



EMPLOYMENT TRIBUNALS

Claimant: Miss K Matyka
Respondent: Sports Direct.com Retail Ltd

Heard at: Nottingham
On: 16, 17 and 18 November 2020, 24 March 2021
Reserved: 25 March 2021

Before: Employment Judge Blackwell
Members: Mr G Edmondson
Mrs L Lowe

Representation

Claimant: In person
Respondent: Ms E Misra of Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that Miss Matyka's claims pursuant to the protected characteristic of disability and of a failure to make reasonable adjustments pursuant to sections 20 and 21 of the Equality Act 2010 fail and are dismissed.

RESERVED REASONS

1. Miss Matyka represented herself and she called the following colleagues or former colleagues as follows:-
 - Mrs Czyzewska
 - Mr Habet
 - Mr Meczowski
 - Ms Karlinska-Jaroszek
 - Ms Maliszewska (known as Budna)

2. Ms Mizra of Counsel represented the Respondent and she called:-
 - Ms Pawlik
 - Ms Stocks

3. There was an agreed bundle of documents and references are to page numbers in that bundle.

Issues and the law

These were identified by Employment Judge Blackwell as follows:-

4. The essence of Miss Matyka's claim is that in November 2016 after a lengthy sickness absence from work, it was agreed with Marlena Pawlik of the Respondent's HR Department that Miss Matyka would work only in the Personalisation Department on her return to work.
5. Miss Matyka alleges that the Company subsequently breached that variation to her contract of employment beginning in March 2019 and confirmed in July 2019. That claim could of course be advanced as a breach of contract but, unfortunately, this Tribunal does not have jurisdiction to hear such a claim unless and until the contract of employment has come to an end.
6. However, that issue remains at the root of Miss Matyka's disability discrimination claim which is her second claim. The disability upon which she relies is the mental impairment of anxiety and depression which she has suffered since childhood.
7. In that regard, in their Response the Respondent said as follows:

“ *It is admitted that the Claimant is likely to be disabled for the purposes of the Equality Act 2010 (EqA), though the Respondent will require confirmation from the Claimant that the disability on which she relies for the purposes of her claim(s) is anxiety and depression.*”
8. That confirmation has now been given.
9. The Respondent does not admit that the Claimant's symptoms are such that they have a substantial and adverse effect on the Claimant's ability to carry out day to day activities and thus that will be a matter for the full hearing.
10. Miss Matyka's claim is one of a failure to make reasonable adjustments. The provision, criterion or practice upon which she relies is that the Respondent has, since March 2019 and confirmed in a meeting in July 2019, required her to return to work in the warehouse rather than the Personalisation Department.
11. Miss Matyka's evidence will be that for the three years she worked in the Personalisation Department, she felt safe and had no panic attacks. Whenever she worked in other departments prior to 2016, she did suffer panic attacks and that is the substantial disadvantage which she alleges.
12. The reasonable adjustment that Miss Matyka relies upon is for her to have been able to work in the Personalisation Department on a permanent basis subject to short lived transfers, ie of about an hour, to other departments when worked was short in the Personalisation Department.

13. The full hearing will also have to determine whether the Respondent knew, or ought reasonably to have known of Miss Matyka's disability and its limitations on her ability to work.
14. The full hearing will also have to determine whether, pursuant to section 123 of the Equality Act 2010, Miss Matyka's claims have been brought within time or whether, if they have not, it would be just and equitable to extend time.
15. Those then are the issues for the Tribunal. I should note that Miss Matyka also suffers from Spondylolisthesis of L5/S1. This was as a consequence of her pregnancy in 2007 and it is common ground that because of that condition, she has been employed on light work ever since. However, it does not seem to me to have any other relevance.
16. **Section 20 Equality Act 2010**

"20 Duty to make adjustments

- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
- (2) The duty comprises the following three requirements.*
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

Introduction

17. This hearing had to be adjourned on the third day of the original hearing because Miss Matyka was unfit to continue because she had a panic attack. The hearing resumed on 24 March 2021 and concluded on 25 March 2021.

Decision on a preliminary matter

18. Miss Matyka makes an application to have included within the bundle of documents, documents which she sent to the Respondent's Solicitors on 9 and 11 November of last year. The Respondent's Solicitors objected to their inclusion. Unfortunately, on that day we had to adjourn because Miss Matyka was ill.
19. Order 5 of the Orders that accompanied the Adjournment Judgment read:

"5. No further documents will be permitted to be introduced by either

party unless the other party consents to their introduction.”

20. On 16 December 2020, Miss Matyka sought to appeal that ruling and have introduced the documents referred to.

21. On 21 December 2020, I directed as follows:-

“ ...

3. *Ms Matyka has appealed Order number 5 on the basis that she wishes to submit new documents. These documents appear to be Polish translations of documents already submitted. In these circumstances, Ms Matyka appeal fails and Order 5 stands. No new documents will be permitted to be submitted.*

...”

22. That then brings us to today and for the reasons set out on 21 December 2020 above, Miss Matyka’s renewed application is refused.

Findings of Fact

23. Miss Matyka began employment with Sports Direct (SD) on 1 October 2006. She resigned from her employment in December 2020.

24. SD are a national retailer of clothing and sports equipment and are part of the House of Fraser Group. They are a very large employer with a dedicated HR Department. At the relevant time, Personalisation Department (PD) was one of 48 Departments based within a very large warehouse.

25. Her contract of employment is at page 233. Her place of work is described as “The Warehouse” and she was employed as a Warehouse Operative working 25 hours per week, Monday to Friday. Though it is not in the contract, Miss Matyka regularly worked from 10:30 am to 2:30 pm.

26. During pregnancy, Miss Matyka suffered an injury to her spine that meant that she remains restricted to light duties.

27. Miss Matyka has a low resistance to infections and has had several long-term absences from work – see page 85. We note that even in the PD she was absent from work through illness on 140 days over 27 months.

28. She was absent from work from 6 December 2015 to 24 November 2016, the predominant cause being depression and anxiety.

29. SD made considerable efforts to bring Miss Matyka back to work, culminating in a meeting held on 21 November 2016 – see pages 136 to 138. Miss Pawlik conducted the meeting; Miss Matyka is represented by Mr Primarolo, a UNITE union representative. Miss Pawlik proposes that the only option for Miss Matyka’s return is in the Warehouse and there is a vacancy in Personalisation.

Miss Matyka responds by saying that:

"Paula doesn't like her".

Miss Pawlik replies:

"It's not for Paula to decide who works there, you have the right to be happy and smiley in your work. It is the only position available at this time. It will take away some of the pressure from the targets on you. You will still have some targets to meet within Personalisation but it will take some of the pressure off".

30. Subsequently, Mr Primarolo asked whether Paula (that is Miss Stocks the Section Manager of Personalisation) could remove Miss Matyka. Miss Pawlik replies:

"No, she has no authority. The only thing that I need to make you aware of is that there may be quiet periods where you would need to do web scanning. There would be no targets for this as you would only be there for an hour or so at the most. It is usually quieter in the mornings than the afternoons in Personalisation. You will have some targets to meet in Personalisation but they will be targeted on the work that you have in."

31. Miss Matyka again asks Miss Pawlik:

"Can you promise me that Paula can't remove me."

To which Miss Pawlik replies:

"I can promise you that, I have spoken to Dave about this, I haven't given him any of your background."

32. This is the meeting Miss Matyka relies on to assert there was a variation to her contract of employment and we accept she genuinely believes that there was. For example, in a meeting held in 2019, Miss Matyka says:

"I was assured by Marlena that I would stay on Personalisation for ever and Paula won't be able to decide to move me."

33. The meeting of the 21 November led to Miss Matyka's return to work in the Personalisation Department, a department within the Warehouse. The Warehouse is a huge structure employing some 7,500 people; the Personalisation Department having at the time some 48 employees. The Personalisation Department processes online customer orders for products and merchandise requiring a personalised name currently on football shirts and boots and beauty and perfume products.

34. Miss Matyka carried out several tasks in the PD, including lettering and sewing. All required tasks were light duties which Miss Matyka was physically capable of doing.

35. There is a conflict of evidence as to whether Miss Matyka had panic attacks during her time in the Personalisation Department, such is denied by Miss Matyka. Ms Stocks says she did on at least three occasions and that is supported by Miss Matyka's own comments made in a meeting held on 15 May 2019 at 178/9 as follows:

"Worked there for 3 years. I know everybody. It's a small department, everybody knows about my health problems. They accept me. I feel safe. Small department, not many people. Everybody knows the second one as well when panic attacks happen they know what to do. They know just to get Paula to grab her and to go outside. Three years never had attack. I knows everyone but since that happened I am back on the attacks."

36. We prefer the evidence of Ms Stocks whose recollection was clear and detailed. We accept therefore that Miss Matyka had at least three panic attacks in PD.
37. Despite Miss Matyka's misgivings about Ms Stocks, all went well in the Personalisation Department. It is common ground that the Personalisation Department is quiet from January to April and it was routine for Miss Matyka to work for short periods in other departments; that was usually between 9:30 am to 11:00 am.
38. On 8 March 2019, Miss Matyka reported as normal to PD and was told that there was not enough work and that she would have to work elsewhere. On her evidence, she chose where to go and work.
39. On 11 March 2019, the same thing happened. This time Miss Matyka found a supervisor who deployed her to work elsewhere.
40. There followed an exchange of emails between Miss Matyka and Ms Pawlik – see pages 164 and 165. Ms Pawlik at 164 says:

"Paula did not remove you from Personalisation without consulting with me. She told me because there is not a lot of orders and she has a lot of people, she needs to change the way they work."

She goes on:

"Due to the changes in the Warehouse, I cannot promise you one place to work because it depends on the client and orders. Therefore you might be sent to different light duties department due to business needs."

41. Miss Matyka never returned to work and has had fitness notes ascribing her lack of fitness to work to "depression and anxiety".
42. On 22 March 2019, Miss Matyka raised a formal grievance – see pages 148 and 149. The heart of her grievance is what she describes as her removal from the PD on 8 and 11 March. She repeats her assertion that there was an

agreement in November 2016 that she would only work in PD. She writes:

“Therefore I am formally writing to you to bring me back to Personalisation Department.”

43. There was a grievance meeting held on 3 April 2019 chaired by Ms Watkinson. Miss Matyka is again represented by a Mr Sterrett of the UNITE union and there is a translator present.

44. Miss Matyka at page 153 says:

“I feel more safe because there is less people and all the supervisors are aware of my conditions and in the case of an attack, they will know what to do.”

45. At page 155 Ms Watkinson explains that there have been changes since the acquisition by SD of the House of Fraser business. She says that PD will no longer be a light duty department. Ms Watkinson explains that it is unlikely that she can grant the outcome Miss Matyka is seeking, ie a return to Personalisation. Mr Sterret then asks for reasonable adjustments and a trial period. Ms Watkinson explains that there are other light duty options available in other departments and that the supervisors would be fully prepared.

46. On 25 April, Ms Watkinson sends an outcome letter on the grievance beginning at page 169.

47. At 170, Ms Watkinson states:

“Your preferred outcome was to be put back on the Personalisation Department permanently. We discussed the proposed departmental changes in our meeting and due to the nature of the changes this department may not be considered a light duty department in the future. The amendments to the department also require multi-trained staff given that the new department will house several different roles.”

48. She goes on:

“You did ask for an opportunity for a trial period on the new Personalisation Department but unfortunately this is not something that can be decided at this stage. This does not mean it cannot be revisited as part of your return to work discussions.”

49. On 30 April, Miss Matyka appealed by a letter at page 172 making broadly the same points but with a complaint about the lack of consultation prior to 8 March.

50. On 15 May, an appeal hearing was held chaired by Ms Rudland. Miss Matyka was again represented by a trade union representative, a Ms Pidgeon.

51. Again, the central theme is the same, namely Miss Matyka’s assertion that she was promised that she would always work in PD. The hearing was adjourned

and Ms Rudland made a number of enquiries, including interviewing Ms Pawlik.

52. By letter of 13 June 2019 beginning at page 197, Ms Rudland rejected the appeal. The letter is lengthy and thorough. Ms Rudland records at page 199 that there had been many operational changes since 2016. She then quotes Ms Pawlik as follows:

“We are heading towards automation so we are now fully running on 7 sorters that process manual tunnelling and web orders for the UK. Autostore is fully operational now and PD going through relocation and machinery replacement. For nearly 2 years we have voice picking in place. All system changes have been linked to the machines that have been installed allowing us to monitor performance and utilise staff better in order to achieve daily KPIs. Due to the operational changes implemented at the warehouse we have reviewed all job descriptions to update them and we are due to sit down with all light duties staff to go through their requirements and assess their capabilities so that they can be redeployed to the most suitable role within the warehouse.”

53. Ms Rudland concludes:

“Due to ongoing changes since you have been absent from work, I am not in a position to either guarantee work on Personalisation or fully exclude you from this. I believe this discussion needs to take place as part of the return to work process.”

54. As part of SD’s long-term absence from work policies, Miss Matyka was invited to a meeting on 5 July 2019. This eventually took place on 16 July and the notes begin at page 205 with Ms Pawlik in the chair. There is a translator and notetaker and Miss Matyka again is represented by Ms Pidgeon. There is discussion about SD paying for CBT therapy. There then follows a discussion of what duties would be suitable for Miss Matyka’s return. Ms Pidgeon at page 209 says as follows:

“So we have six choices web processing, printing and bagging, scan price, pricing, sorter machine and autostore. Would you prefer to have a walk round at the different departments?”

55. Miss Matyka’s response is:

“In 2016 I was told that I can stay on Personalisation.”

Ms Pidgeon responds:

“Even my work is changing. Find one of the options I think I can do that.”

56. On 4 September by letter at page 211, Miss Matyka is invited to attend the warehouse to be introduced to the following Departments:

- Web processing

- Printing and bagging
- Scan price
- Pricing
- Sorter machines
- Autostore.

57. The letter goes on:

“Please note that the purpose of this exercise is to present the options available but these do not mean that you will be permanently transferred to a specific department as this would depend on the business needs.”

58. The letter goes on to say that it is taking time to find a Polish speaking therapist, Miss Matyka having made a request that her CBT therapy be carried out by a Polish speaker. She did attend nine sessions paid for by SD.

59. Miss Matyka did not attend the appointment set out in the letter of 4 September and did not attend the warehouse up to the commencement of these proceedings.

60. It is common ground that Miss Matyka was not specifically invited to view the new PD until after these proceedings had been brought.

Conclusions

61. As was noted in paragraphs 4 and 5 above, there was an identified claim of breach of contract. It remains the case that we do not have jurisdiction to hear the claim because at the time that the claim was brought on 29 October 2019, Miss Matyka remained an employee of SD. However, since it lies at the heart of Miss Matyka’s claim, we will nonetheless determine that issue, namely whether SD varied Miss Matyka’s contract of employment so that her place of work was changed to the PD on a permanent basis.

62. It is common ground that at the relevant time the place of work provision read as follows:-

“Your usual place of work will be the warehouse at the Company’s Head Office and distribution facility. However, the Company shall be entitled to require you to work at other locations in the UK according to the needs of the business. The Company will give you as much notice as possible should it require you to work from another location and will seek to agree any changes which radically alter your travel arrangements to and from work.”

63. It should be noted that at the time of the case management summary, the Employment Judge did not appreciate that the PD was simply a department within the warehouse. The impression given by both sides at the time of the case management discussion was that the PD was physically separate from the warehouse, whereas in fact it is simply a department within the warehouse. However, that does not alter the principle. Miss Matyka’s case is based upon

the exchanges between herself and Ms Pawlik that are set out at paragraphs 29, 30 and 31 of our findings of fact.

64. The words used by Ms Pawlik must be judged objectively to ascertain their true meaning. It is clear that the context was that Miss Matyka, who was not apparently keen to return to work certainly not in the place of work she left, namely the Web Processing Department, needed persuasion to return. The exploratory meeting held on 14 November 2016 had identified a number of possibilities but it is apparent from the meeting of 21 November 2016 that only one viable option was left, namely the PD.
65. Ms Pawlik's words are also clearly in the context that Miss Matyka objected to Ms Stocks as a supervisor. It is clear to us that all Ms Pawlik was saying was that Ms Stocks did not have the authority to remove Miss Matyka from the PD. Thus, contractually, the warehouse remained Miss Matyka's place of work and that of course includes any of the departments within the warehouse. Thus, had we jurisdiction to determine the issue, Miss Matyka's claim of breach of contract would have failed.

Was Miss Matyka disabled within the meaning of section 6 and schedule 1 of the 2010 Act?

66. The mental impairment relied upon by Miss Matyka is anxiety and depression. As is recorded at paragraph 7 above, the Respondent admits that the Claimant is likely to be disabled for the purpose of the Equality Act 2010 and it was confirmed that the impairment relied upon was anxiety and depression.
67. However, SD does not admit that Miss Matyka's symptoms are such that they have a substantial and adverse effect on her ability to carry out day to day activities. Ms Misra correctly submits that there is nothing in Miss Matyka's evidence that goes to the point.
68. We know that Miss Matyka's work activities extended to ironing, sewing, labelling and packing goods. All of those are day to day activities, though done in a work context.
69. We also know that Miss Matyka has had lengthy periods of absence from work, most notably between December 2015 and November 2016 and the relevant fit notes ascribe the absence from work to "*depression and anxiety*".
70. At page 86 we have Miss Matyka's patient record which makes various references to Miss Matyka's condition and to the drugs which she is prescribed to control the symptoms, eg Fluoxetine and Propranolol.
71. At 114 dated 7 September 2016 is a report from a Consultant Occupational Health Physician recording that Miss Matyka was suffering from anxiety and panic attacks also that she was being treated with an anti-depressant called Sertraline.
72. At page 230 is a report from a Psychotherapist of 11 December 2019

summarising the counselling sessions Miss Matyka had had during the autumn of 2019. In summary, the Psychotherapist records frequent panic attacks and fear which appears to be rooted in her early childhood experiences where she suffered physical and emotional abuse and negligence.

73. At page 232 is a report from Dr Johnson, Miss Matyka's GP, recording that Miss Matyka has a history of mixed anxiety and depression, that she is being referred to the psychiatric team for further assessment as she does not seem to be making improvement with her anti-depressants and therapy.
74. It is abundantly plain that Miss Matyka's condition of anxiety and depression is long-term and was present throughout the period of 2015 to the date of this hearing.
75. Though we have no direct evidence from Miss Matyka, there is clear evidence from the medical history set out above that Miss Matyka's mental impairment would have had a substantial and adverse effect on her ability to carry out day to day activities. We are therefore satisfied that she is disabled within the meaning of section 6 and schedule 1 of the Equality Act 2010 and that she has been so disabled since at least 2015 and remains so.

Knowledge

76. It is logical now to turn to the question of knowledge, ie whether Sports Direct knew, or ought reasonably to have known, of Miss Matyka's disability and its limitations on her ability to work.
77. At page 104 is the report from an occupational health practice recording that on 18 January 2016 Miss Matyka suffered a panic attack. Ms Pawlik was present during that appointment and accepts that she saw Miss Matyka having a panic attack. Taken with the medical evidence referred to above and the discussions held on 14 and 21 November 2016, it is clear that from at least January 2016 SD had actual knowledge of Miss Matyka's disability and its limitations on her ability to work.

Provision, criterion and practice

78. The identified PCP is that SD has since March 2019 and confirmed in a meeting in July 2019 required her to work in the warehouse rather than the PD. That issue might be better defined as "*required to return to work in other departments in the warehouse rather than the PD*".
79. Turning first to the events of 8 and 11 March, as a matter of fact Miss Matyka was not being excluded from the PD, rather she was being temporarily redeployed because we accept that the Department was quiet and that staff were being trained.
80. It seems to us that had Miss Matyka been fit to return to work in March, April, May and 2019, she would have returned to the PD.

81. There is abundant evidence that from spring 2019 changes were to be made in PD as described in paragraph 52 of the findings of fact. In addition, we heard clear evidence from both Ms Pawlik and Ms Stocks that each member of staff in the PD would be required to carry out every function within the Department. Both Ms Maliszewska and Mrs Czyzewska gave evidence to the effect that nothing had really changed in the PD. Indeed, the new modern machines were lighter and easier to operate than the old machines. It was also put to Ms Stocks in cross-examination that there was an employee in PD who did the same job every day. Ms Stocks denied that and we accept her evidence that there was a new flexible working regime. That is confirmed by the comments of Miss Matyka's trade union representative at page 209.
82. It is common ground that there were tasks in both the old and new PD that Miss Matyka could not carry out because of her limited ability to lift weights.
83. We also note at page 200, as part of the grievance appeal outcome letter, Ms Rudland does not rule out a return to PD but suggests that it should form part of the normal return to work process.
84. We therefore conclude that as a matter of fact the pleaded PCP has not been made out.
85. We also were referred by Ms Misra to the Court of Appeal decision in ***Ishola v Transport for London [2020] ICR 1204***.
86. We note in particular at paragraph 38 Lord Justice Simler giving the Court's Judgment said as follows:-
- “38. *In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that “practice” here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or “practice” to have been applied to anyone else in fact. Something may be a practice or done “in practice” if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.*”
87. Applying that Judgment to the facts found above, it seems to us that the pleaded PCP is no more than a one-off, even if as a matter of fact it could be made out.
88. Miss Matyka's claim of a failure to make reasonable adjustments therefore fails at that point but, given that we have heard the evidence, we will deal with the other issues.

Substantial disadvantage

89. The pleaded substantial disadvantage is that Miss Matyka felt safe and did not have panic attacks in the PD whereas when she worked in other departments prior to 2016 she did suffer panic attacks and that is the substantial disadvantage.
90. We have found as a fact that Miss Matyka did suffer panic attacks within the PD. We accept that she did not have periods of absence from work ascribed to anxiety and depression during her time at the PD but, given her other absences ascribed to other conditions, she worked for a relatively short period within the PD. We have no evidence as to the frequency of the panic attacks prior to joining the PD. There is thus no evidence that we could conclude that Miss Matyka has been placed at a substantial disadvantage.

Reasonable adjustments

91. Assuming that SD were under a duty pursuant to section 20, the reasonable adjustment pleaded is that Miss Matyka should have been able to work in the PD on a permanent basis subject to short lived transfers, ie of about an hour, to other departments when work was short in the PD.
92. We agree with Ms Misra's submission that this was not a reasonable adjustment because of the fundamental changes to the PD implemented in July 2019. We accept Ms Pawlik's evidence, and supported by the contemporaneous documents, that once the process of change had begun, she would have consulted with each disabled employee to determine what role would be appropriate. Although this process was delayed, it did occur.
93. In our view, Miss Matyka has been intransigent. She has set her mind against any return to work other than in her former role in the PD. She had refused to engage with SD, notwithstanding that her trade union representative advised her to do so. Her bottom line appears to have been:-
- Monday to Friday 25 hours a week 09:30 to 14:30
 - No weekends
 - No targets
 - Not in a large space and with few colleagues
 - The same supervisors and colleagues
 - Supervisors and colleagues who know how to assist her should she have a panic attack.
94. In our view, SD's approach was at all times patient and reasonable. The offer of an inspection of six different departments was in our view a reasonable adjustment and there was little else that could be done in the face of Miss Matyka's unwillingness to engage. We conclude therefore that the pleaded adjustment was not a reasonable adjustment given that it would have required Miss Matyka to perform heavy lifting tasks, which plainly she was not fit to carry out.

95. It follows that Miss Matyka’s claim of a failure to make reasonable adjustments and her claims pursuant to the protected characteristic of disability must all therefore be dismissed.

Jurisdiction

96. It is therefore not necessary to consider matters of jurisdiction since the claims in substance have been dismissed.

Employment Judge Blackwell

Date: 7 April 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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