Appeal No. UKEAT/0344/15/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 26 July 2016

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

ICTS (UK) LIMITED — APPELLANT

MR A VISRAM — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR MICHAEL DUGGAN (One of Her Majesty's Counsel) Instructed by: Moorepay Compliance Warwick House Hollins Brook Way Pilsworth Bury BL9 8RR
For the Respondent	MR OLIVER ISAACS (of Counsel) Instructed by: DAS Law North Quay Temple Back Bristol BS1 6FL

<u>SUMMARY</u>

UNFAIR DISMISSAL - Reasonableness of dismissal

DISABILITY DISCRIMINATION - Section 15

Unfair dismissal - section 98(4) ***Employment Rights Act 1996*** *- fairness of the decision to dismiss*

Disability discrimination - section 15 ***Equality Act 2010*** *- justification*

The ET had permissibly found that the Claimant had an express contractual right to long-term disability benefits and an implied right not to be dismissed, save for good cause, when on long-term sick leave in circumstances in which he would lose his entitlement to those LTDB. The Respondent contended that the ET had erred by wrongly letting its conclusions on the contractual position inform its decision on the Claimant's claims of unfair dismissal and disability discrimination.

Held: *dismissing the appeal*

The ET had not lost sight of the tests it had to apply. It had found the Claimant's dismissal to have been unfair not because of the Respondent's erroneous view of the contractual position but because of its failure to carry out a reasonable investigation. Similarly, in respect of the Respondent's justification defence under section 15 **Equality Act**, the ET had not simply allowed its conclusion on the contractual position to dictate its conclusion. The contractual position was part of the relevant factual matrix and the ET had been entitled to take it into account. The Respondent failed to discharge the burden of proof upon it to demonstrate that the dismissal of the Claimant was justified in the circumstances as found by the ET (which included the Claimant's contractual rights).

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HER HONOUR JUDGE EADY QC

Introduction

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1. I refer to the parties as the Claimant and the Respondent, as below. This is the Full Hearing of the Respondent's appeal against a Judgment of the Reading Employment Tribunal (Employment Judge Vowles, sitting with Mrs Callard and Miss Edwards, on 4 and 5 August 2015, with a further two days in chambers; "the ET"), sent out on 24 August 2015, by which the ET (relevantly) upheld the Claimant's claims of unfair dismissal and disability discrimination. Both parties were represented below; Mr Isaacs, of counsel, appearing for the Claimant as today; the Respondent then represented by its solicitor, today by Mr Duggan QC.

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2. The Respondent's appeal was permitted to proceed (after an Appellant-only Preliminary Hearing before Slade J, on 3 March 2016) on two bases: (1) in respect of unfair dismissal, the ET wrongly conflated its findings of breach of contract with unfair dismissal and erred in concluding that - because the Respondent was contractually obliged to pay the Claimant long-term disability benefits - dismissing him in breach of contract was also an unfair dismissal and/or that there was an implied term that the Respondent could not dismiss the Claimant for medical incapacity; (2) in relation to disability discrimination, that the ET erred by failing to consider the reasons advanced by the Respondent in a dismissal letter when undertaking the balancing exercise under section 15 of the **Equality Act 2010**.

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3. The Claimant resists the appeal, essentially relying on the ET's reasoning but also contending that the Respondent should be held to its pleaded case before the ET in respect of any legitimate aim relevant to the discrimination case, and should not be permitted to advance a different case on this appeal.

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The Background Facts

4. The Claimant had started his employment, originally on 4 May 1992, as a security agent with American Airlines ("AA") at Heathrow Airport. His contract of employment included terms relating to AA's pension and death and disability benefits plan, including a long-term disability benefits ("LTDB") plan - eligibility requirements and benefits in respect of which were set out in the company handbook. The LTDB plan was funded by an insurance policy between AA and Legal & General Insurance Company ("L&G"). Employees of AA were not parties to the insurance policy.

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5. As from 9 October 2012, the Claimant went off work on sick leave with work-related stress and depression. Whilst he was on sick leave, on 1 December 2012, there was a relevant transfer for **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE") purposes from AA to the Respondent, pursuant to which the Claimant's employment duly transferred to the Respondent. Although the Claimant attempted a phased return to work on a part-time basis in March and April 2013, that was unsuccessful and he reverted to sickness absence until his dismissal.

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6. Once the Claimant had been absent on sick leave for 26 weeks, he expected to receive benefits pursuant to the AA LTDB plan. That did not happen. On 28 June 2013, the Claimant presented a grievance stated to be for a breach of the **TUPE Regulations** and for unlawful deduction of wages. That prompted negotiations between the Respondent and L&G and, on 26 September 2013, the Respondent wrote to the Claimant stating that L&G had agreed to reinstate full LTDB plan policy benefits. In fact, L&G had only agreed to pay those benefits for one year until the end of September 2014.

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7. When the Claimant learned of that limitation, he submitted a further grievance on 14 February 2014, complaining he was entitled to remain on the original LTDB plan (or equivalent), under which his benefits would not cease and observed that he should not have been put "*in this detrimental position which continues to create additional anxieties*".

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8. There was a grievance meeting on 16 April 2014, but the Claimant's complaint was not upheld, the Respondent asserting that the terms of the L&G policy had altered before the **TUPE** transfer. The Claimant appealed that decision, but was unsuccessful.

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9. On 17 July 2014, the Claimant accompanied by his trade union representative attended a medical capability hearing. On 13 August 2014, the Respondent wrote to the Claimant to inform him it had been decided he would be dismissed on grounds of medical incapability, with effect from 14 August 2014, with a payment of 12 weeks' pay in lieu of notice.

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10. The Claimant appealed, objecting that his dismissal was in breach of the implied term of his contract of employment, that he would not be dismissed by the Respondent other than for gross misconduct where the effect of that dismissal would be to deprive him of his benefits under the LTDB plan. He further contended that the dismissal was perverse, given the point of the LTDB plan was to protect him in circumstances where he was unable to work due to ill health and the decision was "*wholly unreasonable and unfair*".

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11. There was a hearing on 18 September 2014. Both at the appeal stage and before, the Claimant accepted he had been off work on long-term sick leave and could not foresee any circumstances where he would be able to return to his employment. His appeal was dismissed.

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12. Meanwhile L&G had paid the Claimant's LTDB plan benefits until September 2014; thereafter, the Respondent had continued those benefits on a without prejudice basis.

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The ET's Decision and Reasoning

13. By his ET claim lodged on 23 December 2014, the Claimant (relevantly) complained of unfair dismissal (both automatic as connected with a **TUPE** transfer (see regulation 7 of **TUPE**) and as provided by section 98 of the **Employment Rights Act 1996** ("ERA")) and of disability discrimination contrary to section 15 of the **Equality Act 2010**.

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14. The ET found there was a primary obligation upon the Respondent to make the LTDB plan payments as long as the Claimant satisfied the condition of being absent from work and unable to work due to sickness or injury for a continuous period of 26 weeks or more. That, the ET held, was an unambiguous term of the Claimant's contract, unaffected by the existence of the insurance policy or any changes in the terms of that policy. The ET further found that the Claimant had an accrued entitlement to LTDB plan payments and, therefore, in accordance with the authorities - specifically **Aspden v Webbs Poultry and Meat Group (Holdings) Ltd** [1996] IRLR 521 and **Briscoe v Lubrizol Ltd** [2002] EWCA Civ 508 - there was an implied term in his contract of employment that he would not be dismissed save for a cause other than ill health.

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15. The ET did not accept however that the Claimant's dismissal was causally related to the **TUPE** transfer: the reason for the dismissal had been capability; the Respondent would have dismissed the Claimant by reason of capability whether or not he had (whether or not the Respondent believed he had), the benefit of the LTDB plan. The claim of automatic unfair dismissal was not made out.

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16. Turning to the claim of unfair dismissal under section 98 of the **ERA**, the ET accepted that the Respondent had a genuine belief in capability as the reason for the Claimant's dismissal, but not that it had reasonable grounds for its belief that the Claimant did not have the benefit of LTDB, having taken insufficient steps to establish whether or not he had that entitlement. The Respondent had wrongly assumed the Claimant's entitlement was limited to any benefits under the L&G insurance policy and had refused to accept his entitlement was under his contract of employment, as he had repeatedly contended and as the ET found was the case; had the Respondent properly investigated the Claimant's contention, it would have found he was correct. That said, the ET accepted that even if the Respondent had been satisfied that the Claimant did have LTDB plan entitlement, it would still have dismissed him.

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17. The ET further found:

> **"48. It was unreasonable, and thus unfair, for the Respondent to dismiss in circumstances where the Claimant had a contractual right to LTDB benefits, where there was an implied term in his contract that it would not be terminated save for a cause other than ill health and where the dismissal would terminate entitlement to those benefits. It defeated the very purpose of the entitlement. The dismissal clearly was by reason of his ill health and long term sickness absence caused by that ill health as set out in the dismissal letter."**

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18. The ET further observed that any operational difficulties arising from the Claimant's continued absence and his failure to attend certain treatment sessions were not operative causes of the dismissal. It concluded that the investigation and dismissal were outside the range of reasonable responses and the dismissal was unfair.

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19. As for the discrimination claim, the Respondent agreed that the dismissal amounted to unfavourable treatment for the purposes of section 50 of the **Equality Act** and that the Claimant's ill health, sickness absence record and inability to return to work amounted to something arising in consequence of his disability. The issue was whether the Respondent had made good its justification defence: whether the Claimant's dismissal was a proportionate

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means of achieving a legitimate aim, namely "*to remove from the payroll an employee who would not be returning to work*".

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20. The ET referred to **<u>Homer v Chief Constable of West Yorkshire Police</u>** [2012] UKSC 15, noting that, to be a legitimate aim, the aim must correspond with a real need. In this case, the ET found there was no evidence that there was a real need to remove the Claimant from the payroll. There was no operational difficulty caused by his continued employment; his removal

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from the payroll was simply a tidying up exercise without real need.

21. As for proportionality, referring to the guidance laid down in **<u>Hardys & Hansons plc v</u>**

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<u>Lax</u> [2005] EWCA Civ 846, the ET observed:

> **"59. The discriminatory effect upon the Claimant was substantial. At a time when he was unfit to work, the dismissal denied him the benefit of the LTDB entitlements which amounted to a significant income. On the other hand, the retention of the Claimant's name on the Respondent's payroll would have caused little, if any, administrative burden on the Respondent's staff. The Respondent provided no evidence of any such burden or any other disadvantage in doing so."**

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22. The ET concluded that there was neither a legitimate aim nor was the dismissal a proportionate means of achieving the aim set out by the Respondent. The Claimant had thus

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been subject to discrimination arising from disability.

<u>Submissions</u>

The Respondent's Case

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23. The Respondent's primary contention was that the ET erred in law by permitting its finding that there was a breach of contract - the Respondent's liability to pay LTDB - to dictate its findings on both unfair dismissal and discrimination. Specifically, on the unfair dismissal

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claim, the ET erred in law: (1) in deciding that the dismissal of the Claimant was unfair due to an implied term, which applied to prevent the Respondent from being able to dismiss him when

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he was in receipt of LTDB, save for a cause other than ill health, when there was in fact an admissible ground for dismissing the Claimant (incapacity) and the dismissal was fair in all the circumstances; and (2) in failing to allow that the fact that there may have been a breach of contract did not render the dismissal automatically unfair - the ET had wrongly conflated the breach of contract issue with that of unfair dismissal.

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24. The ET's finding of unfairness was really based on the implied term (see paragraph 48). Absent the ET's finding as to the Claimant's entitlement to LTDB and its finding of an implied term, the ET's conclusion as to the reason for the dismissal had to be as set out in the last sentence of paragraph 48 of its reasoning; i.e. the Claimant's "*ill health and long term sickness caused by that ill health*". Moreover the case law relied on by the ET in its finding of an implied term related to the issue of breach of contract as opposed to statutory liability for unfair dismissal. As for the implied term, the case law made clear that there may be wider grounds than had originally been allowed in **Aspden** for permitting the dismissal of an employee otherwise entitled to long-term or permanent health benefits, provided the dismissal was not for the purpose of avoiding or defeating a disability benefit or permanent health insurance payment that would otherwise be paid. The dismissal of the Claimant in the present case was, as the ET found, because of incapacity and not to defeat the terms of the LTDB plan (although on this point, the Respondent accepted that - given the implied term as defined in **Aspden** - I was bound to allow that the implied term arose whether the dismissal was intended to defeat such an entitlement or where it had simply had that effect). In any event, the Respondent in this case terminated the Claimant's employment because it genuinely believed he was incapacitated and not returning to work; the fact that this had the effect of terminating his benefits did not impact on the question of fairness - if the Respondent had deliberately terminated his employment as a means to deny him LTDB, that might have been unfair, but that was not the case here.

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25. As for the case of **First West Yorkshire Ltd v Haigh** UKEAT/0246/07, that was a case concerned with ill health retirement and the unfairness as found was in failing to consider that as a possible reason for the termination of the employment in circumstances where that might deny the employee that entitlement. In the case of **Lloyd v BCQ Ltd** UKEAT/0148/12, (where the facts were similar to the present case), the ET had rejected the contention that the employee's dismissal had been connected with the permanent health insurance policy, holding that the two reasons for the dismissal were his absence from work for an extraordinarily long time and the lack of any prospect of his return in the foreseeable future. For unfair dismissal purposes, the reason for the dismissal in that case was found to be capability. On appeal, the EAT questioned whether there was any implied term on the facts of that case, but held that, even if there had been, its provisional view would have been that it would be subject to the kind of exception suggested by Ward LJ in **Briscoe** (see below), and any similar term would only be implied where the dismissal was without reasonable and proper cause. In that case, the employee's dismissal was for good cause because of his absence from work and the absence of any prospect of his return. The reason for the Claimant's dismissal in the present case was also due to his continuing inability to do his job and not for any other reason. Since the Claimant was unable to return to work, the Respondent had reasonable and proper cause. It was entitled to fairly dismiss. The fact it was incorrect about the issue of primary liability for LTDB did not mean the dismissal was unfair.

26. That led into the second point raised in respect of the unfair dismissal claim. It was trite law in the employment context that the fact there was a breach of contract does not mean there is an unfair dismissal; **Treganowan v Robert Knee & Co Ltd** [1975] ICR 405, **BSC Sports & Social Club v Morgan** [1987] IRLR 391, **Farrant v Woodroffe School** [1998] ICR 184. Although the Respondent accepted that where a breach of contract is central or relevant to the

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core of an unfair dismissal claim, it can be a factor to consider (**Ford v Libra Fair Trades Ltd** UKEAT/0077/08, **Hooper v BRB** [1988] IRLR 517 and **Gisda Cyf v Barratt** [2010] ICR 1475) it is not determinative (**Shevlin v Innotech Advisers Ltd** UKEAT/0278/14). Further, the fact that the employer may have misconstrued the contract should not lead to a finding of unfair dismissal (see the cases already cited and **Docherty v Southwest Global Resourcing Ltd** [2013] CSIH 72 and **Eversheds Legal Services Ltd v De Belin** [2011] ICR 1137). In the present case, however, it was apparent from the ET's reasoning at paragraph 48 that it considered that it was breach of contract that rendered the dismissal unfair:

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> **"48. It was unreasonable, and thus unfair, for the Respondent to dismiss in circumstances where the Claimant had a contractual right to LTDB benefits …" (Emphasis added)**

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27. Although it was right to say the ET had found there was inadequate investigation into the contractual position on the Respondent's part (paragraph 46), it went on to find that the contractual position had made no difference: the Respondent would still have dismissed the Claimant given his two years' ill health absence and (on his own admission) inability to return to work. That meant the ET's conclusion was entirely dependent on its finding as to the contractual position, both express and implied.

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28. On the discrimination arising from disability case, the Respondent took issue with how the ET had characterised its case. The legitimate aim was not simply removing the Claimant from the payroll, but was, as stated in the dismissal letter, that the Claimant was not able to carry out work and it appeared that he would never be able to do so. In **General Dynamics Information Technology Ltd v Carranza** [2015] IRLR 43, His Honour Judge Richardson had allowed that it was legitimate for an employer to aim for consistent attendance at work and further that "*it was really unarguable that dismissal after [a] very substantial absence was not a proportionate means of achieving a legitimate aim*" (paragraph 47).

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29. Accepting the ET had found that the Respondent had not demonstrated a real need, the Respondent objected, asking whether that meant it was bound to keep an employee on the payroll indefinitely when he had clearly stated he would never return to work; it must be a legitimate aim to remove an employee from the payroll in those circumstances.

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30. As for proportionality, - the approach was as explained by Singh J in **Hensman v Ministry of Defence** UKEAT/0067/14. Here, the ET had failed to take into account the fact that the Claimant would have the right to bring a contractual claim if he had (as the ET had found) an entitlement to LTDB. It was wrong for the ET to find that the Respondent would not remove the Claimant from the payroll, even if there was no prospect of his returning to work. Ultimately, the ET's conclusion on the discrimination case was also all about the contractual claim: if the Claimant's entitlement to LTDB was put to one side, the answer would be obvious (per His Honour Judge Richardson in **Carranza**) and would not amount to unlawful discrimination.

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The Claimant's Case

31. For the Claimant, Mr Isaacs contended that the appeal against the unfair dismissal finding was based on a false premise: the ET had not found that the dismissal was unfair solely because the Respondent was contractually obliged to pay LTDB; the ET had expressly found the Respondent had carried out insufficient investigation into the contractual position, notwithstanding the Claimant having repeatedly drawn this to the Respondent's attention. It had further found that there was an implied term in this case, given that the dismissal of the Claimant would have the effect of denying him the valuable benefit to which the ET had found he was entitled. As for that implied term, although it was expressed in slightly different ways in different cases, here the ET had found that the Claimant had a continuing contractual

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entitlement upon which dismissal would inevitably impact and the ET considered that was a circumstance to which the reasonable employer should have had regard and which was relevant to the question of fairness; this was squarely an **Aspden** case.

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32. For completeness and to the extent the Respondent was arguing that the **Aspden** term should not be implied as (per **Reda and Another v Flag Ltd** [2002] IRLR 747 PC) an implied term could not contradict an express contractual provision; that was not the present case.

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33. In **Lloyd v BCQ Ltd** UKEAT/0148/12, the EAT had been concerned with a case in which the entitlements in question arose under an insurance policy; there was no right to those benefits under the contract of employment. That, too, was not the present case.

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34. Further and in any event, the question of the contractual obligation was not irrelevant to the issue of fairness, as was made clear in **First West Yorkshire Ltd v Haigh**. More generally, a breach of contract can be a relevant factor when considering the fairness of a dismissal (see **Shevlin v Innotech Ltd**). The Respondent's case was premised on the argument that the Claimant's potential right to LTDB could be stripped out, but it was part of the relevant factual matrix of this case and it would not have been right to ignore that. Moreover, there was no authority for the Respondent's proposition. The starting point had to be section 98 **ERA**, which did not limit the question of fairness in a capability dismissal case to the question of the employee's ability to return to work, but expressly provided that regard was to be had to the circumstances of the case, which here included the Claimant's entitlement to LTDB.

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35. The ET did not lose sight of that which was common ground before it, namely that the Claimant was unable to return to work. Equally, it was entitled to have regard to the Claimant's

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case that, in dismissing him, the Respondent would deprive him of the valuable LTDB after more than 20 years of service and that serious prejudicial effect on him would outweigh any other factors to which the Respondent might have given consideration. As the Respondent's witness Mr Hunt identified at the appeal stage, if dismissal impacted upon LTDB payments, that would be unfair.

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36. As for the disability discrimination claim and the identification of the legitimate aim, the ET had been right to consider that as identified by the Respondent in its pleaded case in these proceedings. The pleaded case had clearly put the legitimate aim as the need to remove from the payroll an employee who would not be returning to work. Thus the case had not been put as a **Carranza**-type case and it was noteworthy that the Respondent had attempted to shift its characterisation of the legitimate aim in its Notice of Appeal, where it had wrongly characterised this as a case where there was no entitlement to LTDB.

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37. That was not to say that seeking to remove an employee on long-term sick leave from the payroll could never be a legitimate aim. That would depend on the particular facts of the case, but here the ET had found that the Respondent had not produced evidence as to any real need in this respect and that was a permissible finding of fact not challenged as perverse. Similarly, so far as proportionality was concerned, the ET's analysis was unimpeachable and it was not being contended that it erred in carrying out the balancing exercise required of it. The Respondent's case was that the ET erred because it should have disregarded the entitlement to LTDB, but that was incorrect. The Respondent criticised the ET for failing to carry out a fair and detailed analysis of the working practices and business considerations involved, in particular having regard to the needs of the employer, but the ET did all those things (see

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paragraph 59). **Carranza** did not assist in this case. The *obiter* comment relied on by the Respondent was made in the context of a relevantly factually different case.

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The Respondent in Reply

38. The Respondent's reliance on the **Lloyd** case was focused on paragraph 58 of that report, which allowed that the **Aspden** implied term could still permit dismissal for reasonable and proper cause, which could include the Claimant's long-term absence from work and the absence of any prospect of his return to work. The ET should have considered whether dismissal was for a reasonable and proper cause in this case.

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The Relevant Legal Principles

39. I start by considering the case law relevant to ET's finding that, given the Claimant's accrued entitlement to LTDB plan benefits, there was an implied term in his contract of employment that he would not be dismissed save for a cause other than ill health. In **Aspden v Webbs Poultry and Meat Group (Holdings) Ltd** [1996] IRLR 521 QBD, Sedley J (as he then was), accepted the employee's contention that a term should be implied that the employer would not dismiss him while he remained incapacitated due to sickness, save where the dismissal was in response to a repudiatory breach; the Court allowed that such a term should be implied because it was the intention of the parties that the employee should benefit from the insurance scheme which gave rise to a right to permanent health insurance benefits and both parties were aware those sums would only be payable whilst the employee was in employment. In **Briscoe v Lubrizol Ltd** [2002] IRLR 607, the Court of Appeal - having referred to both **Aspden** and the subsequent case of **Hill v General Accident Fire & Life Assurance** [1998] IRLR 641 - concluded that the principle to emerge from the case law was that "*the employer ought not to terminate the employment as a means to remove the employee's entitlement to*

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benefit but the employer can dismiss for good cause whether that be on the ground of gross misconduct or, more generally, for some repudiatory breach by the employee" (see per Ward LJ at paragraph 107).

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40. For the Respondent, it is noted that the implied term is slightly differently worded in **Briscoe** and **Hill** - focusing on the employer's intention - as opposed to **Aspden** - where the implied term was simply expressed in terms of the effect of the dismissal. The language used in

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Aspden was, however, subsequently accepted by the Court of Appeal (per Staughton LJ) in **Brompton v AOC International Ltd** [1997] IRLR 639 and, at this level, the Respondent accepts that I must approach the implied term in this regard in those terms, that is (per **Aspden**)

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allowing that an employee will not be dismissed without good cause if the effect or intention is to deny their right under LTDB.

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41. The case of **Lloyd v BCQ Ltd** UKEAT/0148/12 concerned an employee who, the EAT concluded, "*had no contractual right*" to PHI benefits in issue. Thus, in that case, the attempt to imply an **Aspden**-type term was impermissible. Nevertheless, I note that the EAT went on to provide the following observation:

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> **"58. We should add that even if there was to be an implied term of the kind contended for by the Claimant, then our provisional view was that it would be subject to the exception suggested by Ward LJ in the *Briscoe* case in the passage cited in paragraph 45 above which was that any similar term would only be implied where the dismissal was "*without reasonable and proper cause*". In this case, the dismissal was for good cause because of the Claimant's absence from work and the absence of any prospect of his return as we explained in paragraph 13 above. We stress that these are provisional views as we have not heard submissions on this point and they do not form any part of our reasons for rejecting this claim."**

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This observation - relied on by the Respondent before me - was made *obiter*, without the benefit of submissions on the point and in the context of a case where it had been found there

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was no entitlement to the PHI benefits under the contract of employment. That said, allowing - as I do - that the implied term identified in **Aspden** must allow for a right to dismiss for good

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cause (bringing in the broader approach adopted in **Briscoe**), the observation of the EAT in **Lloyd** raises the obvious question as to how that would be compatible with the existence of an implied term accepted in the earlier cases. Entitlement to benefits such as PHI are bound to be predicated upon a long-term absence from work, past or future. If that is the good cause for dismissal, it would be hard to see that there would ever be an implied term that the employment should not be terminated if that were to remove an entitlement to PHI or, as here, LTDB. Ultimately, I am not persuaded that **Lloyd** assists me in the issues I have to determine on this appeal, but I would in any event respectfully suggest that the *obiter* observation at paragraph 58 tends, without more, to raise rather more questions than it answers.

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42. In this case, the ET was of course concerned with the Claimant's statutory claim of unfair dismissal and that must be the focus of my deliberations. The contractual position formed part of the context, but the starting point for the ET had to be section 98 of the **Employment Rights Act 1996**, which relevantly provides as follows:

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> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -**
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> > **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
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> > **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it -**
>
> > **(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
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> > **(b) relates to the conduct of the employee,**
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> > **(c) is that the employee was redundant, or**
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> > **(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**
>
> **…**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**

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(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

43. Where there exists a long-term health or disability benefit scheme as part of the employee's contract of employment, the EAT has (see **First West Yorkshire Ltd v Haigh** UKEAT/0246/07) held that it was unreasonable and thus unfair for an employer to dismiss an employee by reason of long-term ill health without first considering whether they were contractually entitled to be medically retired and granted and an ill health pension (see paragraph 41 of that report). As His Honour Judge Richardson observed, in giving the EAT's judgment in that case:

> **"45. … under section 98(4) whether it is reasonable to dismiss is to be decided in accordance with equity and the substantial merits of the case. If an employer could proceed to dismiss a sick employee who might be entitled to an enhanced retirement pension without considering that question, substantial injustice might occur. An employer who had conferred a valuable benefit on an employee might hinder his ability to claim it carelessly, arbitrarily or even deliberately. It may be that the employee would have a common law claim against the employer; but that is no substitute for proper consideration of the matter by the employer before dismissal.**
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> **46. We accept that it may be possible for an employee who has been dismissed without consideration of an ill health retirement provision to bring a claim for breach of contract or in some other way to assert a claim under the pension scheme. We do not need to reach any conclusion on this point, and we did not have before us the full terms of the scheme or Mr Haigh's terms and conditions of employment. Indeed if there were no express provision enabling him to make a claim it might be necessary to imply such a provision: see, by way of analogy (but no more) *Brompton v AOC International Ltd and Unum Ltd* [1997] IRLR 639 and *Aspden v Webbs Poultry & Meat Group (Holdings) Ltd* [1996] IRLR 521.**
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> **47. But the potential for an employee to bring a claim afterwards is no substitute for the orderly consideration of the matter prior to retirement by the Company and its occupational health advisors with such outside advice as is necessary. If it is established that an employee is entitled to take retirement with an enhanced pension, dismissal will often be avoided altogether.**
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> **48. We therefore agree with the Tribunal that fairness requires the reasonable employer to give proper consideration to an ill health retirement scheme before he dismisses for long term sickness."**

44. It is, as Mr Duggan QC reminds me, trite law in the employment context that the fact that there is a breach of contract does not mean that there is an unfair dismissal (see the cases that he has cited in his submissions). That said, as he also allows, where a breach of contract is

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relevant to the central point on the unfair dismissal claim, it is a factor for the ET to consider, albeit the breach of contract will not be determinative. Furthermore, the fact that an employer may have construed the contract should not of itself lead to a finding of unfair dismissal: it is a relevant but not decisive factor. In the case of **Docherty v South West Global Resourcing Ltd** [2013] CSIH 72, the point was explained as follows:

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> **"19. … An employer can, in several contexts, rely on its mistaken understanding as to the law. Deliberate conduct constituting a material breach of contract, if prompted by a mistaken belief as to the meaning of a contract, will amount to a repudiation of it (*Cantour Fitzgerald Ltd v Callaghan* [1999] ICR 639; *Blyth* v *Scottish Liberal Club* [1982] SC 140). However, a dismissal may be fair if, for example, it is based on the mistaken belief that the employee's conduct constituted a breach of contract (*Farrant* v *Woodroffe School* [1998] ICR 184); or that the employee's intimation of an intention to leave amounted in law to a resignation (*Ely* v *V K K Fasteners (UK) Ltd* [1994] ICR 164); or that the continued employment of the employee was prohibited by immigration legislation (*Bouchaala* v *Trusthouse Forte Hotels Ltd* [1980] ICR 721; *Klusova v London Borough of Hounslow* [2008] ICR 396). I think that it follows that a repudiation of the contract can in some cases be regarded as fair, and that when the fairness of it is being judged, the fact that it was prompted by a mistaken or incomplete view of the law can be a relevant consideration. In *Eversheds Legal Services Ltd v De Belin* ([2011] ICR 1137) the President of the EAT (Underhill J) raised the point in the following way:**
>
> > **"… it does not seem to us obvious that the same result should follow in every case where the employer has in his own deliberations taken a view, which has turned out to be wrong, of the extent of his legal obligations: is it reasonable, having regard to equity and the substantial merits of the case, that the employee should bear the consequences of the employer having got the law wrong, even if the mistake could not be characterised as unreasonable?" (para [38]).**
>
> **It was unnecessary to answer the question in that case since the respondent's mistaken view of the law was found to be unreasonable.**
>
> **20. In the current state of the law on the point, I think that it can be said with reasonable certainty that if an employer takes action against an employee which amounts to a dismissal, and does so without having considered the legal consequences, or does so on a mistaken view of what those consequences would be, the dismissal may nonetheless be held to be fair; but the fact that the employer took the action in such circumstances will not ipso facto make the dismissal fair.**
>
> **21. In this case the relevance of the respondent's ignorance of the legal implications of its actions would depend, at least in part, on the question whether it should have taken professional advice. That might depend on a multiplicity of factors; for example, the size and the administrative resources of the respondent (1996 Act, s94(4)(a)). On the other hand, the radical nature of the change might be held, in itself, to have put the respondent on notice of the possibility of there being a legal problem. These are the sort of questions that were pre-eminently for the ET to decide."**

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45. Turning to the disability discrimination claim, the starting point in this case is section 15 of the **Equality Act 2010**:

> **"(1) A person (A) discriminates against a disabled person (B) if -**
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> > **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**

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(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."

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46. In the identification of a legitimate aim, in **Homer v Chief Constable of West Yorkshire Police** [2012] UKSC 15, the Supreme Court stated that the aim must correspond with a real need. If the Respondent is able to demonstrate such a need, it is then for the ET to assess on an objective basis whether the means adopted with a view to achieving that aim are necessary and proportionate - a balancing exercise requiring an evaluative assessment by the ET, see **Hardys & Hansons plc v Lax** [2005] EWCA Civ 846, and as explained by Singh J in **Hensman v Ministry of Defence** UKEAT/0067/14:

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"43. … it is clear, first, that the role of the Employment Tribunal in assessing proportionality, in contexts such as the present, is not the same as its role when considering unfair dismissal. In particular, it is not confined to asking whether the decision was within the range of views reasonable in the particular circumstances. The exercise is one to be performed objectively by the Tribunal itself.

44. However, secondly, … the Employment Tribunal must reach its own judgment upon a fair and detailed analysis of the working practices and business considerations involved. In particular, it must have regard to the business needs of the employer. …"

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47. The Respondent further relies on the EAT case of **General Dynamics Information Technology Ltd v Carranza** [2015] IRLR 43 where His Honour Judge Richardson made the following observation:

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"47. If this case had been put forward as a case of discrimination arising from disability, it would have been easier to analyse - for in truth this was not a case about taking practical steps to prevent disadvantage, but a case about the extent to which an employer was required to make allowances for a person's disability. If the case had been put that way it would to my mind in any event have been doomed to failure. It might have been established that the dismissal and the underlying written warning were 'unfavourable treatment'. But it was legitimate for an employer to aim for consistent attendance at work; and the carefully considered final written warning was plainly a proportionate means of achieving that legitimate aim. The employment tribunal as a whole proceeded on that basis, and the majority found against the respondent only because it had shown some mercy before the last lengthy period of absence. It was really unarguable that dismissal after that further very substantial absence was not a proportionate means of achieving a legitimate aim."

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Discussion and Conclusions

48. I consider first the appeal against the ET's conclusion on unfair dismissal. I bear in mind the statutory test laid down by section 98(4) of the **Employment Rights Act 1996**, which requires the ET to have regard to the circumstances of the particular case. I find it hard therefore to adopt the course urged by Mr Duggan QC and to disregard (or rule that the ET ought properly to have disregarded) the Claimant's entitlement (as the ET had found) to LTDB: that was part of the factual matrix - the relevant circumstances - and I cannot see that the ET erred in law in approaching its task by having regard to that fact.

49. It is right that the Respondent had not allowed itself to be swayed by the Claimant's contractual entitlement to LTDB; that was because it did not think he had such an entitlement and, if he did, the Respondent took the view that would arise from the insurance policy with L&G, not the contract of employment. The Respondent was, the ET found, wrong about that. That said, I would agree with Mr Duggan QC that this would not mean that the dismissal was bound to have been unfair: a mistaken view of a contractual right need not render a dismissal unfair; see the passage I have cited from **Docherty** above. Equally, however, I do not consider that the ET made the mistake of thinking that it did. Its finding was not that the dismissal was rendered unfair because the Respondent had erred in its view of the Claimant's contractual rights, but because it had insufficiently investigated the position (see paragraphs 46 and 51 of the ET's Reasons). That, the ET found, fell outside the range of reasonable responses. That is a finding against which there is no appeal.

50. Mr Duggan QC says that does not matter because the ET also concluded that, even if the Respondent had found that the Claimant had been entitled to LTDB, it would still have taken

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the decision to dismiss: the presence of LTDB was "*irrelevant to the decision to terminate the Claimant's employment*".

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51. I agree the ET did indeed reach that conclusion, but I am not persuaded that this means that its finding on the investigation was irrelevant. I do not read paragraph 47 as negativing the finding that the inadequate investigation fell outside the range of reasonable responses for the purposes of section 98(4); indeed, the ET's conclusion at paragraph 51 makes clear that it did

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not so conclude. Whilst I recognise that the **First West Yorkshire** case I have cited above was concerned with a possible entitlement to ill health retirement rather than to LTDB, it seems to me that the observations made by the fully constituted EAT at paragraph 45 of that case are

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apposite: even if the Respondent had considered a possible contractual entitlement to LTDB irrelevant, the ET was entitled to ask whether it had properly considered the issue, whether it had carried out a reasonable investigation.

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52. It is however also the case that the ET found that the dismissal was rendered unfair as the circumstances included the Claimant's contractual right to LTDB and the term implied consistent with **Aspden** (see paragraph 48 of the ET's Reasons). Does that demonstrate that the

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ET found that the contractual position dictated its conclusion on unfair dismissal?

53. I do not accept that it does. It was an aspect of the circumstances before the ET that the

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Claimant had a contractual entitlement to LTDB; that was a relevant consideration, just as the EAT in **First West Yorkshire** found the possibility of entitlement to ill health retirement be relevant to the question of the fairness of that decision to dismiss.

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54. Adopting a similar approach, the existence of the implied term (as also found by the ET) was also a relevant consideration. Did the ET err in the implication of that term in this case? Did it fail to allow that the Respondent might still dismiss for reasonable and proper cause, in particular given that the Claimant had been absent for ill health reasons for some two years and had said that he would not be able to return to work.

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55. On this question, I consider (as Mr Duggan acknowledged) I am bound by the approach laid down in **Aspden** and it is apparent the ET was similarly doing no more than adopting that approach (as approved by the Court of Appeal in **Brompton**). Moreover, I do not think that the ET then allowed that implied term to dictate its conclusion on unfair dismissal: it was a relevant consideration and one the ET was entitled to take into account when assessing whether the dismissal fell within or without the band of reasonable responses.

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56. Taking together the factual matrix provided by the express contractual entitlement to LTDB and the implied term and the finding on the inadequacy of the Respondent's investigation, it is apparent that the ET reached a permissible conclusion that the dismissal was unfair. The appeal in this respect must be dismissed.

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57. Turning to the section 15 disability discrimination claim, the first question is whether the ET correctly identified or characterised the legitimate aim relied on by the Respondent before it.

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58. The Respondent's original grounds of resistance did not plead any justification defence but it had subsequently been given permission to amend to plead as follows: "*It is denied that the Claimant's dismissal in these circumstances amounted to disability discrimination or that*

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the dismissal was unfair and that it was in the circumstances a legitimate aim to remove from the payroll an employee who would not be returning to work".

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59. The circumstances plainly included the fact - as was not in dispute - that the Claimant had been on sick leave for some time and would not be able to return to work; it was that which gave rise to his entitlement to LTDB. Of course, before the ET, the Respondent was still contending that the Claimant was not entitled to LTDB. Having found that was wrong, the ET was left with a pleaded case which contended it was a legitimate aim to remove an employee who was on sick leave and unable to return to work, but who was entitled to received LTDB whilst he remained an employee. So, the aim relied on by the Respondent was to remove the Claimant in *those* circumstances and the legitimacy of that aim was to be judged by the ET on an objective basis (not limited to what was in the Respondent's mind at the time).

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60. Whilst I would not rule out that an employer might have a real need to remove an employee in these circumstances - the administrative act of removing an employee from the payroll might be a legitimate aim - I agree with Mr Isaacs that this is something that an employer would need to establish; it bears the burden of proof, which is not an unreasonable requirement, given that the employer should be best placed to demonstrate the need in issue. This, however, is the problem for the Respondent in the present case: as the ET found, it failed to do that; the suggested need to remove the Claimant from the payroll was "*simply a tidying up exercise without real need*". That is not a finding dictated by the ET's view of the contractual position; it is a conclusion reached on the Respondent's failure to make good its case on legitimate aim.

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61. The same is true of the ET's conclusion on proportionality. It did not ignore the need to have regard to the Respondent's working practices and business considerations, per **Hensman**, but it was not for the ET to make good the Respondent's case for it. The only disadvantage the Respondent had demonstrated was the (little, if any) administrative burden of retaining the Claimant's name on the payroll. Again, I would not say that it might not be proportionate for an employer to seek to remove an employee from the payroll, even if that might put benefits such as LTDB at risk, but it would be for the employer to establish that was the case, to demonstrate what working practices and business considerations required that.

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62. As for the ET's considering, on the other side of the balance, the Claimant's entitlement to LTDB that would be lost if he were dismissed, I do not read that as allowing the ET's view of the contractual position to dictate its conclusion on discrimination: it was a relevant factor - part of the relevant factual matrix - and the ET was entitled to put it in the balance.

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63. In those circumstances, I cannot see that the ET erred and for the reasons I have given, I therefore dismiss this appeal.

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