

Job Hiring Discrimination: Malaysian Legal Approach on Equal Employment Opportunities

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Abstract

Workplace discrimination often occurs during employment when a group of people is treated unfairly because of specific characteristics. However, workplace discrimination may also occur during the early stage of job hiring process could restrict equal rights amongst the applicants and jobseekers. It jeopardises and denies the jobseeker's right to chances to be employed, resulting in a person's loss of their potential in securing the jobs. Therefore, this paper examines types of discrimination in job hiring from the standpoint of Malaysia and the legal redress provided under Malaysian regulatory framework concerning the issues of job seeking discrimination. The findings show that there is no specific provision addressing discrimination at the job seeking stage in Malaysia, thus this study suggests improvements in the existing employment law to include protection against discrimination to be extended to all stages including job seeking stage.

Keywords: Equal Employment, Job Hiring Discrimination, Employment Legal Framework, Malaysia, United Kingdom, United States, Canada.

Introduction

The job hiring process serves as a critical gateway to economic opportunities and career advancement. However, a persistent issue that hinders the achievement of equitable employment opportunities is the prevalence of job hiring processes. Discrimination, rooted in biases and stereotypes related to factors such as race, gender, age, disability, socioeconomic status, sexual orientation, religious beliefs, national origin, and other personal characteristics, unfairly disadvantages certain individuals or groups, perpetuating systemic inequalities and undermining the principles of meritocracy and equal opportunity (Lee & Khalid, 2016; Cheah & Lim, 2018).

In recruiting new applicants for available positions, employers and organisations use job advertisements or job postings which that typically published online. The advertisement contains information regarding the job description and specific criteria required of the applicants for the available position (Gardiner et al., 2018). Nevertheless, some of the job advertisement have an expression of limitation, specification, or preference as to a protected characteristic such as race, sex, marital status, colour, gender identity, physical disability, mental disability, marital status, age and others (Beauregard, 2019).

Despite having the legal and ethical imperatives to ensure fairness and diversity in the workplace, discriminatory practices affect candidates at the early stage of hiring process. Unconscious biases lead to skewed perceptions, where qualified candidates are often denied due to factors unrelated to their skills or qualifications which is against the idea of right to equality (Vanderpal & Brazie, 2022).

The Malaysian legal framework pertaining to employment practices is comprehensive, yet it faces the challenges of protection against discrimination for the job hiring process. There is currently no written law that specifically prohibits pre-employment discrimination in Malaysia. The suggested implementation of safeguards for individuals seeking employment to prevent bias was retracted due to the limitations of the Malaysian Employment Act 1955 (EA 1955), which solely applies to the connection between workers and their employers. Despite the Act's preamble explicitly stating that it pertains to employment, it fails to extend ensuring equal opportunities in recruitment, resulting in a confined and restricted scope. The persistent issue of discrimination in the hiring process underscores the need for a thorough evaluation of the existing legal structure and proposals for enhancement. By addressing this concern, Malaysia can progress towards fostering a more inclusive, diverse, and fair job market that benefits both individuals and society as a whole.

Therefore, this study aims to analyse the Malaysian legal framework governing employment hiring practices and to assess its effectiveness in combating discriminatory hiring practices. The study will explore into the key elements of Malaysia's legal framework, examining relevant legislation, policies, and regulations that pertain to the hiring process. This includes the Malaysia's Federal Constitution, Industrial Relations Act 1967 IRA (1967), EA 1955, and other pertinent laws and guidelines. This study also analyses the UK, US and Canadian legislations as a reference to improve the existing Malaysian employment law.

Literature Review

Job postings generally specify the job duties and responsibilities and other job requirements such as experience, education, skills, knowledge, ability or other attributes or competencies for a particular job by the hiring organization with details related to compensation and benefits (Kim & Angnakoon, 2016). Job postings are used interchangeably as job announcements or job openings or job advertisements (jobs ads). Job ads describe in detail about the job duties and responsibilities of a position comprising on working experience, educational level, skills gained, knowledge level, background and location of the hiring organization, salary and benefits offered and other attributes required to perform the job (Applegate, 2010). The function of job ads is to attract the most qualified job seekers for the opening positions. An elaboration of the employer's expectations is also specified. The job ads are viewed as the guidelines for both parties, employers and employees in the hiring process. The available information of job ads also crucial in determining the nature of dynamic labour markets amongst the researchers, educators, policymakers, and higher education institutions (Cable & Turban, 2001).

Discrimination is the unequal treatment of individuals based on characteristics or group membership unrelated to productivity or merit. These approaches imply that hiring and wages may be influenced not only by productivity and skills but other characteristics unrelated to these factors. This not only harms the individuals directly affected but also limits the potential for organizations to benefit from a diverse and inclusive workforce that fosters innovation and creativity (Fenton, 2022).

The consequences of discriminatory hiring practices extend beyond individual candidates. They contribute to the perpetuation of disparities in income, representation, and career progression, reinforcing historical and societal inequalities. Moreover, they compromise organizational success by depriving companies of the full spectrum of talents, perspectives, and experiences that a diverse workforce can bring (Quillian, & Midtbøen, 2021).

Some discrimination is on purpose and can be easily noticed, is known as direct or deliberate discrimination. But some discrimination can be unintentional, or accidental is known as indirect discrimination. Archer and Prange (2019) discussed on the unequal wages received by the United States Women's National Soccer Team (USWNT) in the case of *Morgan v. United States Soccer Fed'n, Inc.*, 445 F. Supp. 3d 635. The campaign conducted under the slogan 'Equal Play, Equal Pay' called for the USWNT to be paid the same as the men's team. The women's national team filed a lawsuit against their own governing body, United States Soccer Federation (USSF) alleging years of institutionalized gender discrimination for damages, back pay fees and an injunction against the USSF engaging in its gender discrimination practices. This case showed that, although the issues of wages and income are not a direct discrimination, but the lesser payment received by the female teams as compared to the male teams despite their better performance gives an avenue for them to claim their rights.

A study by Lee and Khalid (2016) revealed that pre-employment hiring discrimination occurred based on race. Other factors of discrimination also include the employer's language proficiency level and other language requirements for advertised jobs. In most cases in Malaysia, employers preferred candidates who were fluent in Chinese demonstrating that cultural compatibility is important. This is seen as discrimination against other races, especially Malay and Indian candidates as they have been viewed and judged negatively (Lee & Khalid, 2016).

Despite the considerable body of research examining the employment discrimination and its impact, Malaysia's current stance differs significantly as it overlooks the issue of early stage of job hiring discrimination, thereby exposing certain individuals to potential exploitation and unjust treatment without any effective legal recourse.

Methodology

This paper was designed as exploratory research to examine the issues of job hiring discrimination faced by the applicants and jobseekers. This paper adopted a qualitative method by analysing the authoritative legal materials and survey data. The legal materials consist of statutory provisions, cases, legal rules, and international guidelines. It includes the International legal instruments of the Universal Declaration of Human Rights 1948 (UDHR), International Convention on the Elimination of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Malaysian Federal Constitution (FC), EA 1955, IRA 1967, Equality Act 2010 of United Kingdom (EqA 2010) and United States Civil Rights Act of 1964 (CRA 1964) and Ontario Human Rights Code (OHRC). The EqA 2010 was referred as UK is a common law country, therefore its legal approaches is suitable and relevant to be implemented in Malaysia.

This study also adopted online survey methods where data was collected among 100 job ads by the industries and firms to identify the requirements and criteria posted for the applicants and jobseekers. The dataset contains information about the firms, types of positions available, job description and job specification details. The study only looked at 100 positions, regardless of job rankings, technical and non-technical jobs, salary ranges, or job locations or job position similarities and differences.

Discussions on Jobs Postings Requirement

The online data gathered on job postings requirements in Malaysia is discussed in Table 1. The job ads were collected from January to October 2023. The analysis job employment data indicated that, there are seven advertised positions over 30 jobs specifying Mandarin or Cantonese language requirements. The data was analysed which has proven on the employers' preferences on mastering other languages as the criteria for job recruitment and selection. It has justified the existence of job discrimination amongst the jobseekers irrespective of the positions in the labour market.

Table 1

Languages Job Requirement

POSITIONS		COMPANY/ORGANIZATION TYPES (Locals)	JOB DESCRIPTION/JOB SPECIFICATION REQUIREMENTS
Position	General	Construction	<ul style="list-style-type: none"> • Mandarin speaker is a pre-requisite as need to liaise with China HQ • Required Languages: Mandarin, Cantonese, Bahasa Malaysia & English • Must be able to communicate in Mandarin (Verbal & Written)
Manager Assistant			
Sales Executive		Fabrication and installation	<ul style="list-style-type: none"> • Language Proficiency in Cantonese/ Mandarin, English and Bahasa Malaysia
Assessment Worker	Social	Charity Association	<ul style="list-style-type: none"> • Required language(s): Bahasa Malaysia, English, Mandarin, as candidate is required to communicate with our target beneficiaries in all three of these languages. Other dialect like Cantonese and Hokkien is a plus point
Accounts Executive		Consultant Firm	<ul style="list-style-type: none"> • Candidates who are fluent in Mandarin is preferred as the role requires dealing with Mandarin speaking clients
Admin. Assistant		Art and Design Company	<ul style="list-style-type: none"> • The job Ads in other language not in BM as the official language
Sales Executive		Industrial Chemicals Supply Company	<ul style="list-style-type: none"> • Proficient in English, Bahasa Malaysia and Mandarin

Service Desk Analyst (English / Cantonese Speaking)	Computer/Information Technology (Software)	<ul style="list-style-type: none"> • Excellent communication skill in Cantonese Business Language
Sales & Marketing Executive (Social Media Executive)	Diversified business group	<ul style="list-style-type: none"> • Required language(s): Bahasa Malaysia, English, Mandarin. Candidates fluent in Mandarin or Cantonese preferred as role required candidate to liaise with Mandarin speaking clients. • Are you mandarin speaker? We need you!
Marketing Executive	Manufacturer of chemical mechanical polishing (CMP)	<ul style="list-style-type: none"> • Required language(s): English, Bahasa Malaysia, Mandarin
Business Development Executive / Sales & Marketing Executive	Buying and selling crypto currency	<ul style="list-style-type: none"> • Excellent in both written and spoken English, Cantonese and Mandarin
Trademark Sales Executive	Legal firm	<ul style="list-style-type: none"> • Able to communicate in English, Malay and/or Mandarin
Production Executive/Engineer	Manufacturer of renewable polystyrene (PS)	<ul style="list-style-type: none"> • Required language(s): Mandarin, English, Bahasa Malaysia.
Technical Support Engineer	Computer & networking products	<ul style="list-style-type: none"> • Required language(s): English, Bahasa Malaysia and Mandarin is an added advantage
Mechanical Technician/Engineer	Energy Saving Solution Provider	<ul style="list-style-type: none"> • MUST be able to speak and write in Mandarin as the job requires the candidates to deal with certain Mandarin-speaking supplier and customers
R & D Engineer	Communication Company	<ul style="list-style-type: none"> • Good verbal in Mandarin is required

Malaysian Legal Perspectives on Job Hiring Discrimination

The principles of equal rights and non-discrimination are fundamental human rights principles mentioned under Article 7 of the UDHR 1948, that “all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”.

Basically, the term discrimination discussed under Article 1 of the International Convention on the Elimination of Racial Discrimination (ICERD) as “the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

Prohibition against sex discrimination is also mentioned in Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). It stated that, “...any

distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

Therefore, as the signatories of the covenant and State Parties to the CEDAW, Article 11 requires Malaysia to take appropriate approach to ensure the equality of men and women, particularly on

- a) The right to work as an inalienable right of all human beings;
- b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
- e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
- f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

Malaysia has taken steps to establish a legal infrastructure that promotes fair employment opportunities by eliminating any unequal treatment based on gender, race, age, religion, disability, language and other personal attributes continue to persist. The main provisions that promote the fundamental right to equality is stipulated in Article 8(1) of the Federal Constitution where it says, “all persons are equal before the law and entitled to the equal protection of the law”.

Article 8(2) provides, “there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in

- i) any law or
- ii) in the appointment to any office or
- iii) employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

However, by referring to the employment issues between the private parties in the case of *AirAsia Bhd v Rafizah Shima [2014] 5 MLJ 318*, the Court of Appeal held that Article 8 (2) Federal Court cannot be invoked to challenge the validity of employment contract between the private parties in this case. The court interpreted that constitutional law a branch of public law, concerns only the contravention of an individual’s rights by a public authority, and therefore did not apply to the agreement in question, which was a lawful contract between private parties (Bhatt, 2006).

Additionally, while Malaysia is signatory to CEDAW, without express incorporation into domestic law or local legislation, the provisions of international obligations in the said convention did not have any binding effect. Furthermore, the agreement did not restrain or prohibit marriage or pregnancy if the respondent completed the said training programme in

the manner stipulated in the agreement. Therefore, the agreement was not discriminatory against the rights of women.

Accordingly, the law of employment has been specifically discussed in the EA 1955 and IRA 1967 to further deal with all aspects of employment including occupational basis in terms of remuneration, protection at the workplace on their rights relating to labour relations and disputes as well as employees' welfare and development opportunities and any other employment perspectives. Section 2 of the EA 1955 defines the word 'employee' as any person or class of persons who has entered into a contract of service. Meanwhile 'employer' is interpreted as any person who in the process to employ any other person as an employee, or any person who has entered into a contract of service to employ any other person as an employee and includes the agent, manager or factor of such first mentioned person. Hence, jobseeker who is a person seeking opportunity for employment is not fall within the definition of employee, thus will not be protected against job discrimination.

It showed the limitation of the existing laws due to its scope that only govern employer and employee relationship. None of the Malaysian employment laws and statutory provisions addressing the non-discrimination aspects for the jobseekers during the hiring process particularly on the terms used in job ads. Therefore, the UK, US and Canada laws were discussed to look into the particular terms and court cases regarding the prohibition of discrimination during the hiring process.

Equal Employment Opportunities: United Kingdom, United States of America & Canada Legal Approach

Reference is made to other jurisdictions of the UK Equality Act 2010 (EqA 2010), US Civil Rights Act of 1964 and Ontario Human Rights Code Canada to observe the legal avenue provided in dealing with job hiring and pre-employment discrimination.

a) Equality Act 2010 of United Kingdom

In the UK, the EqA 2010 aims is to protects people from discrimination in the workplace where this Act makes it unlawful to discriminate against people in relation to nine "protected characteristics" including age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex and lastly sexual orientation (Fell & Dyban, 2016). Basically, section 39 of EqA 2010 provides that an employer must not discriminate, victimise, and harass a person or employee:

- a) In the arrangements the employer makes for deciding to whom to offer employment.
- b) As to the terms on which the employer offers the person employment.
- c) By not offering the person employment.

The interpretation of "arrangements" refers to the policies, criteria and practices used in the recruitment process, including the decision-making process, and includes such things as advertisements for jobs, the application process and the interview stage.

Section 29 of Race Relations Act 1976 on discriminatory advertisements states that it is unlawful to publish or to cause to be published an advertisement which indicates, or might reasonably be understood as indicating, an intention by a person to do an act of discrimination.

Thus, in the case of *Ruhaza v Alexander Hancock Recruitment [2010] EWCA Civ 29*, Francophone Burundi national Mr Ruhaza in February 2007, applied for a post as a French speaking bi-lingual administrator advertised by Alexander Hancock Recruitment (AHR). It became clear to Mr Ruhaza that AHR were looking for someone in the Manchester area, and

he told them - when asked - that he intended to relocate. He was invited to arrange an interview, but he never did, and so was never registered by AHR. Then in November 2007 he saw a similar advert by AHR which said that they would "prefer a British national". The Employment Tribunal clearly understood that the claim of direct discrimination related to the advertisement placed on 9 November 2007, whereas the indirect discrimination related to the fact that Mr Ruhaza asserted the Respondent favoured local candidates.

This case however, has been presented out of time, insofar as the Claimant's claims related to an alleged discriminatory policy or discriminatory advertisement such claims could only be brought by the CRE under ss28 and 29 of the Race Relations Act 1976.

In another case, *Dekker v VJV-Centrum (8 November 1990)*, the applicant for a job, Mrs. Dekker a Dutchwoman, was found to be the most qualified applicant at the job interview and was recommended for hiring by the hiring committee. As she was three months pregnant at the time, she was not given the job because the insurer refused to cover her maternity pay. Mrs. Dekker sued the company, VJV, claiming discrimination on the basis of her sex. The case was then submitted to the ECJ under art 141 and the Equal Treatment Directive. The court held that discrimination in employment opportunities on the ground of pregnancy amounted to direct discrimination in violation of the directive. Here the ECJ considered the disadvantage to women rather than the comparable treatment with men as the basis for determining discrimination on the ground of pregnancy. Thus discrimination was proven if detrimental treatment due to the pregnancy could be shown.

In *R (Elias) v Secretary of State for Defence [2006] EWCA 1293, [2006] 1 WLR 3213*, the rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality, or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins. Direct and Indirect discrimination are mutually exclusive. You cannot have both at once.

b) Civil Rights Act of 1964 of United States of America

In the USA, Title VII of the Civil Rights Act of 1964 (CRA 1964) is a federal law that prohibits discrimination against employees and applicants during the recruitment stage based on the person's national origin, race, colour, religion, disability, sex, and familial status. The laws restrict the national origin discrimination where it is considered as unlawful to discriminate a person's birthplace, ancestry, culture or language.

Title VII of the Civil Rights Act dealt with the sex or gender amended, the Equal Pay Act of 1963, prohibits sex or gender discrimination including the amounts of wages to women and men performing the same tasks.

The US Supreme Court in its famous decision in *Griggs v Duke Power Co (1971) 401 US 424* where the ruling of the Supreme Court was made in favour of the plaintiff. In this case, Black employees sued the employer under Title VII of the Civil Rights Act 1964 claiming that the employer's practice of requiring a high school diploma or success in an IQ test as a condition of employment in particular jobs discriminated them on grounds of race when a disproportionate number of Black workers were being rendered ineligible by practice because they are members of a minority group.

Accordingly, the Genetic Information Non-discrimination Act 2008 (GINA) (2008) has been passed to prohibit genetic discrimination in health insurance and employment. The law

prevents the employers from making decisions, such as hiring or pay, based on genetic information (Lenartz et al., 2021). The act allows the employee to file a charge of discrimination for any unlawful employment practices.

To combat discrimination based on genetic status, the Commission for Equal Employment Opportunities was established to resolve a dispute related to filing a claim against an employer who violated GINA 2008. In the case of *Equal Employment Opportunity Commission v BNV Home Care Agency, Inc., 1:14-cv-05441-JBW-RML, 2014*, the essence of the violation was that the employer requested a family medical history from its employees and applicants in violation of the provisions of this Act. It should be noted that the Commission filed a lawsuit on its own behalf and an undefined group of persons, since the activities of the defendant company grossly violated the requirements of the Genetic Information Nondisclosure Act. The defendant agreed to the imposition of an injunction against continuing violations of the provisions of the Act. The company went through to destroy all questionnaires containing confidential information about the diseases of employees and applicants since 2014 and transform the content of the questionnaire in order to bring it in line with the requirements of American law. The defendant also paid USD 125,000 in damages and this amount was divided equally among the employees (Ponomareva & Kubyshkin, 2022).

c) Ontario Human Rights Code of Canada

Ontario Human Rights Code of Canada defines discrimination based on 17 personal attributes which are against the law include citizenship, race, place of origin, ethnic origin, colour, ancestry, disability, age, creed, sex/pregnancy, family status, marital status, sexual orientation, gender identity, gender expression, receipt of public assistance (in housing) and record of offences (in employment). This law guarantees the right to “equal treatment with respect to employment” covers the process of applying for a job, being recruited, training, transfers, promotions, terms of apprenticeship, dismissal and layoffs.

In the case of *Imperial Oil Limited v. Haseeb 2023 ONCA 364*, the plaintiff in this matter, Muhammad Haseeb applied for an entry-level engineering position at Imperial Oil that listed permanent eligibility to work in Canada, as established by proof of Canadian citizenship or permanent residency, as a condition of employment. Haseeb did not meet this requirement but represented during the recruitment process that he was eligible to work in Canada on a permanent basis. Imperial withdrew the conditional offer of employment on the basis that the plaintiff did not meet the job requirements. As a result, Haseeb filed a complaint with the Ontario Human Rights Tribunal (HRTO) alleging that Imperial violated the Code by discriminating against him based on citizenship. The HRTO found that Imperial Oil Limited violated the Code when it required a prospective job applicant, to be a permanent resident of Canada as a condition of employment. The HRTO determined this constituted an act of direct discrimination on the basis of citizenship, a protected ground under the Code. The HRTO awarded plaintiff approximately \$120,000.00 in compensation for his loss of income and the injury to his feelings, dignity, and self-respect.

Recommendations

The challenges in combatting job hiring or pre-employment discrimination is due to non-existent provisions that protect jobseeker from being discriminated. The legal rules and regulations concerning the prohibition of discrimination in respect of employment at all stages should be applied to all ethnic communities, races, colours, language, and religions as well as to both sexes, national origin and age. No persons or categories of persons are

excluded from the implementation of principle and right relating to the elimination of discrimination in respect of the job employments.

Therefore, it is suggested for a revision in the existing Employment Act 1955 and Industrial Relations Act 1967 to extend the protection coverage not only to employer and employee relationship but to a person who is in the arrangement process to be employed.

Terms use in job advertisements should be fair hiring practices outlines what is required from a candidate including qualification, skills, knowledge, and relevant experience. Fair hiring practice is merit-based, thus any criteria within the job description should be relevant to the role being advertised and not discriminatory. If the employers need to include a special requirement or are asking for information that may be viewed as discriminatory, they must make sure that it is indeed needed for the job. A reason for the special requirement or any data collection should be provided to ensure that the job requirements in the advertisement are well understood. Furthermore, the protection guaranteed should be extended against any “unjustified forms of discrimination” at every stage of employment including job hiring and recruitment process.

The government of Malaysia should combat the job employment discrimination to ensure all races are getting the same opportunities to secure a job. It is also to safeguard the rights of each Malaysian citizen and as well as protecting the job applicants and maintaining a stabilize and dynamic labour market.

Conclusions

In summary, it is essential to understand that the discrimination during job hiring or pre-employment process is against the provisions in international treaties. Besides, the principles of equal rights, non-discrimination, entitlement to equality before the law and equal protection under the law, constitute fundamental human rights.

Imperatively, employers have duty to refrain from making employment decisions based on personal characteristics, including but not limited to gender, race, nationality, ethnic origin, religion or belief, disability, age, or any characteristics unrelated to the inherent job requirements. The protection against discrimination should be adhered not while making the arrangements but in the job postings itself.

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