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Artificial Intelligence and Gender Biases in Recruitment and Selection Processes

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AI in recruitment and the risk of gender bias in Finland

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1. Introduction

1.1 Use of AI in general and in recruitment

There is little information on actual discrimination taking place in recruitment processes using artificial intelligence (AI) technology, recruitment software in particular. There is no case law on discriminatory use of such software, on the basis of gender or other prohibited grounds of discrimination. The risk of discrimination involved should be assessed more carefully, however. AI is abundantly used in Finland by both private and public sector actors. Finnish companies invest heavily in AI technology, and employ AI personnel more in comparison with companies in many other countries. Technological infrastructure and technological platforms are considered crucial for economic growth. The use of AI is widespread in service and technology companies as well as in public administration (Ailisto et al. 2019 https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/161282/4-2019-Tekoalyn%20kokonaiskuva.pdf).

In 2017, the public broadcaster YLE estimated that AI was used in 40 000 recruitments per year (then in less than 10 % of recruitments), but the number of such recruitments has increased considerably since then. Little information on what type of software is used in this context is publicly available.

1.2 Gender segregated labour markets as a risk-increasing factor

A reason to assume that use of recruitment software may involve risks lies in the strong gender segregation of the Finnish labour market. Roughly, men work in the private and women in the public sector. Education leading to occupational choices is also strongly gender segregated, so that technological studies are dominated by men, human and social studies by women. The health sector and teaching are dominated by women, while construction and other technical fields by men. Pay differentials follow the gender segregated choices, with lower pay structures in the public sector and women dominated occupations. In terms of vertical segregation, the highest positions in the private sector are generally held by men. Engineering is a preferred occupation in high ranking positions in the private sector. Companies tend to recruit engineers to CEO and other leading positions. Thus, any recruitment software that uses data from former recruitments to a company would probably replicate the

preference for male educational and professional choices, unless conscious precautions are taken to avoid that.

1.3   Techno-loving Finnish policies

Finnish decision-makers stress the role of technology as a road to national welfare. Digitalisation has advanced quickly. Belief in technology as a boon is apparent in Government policies, with the emphasis on the positive impact of technology rather than problems arising with it. The former Government presented a report on data policies and AI and related ethical issues to the Parliament in 2018. The need to restrict the use of AI is rarely mentioned in these policies, or restrictions are mentioned negatively – for example, a study on future technology considered GDPR (General Data Protection Regulation) as a hindrance to reasonable use of AI (Parliament's Committee for the Future 2018).

2.   Policy debate

2.1   Public services foregrounded in debate

Public discussion on legislative policies to be adopted to face problematic impacts of using AI in decision-making has concentrated more on AI in public services than on discriminatory uses in private services or in the labour market. In 2019, the Prime Minister's Office commissioned studies on the ethical and social acceptability of the AI use by authorities, as well as on algorithmic decision making in the national regulative environment. The stress was on risks related to automated administration.

2.2   Discrimination not in focus

The national programme Aurora AI (2019-2023) aims at developing a model for action at an individual's different life situations, including recruitment. The programme is coordinated by the Ministry of Finance, but is open to public, private and third sector actors. An individual should receive information on public and private services available. The Non-Discrimination Ombudsperson's opinion on the Aurora AI plan noted that the impact of non-discrimination law was not considered fully and concretely in the plan. The programme should pay more attention especially to indirect discrimination.

2.3   Criss-crossing equality body mandates as hindrance

Algorithmic discrimination in general, and especially recruitment related discrimination may be difficult to combat in Finland because the mandates of relevant ombudsperson criss-cross in a manner that is not ideal for developing effective policies against such discrimination. Equality bodies comprise two ombudspersons and a quasi-legal board for decision-making. The ombudsperson monitoring data protection is also relevant for policies in the field.

Discrimination on the ground of gender is in the mandate of the Equality Ombudsperson. The Non-Discrimination Ombudsperson has the mandate to monitor prohibitions on all other discrimination grounds. Where working life discrimination is

in question, the Equality Ombudsperson has mandate on gender discrimination, but the Non-Discrimination Ombudsperson has no competence, as the Occupational Safety Authorities monitor the prohibited discrimination in working life on all other discrimination grounds than gender.

Victims of gender discrimination have no individual access to Non-Discrimination and Equality Board, a quasi-legal body with a mandate to conciliate and decide discrimination cases (only the Equality Ombudsperson or a main social partner may bring gender discrimination cases to the Board). Victims of other forms of discrimination have individual access. The Non-Discrimination Ombudsperson may also take cases there in his/her own initiative and has done so in a case of algorithmic discrimination. The Non-Discrimination Ombudsperson could hardly bring cases concerning recruitment to the Board, as those cases are in the mandate of the Occupational Safety Authorities.

Algorithmic discrimination may also fall under the mandate of the Data Protection Ombudsperson, for whom impact assessment of the outcome of data processing involving natural persons is a tool for detecting algorithmic discrimination. GDPR requires an impact assessment to be made by the controller of data that is likely to result in a high risk to the rights and freedoms of natural persons, and requires the supervisory authority to make public a list of automated processing requiring impact assessment. The supervisory authority shall also review impact assessments (Chapter IV, Section 3, Art 35). Data processing may create a high risk for rights and freedoms of a natural person when automated recruitment software is used. The Finnish Data Protection Ombudsperson's web site gives detailed instructions about appropriate use of automated decision making involving GDPR and related Finnish legislation. The Data Protection Ombudsperson has also paid attention to the right of persons not to be subjected to decisions based solely on automated processes unless an exception applies. The data subject should be told which factors are weighted in a decision based on use of AI.

Equality authorities' web sites give information on prohibited discrimination at recruitment, but no reference to discriminatory algorithms is found on these sites. The instructions to employers and employee's stress the requirements of national legislation, which are not very well suited to situations in which the recruitment procedure is based on AI, especially where the procedure has been outsourced.

2.4   Lack of legal response to a new type of discrimination

The only case of algorithmic discrimination in Finnish law was a case on automated decision-making by a credit company using automated profiling of customers. The case was decided by the Non-Discrimination and Equality Board in 2018 https://www.yvtltk.fi/material/attachments/ytaltk/tapausselosteet/2SVkNzOWF/YVTltk-tapausseloste-_21.3.2018-luotto-moniperusteinen_syrjinta-S._L.pdf.

The case was brought to the Board by the Non-Discrimination Ombudsperson. The credit company made decisions on extending credit on the basis of data used by an algorithm software by an external provider. The case was a simple one in the sense

that the algorithm was directly discriminatory on grounds of gender, native language, age and place of residence, and as such the case is not informative concerning the use of recruitment software, which typically makes use of indirectly discriminatory data.

3. Recommendations

3.1 Improving the legal response

The present Finnish legal provisions and case law on recruitment related discrimination stresses employers' duty to make a comparison of the merits of the candidates to a job always when there are both male and female applicants. The comparison is to be made using the employer's before-given criteria for selection. A non-successful applicant has the right to require a written explanation of the selection criteria and the merits of the person who was nominated to the job in question (Section 10 of the Act on Equality). The establishing of discrimination requires comparison with a comparator, and sufficient information about the merits of the candidate that was chosen. Legislation seems to be based on a model of recruitment where a vacancy is announced, the criteria for selection are made public and the procedure is carried out by a person or persons. The employer is recommended to make a written comparison of applicants' merits to avoid discrimination.

In a case of algorithmic discrimination, explaining how the criteria of selection were used by the algorithm may be difficult. The algorithm may be opaque and learning programming may have been used. In order that the comparison of merits may be presented, the data used by and the decisions made by the algorithm should be transparent. Use of sensitive data should be excluded.

A victim of discrimination should have access to an effective remedy. Lack of information that could allow the victim to assess whether discrimination has taken place, and to produce evidence of discrimination at court effectively precludes the right to remedy. An amendment of the burden of proof provision could be useful in cases where information on the merits of the applicants cannot be compared due to lack of transparency. The employer, unlike the victim, should be in a position to provide information of the algorithm that was used. There is an analogy with pay discrimination in cases where the pay system is opaque. Lack of transparency may in such cases establish a prima facie assumption of discrimination and turn the burden of proof to the employer.

Adopting a system of auditing recruitment software is another possibility. Auditing has been used in the context of pay transparency. The Finnish Act on Equality between Women and Men requires that employers of over 30 persons make pay audits regularly. Pay audits under the Act on Equality follow a model that is not suited to algorithmic discrimination at recruitment, however. Pay audits are carried out in cooperation between the employer and employee representatives at the workplace. Unlike auditing algorithms, pay audits should not require special expertise. An audit that would resemble the Icelandic pay audit system could be effective against

algorithmic discrimination. In Iceland, an Equal Wage Standard was planned to measure and assess pay systems according to legal criteria to prevent direct and indirect discrimination in a pay system. Employers of more than 25 employees must carry out a pay audit to get their pay systems certified by the Centre of Gender Equality by 2019. The certificate is valid for three years. The Icelandic pay audit system was prepared in cooperation by the Government and Social Partners and adopted as a part of the Gender Equality Act.

(see: http://kvenrettindafelag.is/2018/looking-for-information-about-equal-pay-in - iceland-all-about-the-equal-pay-standard/)

A similar auditing for algorithms would require licencing or use of independent auditors or agencies. Such auditing is perhaps more in the line of supervision of data use under the GDPR – I refer to what is said under 2.3 about the supervisor's duty to decide which type of automated procedures cause risks to rights and thus require impact analyses, and the supervisor's duty to review such procedures.

3.2   Awareness raising

There has been increasing attention to risks caused by IT use in administrative decision making by Government policies. An opening towards the risks caused by use of algorithms in recruitment should be possible.

One key to raising awareness in Finland of the risk of gender bias inherent in the use of algorithms in recruitment certainly lies in co-operation among the equality bodies and the Data Protection Ombudsperson in dealing with the question. In cooperation, the bodies could inform both employers and employees much more effectively. Unfortunately, the mandates of these bodies are far from optimal for dealing with the issue.

Traditionally, Finnish working life issues are treated as the prerogative of the Social Partners. It may not be easy to find a common policy on dealing with risks caused by use of algorithms and raising awareness of risks involved among the Social Partners. Cooperation among Social Partners tends to be difficult in issues that somehow relate to the employers' right to direct work and make recruitment decisions. The employers have also been negative to proposals on increase pay transparency.

Awareness raising activities should also consider the possible positive impact of increasing use of IT in recruitment. It should be easier to dismiss directly discriminatory data from the selection process when using automated decision-making. It is well known that prohibited discrimination grounds, such as gender, ethnicity and age evoke often unconscious biases in the minds of human recruiters.