

Artificial intelligence in recruitment



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Artificial intelligence is a concept that has made a great career in recent decades not only among engineers and scientists, but also in popular culture. Some take the view that no software or computers created to date truly qualify as AI, but technologies are already appearing on the horizon which can permanently change how companies operate, including on the HR side—and generating plenty of legal issues along the way.

One of the technologies that can strongly impact employment law is support systems for HR staff handling tasks such as recruitment. The new technologies are not replacing recruiters yet, but they can take a lot of work off their hands, especially when it comes to searching for candidates and pre-screening them.

A bot too far

Such technologies are already available in Poland. A Polish firm created one of the first bots on the market which uses the Messenger app to impersonate a career counsellor. It exploits mechanisms for machine learning to collect and process vast quantities of data. Chatting with a candidate, the bot learns the candidate's preferences and then selects job offers matching the candidate's preferences and suiting the candidate's profile.

From the perspective of employment lawyers sensitive to issues such as job discrimination, a huge advantage of such solutions could be the opportunity to make the recruitment process objective and to reduce the risk of erroneous decisions (rejecting a good candidate), based for example on unwarranted (or even illegal) criteria, prejudices or hunches.

Unfortunately, these hopes were quite brutally squashed by the example of the bot created by Microsoft with the charming name Tay, which communicated so effectively and eagerly with some of its followers on Twitter that the bot started creating its own racist and sexist tweets.

This case raises the interesting legal issue of the employer's liability for communications conducted by its bot "employee." Taking this a step further, the question is whether the bot's algorithms were too imperfect to identify and screen data which were digested within the machine-learning process, leading to such unfortunate results. And what should be the responsibility of the designer of such programming? What about the case of "black boxes"—algorithms so complicated it is impossible to determine what they actually analyse or what basis they use to generate results?

The employer is still liable

No doubt there are many such questions. The larger the sample or database which the algorithm processes and learns from, the lower the risk of a decision displaying unlawful discrimination. Access to data in the cloud also plays a huge role here, as data from a larger sample should reduce this risk. This leaves the issue of access to "training" data, particularly in light of the approaching entry into force of the EU's General Data Protection Regulation.

From the perspective of employment law, however, there is no doubt that liability for discrimination in hiring, for example, caused by an algorithm's matching of discriminatory data, is fully borne by the employer. The Labour Code requires employers to apply equal treatment in establishment

and termination of employment relationships, employment conditions, advancement, and access to training to improve employees' professional qualifications, in particular without regard to sex, age, disability, race, religion, nationality, political beliefs, union membership, ethnic origin, or sexual orientation, or employment for a definite or indefinite period, full-time or part-time. For example, a job candidate whose application is rejected by an algorithm because of the candidate's race could seek damages in court against the employer in an amount no less than the applicable minimum wage.

A finger on the pulse

But let's focus on what we think is the key question: Will we trust AI if it selects a job candidate we just don't like? Or in the final reckoning, won't the decision always be taken by a human?

It may also turn out that recruitment bots, although only used for a relatively short time, will not prove revolutionary and soon will be discarded. Technologies are already emerging enabling analysis of facial expressions or even changes in job candidates' pulse (which from a legal perspective may raise similar doubts as the use of devices such as lie detectors in recruitment). Such technologies can determine whether a grin was sufficiently sincere, or whether the candidate answered a certain question frankly. And this is becoming possible not from hooking up a candidate to a lie detector, which is generally impermissible, but in a discussion with a robot recruiter with a soothing female voice and facial expression recognition software.

Such a recruiter already exists. Her name is Sophie and she is a robot created by the Japanese company NEC and La Trobe Business School in Melbourne.

From a legal perspective, such an examination of an employee by a robot remains decisively risky and may infringe the employee's personal rights. Even if a candidate consents to such an interview, during which a machine processes and analyses data such as the candidate's pulse or facial expression, under the existing case law in Poland (e.g. judgment of the Supreme Administrative Court in Warsaw of 13 February 2003, Case II SA 1620/01), it may be disputed whether such consent is truly voluntary.

At this stage of development of these technologies (and perhaps more to the point, at the present stage of their social perception and acceptance), we may wonder how a qualified and sought-after job candidate would respond when scheduled to meet with an android because the prospective employer does not have time for a personal interview. Will the candidate still want to work for that organisation?

The future is now

Although we believe that live recruiters will still play a key role at least in the final phase of selection of candidates,

particularly when it comes to assessment of their soft skills, robot assistants already seem to be nipping at their heels. Employment law will need to rise to entirely new challenges of a new working environment, where part of that environment will include robot recruiters.

If this sounds too much like science fiction, we should point out that Sophia, a humanoid (android) created by Hanson

Robotics from Hong Kong, and namesake of Sophie the robot recruiter, recently received Saudi Arabian citizenship. This may have been a purely symbolic act, but it is already the reality—whether we like it or not.

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