EMPLOYMENT TRIBUNALS

Claimant: Miss Louise Brown

Respondent: Veolia ES (UK) Limited

Heard at: Hull **On:** 29, 30 and 31 July 2019

Before: Employment Judge Lancaster
(sitting alone)

REPRESENTATION:

Claimant: Mrs A Datta, Counsel
Respondent: Ms A Niaz-Dickinson, Counsel

JUDGMENT having been sent to the parties on 2 August 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. There are two complaints before me arising out of the termination of Miss Brown's contract of employment. On the first of those I find that the claimant was fairly dismissed. In short, I am satisfied that the respondent has established that the principal reason for dismissal was related to conduct, and in particular an allegation of inappropriate conduct towards a subordinate, Neil Bolton, and I accept the evidence of the dismissing officer, Mr Roberts, that although he did not represent this clearly within the termination letter, that was what weighed on his mind.

2. I am further satisfied that Mr Roberts genuinely believed that the claimant had behaved inappropriately towards Mr Bolton, and he did have reasonable grounds for coming to that conclusion because in the course of the investigative process there had been a number of witnesses who supported that general allegation.

3. The investigative and disciplinary process was however in my view a catalogue of ineptitude and misjudgement on the part of the respondent, but

notwithstanding that I am just persuaded that it fell within the band of reasonable responses open to a reasonable employer to consider that that level of investigation in the circumstances was sufficient and appropriate.

4. On the second complaint, however, the respondent has not satisfied me that they have established that what the claimant actually did amounted to gross misconduct justifying summary dismissal without notice, and the claim of wrongful dismissal therefore succeeds.

The Facts

5. The claimant had worked for some 17 years for Veolia. On 28 February 2018 an employee who had been there for some ten months and handed in her notice sent an email making complaints principally against Gavin Smedley, the claimant's superior, but also making some allegations against the claimant. It is not clear who initially dealt with the receipt of that email but on 5 March 2018 it was passed to Mr Simon Elshaw who became the investigative officer. It appears that shortly before that the Security Director, Mr Simon Jenkins, had also considered the matter and in the light of Miss Broomhead's email had approached a security company to carry out surveillance of both the claimant and Mr Smedley. This was certainly something which Mr Elshaw approved and described it at that stage as constituting an investigation into alleged corruption and bribery. That appears to me to be an overreaction and a great misjudgement on the part of the respondent.

6. In Miss Broomhead's email the allegation of potential corruption or bribery against the claimant amounted to a hearsay comment that Miss Broomhead had heard that two Fitbits had been passed on to a client, Humber Roads, who had helped the respondent in delivering some online training. That was a hearsay comment and on that basis, coupled with some other unsubstantiated general allegations that there may be irregularities in the posting of various finances, where the coding notes were not as I understand the responsibility of the claimant but of Admin, this enquiry was launched, and on 9 March 2018 there was then a meeting with that company, Subrosia, and it appears the focus of the investigation at that stage apart from carrying out general financial checks into the claimant and Mr Smedley, an investigation arising more specifically out of Miss Broomhead's allegations that Mr Smedley was never in the office but spent most of his time at a local hotel, and the rather vague allegation that the claimant would often go and meet him there.

7. So that was the principal focus, and as I say it seems to me a gross overreaction to commission a covert investigation of the claimant, intrusive of her privacy, to support a general allegation that she went out of the office to meet her superior, but that is what the respondent chose to do, and having commissioned that report the surveillance did not commence 1 April and lasted for a month. The respondent chose to do nothing further until they received that report, which they did not in fact receive until 30 April; that is two months after the initial email from Miss Broomhead.

8. When that report came through it showed nothing untoward so far as the observations of the claimant were concerned, and only then did the respondent decide that they would move on to phase two of their investigation to start their

enquiries into any potential financial impropriety, which as I say at this stage appeared to be limited to a hearsay allegation in relation to some Fitbits and a suggestion that they might investigate the postings of various other purchases, and it means that enquiry had been delayed for two months.

9. Coincidentally on the same date, 30 April 2018, the respondent received a further email following a telephone conversation from Mr Bolton, properly described as a grievance and does make allegations of bullying against him on the part of the claimant. Some very general comments about the claimant's interaction with Mr Bolton had been included in Charlotte Broomhead's email but at that juncture it is clear from his evidence that Mr Elshaw did not consider that to be an allegation of bullying, and certainly not something he investigated, and when he first spoke with Miss Broomhead, which was on 23 March 2018, those matters were not questions that he put to her at all. But having received a further email from Mr Bolton, Mr Elshaw then determined rather than deal with this under the Dignity at Work policy as a bullying allegation where ordinarily therefore Mr Bolton would be spoken to that procedure, to be ascertained what relief he wished to obtain, and the claimant would similarly be spoken to, having been made fully aware at that very early stage of the allegations in the grievance against her, and similarly Mr Bolton would have been made aware of the claimant's response and then subsequently, as I understand the policy, a decision might well be made that it would lead to disciplinary procedures. Instead, Mr Elshaw determined from the very outset that when he summoned Mr Bolton to the preliminary meeting, which was on 11 May 2018, that would be a disciplinary investigation interview. Miss Broomhead was called in again for a further interview (on 16 May 2018) and clearly Mr Elshaw had already determined that he was set on a course to proceed down a disciplinary investigation, and I think there is some force in the claimant's assertion that he may have been predisposed to take that line: he had commissioned, no doubt at some expense and certainly at some time, a futile report into alleged misconduct on the part of the claimant and he was now looking to pursue other potential allegations against her.

10. Whilst I accept, as I have indicated in the course of argument, that these allegations all originated on the face of it from external communications from one ex-employee and one current employee, there certainly does appear at this stage to be something of a predisposition on the part of Mr Elshaw to take the view that this should proceed to a disciplinary matter rather than look at any other possible recourse.

11. Therefore on 18 May 2018 the claimant and Mr Smedley were both summoned to a meeting and suspended, and the purpose of that suspension was to allow a further investigation. So there were a series of interviews with potential witnesses that took place between that date and 4 June 2018. I pause to observe that after 4 June 2018 there were no further enquiries undertaken with any witnesses, not any further examination of any documentary evidence by the respondent, and therefore the primary purpose of the suspension to afford an unfettered enquiry had already been met. There appears to be no evidence the respondent ever at that stage or thereafter considered whether suspension of the claimant was still appropriate. That may have been largely unnecessary because she was certified unfit for work for a large part of this period.

12. Those interviews, as I have said, disclosed eight witnesses including Miss Broomhead and Mr Bolton, generalised allegations of misconduct. These are summarised by Mr Roberts in the course of the disciplinary interview and also then reflected in his written reasons, so he singles out particular comments. I do not pause to attribute them to particular witnesses, nor did he in the letter. The amount he (Mr Bolton) takes is unbelievable. The way he is spoken to and treated is what I describe as bullying. The way he is spoken to is quite manipulative. "She has been at Neil straightaway and shouting at him", "she's unprofessional, especially against Neil", "I really feel for him", "she was constantly on at him", "Neil has been in tears because she spoke to people badly", "it was very uncomfortable" directed at Neil Bolton "and very belittling".

13. There were also a number of other witnesses spoken to who did not substantiate any of those specific complaints against Mr Bolton.

14. Following that phase of the enquiry the claimant, and indeed Mr Smedley, were summoned to a first investigative interview on 6 June 2018. The letter of invitation on 29 May set out five bullet points that were alleged to be the detail of the matters under investigation:

- The first of those is "bullying and harassment allegation in relation to more than one individual of the whole site over a prolonged period of time", so not limited to Mr Bolton and not identifying any particular employee;

- Financial misconduct in relation to multiple allegations of misappropriation of finances including withholding of revenue, misuse of the expenses policy, unauthorised purchase orders and lack of authorisation for sponsorship and charitable contributions;

- Inappropriate relations with your colleague, Gary Smedley, which directly impact the workforce;

- Unprofessional behaviour in your correspondence and communications with individuals at the site;

- Mismanagement and lack of leadership in relation to culture and colleague morale.

15. Under the respondent's own disciplinary process at the investigative stage details of the matters to be enquired into are supposed to be given in advance. Those subheadings are very vague.

16. The respondent then mismanaged the process of investigation. They had called Mr Smedley and the claimant to interview on the same date, 6 June. For some reason they were not able to arrange the commencement of Mr Smedley's interview until 12.15pm although they had arranged for the claimant to attend at 1.30pm, therefore her interview did not commence until 2¼ hours later and although it lasted for an hour and nine minutes it was not possible to conclude.

17. The claimant at this stage had in fact received a sick note from her doctor but had elected to attend for this interview in any event, but at the end of that abortive investigation where the respondent had not allowed sufficient time to investigate both people they sought to adjourn it to the following day; the claimant then said she was too unwell and it had to be adjourned further. There were then two further meetings on 26 July and 20 August. I accept that these were in part delayed by concerns the claimant would be fit enough to attend. In total the claimant was interviewed for a little short of seven hours, so even on a second re-arranged interview, which again was only scheduled to start at 1.30pm, the respondent had not been able to organise sufficient time to enable this matter to be dealt with quickly and efficiently and it had to be further adjourned.

18. At no stage during that investigative process of the three interviews was the claimant given copies of the statements taken up to 4 June. A number of them were read out but she was never provided with the written version, and in part particular points of statements were cherrypicked and read out rather than giving the whole context, and I do note that that process was participated in by the HR Associate present who appears to have not taken a fully impartial stance in the course of these proceedings but was joining with Mr Elshaw in putting specific allegations to the claimant.

19. None of those allegations, except for two that I can see, were particularised in any detail. Throughout the course of the investigative interviews none of the witnesses was pinned down to say what precisely was said by the claimant that they construed as being belittling or abusive; none of them were asked to put a timeframe upon it and none of them were asked to give any context. In actual fact I note that from the very first interview with Mr Bolton his initial concern was that he was spoken to inappropriately, particularly over the telephone, by Mr Smedley, and on those occasions he said he would actually go and confide in the claimant, asking her why he was being picked on, but he says that at some stage then she started to participate in that process but he does not say when or how. When asked if he had particulars of why in his email he described this conduct as bullying he said he could not really be specific. But he gave one example which was actually the morning of 11 May when he had his interview, and that related to his being challenged about whether he had worked productively when he had come in on a Bank Holiday. The claimant was able to give an explanation of that matter where she accepts she was frustrated that she was not given an adequate answer at first as to what Mr Bolton had been doing, and she accepts that she was frustrated and raised her voice, and accepts that in the context that she of course was answerable for the costings to the client who was paying for his time coming in on overtime on a Bank Holiday.

20. The second specific allegation that I can identify, the only one that was pinned down at all, was in relation to an allegation by Mr Bolton that he was inappropriately required to contribute to the cancellation cost of the claimant's holiday, and he claimed at his interview that she then had the audacity to claim that was done to assist him. That was the only specific allegation of alleged bullying that was ever itemised; that happened in a list of questions that was sent before the second investigative interview on 26 July. In relation to that allegation, however, there is email correspondence, and it is perfectly clear to anybody reading that, that that cannot be and is not any form of bullying. The claimant had a pre-booked holiday. Mr

Bolton's father then booked a family holiday for the same period without having told him. Because it was not desirable at all that two people in those positions should be absent at the same point, Mr Smedley had said that Mr Bolton would have to sort that out with the claimant, if they could come to some arrangement. In the course of those emails, without reading them in detail, it is quite clear that the claimant was prepared to accommodate a change of her holiday plans by putting it back to allow Mr Bolton to participate in the family holiday, but that entailed a cost to her, not a great cost but £37, and she made the point in the emails that it would be unfortunate because her holiday destination was not her preferred choice because of cost implications in any event. It is clear from Mr Bolton's responses that he fully understood that position, that he appreciated what the claimant was doing in changing her plans, he volunteered that he did not think it was appropriate that she should bear the cost, and when she explained that she was sorry about this but there was financial stringency he was entirely sympathetic. How that materialised into any allegation of bullying let alone one that was ever pursued by the respondent is beyond me.

21. Apart from that lack of specifics in the allegations, there was as the respondent has properly pointed out a common thread in a number of the witnesses. It is highly unfortunate that Mr Elshaw chose to phrase the questions to witnesses in a way which I consider to be leading, that he identified that the respondent was investigating allegations of bullying, harassment and financial mismanagement against the claimant and indeed Mr Smedley, and invited their comments. He is therefore leading the witnesses to interpret any inappropriate conduct that might have taken place as in fact being bullying and harassment rather than giving a neutral account of what happened and allowing an objective assessment to be made of that behaviour and conduct.

22. At no stage did Mr Elshaw ever consider going back to any of those witnesses and asking for clarification of the specific allegations, let alone putting to them the claimant's alternative analysis, and in general terms that can be summarised as saying that she accepted that she was sometimes abrupt, and indeed that appears to be a common pattern of witness evidence, even those who do not describe it as being bullying, but she was under considerable pressure at work at the time, and in relation specifically to Mr Bolton she identified that he was somebody that had to be taken to task because he did not always perform promptly what was expected of him, but she consistently denied ever having shouted at him. So there is clearly room for divergence of opinion: that one person who may object to being taken to task for underperformance perceives that as inappropriate bullying, whereas the claimant considers that simply to be an appropriate way without (which was never accepted) shouting or seeking to belittle Mr Bolton, managing what he did in the office.

23. Of course throughout the whole of this enquiry the matter was not limited solely to allegations in relation to Mr Bolton. There were the overarching unspecified allegations of bullying and harassment in relation to more than one individual over a prolonged period of time, whatever that may have been, and the more general and even more unspecific allegation of "unprofessional behaviour in your daily correspondence and communication with individuals at the site". As I have said, although a significant number of witnesses partially corroborated the accounts of

inappropriate conduct towards Mr Bolton, a number of course did not. The respondent, particularly in the period of Mr Elshaw, did not ever conduct a more general enquiry to ascertain how the claimant was perceived in the workplace. They did not do that even when she provided a list of names of people who might be able to assist, and in those circumstances I have some sympathy for the claimant's perception that this was not a balanced investigation. I certainly know that in the course of those three lengthy investigative interviews, while I have already commented the claimant was never given copies of the statements that were to be used against her, she never had brought to her attention, as far as I can see, those alternative statements that in part supported her view that she may have been abrupt but it was not regarded as bullying. The claimant was expressly told at the end of the third interview that it was inappropriate for her to seek to obtain her own witness statements that may back up her account, and I repeat: this was not limited at this stage simply to an enquiry into what had happened in relation to Mr Bolton, it was also to defend herself against the more general allegations of unprofessional behaviour towards her colleagues. So if there was evidence of perfectly properly behaviour, and indeed there was as I say evidence of perfectly proper behaviour and on one significant occasion towards Mr Bolton himself, that would potentially have been relevant.

24. What it meant was that it was not until 3 September 2018, that is six months after the initial complaint by Charlotte Broomhead, that the respondent gave copies of the witness evidence to the claimant, and on that occasion they have her nine days' notice of a disciplinary hearing to be convened. The charges that were to go to that disciplinary hearing were exactly the same as those that had been identified on 29 May: the same five points. Mr Elshaw who sent that letter of invitation had made no attempt whatsoever to distil from the course of his lengthy enquiry or his seven hours of interview with the claimant any more particular examples of allegations, and he included still the overarching allegation of "financial misconduct in relation to multiple allegations of misappropriation of finances", which so far as I can see there is not a shred of evidence at all that the claimant ever misappropriated any sum of money, yet through ineptitude or laziness Mr Elshaw did not seek to modify that charge and left it hanging over the claimant, even after this lengthy period.

25. The claimant having received not only those 20 witness statements but also the fully body of Mr Elshaw's report only on 3 September then on 7 September made a request for an adjournment of the hearing to allow her further time to prepare, and she also at that stage specifically asked permission to contact potential witnesses who in part, as the respondent contends, may have been character witnesses and therefore that is not directly relevant, but also could similarly have been relevant witnesses as to context, particularly given the fact that the charges remained in their general amorphous state, unaltered from the start of the investigation, leaving the claimant still largely unclear as to what specific parts of those 20 statements were in fact relied upon, because even within his conclusions in his Mr Elshaw did not do more than to summarise that evidence and say "some witnesses suggest that this happened". It is unclear from that whether the claimant would be expected to understand that where he says "this is suggested" it was a specific allegation she had to answer, though that is Mr Elshaw's evidence to me.

26. That request for an adjournment was refused. I consider that too to be a misjudgement in all the circumstances. The respondent had had six months to build their case against the claimant: they gave her nine days to respond to the specific and somewhat lengthy information they provided to her. They also refused her request for somebody other than another employee or union representative, and she was not in the union, to accompany her, although of course there was no entitlement to such representation that again in my view would appear to be an error or judgment given the circumstances, and as I say particularly given the intervening ill health of the claimant during this enquiry. They also refused her application to contact potential witnesses, and of course she needed consent because never having reviewed the suspension she was still under a prohibition from contacting her colleagues. No-one seems to have addressed any attention to the fact that under the disciplinary policy the claimant would have been entitled to call witnesses as appropriate, and as a precursor to doing so she necessarily would have had to be able to make contact with them to establish they were relevant. Instead, having categorically denied her application for an adjournment the respondent then went on to purport to say that she could give reasons why they were relevant and therefore whether the Chair of the enquiry would need to ask them questions. It seems to me perfectly understandable that the claimant elected not to seek to pursue that in the circumstances.

27. There was a disciplinary hearing before Mr Roberts on 12 September and the claimant accepts that she was afforded an opportunity to put her case at that meeting, and certainly there was then a subsequent appeal before Mr Williams where she had further time to consider her position. But even at that disciplinary hearing Mr Roberts made no specific findings of fact because he had no factual information to say that this was said on a particular instance; he simply repeated the general allegations of belittling and abusive shouting behaviour as corroborated by a number of witnesses, and still when the claimant put her alternative account it never occurred to him to seek to test again the witness evidence, and indeed it appears to me that he got perilously close to prejudging this issue. When asked why he supported Mr Elshaw's decision not to allow any adjournment or the questioning of further witnesses his somewhat revealing comment in evidence was "those are already sufficient to prove the respondent's case", and it is clear from the tone of his interview on 12 September that he accepted without more the statements in front of him, which as I say had never been drilled down for any detail and had never been subject to any challenge, and of course there was never any suggestion that any of the these people actually be called as witnesses at the disciplinary hearing to allow the claimant to question of challenge their evidence.

28. So that is why I have described the conduct of this investigation as a catalogue of ineptitude and misjudgement, but nonetheless as I say I am just persuaded that the respondent was acting within the band of reasonable responses in treating it as sufficient in the circumstances. Even for a very large employer such as this I cannot expect the same standards of exactitude as, say, in criminal proceedings, or even in court proceedings. What they had done was to obtain evidence from a large number of people which described the adverse effect of the claimant's manner, particularly upon Mr Bolton, and there certainly was evidence from his interviews of clear apparent distress when raising these matters. There may be many issues as to why this had not been raised earlier, why Mr Bolton was

somewhat disingenuous in his account of the holiday matter as being also bullying, why he made no mention of any issues with his performance that may have prompted the claimant speaking somewhat harshly to him, but there is still a body of evidence obtained during a lengthy investigation and even if matters could have been dealt with better I still consider it a permissible course of conduct. As I have said ultimately, although I consider that showing some compassion and a degree of common sense more time might have been afforded to the claimant to marshal her arguments, she was made aware of all the charges and she had certainly over the course of the lengthy investigation spread over three substantial meetings at least been told if not given written confirmation of the nature of the allegations against her.

29. Having come to that conclusion, that he accepted the evidence of the descriptions of the way the claimant dealt with Mr Bolton, I cannot and do not substitute my own view for that of Mr Roberts. On his finding this was a serious matter that justified termination, notwithstanding the substantial mitigation for the claimant's long service. However, having heard the evidence over the last three days, as I have said I am not at all persuaded that the respondent has satisfied me that this in fact meets the definition of gross misconduct under their own policy.

30. Absent any attempts to verify the evidence and the accounts and the interpretations given by witnesses, I have the claimant's own account. I find her to be rank in stating that she accepts she was abrupt, and indeed she could hardly do otherwise given the wealth of evidence of that, but I accept her evidence that if that conduct unbeknown to her had a deleterious effect on Mr Bolton that that was not her intention: that there were genuine perceived performance issues on his part, that generally she was seeking to support, and that if she did by her actions have the effect that it appears to have upon him that was not deliberate. There is no admission of bullying in her assertion today that she would have wished the opportunity if at all possible to speak through and address those issues and discuss them with Mr Bolton and see if there was a resolution. That is entirely consistent with somebody who has inadvertently misconducted themselves in a manner that has unintentionally caused stress to one of their subordinate colleagues. The definition of "bullying" within the Dignity at Work policy expressly requires there to be that element of intention, and as I say the respondent has certainly not proved that before me at this Tribunal. So although they are entitled on the findings of Mr Roberts to conclude that what had actually happened because of the effect it had on Mr Bolton was so serious as to justify dismissal, that should have been dismissal on notice and not summary termination. So to that extent the claim succeeds.

31. A relatively novel point has arisen after my judgment, which is whether I should award an uplift on the damages for wrongful dismissal in circumstances where I have disallowed the claim for unfair dismissal. Under section 207A of the 1992 Trade and Labour Relations (Consolidation) Act I have power to award an uplift in appropriate circumstances, but it is discretionary if I consider it just and equitable. These are proceedings to which 207A relate, and there are certainly potential breaches of the Code of Conduct.

32. The first alleged breach is unreasonable delay in investigating the matter. There was a substantial delay from the initial email of Miss Broomhead on 28 February until the commencement of any investigation into the financial matters,

which was not until early May. However, there is a reason for that delay. I consider it to be based upon a bad judgment call but it was the intervention of the Sobrosia investigation, so I do not consider that in all the circumstances to be an unreasonable breach of the Code. This is not simply a situation where the respondent sat upon an allegation and delayed bringing proceedings: they were conducting collateral and parallel enquiries. From the commencement of Mr Bolton's complaint, the delay is not significant. His email was 30 April. The suspension was on 18 May, there were then investigations over a relatively short period, and the first investigation meeting with the claimant was called for 6 June.

33. So far as the allegations that there was not sufficient time allowed for the claimant to prepare her case and she was not allowed to call relevant witnesses, I consider that potentially there are breaches of this Code. I have pointed out that the claimant was only afforded nine days to prepare, having received a substantial body of information, and I have described the failure to accede to that request at the time as showing perhaps a lack of compassion and common sense, and a corollary of that was the fact that the claimant, having been denied that extension of time for the hearing, had not time to consider the potential appropriateness of witnesses. How those witnesses would in fact have been relevant to the charges that Mr Roberts was to consider is unclear, but that is partly because Mr Roberts nor Mr Elshaw had actually narrowed down the issues sufficiently to identify the general concerns were not to be considered and it was confined to the allegations in relation to Mr Bolton. But in any event, on those matters the failure to allow an extension of time and the failure to allow the claimant to call potentially relevant witnesses at the hearing.

34. Having made my decision this was in all the circumstances a fair dismissal under section 98(4). I do not consider it would be just and equitable if I were to then award effectively a windfall to the claimant for what is on the face of it an unreasonable breach of the Code of Practice. The two must be looked at in the round.

35. However, there is one final breach of the Code, which is the failure to keep under review the suspension, and that I consider to be in a different category because by definition "suspension" sits out of the disciplinary process. "Suspension is not if itself a disciplinary act, but the Code is quite clear: where suspension is considered appropriate it should be kept as brief as possible, should be kept under review as well as making clear that it is not considered of itself a disciplinary action. The initial reason for suspension, as I have stated, was to allow an unfettered investigation, but that was completed by 4 June: beyond that date the respondent took no efforts whatsoever to interview any further witnesses nor appear to have considered doing so. As I stated in my original judgment, there is no evidence of them ever having sought to review the suspension. That did become significant when the claimant, as of 20 August, the final investigatory meeting and then by her letter of 7th, sought permission that she needed given the terms of the suspension to seek to contact fellow employees. I consider that that is an unreasonable breach, a requirement of the Code actively to review a period of suspension and keep it as short as possible, and that because it sits outside of the decision that this was a fair dismissal I consider the claimant is entitled to an uplift in that regard alone, and the minimum amount that I would ordinarily award, and what I award here, is 5%.

36. The claimant is entitled to damages in the gross sum of £8,010.26 which is agreed, and further given the ruling that there has been an unreasonable breach of paragraph 8 of the ACAS Code of Practice an uplift which I calculate at £400.51.

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Employment Judge Lancaster

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Date 23rd August 2019

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