based on build – obesity itself can be protected characteristic as other situation. In Hungarian law it is not regarded as disability, so the existence of the above mentioned requirements is not necessary to state it protected situation.

13. ABUSE OF RIGHTS AS A POSSIBLE "ALTERNATIVE"

It is important to examine the aspect of the resolution which concentrates on distinguishing discrimination on the grounds of other situation and the supposed and real infringement conceptually and practically. In this regard the prohibition of abuse of rights is the most important element because (in general it is true in connection with discrimination) in practice generally there is only a thin dividing line between unequal treatment and the abuse of rights, so their interpretation also appears in legal practice.

A good example of this problem of distinction is the judicial declaration of EBH 2014. M. 11. in which the Curia declared improper the exemption of the civil servant without justification as art. 8 § (1) para. pont b) of 2010. LVIII. However the employer's intention to terminate employment was clear earlier, it being committed after the enforcement of the law due to the easier way of exemption. Furthermore, the principle of equal treatment was examined in part, because according to the plaintiff exemption committed indirect discrimination, so it is illegal if only some of the close colleagues suffer termination – practically public servants in a comparable position – and any real cause did not emerge for them and the marked professional aspects equally refer to everybody. According to the plaintiff their legal relationship was terminated because of other characteristic. Finally, the question of discrimination was not judged on merit, but according to the Curia the lack of argument itself cannot be enough reason for exemption from discrimination, and the exemption which is proper may be discriminative at the same time and also illegal. In this case other situation could have been the plaintiff's position, employment status, or their opinion, but it is clear that it is simplest to distinguish abuse of rights and discrimination if a protected characteristic exists in that case. Consequently, in such cases whether there is a lack of protected characteristics, we can rather conclude a case of abuse of rights.

In connection with the managerial position the above examined KGD 10/2011. Resolution is a good example of it, with the difference that although in that case managerial position - even it was discussed – was present as other situation, finally, abuse of rights was declared because according to the Curia the conceptual elements of disadvantageous discrimination did not exist.

14. CONCLUSIONS

Finally, it can be stated that the application of the concept of other status according to Ebktv. referring to discrimination cases in connection with working relationship is difficult and its interpretation is not uniform. Although the Equal Treatment Authority intends to enforce the essence of the resolution of the analysing advisory board referring to the essence of other status, but in connection with employment relationship such problematic cases may emerge in which it is difficult to decide which is more dominant: the essence of the definition built into the personality in the given circumstances or the foundation of belonging to the homogeneous group based on prejudices. A good example of it may be the application of local or regional aspects. In my opinion the examination of the latter should be more stressed, since other status as a protected attribute in connection with employment relationship may arise in reality in varied forms. Though judicial practice is not uniform, but basically, in the majority of the cases the latter approach is taken as the basis, and so consequently, to create consistency between the narrow interpretation of the Advisory Board and the specialities of employment relationship would be useful.

As to the question whether generally the concept of other status should be interpreted narrowly or broadly, I think the correct answer is narrow. The reason for this is the following practical aspect: in case the legislature and the judiciary do not set any further well-defined attributes that something is judged protected, then any kind of attributes or status would be regarded as protected. Such a condition can be whether the characteristics will be integrated into the personality, will it ground the group identity or the fact that it cannot be classified according to any other attribute. Take an example: an opposing view or opinion is that the employer itself simply cannot be a protected characteristic, because it is too “weak” to be a protected attribute, it not being enough if it occurs only once. Neither can it be other characteristic because it is not sure that an opinion different from another person’s is suitable to be the ground on which the holder of this opinion would belong to a group. What is more, the function of the other status is not that anything could be classified here “if there are no other possibilities”, but that the Ebktv. could provide the possibility of legal protection in such cases where somebody suffered discrimination on the basis of an attribute which is beyond the catalogue of 8 § but similar to it. Furthermore, one-time opinion cannot be other status since other status is not a complement to the catalogue of attributes in 8 §, but an independent attribute or characteristic with its own criteria.

Considering the context of the employment relationships, it is clear that other status referring to employment should be interpreted as above, but such special cases often can be observed referring to the employees’ legal injuries that justify their being judged a little bit differently.⁵⁸ They can be regarded as well-founded because judicial practice is definitely strict on judging other status. Although the Equal Treatment Authority interprets them narrowly, the approaches are not uniform. It seems to be justified that such

⁵⁸ It is necessary to refer to the fact that according to the judgment no. EBH 2012.M.5. of the Curia of Hungary other characteristic can be only important feature of the personality, such an attribute that is built in the personality of a given person. Consequently, referring to employment relationship the narrowing interpretation should be applied.

attributes which fundamentally would not be necessarily considered as other status, taking into consideration all circumstances of the given case, should be regarded as other status: management positions, earlier management positions, higher positions, place of work, residence etc. Furthermore, considering employment relationships, a more flexible interpretation can be acceptable due to the original function of other status as a protected attribute.⁵⁹

It is clear that in the special resolutions of the Equal Treatment Authority the narrow interpretation of the other situation mainly appears in a consequent way, but in most of the cases the authoritative legal practice – earlier legal dispute between the parties, the legal status of the employee, local or regional aspects – seems to be indefinite. Naturally, it is impossible to complete a united and unquestionable catalogue about these characteristics,⁶⁰ since the introduction of other situation intends to ensure legal protection for those persons who suffer supposed or real discrimination even if Ebktv. does not list concretely their protected attribute in spite of the fact that it is a protected attribute in reality.

It is difficult to judge to what extent the Authority regards as a protected attribute those attributes and situations which are typical in employment relationships. The leased employment status⁶¹ is a good example of taking these aspects into consideration, but in my opinion it is unjustified that employment at different places of business is beyond this circle.⁶²

In my opinion the relevant judicial practice is characterized by duality what was intended to be ceased by the above described judgment of 2014. Although in legal practice this Precedent definitely supports the directives which are the closest to the practice of the Authority, but in my opinion it does not seem to be enough to the real unification and development. At present sizing up the conduct and the relationship of the parties as protected attribute is questionable and in this respect, the Precedent itself can be regarded as a directive in the future.

This duality can be observed since in most of the judgements judicial practice refers to both the Resolution and the subsequent practice of the Authority. Therefore, in the above analysed cases such legal dualities referring to legal consequences can be observed that are difficult to explain. Basically, judicial practice intends to narrow the concept of other characteristic and makes interpretation within reasonable limits, but it seems that in some cases of discrimination in relation to employment relationship different standards are applied.

Consequently, judicial practice does not reject either the narrow or the broad interpretation. A good example of the former is residence,⁶³ while an application for a management job position is a good example of the latter.⁶⁴

⁵⁹ To give protection also in the case where somebody is discriminated on an attribute which is not listed in art. 8. § of the Ebktv. as protected characteristic, if it is an essential element of a given person's personality. See: Position No. 288/2/2010. (IV. 9.) TT. sz. of the Equal Treatment Advisory Board, 3.

⁶⁰ Position No. 288/2/2010. (IV. 9.) TT. sz. of the Equal Treatment Advisory Board, 1.

⁶¹ See resolutions 173/2015. and 449/2013. of the Equal Treatment Authority.

⁶² See resolution no. 809/2009. of the Equal Treatment Authority.

⁶³ See: judgment no. KGD 38/2011. of the Curia of Hungary.

⁶⁴ See: judgment no. Mfv.I.10.667/2010/38. of the Curia of Hungary.

Besides, the narrow interpretation of other characteristic cannot be disclosed considering employment relationship. Their specialities and the fact that it is the field where discrimination occurs the most easily and most often should be taken into consideration. Typically, the employee's circumstances which are special and exclusively connected to employment relationship may belong to this circle of cases.

Naturally, any application different from the above analysed strict interpretation in the resolution of the Council Board of the Equal Treatment Authority raises one further question: who are the persons, group of persons with unnamed (protected) attributes in the 8 § of Ebktv. who are intended to be protected by this rule? Though this question is difficult to answer, the narrow interpretation cannot influence the interpretation of the concept of other status to such a narrow circle that it would become dysfunctional. Finally, considering employment relationship in some cases according to a flexible interpretation. Therefore a bit different from the "usual" interpretation can be justified.

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