



EMPLOYMENT TRIBUNALS

Claimants: Mr R Emmett (1)
Mr A Baldwin(2)

Respondent: CBT Limited (1)
Expect Distribution Limited (2)

HELD AT: Leeds **ON:** Tuesday 15 and Wednesday
16 May 2018
BEFORE: Employment Judge T R Smith

REPRESENTATION:

Claimant (1): In person
Claimant (2): In person
Respondent (1): Mr P Mills (Consultant)
Respondent (2) Mr R Clements (Counsel)

JUDGMENT

The decision of the Tribunal is there was a service provision change in respect of Claimant 1 to Claimant 2 within the meaning of Regulation 3(1)(b)(ii) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") when Flexiform Business Furniture Ltd moved its contract from the First Respondent to the Second Respondent in or about September 2017. The Claimants were not an organised grouping of employees which had as its principal purpose the carrying out of activities on behalf of Flexiform Business Furniture Ltd.

REASONS

Background

Agreed issues

1. At a preliminary hearing chaired by Employment Judge Davies it was agreed that the issues the Tribunal was required to deal with were as follows.
2. Was there a service provision change within the meaning of Regulation 3(1)(b)(ii) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) when Flexiform Business Furniture Ltd (Flexiform) moved its contract from the First Respondent to the Second Respondent in or about September 2017.
3. Was there a situation in which activities ceased to be carried out by a contractor (the First Respondent) on the client's behalf, Flexiform, and activities which were fundamentally the same were carried out instead by a subsequent contractor (the Second Respondent) on the client's behalf.
4. If so was there immediately before the service provision change an organised grouping of employees which had as its principal purpose the carrying out of the activities on behalf of the client.
5. If so, were the Claimants immediately before the transfer employed by the First Respondent and assigned to the organised grouping of employees in question.
6. It was agreed on the first day of the hearing by all parties that the activities now carried out by the Second Respondent were not for a single specific event or a task of short term duration.
7. It was agreed by all parties that the activities now carried on by the Second Respondent did not consist only or mainly of the supply of goods for Flexiform's use.

Evidence

8. The Tribunal heard oral evidence from Mr Raymond Emmett, Claimant 1, Mr Alexander Baldwin, Claimant 2, Mr Colin Baldwin (managing director of the First Respondent), Mr Andrew Taylor (director of transport of the Second Respondent). The Tribunal also had before it an agreed bundle of documents which totalled 239 pages.
9. At the commencement of the hearing the Tribunal reminded the parties it would only have regard to those documents that were specifically brought to its attention.
10. The Tribunal has used the following expressions in the course of its Judgment.
11. Mr R Emmett has been referred to as Claimant 1.
12. Mr A Baldwin has been referred to as Claimant 2.
13. A reference to "Claimants" is a reference to Claimants 1 and 2.
14. The First Respondent, CBT Limited, has been referred to as CBT.

15. The Second Respondent, Expect Distribution Ltd, has been referred to as Expect.
16. A reference to the Regulations or TUPE is a reference to the Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended.
17. A reference to a SPC is a reference to a service provision change as defined in the Regulations.

Credibility of witnesses

18. The Tribunal found all the witnesses who gave evidence before it credible and that they sought to tell the truth from their own perspective. The Tribunal was alive to the fact that Claimant 2 was the son of Mr Colin Baldwin, the managing director of CBT. The Tribunal therefore approached Claimant 2's evidence with particular care but was satisfied that Claimant 2 was an honest and credible witness. Fundamentally the facts were agreed but not the interpretation.

The legal principles the Tribunal applied

19. The starting point is the Regulations themselves and in particular Regulation 3 of TUPE which provides as follows:

“

- (1) These regulations apply to –
 - (a) ...
 - (b) a service provision change, that is a situation in which
 - (i) activities ceased to be carried out by a person (“a client”) on his own behalf and are carried out instead by another person on the client’s behalf (“a contractor”).
 - (ii) activities ceased to be carried out by a contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person (“a subsequent contractor”) on the client’s behalf; or
 - (iii) activities ceased to be carried out by a contractor or subsequent contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his behalf) and carried out instead by the client on his own behalf;And in which the conditions set out in paragraph (3) are satisfied.
- (2) In this regulation “economic entity” means an organised grouping of resources which was the objective of pursuing an economic activity, whether or not that activity is central or ancillary.
- (2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.
- (3) the conditions referred to in paragraph (1)(b) are that –
 - (a) immediately before the service provision change there is an organised grouping of employees situated in Great Britain which has as its principal

purpose the carrying out of the activities concerned on behalf of the client ...”

Guidance was provided to Tribunals by his Honour Judge Peter Clarke in **Enterprise Management Services Limited v Connect Up Limited [2012] IRLR 190**, as to the proper approach to be taken in connection with an alleged SPC transfer within the meaning of the Regulations in the following terms:

“

- (2) The expression “activities” is not defined in the Regulations. Thus, the first task for the Employment Tribunal is to identify the relevant activities carried out by the original contractor ...
- (3) The next (critical) question ... will be whether the activities carried on by the subsequent contractor after the relevant date ... are fundamentally or essentially the same as those carried on by the original contractor. Minor differences may properly be disregarded. This is essentially a question of fact and degree for the Employment Tribunal.
- (4) Cases may arise ... where the division of services after the relevant date, known as fragmentation, amongst a number of different contractors means that the case falls outside the SPC regime ...
- (5) Even where the activities remain essentially the same before and after the putative transfer date as performed by the original and subsequent contractors, an SPC will only take place if the following conditions are satisfied:
 - (i) there is an organised grouping of employees in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client ...
- (6) Finally, by Regulation 4(1) the Employment Tribunal must decide whether each claimant was assigned to the organised grouping of employees”.

20. The word “activities” is not defined in the Regulations. The Tribunal derived the following principles from the myriad of authorities.

- (1) the word “activities” as set out in the Regulations should be given its ordinary everyday meaning.
- (2) activities must be defined in a commonsense and pragmatic way.
- (3) have a pedantic and excessively detailed definition of activities would risk defeating the purposes of the TUPE provisions. That said activities should not be defined at such a level of generality that they will not really describe the activities at all.
- (4) the definition of activities should nevertheless be holistic, having regard to the evidence placed before the Tribunal avoiding too narrow a focus in deciding what the activities were.

21. Lady Smith offered guidance as to what constituted an organised group of employees which has as its principal purpose the carrying out of the activities concerned on behalf of the client, in **Argyll Coastal Services Ltd v Sterling UK EAT S/0012/11** in the following terms: “a number of employees which is less than the whole of the transferors entire workforce, deliberately organised for the

purpose of carrying out the activities required by the particular client contract and whose worked together as a team”.

22. Lady Smith made it clear that the client work need not be the sole purpose.
23. Whether an employee is assigned to an organised grouping is a question of fact.
24. Lady Smith’s definition was subsequently built upon in the later decision of **Eddie Stobart Limited v Moreman** [2012] ITLR 356. An organised grouping is a team of employees that are essentially dedicated to carrying out the activities that are to transfer. It is not enough that employees carry out the majority of their work for a particular client. Employees must be organised by reference to the requirements of the client and be identified as that client’s team.
25. The fact that an employee spends all of their time on work for a particular client does not mean that the employee is an organised grouping. The fact that an employee does the majority or all of their work for a particular client must not be mere happenstance see **Ceva Freight v Seawell** [2013] CSIH 59.
26. The analysis of whether there is an organised grouping of workers whose principal purpose is the client’s contract is analysed immediately before the transfer, see **Amaryllis Ltd v McCloud** UK EAT/0273/15.

Submissions

27. The Tribunal means no disrespect to each advocate for failing to repeat their oral submissions. Those submissions were directed to matters of evidence and not the law and therefore the Tribunal has built into its findings those issues its findings and conclusion.

Findings of fact

28. Although the Tribunal set out its findings by reference to sub headings, findings of fact in one section may be relevant to another section and the Judgment must therefore be read in its entirety.

Background

29. The Tribunal has briefly summarised the background relevant to an understanding of the current dispute.
30. Claimant 1 commenced employment with CBT on 11 October 1999. He is a qualified Class 2 HGV driver.
31. In approximately May 2016 he ceased his duties of driving and acting as a driver/team leader and undertook what he described as “admin work” for CBT. On the evidence of Mr Colin Baldwin the Tribunal accepts the change in duties was principally due to health issues.
32. Claimant 2 commenced employment with CBT on 30 October 2011. He described his job as “office staff”.
33. CBT is a specialist haulage and commercial removal firm.
34. CBT secured a contract on or about 16 January 2012 with Flexiform to organise the delivery and installation of Asgard sheds which the parties referred to in their statements as the Asgard work.

35. Asgard sheds are high security facilities for storing products such as motorbikes and pedal cycles. They are supplied by Flexiform in kit form. CBT would, if so instructed by Flexiform, assemble the shed for the customer.
36. Mr Colin Baldwin was the managing director of CBT and, although his wife was also a director, he was the driving force of the company.
37. He was also the authorised CPC holder.
38. He was supported by a general manager Mr Neil Hindle.
39. CBT did not have an HR department.
40. A self employed chartered accountant provided part time financial management to the company. He acted as its financial director.
41. In addition, a Ms Vicky Brown undertook lower level accountancy duties and completed what were described as driver administration.
42. A Ms Natalie Baldwin also worked in what has been described as “admin”. She was not a party to these proceedings.
43. Prior to the transfer, CBT employed approximately 30 drivers together with agency staff and operated approximately 20 commercial vehicles. It has one depot situated in Leeds.
44. Prior to the transfer the Flexiform contract amounted to approximately 68% of CBT’s turnover. The other work undertaken pre-transfer involved commercial office removals and work for other transport customers which accounted for the remaining 32% of turnover (R197).
45. On 17 May 2017 Flexiform gave oral notice, confirmed later by email of the same date (R131), that it intended to award the contract for the Asgard delivery and installation work to Expect and would terminate its contractual arrangements with CBT.
46. Flexiform made it clear that termination was in no way related to the service levels or professionalism of CBT but that the decision had been based “mainly on economics, particularly following your 9% cost increase”.
47. The Tribunal finds as a fact that Flexiform had been making enquiries in the open market for a cheaper service prior to 17 May 2017. One of the parties’ approached was Expect.
48. By a letter dated 20 May 2017 (R132 to 133) Expect informed CBT that it had been awarded the contract by Flexiform and “we accept that the Transfer of Undertakings (Protection of Employment) Regulations 2006 clearly apply to the transfer of the above contract”.
49. There was then protracted communication between CBT and Expect during which Expect sought to carry out due diligence.
50. The net result of the correspondence was that it was agreed by Expect that the drivers who worked on the Flexiform contract together with the porters (for clarity, and to use an old fashioned title, driver’s mates) transferred under TUPE. It would appear that those drivers and porters were specifically assigned to the Flexiform contract.

51. As it transpired a number of the drivers and porters would appear to have objected to the transfer and therefore did not transfer on 4 September 2017, the agreed TUPE transfer date.
52. Expect did not accept that three of the office staff, Claimant 1, Claimant 2 and Ms Antonia Baldwin transferred to them under TUPE.

The service CBT provided to Flexiform

53. The service provided by CBT to Flexiform was the collection and distribution of its sheds to its customers. This involved the collection of the product from Flexiform's premises, liaison with customers to arrange delivery, effecting delivery and, if required, erecting the sheds. If a delivery could not be effected CBT would store the shed and re-arrange delivery.
54. CBT were required to report to Flexiform as and when delivery were affected.
55. There was also an obligation upon CBT to report to Flexiform any defects in its products that were raised with it by customers.

Who at CBT provided the service?

56. Flexiform notified CBT when it had received a customer's order.
57. It did so by forwarding what was known by CBT as an acknowledgment slip to CBT. This was done by computer.
58. CBT collated the acknowledgement slips, usually weekly. The collation, which took about an hour and a half, could be undertaken by the Claimants but could and was on occasions undertaken by Mr Colin Baldwin or Mr Neil Hindle.
59. The collation process involves CBT printing off each acknowledgement slip and then placing it in a ring plan binder organised by delivery date and order number.
60. The Claimants would then seek to contact the customer, almost invariably by telephone. The Tribunal accepted that the telephone was used in preference to email given that some emails were bounced back due to spam filters on customer's computers. The process of telephoning customers would not begin, at the earliest, until 8.30 in the morning.
61. The Claimants would seek to arrange a delivery date. The Tribunal finds this could at times be an arduous task given the need for CBT to plan its routes economically with the customer's availability. The Claimants did not plan the routes. In some cases delivery dates would be agreed with the customer but then changed. The Claimants would note down all information as regards delivery and any changes thereto on each individual acknowledgement slip.
62. Each week Flexiform would send a summary of deliveries for the following week. That information had to be checked against CBT's records. It was normally done by the Claimants but could be done and on occasions was done by Mr Colin Baldwin or Mr Neil Hindle.
63. On occasions a customer would request that the product was assembled on site. The Claimants would therefore ensure that sufficient time was allowed on the delivery round to accommodate this and would liaise with Flexiform, given this would be an increased cost to the end customer.
64. The delivery routes themselves were planned by either Mr Colin Baldwin or Mr Neil Hindle. This involved ensuring in the planning of the route that it was

done in the most economic manner, having regard to agreed delivery times, the customers, any time required to erect a shed, and complying with driver hours regulations.

65. The Claimants would run a computer sheet setting out each customer's delivery product and date of delivery and whether it would need to be built on site or not. This was then sent to Flexiform.
66. The delivery slip was then passed on to the appropriate driver.
67. CBT drivers would then visit Flexiform's premises and their lorries would be loaded with the agreed delivery derived from the above mentioned computer sheet supplied by the Claimants.
68. The Claimants would where necessary arrange overnight accommodation for the drivers.
69. The driver and the porter would then deliver the shed and obtain a signature from the customer on a duplicate delivery slip.
70. The driver and porter might be required to erect the shed. The Tribunal accepted the uncontested evidence that the erection of a shed could take up to 2 ½ hours.
71. The customer signed the delivery note which would then be given to Ms Vicky Brown who scanned the delivery sheet and send it to Flexiform for payment and kept a record of payment.
72. If a delivery could not be affected the CBT driver would ring the Claimants. The Claimants would then try and contact the customer. If it could not be delivered the item was brought back to the depot and the Claimants made arrangements with the customer to reschedule. The Tribunal is satisfied that on occasions customers would speak to the Claimants as regards damaged or missing items required to correct the sheds. In turn the Claimants would then revert back to Flexiform for guidance.
73. Calls received from Flexiform customers in relation to Flexiform deliveries could and were taken by any member of staff. That is Mr Colin Baldwin, Mr Neil Hindle, Ms Vicky Brown or anyone else who was available.
74. If a delivery could not be affected, for example because the customer was out and could not be contacted then the Claimants would authorise the return of the product whereupon it be stored in CBT's warehouse and the Claimants would then seek to re-arrange delivery.

The service Expect provided to Flexiform

75. Expect chose not to place before the Tribunal its contract with Flexiform.
76. The Tribunal was therefore reliant upon the oral evidence given by Mr Taylor as to the services required by Expect and what Expect actually provided to Flexiform.
77. Mr Taylor acknowledged in his statement (paragraph 2) that at no stage did Flexiform ask Expect to provide a solution that was different to that provided by CBT.
78. At a consultation meeting with the employees of CBT held on 7 August 2017 (R193A) Mr Taylor was asked "how will the office side work?" He replied

“essentially the process will be the same but I can’t confirm the exact details at the moment”.

79. The Tribunal has noted carefully that the service proposed by Expect to Flexiform was not in all respects the service that was actually provided following the TUPE transfer on 4 September 2017. In the Tribunal’s judgment the proper analysis is to determine what Expect provided to Flexiform and not what Expect proposed to provide to Flexiform.
80. The Tribunal’s findings are therefore based on the service actually provided to Flexiform on the evidence placed before it.
81. Expect had a contract manager dedicated to Flexiform’s contract who was responsible for all aspects of the contract including planning routes, driver’s hours and utilising the computer systems.
82. Expect collected the product from Flexiform following receipt of an electronic order.
83. Goods were collected by Expect drivers and delivered to Flexiform customers.
84. However, the product is now delivered to customers in rolled cages rather than the manually handling of individual panels.
85. Expect intended to use single manned vehicles for Flexiform deliveries. However, as at May 2018 this has not been fully achieved. Expect used single manned vehicles for approximately 50% of the Flexiform orders.
86. Expect offered Flexiform double sleeper vehicles which would mean that overnight accommodation would not be required for drivers. This was not available on the transfer date. By mid November 2017 Flexiform indicated it did not require the use of double sleeper vehicles. This has never been provided.
87. Expect offered Flexiform an automated appointment creation system. Unfortunately, due to IT difficulties this was not in place as at the date of the TUPE transfer but has been operational since February 2018.
88. Expect offered Flexiform access to an electronic portal covered with vehicle tracking. This allowed both the customer and Flexiform to monitor the status of an order from dispatch to delivery. This has been operational since the date of the TUPE transfer. The effect of the electronic portal is that a customer can place an order directly and select a delivery date without the need for human interaction.
89. Customer care is provided by Expect’s network of 11 operatives, one supervisor and one manager. The customer care staff are not specifically allocated the Flexiform contract. The customer service team can alter a delivery time electronically.
90. Expect provide an erection service of Flexiform’s goods if required by the customer and approved by Flexiform.
91. Expect have a number of depots country wide. In some cases therefore Flexiform orders were taken by an Expect general transport vehicle (that is the vehicle not dedicated to Flexiform’s contract) along with other freight and the Flexiform’s goods are left at one of its depots for collection by a dedicated vehicle. This allows Expect to achieve economies of scale and ensured its vehicles operated, as far as possible at a maximum load capacity.

Discussion in relation to pre and post transfer activities

92. The Tribunal has already set out its findings of fact as to the activities carried out by CBT and then it is findings of fact as to the activities carried out by Expect.
93. The first question the Tribunal must address is whether the activities carried out by Expect after the TUPE transfer date are fundamentally or essentially the same as those carried out by CBT.
94. The Tribunal has come to the conclusion that the activities were fundamentally the same. Both pre and post transfer the essential activity was the collection, transportation and delivery of Flexiform's products to its customers, a support service to those customers, and with, on occasion, an erection service also being provided.
95. Whilst the Tribunal has no doubt that Expect, by using modern technology may have been able to provide better information to both Flexiform and its customers and also to achieve a service at a reduced cost to that provided by CBT by making better use of computerisation, these were not substantiated differences as to make the activity fundamentally different. Whilst Expect has sought to highlight differences between the administrative service CBT provided and Expect provided that was not the activity that was transferred. The activity transferred was the already identified transportation of Flexiform's goods to its customers. The reality is that Expect accepted initially there was a transfer and sought to take over the drivers and porters but it is only at a later stage refused to take over the Claimants who were a mere part of the activity and not the activity itself.
96. On the evidence placed before it the Tribunal must come to the conclusion that the service Flexiform wanted from Expect was fundamentally the same service that CBT provided but at a better price. The additional information and automation was a benefit but the real driver was cost from Flexiform's perspective. Whilst the Tribunal noted the evidence of Mr Taylor that Expect had offered Flexiform "a scalable solution fit for growth" this was simply a factor that may have made the offer put forward by Expect more attractive than the service provider by CBT. This did not alter the fundamental service.
97. The fact the Tribunal has found that the activities carried on by Expect after the TUPE transfer date were fundamentally or essentially the same as provided by CBT does not conclude the matter. There is a further stage that must be considered namely whether there was an organised grouping of employees whose principal's purpose was carrying out the activities concerned on behalf of the client.

Was there an organised group of employees pre transfer

98. The Tribunal is required to consider firstly whether there was an organised grouping of employees and secondly whether the Claimants were assigned to that grouping. These are separate questions although the Tribunal's previously recorded evidential findings may be relevant to both, as an analysis to determine whether there was an organised grouping will require a similar analysis to that undertaken for activities. That is who was doing what, where and when and how they were doing it?

99. The Tribunal is satisfied that CBT put together a team to undertake the Flexiform contract. There were dedicated drivers and porters who did that work. Expect itself has not disputed and indeed has accepted by applying the regulations to the drivers and porters that there was an organised group of employees undertaking the Flexiform contract prior to the TUPE transfer.

Were the Claimants assigned to the organised grouping

100. In order to answer this question the Tribunal have recorded the following additional findings of fact which are relevant to its determination.
101. The Tribunal is satisfied that the Claimants spent the majority of their time undertaking work for Flexiform in the region of 85%. The Tribunal accepted the evidence of the Claimants on the amount of work they did on the Flexiform contract for three reasons.
102. Firstly, the Tribunal found both Claimant 1 and Claimant 2 to be credible and honest.
103. Secondly the documentation, to the extent it existed supported the Claimants' evidence. For example in the bundle (pages 237 to 238) a breakdown was undertaken of the inbox and outbox of both Claimants which showed the majority of their email traffic related to the Flexiform contract. That said the Tribunal reminds itself that both Claimants asserted that the majority of their work was undertaken by telephone.
104. Thirdly Mr Taylor very fairly indicated that he could not dispute the Claimants' assertions that they spent the majority of their time on the Flexiform contract.
105. The Tribunal noted that in an email of 31 May 2017 (R147) CBT supplied to Expect a schedule of employees who it was claimed were allocated to the Flexiform contract.
106. It did not include the office staff and in particular the two Claimants. In the covering email Mr Colin Baldwin stated "there are three of the staff which are not in this list which we can discuss later". Two of those staff were the Claimants. The other was Mrs Natalie Baldwin. The Tribunal attached some weight to this. The managing director of CBT did not regard the Claimants as an organised grouping.
107. In cross-examination the explanation put forward by Mr Colin Baldwin of CBT for their exclusion was "we were trying to establish what they did".
108. No evidence was placed before the Tribunal as to how the work of the Claimants was costed and in particular how, if at all, it was attributed to the Flexiform contract. If the Claimants were a group specifically put together to deal with a Flexiform contract the Tribunal was surprised that such management information was not available. Without such management information costings would be difficult. The Tribunal noted that CBT used a self employed chartered accountant to act in effect as its financial director. It is therefore implausible that if there was an organised grouping, that such information was not collated and available.
109. There was no dedicated telephone lane to the Claimants. Any member of staff could and did take phone calls from Flexiform's customers, albeit information would then be relayed to the Claimants.

110. The Claimants did not have a dedicated email address for correspondence with customers or with Flexiform.
111. No job descriptions were produced from either Claimant which helped to indicate that they had been assigned to the Flexiform contract. Indeed the Tribunal noted that Claimant 1 was transferred to undertaking “admin” work due to health reasons.
112. The Tribunal noted that Claimant 1 stated that he would come into work at 6am on Monday morning to open up and to assist drivers loading their wagons, and on 7am on other days of the week. However, the majority of his work on the Flexiform contracts was ringing customers which did not start, at the earliest until 8.30am.
113. Claimant 1 also accepted he did some degree of management of drivers and would occasionally drop off vehicles for service or collect them.
114. As the Tribunal has already found the delivery routes were prepared by Mr Colin Baldwin or Mr Neil Hindle. They would quite often undertake the sorting out, each week, of the acknowledgment forms from Flexiform. The signed acknowledgments obtained from the drivers were then dealt with by Ms Vicky Brown.
115. There must have been administration work connected with the 32% of none Flexiform turnover. The Tribunal finds the Claimants also did some of that work.
116. Flexiform could and did speak to anyone at CBT.
117. The mere fact the Claimants may have undertaken the majority of their work on the Flexiform contract is a relevant consideration but not a determinative consideration, see **Eddie Stobard and Moreman**.
118. The fact that the Claimants did a great deal of work on the Flexiform contract was simply because that client provided, in terms of percentage turnover to CBT, the majority of the work the Claimants were not deliberately put together to do that work or dedicated that work and could and did do other work for other clients of CBT. The Claimants did administrative work and it was simply a case that the majority of their administrative work was generated by Flexiform as they were the major client.
119. Looking at all the evidence in its totality and pulling together the above findings of fact and bearing in mind the burden of proof is upon the Claimants the Tribunal has reached the conclusion that on the balance of probabilities insufficient evidence has been placed before it to hold they were deliberately organised for the purpose of carrying out the activities required by the Flexiform contract.

Employment Judge T R Smith

Date 16/05/2017

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