

Uber Payout Offers Employer Lessons On Mitigating Bias

Pa Edrissa Manjang, an Uber Eats UK Ltd. driver, recently settled his case with Uber after alleging that the gig economy food delivery service's use of facial recognition software was discriminatory, according to a press release on March 26 by the Equality and Human Rights Commission, or EHRC.¹

The payout came following a preliminary hearing in July 2022 in the Employment Tribunal in Pa Edrissa Manjang v. Uber Eats UK Ltd., where Uber's application for a strike-out of the claims was dismissed

Uber uses a real-time facial recognition ID check as a safety feature, implemented in order to satisfy Uber's U.K. licensing requirements. The satisfactory completion of a courier's ID check is a prerequisite to accessing work and, as a result, pay.

The facial recognition software, based on technology from Microsoft Corp., is known to have flaws. Microsoft has previously accepted that its software is less accurate for people of color, including ethnic minorities.² However, according to Uber, the software was not involved in the issues that Manjang complained of and applied for a strike out of the claims.

Manjang, a Black male worker, alleged that he experienced regular difficulties with the artificial intelligence-powered facial recognition check. He claimed that the software repeatedly asked him to provide selfies to check his identity with a frequency that he argued amounted to racial harassment.

The issue culminated in April 2021, when Manjang said he had been informed that he would no longer be provided with work by Uber due to the "continued mismatches" between the images he submitted, despite his assertion that there was no change in his appearance. Manjang was supported by the EHRC and the App Drivers and Couriers Union in pursuing his claim.

In this article, we will discuss whether bias in AI was truly at the heart of this claim, and look at lessons that employers can learn from this case to avoid litigation risk arising from their use of technologies.

What were the claims?

Manjang's employment tribunal claim predominantly centered on indirect discrimination on the grounds of race under Section 19 of the Equality Act 2010.

In theory, if Uber had been found to have implemented a policy of only providing work to employees who had satisfied the AI facial recognition check, which Manjang claimed had inherent biases against people with darker skin, the company would have discriminated against Manjang. Uber would have needed to demonstrate that the ID check was a proportionate means of achieving a legitimate aim, i.e., the safety checks or licensing requirements, to avoid a finding of indirect discrimination.

In addition, Manjang presented claims of harassment and victimization relating to the suspension of his account and the denial of a human review of his ID check

1 <https://www.equalityhumanrights.com/media-centre/news/uber-eats-courier-wins-payout-help-equality-watchdog-after-facing-problematic-ai>.

2 <https://www.bbc.co.uk/news/technology-68655429>; <https://www.bbc.co.uk/news/business-53015468>.

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Uber's position was that the claims were based on fundamental factual errors, stating that Manjang lost access to the app temporarily following a human error in a human facial verification check and a separate flagging of unusual use of Uber's systems. The company held that any unfortunate shortcomings in the way Manjang's case was handled were entirely unrelated to race.

There are data protection laws that controllers must follow.

Data controllers are subject to the U.K. General Data Protection Regulation regarding biometric data processing and automated decision making, alongside the general principles of transparency and accountability to data subjects when processing personal data.

The Information Commissioner's Office, or ICO, published the first draft of biometric data guidance on Feb. 23, which specifies that data controllers should check their biometric data processes for bias and must ensure that any biases do not result in discrimination. The office is now entering into a second phase of consultation.³ Thus, companies need to consider their duties as employers alongside their duties as data controllers under the U.K. GDPR.

Data controllers are also subject to additional rules to protect individuals who are subject to solely-automated decision making, which has a legal or similarly significant effect on individuals.

The ICO asks that data controllers give information to individuals about the processing, introduce simple means of requesting human intervention or challenge, and carry out regular checks to ensure that systems are working as intended.

Individuals who have concerns regarding biometric data processing or automated decision making can complain to the ICO.

Was there bias?

As a settlement has been reached between Uber and Manjang, the question of whether the facial recognition software was biased will not be tested.

Uber continues to assert that its facial recognition checks are supported by a "robust human review" to ensure Uber is "not making decisions about someone's livelihood in a vacuum, without oversight." Uber also stated that "automated facial verification was not the reason for Mr Manjang's temporary loss of access to his courier account."⁴

In its defense, Uber relied on their human error as the reason for the facial verification check failure. It also appears from the tribunal's records that Uber offers couriers the opportunity to have a computer or human review of their identity check.

Uber also submitted that the reason Manjang's account was suspended was due to "unusual activity," as several attempts had been made to access his account from differing locations, suggesting that multiple individuals were attempting access at around the same time.

Amid the press interest following settlement of the claim, Uber continues to support that this was not the result of biased software making autonomous decisions.

What are the takeaways?

The press focus has been on this matter as a groundbreaking case and whether AI has been discriminatory. However, in reality, this case has only lightly touched on the issue. During the tribunal hearings, Uber maintained that Manjang was mistaken in his understanding, which they say was ultimately down to human error at Uber.

However, there are some key takeaways from this case.

³ <https://ico.org.uk/about-the-ico/ico-and-stakeholder-consultations/ico-consultation-on-the-draft-biometric-data-guidance/>.

⁴ <https://uk.movies.yahoo.com/uber-eats-couriers-fight-against-215825579.html>.

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The EHRC is primed to take action.

One clear feature is that the EHRC is ready and prepared to take action in relation to discriminatory AI, and forecasts this as a significant issue.

Kishwer Falkner, chairwoman of the EHRC, stated in a March 26 press release that "more needs to be done to ensure employers are transparent and open with their workforces about when and how they use AI." In particular, the EHRC recognized that companies are obliged to guard against unlawful discrimination when relying on automation.

The equality watchdog has also committed to tackling unfair use of AI in employment practices in its 2023-2024 business plan. The world is watching for "AI gone wrong" cases of substance, and employers using AI would do well to implement procedures and policies to govern use of AI to minimize risk of being an example case.

We anticipate that there will be more cases in the near future where the EHRC has funded litigation in order to test this point in the tribunals.

Any future test case on AI will be high profile.

There has been an extraordinary amount of attention on this case, despite the fact that AI bias was not actually tested. Any future case will also likely be seized on and should be expected to make headlines — and employers will want to avoid that level of attention.

The unclear use of AI creates litigation risk for companies.

Uber's response to the claim presented detailed information on how ID verification checks are conducted. Manjang subsequently applied to amend his claim on the grounds that this information was new to him. Uber acknowledged before the tribunal that this information would not have been available to Manjang before.

In the hearing of Uber's strike-out application in the tribunal, the company stated that it had implemented policies and practices, which would appear to comply with data protection and employment laws, and the absence of clear information on how ID verification was carried out left a blank slate for Manjang to infer discrimination.

In March, the Department for Science, Innovation & Technology published the helpful guidance "Responsible AI In Recruitment," which provides useful information for employers' risk assessment of the use of AI in a recruitment and employment context.

Furthermore, employers can mitigate risk by providing clear information on the use of AI or technology in decision making, and implementing clear processes and policies to govern the use of these technologies.

Robust policies ensure that processes are applied consistently, meeting the requirements of

data protection and equality laws. Employers who utilize AI will need to ensure that there are human reviews of AI based-decisions and clear avenues to challenge decisions — particularly where the outcome affects an individual's ability to work.

Workers should also be provided with an avenue to raise concerns regarding potential bias that should be investigated and addressed. If bias in technology is found, employers will need to take measures to avoid discrimination, or consider if the technology is even viable.

Companies should provide clear reasons to workers for decisions affecting employment.

One of the features of concern in this case mentioned by the EHRC was that Manjang was not made aware that his account was in the process of being deactivated and that the outcome he was provided with was opaque.

While employers have no obligation to go through a particular process for dismissal in respect of workers — compared with employees, who can challenge the fairness of a dismissal — in the absence of a good reason, Manjang inferred that there was a discriminatory reason for the deactivation of his account.

To avoid litigation risk, platform providers will need to ensure that there are processes in place to give avenues for workers to challenge unilateral decisions about account suspension — or other decisions directly affecting them — regardless of whether those decisions are taken by AI or by a person.

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Companies should check for bias, and offer a human alternative to automated decisions.

In Uber's case, it seems the platform did offer a human review process, alongside an alternative review system in the event of a failed verification. However, it appears that its own internal processes were not followed in respect of Manjang's verification request, according to Uber's representations to the tribunal.

According to a 2020 report by the Alan Turing Institute, facial recognition software is known to carry the risk of bias, particularly as a result of the datasets used to train the software and because image software seeks contrast between facial features, which works best on individuals with lighter skin.⁵

Employers will need to remain mindful of their obligations to avoid unlawful discrimination, which may involve implementing a human option alongside a technology-based option, or taking steps to address bias.

Employers using AI should routinely test their systems to check if individuals with certain protected characteristics will likely be adversely affected, and conduct risk assessments before implementing new technologies.

It shouldn't be long until tribunals test bias in AI.

While there is certainly excitement around this case, the reality is that the tribunals have yet to test bias in AI following the advance of AI-based technologies in the last 18 months. However, with the support of the EHRC, it should not be long before this is properly put to the test.

There are practical steps companies can take when implementing AI-based technologies across their workforce, including carrying out risk assessments and monitoring for potential bias. By providing clarity on the use of technology, transparent decisions and an avenue to appeal an outcome, employers will mitigate the concerns the EHRC had in this case.

Where the use of technology is unclear, it leaves a space for individuals to infer bias and potentially present a claim — even if it is, on the facts, unfounded.

⁵ Understanding bias in facial recognition technologies by The Alan Turing Institute, Dr David Leslie, https://www.turing.ac.uk/sites/default/files/2020-10/understanding_bias_in_facial_recognition_technology.pdf, p. 15.

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