



EMPLOYMENT TRIBUNALS

Claimant: Mrs R Hasham

Respondent: Lancashire County Council

HELD AT: Manchester (by CVP)

ON: 17 - 19 May 2021 and
(deliberations) 8 June
2021

BEFORE: Employment Judge B Hodgson
Ms P J Byrne
Mr S T Anslow

REPRESENTATION

Claimant: In person

Respondent: Mr D Tinkler, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of discrimination arising from disability is not upheld and is dismissed
2. The claim of failure to make reasonable adjustments is not upheld and is dismissed

REASONS

Background

1. By an ET1 Claim Form presented on 18 July 2019, the claimant raised claims of discrimination on the grounds of disability and also that she was owed "other payments"
2. The matter came before the Employment Tribunal at a Preliminary Hearing ("PH") heard on 20 November 2019. At the PH, it was clarified that the claimant was not pursuing any complaints other than disability discrimination
3. At that stage, the respondent did not admit that the claimant was at the relevant time a disabled person as defined but that issue has subsequently been conceded

Issues

4. The issues falling to be determined in this claim were fully discussed and agreed at the PH. Those issues identified at that stage were as follows:

Disability – section 6 Equality Act 2010

4.1. As indicated, this issue has subsequently been conceded. It is admitted that the claimant was at all relevant times (namely between January and April 2019) a disabled person, as defined, by reference to the conditions of anxiety, a back injury with arthritis and fibromyalgia

Breach of duty to make reasonable adjustments – Sections 20 and 21 Equality Act 2010

4.2. Did the respondent apply a provision criterion or practice ("PCP") of communicating in an informal and ad hoc manner with employees in the claimant's position approaching the end of their contract?

4.3. If so, did that PCP place the claimant at a substantial disadvantage compared to a person without her disability in that the anxiety component meant that the uncertainty of such an approach exacerbated her symptoms?

4.4. If so, can the respondent nevertheless show that it did not know and could not reasonably be expected to have known that the claimant had a disability and was likely to be at that disadvantage?

4.5. If not, did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage? The adjustment for which the claimant contends was to have communicated with her clearly and unambiguously in writing so as to remove any unnecessary uncertainty

Discrimination arising from disability – Section 15 Equality Act 2010

- 4.6. If the claimant was a disabled person, can the respondent nevertheless show that it did not know and could not reasonably have been expected to have known that the claimant had a disability?
- 4.7. If not, are the facts such that the Tribunal could conclude that in deciding not to extend her fixed term contract the respondent treated the claimant unfavourably because she had been making a request to purchase additional leave under the "PALS" scheme?
- 4.8. If so, are the facts such that the Tribunal could conclude that the claimant's request under the PALS scheme arose in consequence of her disability because she wanted the extra leave in order to help stabilise her medical condition?
- 4.9. If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim (ensuring that the fixed term contracts allowed to continue matched posts still needed so as to ensure sufficient operation of its activities) or otherwise?
5. These issues were discussed with the parties at the outset of the hearing and agreed save that the respondent confirmed that it was no longer seeking to argue, in respect of the claim of discrimination arising from disability, that the treatment was a proportionate means of achieving a legitimate aim

Facts

6. The Tribunal heard oral evidence from the claimant herself. The respondent called, to give oral evidence, a total of three witnesses: Ms Kelly Dawson, Senior Special Educational Needs and Disabilities Officer; Ms Janette Hastings, Team Manager; and Ms Sally Richardson, Head of Service
7. The parties had agreed a final hearing bundle and reference to numbered documentation within this Judgment is by way of reference to pages as numbered within such bundle
8. The Tribunal came to its conclusions on the following facts – limited to matters relevant or material to the issues - on the balance of probabilities, having considered all of the evidence before it both oral and documentary
9. The respondent is a large local authority with which the claimant initially commenced employment in 2006
10. The claimant held a number of roles with the respondent the most recent of which commenced by way of re-deployment in February 2017, being the role of a Special Educational Needs and Disabilities Officer ("SEND O"). This was a fixed-term appointment, initially for one year, then extended by a further year

and scheduled to expire on 31 March 2019. She was one of nine staff employed in this role on this basis

11. The role principally involved the transfer over of records electronically and it is fair to say that it was not a role that the claimant particularly enjoyed, believing it did not match her abilities or qualifications. In the circumstances, the claimant made no secret of the fact that she was comfortable at the prospect of her employment with the respondent coming to an end at the expiry of the fixed term by way of early retirement with a redundancy package
12. A meeting was held with the claimant's team on 14 December 2018 when it was confirmed the fixed-term posts would terminate on 31 March 2019 due to a lack of further Government funding. This position was confirmed by letter dated 28 December 2018 from Ms Janette Hastings [page 64] and the claimant – along with her colleagues - was advised of her right to appeal against this decision. She did not exercise that right. The claimant had attended the meeting with her Trade Union representative
13. Following the meeting on 14 December, the claimant completed the employee sections of an "Access to Vacancy Management" form [pages 58 – 63] which she passed to her Line Manager, Ms Kelly Dawson, who completed the management section of the form and then sent it on the respondent's HR department [page 57]. It is clear from Ms Dawson's covering e-mail [page 57] that she was uncertain as to the correct manner in which to complete the form – she had indicated [see page 63] that the reason for completion of the form was "end of fixed-term contract – not redundancy"
14. The claimant advised Ms Dawson that whilst she would be prepared to consider alternative roles within the respondent, she would also be looking for other opportunities externally. An internal job search produced nothing of interest to the claimant and no offers of alternatives were made to her
15. On 21 January 2019, the claimant was sent by Ms Hastings an email setting out her redundancy estimate. In her acknowledgement, sent on the same day, the claimant indicated that she was "looking forward to [her] end date" albeit "a bit apprehensive about such a huge change" [pages 69 – 70]
16. In February 2019, the claimant accepted an alternative job offer (and also a further voluntary role) with a start date of 1 April 2019 and advised both her Line Manager (Ms Dawson) and her colleagues of this development. She remained however on the respondent's redeployment register to keep her options open
17. On 11 March 2019, the claimant was advised by Ms Dawson that Ms Hastings had been asked to prepare a "business case" to be presented to one of the respondent's Cabinet groups to extend the contracts of the fixed-term SENDO team. Ms Dawson was however unable to give any further details as to numbers or timing

18. It had been agreed with the claimant that she would be taking at least part of her outstanding holiday at the back end of March, leading up to the termination of her employment, and accordingly her last working day was to be 14 March. In the circumstances, the claimant emailed Ms Dawson on 11 March asking for clarification and proposing holding her holiday back in case her employment continued . Ms Dawson replied on the same day indicating an uncertain timing but agreeing for the claimant to deal with the holiday position as she saw fit [see pages 71 – 72]
19. On 19 March, the claimant was absent through ill-health. The late potential change of position and the impact of this on her work arrangements, both current and future, caused her to be absent by reason of anxiety
20. On that day, it was confirmed that the decision had been taken that the contracts for the SENDO team were agreed to be extended through to August 2019
21. Ms Dawson met with the claimant on 21 March and confirmed the extension. The claimant was verbally offered three options. The claimant asked for the options to be set out for her in writing to enable her to give them proper consideration. Ms Dawson did so by email of the same day timed at 12.57 [page 85]. These were:

- 1 *you continue in post until the new end date of the 31/08/2019 as per the agreement following cabinet meeting*
- 2 *you can resign on 31/03/2019 but will not be entitled to your redundancy, but the service can backfill your post*
- 3 *the service would agree you can leave on 31/03/2019 as part of the ending fixed term contract guidance so you will be entitled to your redundancy but the service will not be able to backfill the posts (sic) as it will be disestablished*

The email ended with Ms Dawson advising the claimant to "please think through this carefully and take advice if needed and then get back to me"

22. It transpired, unknown to Ms Dawson, that, although she had been instructed to do so, it was in fact an error to have put these options to the claimant. These options had been given to management by HR for them to consider rather than be passed on as available options to the staff
23. Later that same day, the claimant by email timed at 15.40 forwarded Ms Dawson's email to her Trade Union representative, seeking guidance [page 86]
24. The representative's advice in a follow up telephone conversation was either to defer and negotiate confirmation of redundancy at the end of August or to take it now. The claimant was concerned if she took immediate redundancy that this may impact upon the work load of her colleagues who remained

25. By email dated 22 March the claimant raised with Ms Dawson the issue of her annual leave arrangements under the PALS scheme and whether this would be available to her if she remained employed through to August. (The respondent's "PALS" scheme is a scheme whereby employees can 'purchase' additional holiday. The claimant had been utilising the scheme, at least in part to give her additional time off to assist with her management of her impairments)
26. The claimant had already a pre-booked three week holiday in June 2019. She indicated that: "If I decide to remain, I was thinking of the full 20 days as we will be fasting in May. But at a push will need at least 15 days as my holiday is from 14 June to 8 July." Ms Dawson's reply was that Ms Hastings who would be responsible for making the decision was due to return to work from leave the following Tuesday (26 March) [pages 87 - 88]. Reference to 20 days is to the maximum additional leave that was available under the PALS scheme
27. During the intervening period, the claimant continued to discuss her options with her family and her representative, finding it stressful and difficult to come to a decision
28. On 26 March, the claimant emailed Ms Dawson asking if she could talk to her "today or tomorrow". She added that "It will be good if [I] can run some ideas past you to [help] me reach a decision." Ms Dawson replied that "tomorrow would be better" as she had not at that stage had the chance to speak with Ms Hastings [pages 98 – 99]
29. The claimant replied, stating: "Thanks Kelly, I will ring u tomorrow. I do appreciate all the arrangements you and Janette made so I could be made redundant, despite the impact it would have ie not being able to backfill my role, but my health has been affected and it wouldn't be fair for me to start with a new employer when I am not well. Hopefully things work out, I need to plan logically. I will ring you tomorrow." [page 89]
30. In fact Ms Dawson followed up that e-mail with a further email (timed at 16.57) [page 98] advising that: "I have spoken to [Ms Hastings] who has spoken to Steve Martin and we would be happy for you to finish on the 31st of March 2019 as you previously hoped to do and you will still be eligible for your VR [Voluntary Redundancy] etc. It is very unfortunate you have had this additional stress so near to the end of your contract. Can you please let me know if you are happy to proceed in this way. Feel free to call me tomorrow."
31. Ms Dawson's evidence was that on the morning of 27 March she telephoned the claimant and advised her that the decision had been taken that the claimant would be entitled to redundancy and accordingly her contract would terminate as at 31 March in accordance with her express wishes. The claimant makes no reference to such a call in her witness statement and in answer to cross-examination indicated that she had no recollection of such a call. The Tribunal in those circumstances accepts Ms Dawson's evidence particularly given that,

in a subsequent email [pages 101 – 102], Ms Dawson makes reference to "our phone call earlier today" (see below)

32. Later on 27 March, after the confirmatory phone call, the claimant emailed Ms Dawson at 14.30 [pages 102 – 103] stating that she "would like to confirm [her] position on the 3 options [she] was given". She advised that the option she had chosen was "that I continue in post until the new end date of 31/8/2019". She continued that:

"You are aware I had hoped to finish on 31/3/2019, but all the uncertainty and being part of a group of employees at risk, being aware of how cabinet decisions were made, I felt totally dislodged regarding my personal plans. So I am left with a difficult decision to be made in a very short time. It will be difficult to rebuild the changes to my personal plan, and you will be aware my health has been affected by these sudden and out of my control changes, so the best option for me is to continue in post as cabinet have agreed till 31/8 2019.

As discussed, we will need to address my pre-booked holiday.

I hope the above clarifies my position.

I look forward to your response.

Many thanks for your support."

33. Ms Dawson replied by email at 15.53 [pages 101 - 102]. She advised that

"As I explained in our phone call earlier today your temporary contract is ending as previously planned on the 31st March, therefore the 3 options previously suggested on the 21st March are no longer applicable. This has been confirmed [] with both Stephen Martin and Janette Hastings.

...

I would like to thank you for the work you have done in the SEND team and wish you the very best of luck going forward.

..."

34. At 17.05, the claimant asked Ms Dawson to advise "on what basis this decision of the options presented following cabinet agreement are no longer applicable" and Ms Dawson replied at 09.01 the following day [page 101] that "it has been agreed that we now no longer need all the posts this therefore allows for the option of VR" [page 101]

35. The claimant was advised by her representative to submit a grievance which she did attached to an email dated 29 March sent to Ms Dawson. Ms Dawson confirmed that the grievance would be forwarded directly to Ms Sally

Richardson (Head of Service) to whom it was addressed [page 109]. The grievance document [page 110] raises a number of issues, stating:

" I am submitting this grievance because of the lack of clarity, and lack of the following of policy and procedure in relation to the ending of my employment with Lancashire County Council (LCC).

My line manager is aware of the way in which my contract has been dealt with, and the impact it has had on my health, as well as my overall plans of my employment with LCC.

Below are some of the issues that have affected me and are very much against the processes and ethos of LCC:

- Lack of detail and consultation when a business case was submitted to LCC Cabinet for the extension of the fixed term contracts*
- Disruption to my personal plans and lack of time in fully allowing me to evaluate and decide which way I wanted to go*
- I was given three options at a very late ate with a very short deadline to come to a decision, as a way forward in relation to my contract. After accepting one of the three options provided ("that I continue in post until the new end date of 31/9/2019"), the option was refused. The explanation I as given was the organisation no longer needs the posts as first put forward. Further adding to the disruption of my well-being*

It took me a lot of effort and discussions with HR, Unison, and other people I seek guidance from to reach the decision. During this time, I kept my line manager fully informed and made enquiries of her as required.

Once I chose the option which I felt, and was advised was practically and morally right for all parties ("that I continue in post until the new end date 31/8/2019"), I was told that 2 managers have decided they will end my contract at the end on March 2019.

I have been made aware that expressions of interest have been advertised within the Inclusion Service to cover for the fixed term roles that were left vacant. This contradicts what I have been told as part of the revoking of the option as above.

At present I am not in work due to sickness and requested access to my laptop so I could access my certificates and other personal papers before my contract formally ends 31st March 2919. This has not been allowed.

I am very aggrieved, and am of the view that I am being treated unfairly and like an employee that is being dismissed , and not one being made redundant. This leaves me very distressed as to the reason behind this approach.

I hope you will address this grievance as a formal one, as the informal discussions I have had have not brought any result to satisfy me that the managers have dealt with this whole process in line with LCC policy and procedures."

36. The claimant's employment ended on March 31. She received her redundancy pay entitlement and her P45. It is not clear on what date these were received but it is agreed that it was prior to 3 April
37. Ms Dawson was instructed by her managers to contact the claimant to offer her the option of returning to her post. She did so by telephone on 3 April. Ms Dawson's report of the discussion is set out in her email to Ms Hastings and Mr Martin on that same day [pages 111 – 112]. Ms Dawson summarises the content of the call as follows: "It was not a pleasant conversation, in fact it wasn't a conversation as she ranted much of the above and I had to at one point say 'could you let me speak'."
38. Ms Dawson had a further telephone call with the claimant on the following day, 4 April. Her report of the content again is set out in an email to Ms Hastings and Mr Martin [page 113]. Ms Dawson advised that the claimant had said that she had yet to get formal advice from her Union and would be having a formal discussion with them the following Monday. Ms Dawson's expressed view was that it would be unwise to take the offer away until the claimant had spoken to her Union
39. Ms Richardson wrote to the claimant by letter dated 8 April [page 114] acknowledging the grievance, stating: "I would welcome the opportunity to speak with you to try to find a resolution to this as quickly as possible and will contact you again shortly to arrange a mutually convenient date and time for a meeting." Ms Richardson in fact did not follow up on this
40. The claimant subsequently made arrangements for the collection of her personal belongings. There were later issues with regard to the correct calculation of the claimant's pension entitlement but these were resolved in or about November 2019

Legal Framework

41. Section 15 of the Equality 2010 ("EqA") states that:

(1) A person (A) discriminates against a disabled person (B) if -

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability

42. Section 19 EqA states that:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ("PCP") which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purpose of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons which whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim

[The relevant "protected characteristics" include "disability"]

43. The burden of proof in discrimination claims rests initially with the claimant but section 136 EqA provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent has acted in a way that is unlawful, the Tribunal must uphold the complaint unless the respondent shows that it did not so act

44. This requires a two-stage process. First, the complainant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination against the complainant. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' (namely, that a reasonable Tribunal could properly conclude from all the evidence before it) that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. The second stage, which only applies when the first is satisfied, requires the respondent to prove that it did not commit the unlawful act. However, it is not necessary for the burden of proof rules to be applied in an overly mechanistic or schematic way

Submissions

45. The respondent prepared and spoke to written submissions, including reference to relevant case law, which, being on record, are not repeated in this Judgment but were fully considered by the Tribunal

46. The claimant was given the opportunity to consider the respondent's submissions before making her own submissions which she did orally and which are summarised as follows
47. She would have been entitled to a redundancy if she had stayed until August 2019 but ultimately was given no option. The respondent was aware that she was being advised by her Union throughout but corresponded with her direct. At no point did the respondent treat the claimant sympathetically. Although she had described her direct line manager, Ms Dawson, as a kind person, she was more concerned with the overall shabby treatment of her by the respondent. Her request with regard to the PALS scheme had not been answered although she needed clarity as it impacted on her health as well as Ramadan and holidays. One of the reasons for her coming to the Tribunal was to be heard and have her disability acknowledged which the respondent had failed to do. The respondent's ignoring of her feelings and the impact of their actions had greatly affected her

Conclusions

48. Throughout its deliberations the Tribunal reminded itself that it is the claims that are before it that must fall for consideration, rather than claims that the claimant perhaps could have brought but, for whatever reason, had chosen not to. By way of example, there is no claim before the Tribunal of unfair dismissal

Breach of duty to make reasonable adjustments – Sections 20 and 21 Equality Act 2010

49. The PCP contended for is that the respondent communicated in an "informal and ad hoc manner". Although this is rather nebulous phrase, the Tribunal is satisfied that it can in theory amount to a PCP which to a degree merges into the question of whether or not such alleged PCP placed the claimant at a substantial disadvantage in that the anxiety component meant that the uncertainty of the situation exacerbated her symptoms
50. It is correct that the respondent, through Ms Dawson, approached the claimant to advise her of developments towards the latter part of March directly and through personal contact or telephone calls. The Tribunal does not however accept the communication by Ms Dawson can properly be categorised as informal and ad hoc. It is clear from the evidence that Ms Dawson was placed in the unfortunate position of having to convey and seek to explain to the claimant the decision making process, such as it was, of her more senior managers. It was acknowledged by the claimant in her evidence that she had a very good working relationship with Ms Dawson who she found to be supportive. Ms Dawson felt, especially given the very tight time-frame, that it was better and more sympathetic to approach the claimant direct. She did not consider it appropriate for example to attempt to communicate with the claimant through her trade Union representative. She was aware that the claimant had such a representative but was also made fully aware by the claimant (both directly and seeing the content of the claimant's e-mails) that the claimant was

in close contact with her Trade Union representative throughout. At no point, on the evidence, did the claimant request that Ms Dawson communicate with her through her representative. Whenever the claimant asked for the position advised verbally to be set out in writing, Ms Dawson did so promptly. There was clearly on the evidence no intention to place the claimant at a disadvantage by this approach and no such disadvantage could be detected by the Tribunal in terms of the way in which information and decisions were conveyed, as opposed, for example, to the substance or timing of what was being conveyed

- 50.1. This conclusion is supported by the Tribunal's consideration of the question of the adjustment contended for which was to have communicated with the claimant clearly and unambiguously in writing so as to remove any unnecessary uncertainty. As indicated, whenever requested, this is precisely what in fact Ms Dawson did. The Tribunal was not referred to any approach by Ms Dawson that was requested to have been or otherwise should have been set out or confirmed in writing but was not

Discrimination arising from disability – Section 15 Equality Act 2010

- 50.2. The basis of this claim is as set out in the issues above namely are the facts such that the Tribunal could conclude that in deciding not to extend her fixed term contract the respondent treated the claimant unfavourably because she had been making a request to purchase additional leave under the "PALS" scheme? If so, are the facts such that the Tribunal could conclude that the claimant's request under the PALS scheme arose in consequence of her disability because she wanted the extra leave in order to help stabilise her medical condition? Neither aspect is admitted by the respondent
51. The Tribunal considered the latter point first. Did the request arise as a consequence of the claimant's disability? The respondent's position is that it does not. It argues that the claimant specifically tied in her request for additional holidays under the PALS scheme to two express matters - Ramadan and her pre-booked holidays for June. To support this, they pray in aid the content of the claimant's e-mails of 22 March at pages 87 -88, the later of which states: "If I decide to remain I was thinking of the full 20 days as we will be fasting in May. But at a push will need at least 15 days as my holiday is from 14 June to 8 July". The earlier e-mail had only referenced the pre-booked holiday
52. It is correct that on the face of these emails, the PALS request is said only to arise in respect of Ramadan and the claimant's pre-booked holiday. However, it is clear from the evidence that the claimant utilised the PALS scheme to increase her overall holiday entitlement at least in part to assist with the management of her impairments. The Tribunal's conclusion is that it is not correct therefore to consider the reasons for the claimant requesting additional holiday in isolation but rather why the additional holiday was requested in the context of what her entire holiday allocation (namely both contractual and under PALS) had been and was to be used for. Without the use of holiday to assist in the management of her impairments, the additional holiday - or at least the

extent to which it was requested - would not have been required. The Tribunal's conclusion on that basis is that the request arose as a consequence of the claimant's disability

53. The unfavourable treatment is termination of the claimant's employment. Was the claimant's contract allowed to expire because she had made a request to purchase additional leave under the "PALS" scheme? The Tribunal's conclusion is that it was not – although the process followed appears on its face to have been incompetent at senior level, there is no evidence whatsoever that the decision to terminate was impacted in any way by the request for PALS, beyond the coincidence of timing. The respondent's evidence was that the question was not even considered given the closely connected (in terms of timing) decision to confirm the termination of the claimant's employment. The claimant had previously had granted her request for the full PALS allowance. There is no suggestion as to why it would not be granted again. There was clearly a question mark as to the extent to which the SENDO team was needed during the extended period and to grant the request would increase the claimant's time off and accordingly reduce her pay, thereby creating a saving. If anything, therefore, on the evidence, it would be of financial advantage and without operational disadvantage to the respondent to grant the request and it was within the power of the respondent in any event simply to refuse it if they had considered it appropriate to do so
54. The Tribunal is accordingly satisfied on the evidence before it that the issue of the PALS request played no part whatsoever in the decision to dismiss
55. The Tribunal found Ms Dawson to a most impressive witness. She came across to the Tribunal as a sincere and credible witness who had done her very best in her dealings with the claimant despite having been placed in severe difficulties in doing so by those senior to her. The senior employees who gave evidence before the Tribunal cannot be described in a similar fashion. Counsel for the respondent states in his submissions that *"the respondent has been frank that mistakes were made in relation to the process followed [at] the end of the claimant's contract..."* This in the Tribunal's view is undoubtedly an understatement. The process was on the face of matters badly mismanaged throughout by those in senior positions. The senior managers giving evidence attributed full responsibility for the decision making process to Mr Martin who chose not to attend as a witness. It is however the specific claims presented to the Tribunal upon which it must adjudicate. On the above analysis, those claims must fail

Employment Judge B Hodgson

Date 7 September 2021

JUDGMENT SENT TO THE PARTIES ON

13 September 2021

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