INSIGHTS

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Artificial Discrimination in the Workplace

During the Parliament sitting on 16 October 2023, the Minister of Human Resources, V. Sivakumar, highlighted that as of 30 September 2023, only 8 cases of discrimination have been reported to the Labour Department. None of these cases concerned discrimination in relation to mental or physical disabilities. In the circumstances, the Minister opined that there was no real need for a legislation to be enacted specifically to protect employees with mental or physical disabilities from discrimination at the workplace, as the current legislations in place are sufficient.

In arriving at his opinion, the Minister referred to the inclusion of an avenue for employees to lodge a complaint with the Labour Department regarding discriminatory practices in Section **69F** of the recently amended Employment Act 1955 ("**EA 1955**"). Although this amendment to the EA 1955 marks a significant progress in Malaysia's efforts to tackle discrimination in the workplace more fervently, it remains to be seen whether section **69F** of the EA 1955 provides adequate protection against all forms of discrimination in the modern workplace. This is especially in view of the rise in the adoption of artificial intelligence ("**AI**") tools in all stages of the employer-employee relationship in an organisation with the aim of improving efficiency.

Artificial Intelligence in the Modern Workplace

Commonly, AI tools implemented by the Human Resources ("**HR**") Departments of organisations are software applications that optimise HR systems and processes, from hiring, onboarding, career progression, administration to offboarding. During the recruitment process, AI may be used to examine and sift through job applications on a larger scale and at a much quicker rate than what internal talent acquisition teams could typically manage.

AI can automatically review applicants, eliminating those who do not meet essential criteria or are unlikely to be a good fit. Additionally, it can evaluate interview performance using natural language processing and interview analytics to gauge a candidate's suitability based on their soft skills and personality traits. There has also been a surge in the use of AI technology to monitor an employee's "productivity" since the increase in the implementation of remote working arrangements post-pandemic.

This may become an issue when appraising an employee's performance for career progression if their "productivity" or lack thereof, does not accurately reflect their quality of work. Despite the clear benefits of AI tools in HR processes, there are important risks and corresponding precautions that employers should take into account before incorporating AI technology to among others, address the various types of biasness in hiring and even career progression processes, including gender, age, culture, and race.

Gender Bias

In 2018, Amazon unveiled that their AI recruiting engine showed biasness against women, whereby the AI system taught itself to prefer male candidates over female candidates. The algorithm penalised resumes that included the word "women" such as "women's chess club captain." Even though Amazon edited the programs to make the AI tools gender neutral, there was no guarantee that discrimination was completely wiped from the AI recruiting engine. Ultimately, this particular AI recruitment tool was scrapped.

Age Bias

Ageism is an unconscious implicit bias that typically prejudices older employees in the workforce. In 2022, the United States' Equal Employment Opportunity Commission sued iTutorGroup for age discrimination. iTutorGroup programmed its online recruitment software to automatically reject older applicants. Female applicants aged 55 or older and male candidates aged 60 or older were automatically rejected solely based on their age. Ultimately, iTutorGroup settled the matter by distributing $365,000 to applicants who were automatically rejected because of their age.

Cultural & Racial Bias

Gender bias is not the only form of biasness that stems from using AI tools. Facial analysis algorithms could also lead to biasness against cultural expressions which are not frequently used. In 2020, HireVue's AI face analysis screening tool was discontinued as there were concerns about its controversial feature which used algorithms to assign certain traits and qualities to job applicants' facial expressions in video interviews. Chief Data Scientist at HireVue, Lindsey Zuloaga, reportedly said that:

> "*Facial expressions are not universal - they can change due to culture, context, and disabilities - and they can also be gamed … So, accuracy in correctly categorising an expression is problematic to start with, let alone inferring traits from it.*"

Infamously, Uber Eats in the United Kingdom was also accused of racial bias for using AI at the workplace. A former Uber Eats driver alleged that the company used racist recognition checks whereby he was required to take multiple photos of himself each day to confirm his identity. When the software identified him as another person, he was dismissed from service for allegedly sharing his work account. The United Kingdom Employment Tribunal in 2022 rejected Uber Eats' attempt to strike out the discrimination claim.

Conclusion

It is undeniable that AI is already reshaping the modern work environment. The exponential growth in employers' reliance on AI-based tools to keep up with the demands of a modern-day workforce, are mainly contributed by the significant enhancements in productivity and proven efficiency of such tools. Nonetheless, irrespective of whether an organisation widely adopts AI tools, it is important to consider AI risk management and ensure that the tools applied do not expose employers to complaints of discriminatory practices being lodged by employees pursuant to Section **69F** of the Employment Act 1955.

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