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## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4100108/2021**

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**Hearing Held by Cloud Video Platform (CVP) on 18 – 20 May 2021 & 25 June 2021**

**Employment Judge Ronald Mackay**

**Mr Oumar Akram**

**Lanarkshire Enterprise Services Limited**

**Claimant  
Represented by:  
Ms Mohammed,  
Solicitor  
Respondent  
Represented by:  
Ms Miller,  
Solicitor**

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## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Claimant was fairly dismissed by the Respondent by reason of his conduct. The claim is, accordingly, dismissed.

### **REASONS**

20 **Introduction**

- 1 This is a claim for unfair dismissal. The Respondent contended that the Claimant was fairly dismissed by reason of conduct in accordance with Section 98(2) of the Employment Rights Act 1996 (“**ERA**”).
- 2 The parties prepared a joint bundle of documents. During the course of the  
25 Hearing, additional documents were added.

3 It also became apparent during the course of the Hearing that a letter in the  
bundle from the Respondent to the Claimant was not in the same form as  
the letter received by the Claimant. The correct letter was subsequently  
added.

5 4 The Tribunal heard from three witnesses for the Respondent, Ms Alison  
Nimmo, Mr Graeme Currie and Ms Elizabeth McCutcheon.

5 The Claimant gave evidence on his own behalf.

### Notes on Evidence

6 Each of the Respondent's witnesses were largely credible and reliable in  
10 their evidence. No issues at all arose with the credibility of Mr Currie. One  
issue of dispute arose between the evidence of Ms Nimmo and Ms  
McCutcheon. This is set out further below and relates to a conversation  
which took place during the appeal stage of the internal process. The  
recollections of both were hampered by the absence of a contemporaneous  
15 file note. The Tribunal, did not, however, consider that that conflict gave rise  
to any material bearing on the case.

7 The Claimant was clearly very aggrieved and whilst he felt passionately  
about the issues before the Tribunal, he had a tendency to give differing  
accounts of certain aspects of the evidence. This was most apparent in his  
20 evidence before the Tribunal which on occasion was at odds with the case  
as pled or the contemporaneous documentation. He also had a tendency  
to introduce new matters in the course of his evidence which were not  
foreshadowed in the pleadings and which were not put to the Respondent's  
witnesses.

25 8 That said, relatively few of the material facts in the case were disputed.  
Where areas of conflict emerged, the Tribunal has considered these and  
resolved them in the Findings in Fact section which follows.

## Findings in Fact

- 9 The Respondent is a not for profit social enterprise company providing  
support to small businesses. It is based in Lanarkshire with offices in  
Coatbridge and Hamilton. It is a small organisation with no dedicated HR  
5 function.
- 10 The Respondent hosted, and employed individuals to provide services  
under, the Scottish Government's Developing the Young Workforce  
programme ("DYW"). The Claimant was employed as a DYW Development  
Executive initially on a fixed term contract starting on 23 October 2017. He  
10 remained employed until his dismissal with effect from 14 October 2020.
- 11 The Claimant's role involved liaising with school pupils and employers in  
raising awareness of opportunities for school leavers.
- 12 The Respondent's DYW programme was one of 21 across Scotland, each  
hosted by local organisations (such as the Respondent).
- 15 13 Whilst the Claimant's primary activities centred around the DYW  
programme, he was engaged in other projects from time to time. One such  
project emerged in September 2020. The UK Government introduced an  
initiative called the Kickstart Scheme. The purpose of the scheme was to  
provide funding for employers to offer job placements to young people on  
20 Universal Credit. The scheme was part of the UK Government's COVID  
response.
- 14 The scheme was open to employers who could offer at least 30 work  
experience places. As an alternative, smaller organisations were able to  
come together under the umbrella of an intermediary organisation who could  
25 provide 30 places across a number of employers.
- 15 The Respondent assessed whether it would be appropriate to operate as an  
intermediary. As part of their assessment, the Claimant was tasked with  
identifying whether the Respondent could find a sufficient number of  
employers who were interested to meet the 30 threshold.

16 The Claimant at one stage in his evidence suggested that his efforts to  
recruit employers was done outwith his contract of employment and in his  
own time. The Tribunal was satisfied, however, that he was doing this work  
as part of his employment with the Respondent and on their instructions. It  
5 is clear that some of the activity was outwith normal working hours. The  
Claimant stated, however, that this was normal for him in his work generally.

17 Whilst the Claimant was successful in obtaining expressions of interest from  
a sufficient number of employers, with other expressions of interest coming  
from elsewhere within the Respondent, the decision was ultimately taken by  
10 the Board of the Respondent, that they should not participate in the scheme.

18 The Respondent was keen not to let down those employers who had  
expressed an interest in the scheme. They decided that they should make  
efforts to ensure that they were referred to another intermediary provider. A  
discussion took place between the Claimant and Ms Nimmo on 30  
15 September.

19 For those employers in Lanarkshire, North and South Lanarkshire Councils  
were identified as alternative providers. A dispute in evidence arose as to  
what was to be done with those employers outwith Lanarkshire.

20 Ms Nimmo gave evidence that she suggested Glasgow Chamber of  
Commerce. She indicated that the Claimant had also suggested East  
20 Dunbartonshire Chamber of Commerce. She said that she was comfortable  
with either. She gave evidence that there was no mention of any fees being  
provided.

25 21 The Claimant gave evidence that he mentioned East Dunbartonshire  
Chamber of Commerce offering a fee for referrals. In his evidence, the  
Claimant stated that he was told that he was free to do what he wanted with  
those employers identified by him (including securing a fee). That account,  
however, is not consistent with the Claimant's pleadings where he stated  
30 only that he "*felt from [the] discussion that there was no issue with him doing*

*as he pleased with these leads*". It is also inconsistent with the account given by the Claimant at the disciplinary and appeal hearings connected with his dismissal. At the latter, the Claimant, when asked if he had been given permission to ask for a fee for himself, the Claimant answered no.  
5 The evidence of Ms Nimmo in this regard is, accordingly, preferred.

22 Following the discussion, the Claimant emailed a contact at the Wise Group (another organisation involved in supporting young people in employment). This led to a telephone conversation on 1 October 2020. During the course of that conversation, the Claimant requested a fee for the transfer of  
10 employer contacts. He indicated that the fee was to be paid to himself rather than to his employer.

23 Ms Nimmo received a telephone call from a representative of the Wise Group. The representative advised that the Claimant was seeking a payment for leads for himself. She wanted to establish if this was correct.  
15 The Wise Group account of events was confirmed in an email of 2 October 2020.

24 Ms Nimmo's reaction was that the Claimant should not have been requesting a fee either for himself or for the Respondent. She considered that to be inappropriate.

20 25 A meeting took place between the Claimant and Ms Nimmo on 2 October 2020.

26 During the course of the meeting, the Claimant indicated that he had not  
25 sought to sell Lanarkshire leads, only those which he had sourced which he considered to be his own. The Claimant was suspended on full pay pending further investigations. As it transpired, no further investigations took place other than the preparation of a note by Ms Nimmo of her involvement in the issue.

27 By letter dated 7 October 2020, the Claimant was invited to a disciplinary  
hearing to take place on 12 October 2020. The allegation as set out in the  
letter was to the effect that he had contacted the Wise Group and told them  
that he had employer contacts to pass to them and that he would be seeking  
5 a finder's fee for the referrals. It was further alleged that the Respondent  
does not ask agencies for a finder's fee for any referrals of any nature and  
the Claimant was not authorised to request a finder's fee for himself. The  
letter went on to say: "*It is deeply concerning that you attempted to use your  
position with the Developing Young Workforce team to obtain money from a  
10 partner agency in this way. This situation has reputational consequences  
for [the Respondent] with local partner agencies including the Wise Group  
and also the Scottish Government.*"

28 The Claimant was advised that he may be dismissed without notice if found  
to have committed gross misconduct.

15 29 The Respondent conducted the disciplinary process in accordance with its  
standard disciplinary procedure. In the Claimant's contract of employment,  
however, it is provided at Clause 14.2 that any disciplinary matter will be  
dealt with by the Chief Executive with a right to appeal thereafter to the  
Board of the Respondent. This contractual provision was not followed.

20 30 Whilst Mr Currie sought to persuade the Tribunal that this was for the benefit  
of the Claimant, Ms McCutcheon's reasoning seemed to focus on the  
difficulty of getting the Board together.

31 The disciplinary hearing took place on 13 October 2020. The Claimant was  
accompanied by a colleague. The hearing was chaired by Mr Currie, the  
25 Respondent's Deputy Chief Executive.

32 In his evidence, but not before, the Claimant suggested that the hearing was  
conducted in an aggressive manner and that he was badgered into giving  
the answers that Mr Currie wanted. That is not reflected in the minutes of  
the meeting which were not previously disputed by the Claimant; nor was  
30 the suggestion put to Mr Currie in cross-examination. The Tribunal was

content to find that the hearing was conducted in a fair and reasonable manner as represented in the minutes.

33 During the course of the hearing, the Claimant confirmed the content of the  
conversations between him and the Wise Group. He stated that he had  
5 made a huge mistake, that he apologised and would apologise to Ms Nimmo  
if allowed to return.

34 The Claimant initially suggested that he had sourced the employers in his  
own time and thought he could pass them to whoever he wished. On being  
asked if he still felt that the contacts were his own, he stated that he no  
10 longer did. The Claimant did not indicate that he had been given approval  
to sell the leads for his own gain.

35 Following the hearing, the Claimant emailed Mr Currie and asked that the  
sanction be limited to a warning with training.

36 By letter dated 14 October 2020, Mr Currie confirmed that he had taken the  
15 decision to dismiss the Claimant. The reason for dismissal was set out as  
follows:

*“The reason for your dismissal is that you attempted to obtain a personal  
financial gain from a partner organisation by offering to sell them the  
contact details of SMEs which you had been asked by your line manager  
20 to refer to a different Kickstart provider. During the disciplinary hearing  
you agreed that the evidence produced was a fair and accurate account of  
events and as such the accusation was true.”*

37 The letter concluded that the Claimant was not entitled to any notice or  
payment in lieu of notice but that Mr Currie had decided to make a payment  
25 in lieu of one month’s notice. On being questioned as to why a payment in  
lieu of notice was made, Mr Currie advised that effecting the dismissal was  
one of the saddest days of his life and took into account the fact that there  
was a young family involved.

38 During the course of his evidence, the Claimant sought to suggest that there was animosity between him and Mr Currie and that the decision was predetermined. The Tribunal had no hesitation in rejecting that and accepted the evidence of Mr Currie on this point.

5 39 In reaching his decision, Mr Currie took account of the Claimant's good record and hard work. He also took account of potential reputational damage caused by the Claimant using the Respondent's email account and email signature, seeking payment for referrals.

40 Given the nature of the situation, the Respondent felt it necessary to  
10 disclose the issue to the Scottish Government.

41 The Claimant was afforded a right to appeal against the decision. He exercised this by means of an email dated 21 October 2020 to Liz McCutcheon, the Respondent's Chief Executive. In his email, the Claimant challenged the severity of the sanction. He also stated that there was a lack  
15 of clarity on instructions from his line manager and no clear policies and procedures on the handling of the leads.

42 The Claimant was invited to an appeal hearing by letter dated 22 October 2020. The meeting took place on 26 October 2020, and was chaired by Ms McCutcheon. The Claimant was again accompanied by a work colleague.

20 43 During the course of the appeal hearing, the Claimant accepted that he had not sought authority to ask for a fee for leads. He also accepted that he had not sought approval to approach the Wise Group. Contrary to the position ultimately accepted by him at the disciplinary hearing, the Claimant sought to re-state the position that the leads were his own to deal with as he wished.

25 44 Ms McCutcheon questioned the Claimant as to why if this was the case, he had not sought approval under his contract of employment to perform outside activities. The Claimant indicated that he had sought payment for leads during the first month of his employment and that Ms Nimmo was aware of this.



45 Following the appeal hearing, Ms McCutcheon spoke to Ms Nimmo on this  
point. It is unfortunate that there is no note of the conversation and there  
was a clear dispute between the two as to what was said. The lack of clarity  
on this issue was compounded by the fact that the wrong appeal letter was  
5 initially contained in the bundle. Only after the conclusion of Ms Nimmo's  
evidence did the Claimant's solicitor alert the Tribunal to this issue. The  
correct letter was subsequently introduced and Ms Nimmo was recalled to  
give further evidence.

46 The key difference between the two letters was that the correct version  
10 contained an account of the conversation between Ms McCutcheon and Ms  
Nimmo.

47 The letter, which accords more with the evidence of Ms McCutcheon, states  
that Ms Nimmo was aware of the Claimant having been involved in outside  
activities relating to apprenticeships at the beginning of his employment.

15 48 In her evidence, Ms Nimmo indicated that she was not aware of what this  
meant and that her recollection of the conversation was vague. She stated  
that she was not aware of the Claimant dealing with leads in relation to  
apprenticeships during his employment with the Respondent. She was less  
clear on the position in the Claimant's previous work.

20 49 The Claimant sought to suggest that the original appeal letter in the bundle  
was a fabrication and that it was designed to mislead the Tribunal. The  
Respondent's position was that it was an error on the part of the person  
collating the bundle. Whilst the Tribunal was content to accept that there  
was no deliberate attempt to mislead, as it would be straightforward for the  
25 Claimant or his solicitor to identify the issue (as they ultimately did), it was  
disappointed that Ms McCutcheon in her preparations for the Tribunal did  
not identify and correct the issue herself.

50 The Claimant's appeal was ultimately dismissed.

51 Both Mr Currie and Ms McCutcheon on being asked whether the Claimant  
30 would have been given permission to sell leads for a personal fee if asked,

said that the answer would have been no. They both considered it to be contrary to the interests and ethos of the organisation.

### The Law

52 The law relating to unfair dismissal is set out in the ERA. Section 98(1)  
5 states:

*“In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -*

*(a) the reason (or if more than one, the principal reason) for the dismissal, and*

10 *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

53 Section 98(2) sets out that a reason falls within this subsection if (*inter alia*) it -

15 *(b) relates to the conduct of the employee*

54 Section 98(4) states:

*[Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -*

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

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

55 This determination includes a consideration of the procedure carried out prior to the dismissal and an assessment as to whether or not that procedure was fair.

56 In circumstances where the reason for dismissal is conduct in terms of  
5 Section 98(2)(b), what has to be assessed is whether the employer acted reasonably in treating the misconduct that he believed to have taken place as a reason for dismissal.

57 *British Home Stores v Burchell [1978] IRLR 379*, sets out the questions to be addressed by the Tribunal when considering reasonableness as follows:

- 10 i. whether the respondent genuinely believed the individual to be guilty of misconduct;
- ii. whether the respondent had reasonable grounds for believing the individual was guilty of that misconduct; and
- 15 iii. whether, when it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

58 Tribunals must not substitute their own view for the view of the employer (*Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23* and *London Ambulance Service NHS Trust v Small [2009] IRLR 563*) and must not consider an employer to have acted unreasonably merely because the  
20 Tribunal would not have acted in the same way.

59 Following *Iceland Frozen Foods Ltd v Jones 1983 ICR 17* the Tribunal should consider the "band of reasonable responses" to a situation and  
25 consider whether the Respondent's decision to dismiss, including any procedure prior to the dismissal, falls within the band of reasonable responses for an employer to make. The importance of the band of

reasonable responses was emphasised in *Post Office v Foley [2000] IRLR 827*.

### Submissions

5 60 The evidence having concluded towards the end of the third day fixed for the Hearing, parties agreed to provide written submissions. Both did so within 14 days and thereafter provided supplementary submissions in response to those of the other.

10 61 To summarise these, for the Respondent first of all, it was submitted that the witnesses of the Respondent were credible and reliable and in areas of conflict, the evidence of the Respondent's witnesses should be preferred. Ms Miller gave examples of contradictions in the evidence of the Claimant and highlighted matters raised by the Claimant in his evidence which were not put to the Respondent's witnesses.

15 62 Having regard to the statutory tests, Ms Miller submitted that conduct was the reason for dismissal - specifically that the Claimant sought to obtain personal financial gain from a partner organisation by offering to sell them contact details of companies that he had been asked by his line manager to refer to a different third party provider.

20 63 She went on to invite the Tribunal to find that the dismissal was fair in accordance with Section 98(4) of the ERA. She referred to the relative small size of the Respondent and its resources.

25 64 Having regard to the **Burchell** test, Ms Miller submitted that the conduct which resulted in the dismissal was not in dispute. Against that background, she submitted that the level of investigation was proportionate in the circumstances. She highlighted that the Claimant at no point suggested that the investigation was in any way unreasonable or that other investigations should have been conducted.

65 She submitted that the Respondent had a genuine belief with reasonable  
grounds for the Claimant's guilt and that that state of affairs led to the  
decision to dismiss. Having regard to the issue of the Claimant's earlier  
outside activities, she sought to distinguish those from those which led to  
5 the dismissal in that they were entirely unrelated to the work of the  
Respondent, did not involve the selling of work which he had done for the  
Respondent and were not contrary to the instructions of his line manager.

66 Having regard to the general fairness, she outlined in some detail the efforts  
taken by the Respondent to comply with a fair process.

10 67 In terms of the Respondent's failure to comply with a contractual disciplinary  
process, Ms Miller submitted that compliance with the disciplinary policy was  
itself a fair procedure. She went on to submit that if there was a breach in  
not applying the contractual procedure, the breach was affirmed by the  
Claimant given his engagement with the process without complaint. She  
15 referred to *Westminster City Council v Cabaj 1996 ICR 960* where the Court  
of Appeal stated that although employers should follow agreed procedures,  
a failure to do so would not necessarily mean that a dismissal is unfair. The  
question for the Tribunal is still whether in all the circumstances the  
employer acted reasonably.

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25 68 In terms of sanction, Ms Miller submitted that the decision fell within the  
range of reasonable responses and reminded the Tribunal that it is not its  
place to ask whether a lesser sanction would have been reasonable but  
whether or not the dismissal was reasonable (*British Leyland UK Limited v  
Swift [1981] IRLR 98*). She went on to submit that the Claimant's conduct

amounted to gross misconduct justifying dismissal in all of the circumstances.

69 For the Claimant, Ms Mohammed invited the Tribunal to make a range of findings in fact. She challenged what she saw as insufficient investigation and the absence of the further investigation which was said would take place following the meeting between the Claimant and Ms Nimmo on 2 October 2020.

70 She pointed to what she considered were inconsistencies between the allegations as they evolved during the process. In particular, she referred to the absence of any reputational damage which was a factor considered by the Respondent. She submitted that the *Burchell* test had not been satisfied and that dismissal was not within the band of reasonable responses. She pointed to what she submitted was confusion about what was acceptable and what was not and submitted that dismissal was a disproportionate sanction.

71 Having regard to the failure to apply the contractual disciplinary procedure, Ms Mohammed submitted that the decision was procedurally unfair.

72 She submitted that the decision was predetermined and that there was no genuine belief in the misconduct in question.

73 She submitted that if the dismissal was truly for a breach of trust, this ought to have been characterised as a dismissal for some other substantial reason and not conduct.

74 Ms Mohammed went on to submit that if the dismissal was by way of conduct, it was not within the range of reasonable responses.

75 Both parties made submissions on compensation.

### Decision

76 The Tribunal first considered the reason for the dismissal. It had no hesitation in accepting that the reason for dismissal was the Claimant's

conduct – a potentially fair reason under Section 98(2)(b) of the ERA. As noted above, the Tribunal rejected the suggestion that Mr Currie had an ulterior motive.

77 Whilst in her submissions, the Claimant's solicitor sought to advance some  
5 proposition that the real reason for the dismissal may have been some other substantial reason, this was not part of the case as pled and was not borne out by the evidence.

78 Although the Claimant criticised what he saw as a shift in the reason for  
10 dismissal over the course of the disciplinary process, the fundamental reason never changed. It related to the Claimant seeking personal financial gain for transferring employer contacts which he had obtained in the course of his employment with the Respondent, without approval and contrary to the instructions of the Respondent.

79 The Tribunal then went on to consider whether the dismissal was fair or  
15 unfair. It had regard to the fact that the Respondent is a small organisation with limited administrative resources.

80 Considering the various limbs of the **Burchell** test, the Tribunal was satisfied  
20 that the Respondent had a genuine belief that the Claimant had committed an act of misconduct. It is pertinent that the Claimant did not dispute the conduct in question at any time.

81 As such, in the opinion of the Tribunal the Respondent had reasonable  
grounds for the belief. The information provided to the Respondent from the Wise Group was clear and unchallenged.

25 82 In terms of the investigation conducted by the Respondent, whilst there had been an indication at an earlier stage that further investigations would take place, this did not happen. The Tribunal was satisfied, however, that given the admitted facts and the relatively straightforward nature of the issue, the scope of the investigation was reasonable. The Claimant did not identify

any other investigations which ought to have taken place or which might have led to a different factual matrix.

83 In terms of the procedure followed, the Tribunal noted that the Respondent had failed to follow its contractual procedure. The procedure adopted was  
5 wholly in compliance with the ACAS Code of Practice. The question for the Tribunal was whether by virtue of the failure to follow the contractual process, the dismissal was procedurally unfair.

84 On this point, the Respondent accepted the submissions of the Claimant's solicitor, both in terms of the Claimant's affirmation of the breach by  
10 participating in the process without complaint and, in any event, being satisfied that there was no evidence that applying the contractual policy would have led to any different conclusion or afforded extra protection.

85 Having said that, there may be cases where that is not the case and the Respondent is reminded to have regard to contractual terms in embarking  
15 upon processes of this nature with employees.

86 The Tribunal went on to consider whether the decision to dismiss fell within the band of reasonable responses. Whilst many employers may have taken a different approach, particularly having regard to the Claimant's obvious acceptance of fault and contrition at the disciplinary hearing stage, the  
20 Tribunal was unable to conclude that no reasonable employer would have acted in the way that the Respondent chose to do. It is clear that the Claimant himself, at the disciplinary hearing stage at least, accepted that his conduct warranted some warning. Having regard to the evidence of Mr Currie, it was considered extremely serious for the Respondent, as a not for  
25 profit organisation funded by the Scottish Government, to have an employee, using the Respondent's systems, seek personal payments from a sister organisation. The Tribunal also accepted that the sequence of events may have given rise to reputational damage. Dismissal is, accordingly, found to fall within the band of reasonable responses open to a  
30 reasonable employer.



87 The Claimant's approach at the appeal stage may not have assisted his  
case. He moved from a position of apology and contrition to one of  
challenging procedures and retreating from positions previously advanced  
by him. Considering the issue of conflict between the Respondent's  
5 witnesses at the appeal stage, even taking Ms McCutcheon's account at its  
highest, the Tribunal was not persuaded by the argument that the Claimant  
could assume approval for the activities which gave rise to his dismissal  
from any deemed approval he felt for earlier outside activities. The former  
were clearly part of his work for the Respondent, the latter were not.

10 88 Having reached the conclusion that the Claimant had committed an act of  
gross misconduct, the Respondent was entitled to dismiss the Claimant  
without notice. The Tribunal accepted Mr Currie's account as to why notice  
was in fact paid as a goodwill gesture.

15 89 For these reasons, the Tribunal concluded that the Respondent acted  
reasonably in treating the Claimant's conduct as a sufficient reason for  
dismissal. The claim of unfair dismissal is, accordingly, dismissed.

90 The Tribunal would like to thank the parties' solicitors for their assistance in  
the case and for their helpful written submissions.

20 Employment Judge: Ronald Mackay  
Date of Judgment: 20 July 2021  
Entered in register: 20 July 2021  
and copied to parties

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