EMPLOYMENT TRIBUNALS

Claimant: Mr D Lees

Respondent: Trade Timber Supplies (a firm)

Heard at: Nottingham **On:** 8 June 2022

Before: Employment Judge Heathcote (sitting alone)

Representation:

Claimant: In person

Respondent: Mr J Dutton (Partner)

RESERVED JUDGMENT

The decision of the Tribunal is that:

1. The claimant was unfairly dismissed by the respondent.

2. A 75% reduction in the compensatory award for unfair dismissal will be made under the principles in Polkey v AE Dayton Services Ltd [1988] ICR 142.

3. The claimant contributed to his dismissal to the extent of 75%, to be applied to the basic and compensatory awards for unfair dismissal.

4. The respondent failed to provide the claimant with a written particulars of employment and is ordered to pay the claimant the sum of four weeks' pay to be determined at a final remedies hearing.

5. The matter will be listed for a final remedies hearing. This will include the question whether any adjustment should be made under s207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 for failure to follow the requirements of the ACAS Code of Practice on Disciplinary and Grievance Procedures.

REASONS

1. By a Claim Form presented on 28th January 2022, the claimant brings a complaint of unfair dismissal in relation to the termination of his employment by the respondent on 22nd October 2022 (the effective date of termination).

2. The claimant also ticked the box on the ET1 Claim Form to say that he was making another type of claim and cited this as 'various bullying over the years from bosses'. It was explained at the commencement of the hearing that this could not exist as a standalone claim. In the absence of any discrimination allegations, the claimant confirmed that his case therefore was that these matters culminated in his eventual dismissal. It was confirmed that the claimant's evidence in this regard would be considered in relation to his unfair dismissal claim.

3. The claimant's schedule of loss seeks an award for injury to feelings. There is no claim for discrimination before the Tribunal and it is not possible to award such sums in relation to an unfair dismissal claim.

4. The respondent contests the claim. It claims that the claimant was fairly dismissed on the grounds of misconduct which arises out of gross insubordination, culminating in an altercation between the claimant, Mrs Dutton and Ms Kemp. The respondent contends that it was entitled to terminate the claimant's employment because of the gross misconduct.

The issues

5. The issues for the Tribunal to decide are as follows:

6. What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996? The respondent asserted that it was a reason relating to the claimant's conduct.

7. If so, was the dismissal fair or unfair within section 98(4), and, in particular, did the respondent in all respects act within the band of reasonable responses?

8. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in **Polkey v AE Dayton Services Ltd [1988] ICR 142**?

9. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, as set out in section 122(2) of the 1996 Act, and if so, to what extent?

10. Did the claimant, by his blameworthy or culpable conduct, cause or contribute to his dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award under section 123(6)?

Evidence

11. I heard evidence from three of the partners of the respondent firm, Mr James Dutton, Mrs Debra Dutton and Ms Sarah Kemp. I also heard evidence from a current employee, Mr Martyn Annable and a former employee, Mr Andrew Brown. The respondent did have other witnesses available but having determined the issues at the start of the hearing, the respondent did not feel it was necessary to call them, as their evidence did not relate to those issues. I heard evidence from the claimant giving evidence on his own behalf only.

12. There was an agreed bundle of documents totalling 34 pages, which included two statements from the claimant. I was also provided with a number of photographs and copies of telephone text messages. In coming to my decision, I have had regard to the oral evidence of the witnesses and the contents of the witness statements of those who were called to give evidence. I have also had regard to the documents mentioned.

Findings of fact

13. The claimant was employed by the respondent as a van driver on an annual salary of £16,640. His employment commenced on 6 August 2018. Whilst the claimant states that he was employed from 2nd May 2015, I accept the evidence of Mr Dutton and Ms Kemp on this point both of whom state that the respondent business was not established until over year after the claimant claims his employment commenced.

14. The respondent is a family run timber merchant business, employing nine people and operates out of premises situated at Market Warsop in Mansfield ('the yard').

15. The respondent has a fleet of delivery vehicles and employs its own drivers to deliver orders to customers. Orders are placed and, where possible, dispatched the same day. Drivers will generally arrive at the yard at around 8am each day and are provided with details of orders received. They are required to load their vans accordingly.

16. At the time of the claimant's employment, the respondent would determine the total permissible load each van was able to carry with reference to the cost of the wood ordered. On the strength of this calculation, each van was able to carry £2,000 worth of orders. This method of calculation has since been refined due to the respondent now supplying aggregates and concrete products, making the previous method of determining load capacity unreliable and unsafe.

17. Once each van was loaded with its initial order, the drivers would await further instruction as to whether any more orders had been received which should be added to their delivery schedule. It was not cost effective to send out vans with only limited number of orders and so drivers would wait until later in the morning before leaving the yard. Prior to leaving the yard, the loads would be strapped down to prevent movement and checked by another employee.

18. Whilst waiting to commence deliveries, drivers would undertake other duties in the yard, including serving customers, cleaning and tidying. On occasions, when there were no deliveries for a particular driver during the day, they would undertake these duties instead.

19. There was a history of what the claimant and the witnesses for the respondent

describe as 'banter' within the yard; it included name calling. Employees would also engage in games such as football and 'nerf darts'. The claimant was often party to this and would sometimes instigate it.

20. Despite the claimant being an active participant in these activities, he has a history of depression and anxiety. He described himself as 'overthinking' things and 'taking matters to heart'. He also accepted that he would sometimes 'do his own thing' if he was 'in a mood'. The respondent was aware of the claimant's condition and would try to accommodate him where possible. On occasions, Mr Dutton would warn other employees to be cautious around the respondent and not to include him in any horseplay. The claimant states that 'sometimes people realised [he] had a monk-on *(was in a bad mood)* so they just left [him] alone'.

21. The claimant was prone to erratic and volatile behaviour. It was normally Mr Dutton who was able to calm the situation down. This was sometimes achieved by him sending the claimant home or asking him to go to the canteen to calm down. The claimant's outbursts have not resulted in physical violence, although his erratic driving following an outburst has endangered others in the yard in the past.

22. The claimant did not like working in the yard. However, I find that this was not due to any treatment, or unwanted attention, but rather because he found it 'boring', explaining that the day 'went too slowly'. He preferred to be in his van explaining that 'there's no pressure, you feel like your own boss' and that it is 'an escape from reality'.

23. The claimant had a good relationship with the respondent and with Mr Dutton in particular. The claimant referred to Mr Dutton as 'always being fair' to him. In his evidence, he quickly added that everyone in the respondent organisation had. The claimant explained that he had been made to feel part of the family and that he had jokingly referred to himself as their adopted son. He helped Mrs Dutton at car boot sales and in the early stages of his employment, would have a packed lunch provided to him by Mrs Dutton. When this stopped, the claimant and other drivers received a pay rise to compensate them.

24. During the series of incidents leading to the claimant's dismissal, Mr Dutton was overseas, and the running of the business was left to Mrs Dutton and Ms Kemp.

25. On the morning of Wednesday 20th October 2021, while the claimant was loading his van, he was asked by Mrs Dutton to add a further order that was due for delivery to the same street. The addition of this order meant that the claimant's load was still below the £2,000 limit and it could have been accommodated safely.

26. The claimant responded that his van was full, and that Mrs Dutton should ask someone else to do it. In his evidence, the claimant explained that he had a consignment of shiplap timber that could have been crushed by further loads. However, he also accepted that he could have reloaded his van to accommodate the additional delivery and that his van would not have been overloaded. His objection to the additional load was, in his own words, that it would have been a 'drama' to adjust his load. The additional load was assigned to an alternative driver and Mrs Dutton gave the claimant a verbal warning. There is no subsequent written record of this warning.

27. There was a dispute in the evidence as to the claimant's activities on Thursday 21st October. Mrs Dutton states that the claimant refused to undertake any deliveries and was left to 'potter around the yard for the rest of the day'. The claimant states that he was 'sure' that he undertook deliveries. He explained the reason for his certainty was his dislike of working in the yard and his desire to be in his van, explaining that he is one of the first to volunteer to undertake delivery duties. I prefer Mrs Dutton's evidence for two reasons: firstly, she had already had an altercation with the claimant the day before and would have been wary of his objections; secondly, she was responsible for ensuring deliveries were undertaken, so she would have a better recollection of which drivers were fulfilling orders and which were not.

28. On the morning of Friday 22nd October, the claimant had loaded his van and was asked to add a further order for delivery, by a fellow employee, Mr Martyn Annable. The claimant stated that his van was full and went into the office, with Mr Annable, to ask Mrs Dutton to check that his statement was correct. Both Mrs Dutton and Mr Annable confirm that there was room on the claimant's van, with the load still being below the £2,000 limit, and I prefer their evidence. The claimant had loaded plywood across the bed of the van as opposed to stacking it, meaning that he would have to reload his van. Having refused to do so on the previous Wednesday, the claimant sought to avoid reloading his van again on Friday.

29. The claimant remonstrated with Mrs Dutton who again relented and said to give the load to another driver. As Mrs Dutton was walking back to the office, the claimant swore, which prompted Mrs Dutton to turn around and confront him. At that point, the claimant became aggressive, and abusive. Mrs Dutton explained that she felt frightened and was concerned that the claimant was about to strike her. Mr Annable and Ms Kemp both intervened. Mr Annable attempted to calm the situation and Ms Kemp put herself between the claimant and Mrs Dutton.

30. The claimant continued to verbally abuse both Mrs Dutton and Ms Kemp and I accept their evidence that the language used by the claimant was highly offensive. I also accept that the claimant's animated actions caused them both to fear, at least initially, for Mrs Dutton's safety.

31. Mrs Dutton removed the claimant's keys from the ignition of the van. In the meantime, Ms Kemp had become embroiled in the dispute. It is evident that choice language was used on both sides of the dispute. At one point, Ms Kemp warned the clamant that if he did not leave the yard she would 'lamp' *(hit)* him. In the course of a heated verbal exchange, Ms Kemp told the claimant that he was 'sacked'. This was immediately confirmed by Mrs Dutton.

32. The claimant's summary dismissal was confirmed in writing by letter dated 4th November 2021, sent by Mr Dutton on behalf of the respondent. There was a delay in sending this letter, but this was because Mr Dutton had only recently returned from his overseas trip and the matter was left for him to deal with.

The law

33. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the

respondent under section 95, but in this case the respondent admits that it dismissed the claimant (within section 95(1)(a) of the 1996 Act).

34. Section 98 of the 1996 Act deals with the fairness of dismissals and provides:

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

35. There are two stages within section 98. First, the respondent must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

36. In this case it is not in dispute that the respondent dismissed the claimant because they believed he was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2)(b).

37. Section 98(4) then deals with fairness generally and provides:

> *'[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)—*
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *(b) shall be determined in accordance with equity and the substantial merits of the case.'*

38. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decision in **British Home Stores Ltd v Burchell [1978] IRLR 379**. This requires three things to be established before a conduct dismissal can be fair. First, the employer must genuinely believe the employee is guilty of misconduct. Second, there must be reasonable grounds for holding that belief. Third, the employer must have carried out as much investigation as was reasonable in the circumstances before reaching that belief.

39. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones [1982] IRLR 439).**

40. The Tribunal must also consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, in accordance with the principles in **Polkey v AE Dayton Services Ltd [1988] ICR 142.**

41. In **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274**,

> *'A 'Polkey deduction' has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand…'*

42. S.207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that

'If, in any proceedings to which this section applies, it appears to the employment tribunal that —

> *(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*
> *(b) the employer has failed to comply with that Code in relation to that matter, and*
> *(c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.'*

43. Unfair dismissal is listed in Schedule A2 of the Act as proceedings where such an uplift can be made.

44. The Tribunal may reduce any basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

45. Section 122(2) provides as follows:

> *"Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."*

46. Section 123(6) then provides that:

> *"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

47. Adopting a systematic approach, the Tribunal should: First, identify the conduct which is said to give rise to possible contributory fault. Second, decide whether that conduct is blameworthy. Third, under section 123(6), consider whether the blameworthy conduct caused or contributed to the dismissal to any extent. Fourth, decide to what extent it is just and equitable for the award should be reduced.

48. The impugned conduct need not be unlawful so as to justify a reduction, but it must be blameworthy. Blameworthy conduct includes conduct that could be described as 'bloody-minded', or foolish, or perverse **Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 110**.

49. Section 38 Employment Act 2002 states that a tribunal must award compensation to a worker where, on a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5, it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under S.1 ERA. The minimum award is an amount equal to two weeks' pay, increasing to four weeks' pay where it is just and equitable in the circumstances. This duty does not apply if there are exceptional circumstances which would make such an award or increase unjust or inequitable. The list of jurisdictions set out in Schedule 5 includes claims for unfair dismissal.

Conclusions

Unfair dismissal

50. The respondents assert that the reason for the claimant's dismissal was his misconduct. This is a potentially fair reason for dismissal under s.95(1)(a).

51. The claimant was asked on Wednesday 20th October 2021 to add an additional order to his delivery schedule and to load his van accordingly. This was standard practice across the respondent's business. The claimant was aware of this and had adhered to these instructions many times in the past. If there has been any concern in respect of the weight or safety of the revised load, the claimant may have been able to refuse what would have been an unreasonable instruction. However, no such concerns existed. The claimant did not want the 'drama' of having to adjust his load. His refusal to comply with a reasonable instruction was unjustified.

52. Having failed to comply with a reasonable request from the respondent on the Wednesday, the claimant sought to do the same again on the following Friday. He had been left to his own devices the previous day and, in the absence of Mr Dutton, was not prepared to accept the authority of Mrs Dutton. His insubordination continued into that morning. When again asked to add a further delivery to his vehicle, he tried to claim that there was no room. There was room, but the claimant did not want to put himself to the trouble of adjusting his load and preferred to challenge the authority of Mrs Dutton.

53. Despite Mrs Dutton revoking what was a lawful order, the claimant sought to inflame the situation further. As Mrs Dutton was walking away, he loudly stated that 'this is a piss take'. Mrs Dutton asked why the claimant felt this way and was subjected to a barrage of abuse from the claimant, at one point causing Mrs Dutton to fear for her safety. Neither intervention by Mr Annable nor by Ms Kemp was successful in diffusing the situation which led to Ms Kemp stating that the claimant was dismissed. This was repeated by Mrs Dutton and eventually led to the claimant leaving the premises.

54. Given these matters, I am satisfied that the claimant's actions were an act of gross misconduct, and the respondent has satisfied the requirements of s95(2).

55. Turning to the procedure adopted, Mrs Dutton and Ms Kemp held a genuine belief that the claimant was guilty of misconduct. They were both present and were, at various times, the targets of the claimant's outburst. Their evidence was clear about why they dismissed the claimant. It was clear what the claimant had done.

56. However, whilst the respondent may have been entitled to dismiss the claimant, they did not follow any further procedure. The ACAS Code of practice on Disciplinary and Grievance Procedures ('the ACAS Code') sets out the usual approach expected of employers when faced with potential employee misconduct**.**

57. The respondent did not carry out any further investigations or invite the claimant to a formal disciplinary hearing in accordance with the ACAS Code. Whilst the respondent is not a large corporate employer, it was aware of the claimant's anxiety and temperament. They had managed the claimant successfully in the past and was also aware that he had undergone emotional stress in his homelife. A reasonable investigation, including a fair hearing would have enabled the claimant the opportunity of advancing an explanation, or offering mitigation, for his behaviour.

58. Moreover, there was no attempt to engage with the claimant subsequently. He was not afforded the right to appeal against the decision to dismiss. The range of reasonable responses test applies to all aspects of what the respondent did.

59. I find that whilst the claimant's actions were serious, the dismissal fell outside the band of reasonable responses because the claimant was not given the opportunity to have a say at a fair hearing and was not afforded the right of appeal against any subsequent decision to dismiss.

60. The respondent admits that there were procedural failings in the dismissal. They have now secured professional human resources support which is intended to

ensure that all employees are provided with written contracts and that appropriate policies and procedures are put in place. Prior to this, Mr Dutton accepts that employees were not provided with contracts of employment, or statements of initial employment particulars.

61. I find, therefore, that the claimant was unfairly dismissed by the respondent within s98 of the Employment Rights Act 1996.

Polkey reduction

62. In his evidence, Mr Dutton conceded that 'procedure had not been followed'. However, the respondent contends that if it had been, the claimant would have been dismissed anyway. The respondent contends therefore that there would have been no difference.

63. In addressing this point, I am reminded that I must consider the likelihood of the respondent dismissing the claimant. In considering this, I have particular regard to the witness evidence of Mrs Dutton and Ms Kemp. Mrs Dutton was subjected to significant verbal abuse and at one point, feared that the claimant would strike her. Moreover, this insubordination was done in the presence of other employees. Mrs Dutton was very unlikely to want to continue to employ the claimant.

64. Ms Kemp felt compelled to intervene in the altercation between Mrs Dutton and the claimant as she too feared that the claimant was going to strike Mrs Dutton. Her hostility towards the claimant was clear in the witness box. If a fair procedure had been followed, again, it is likely that the claimant would have been dismissed.

65. However, I turn to the letter of dismissal. This letter was dated 4th November 2021, almost two weeks after the claimant's dismissal. It was written by Mr Dutton on his return to work. The letter clearly states that:

> *'This matter would have been dealt with sooner, however, I have been out of the country for the past few weeks which you were well aware of and I have only returned today'.*

66. Matters relating to the day-to-day management of employees was left to Mr Dutton. It is probable that had there been a fair hearing and/or an appeal hearing as part of the process, this would have been dealt with by Mr Dutton. The decision to dismiss, therefore would have fallen to him, or indeed left to him.

67. Mr Dutton explained in his evidence that he had 'always gone out of his way to help' the claimant. This even extended to giving the clamant his job back following a dismissal some years ago. Mr Dutton explained that the claimant was 'good with customers and timekeeping'. He also explained that it was difficult to find delivery drivers. Significantly, in his evidence, Mr Dutton stated that 'If I was there, it might have been different, but I wasn't there'. This implies that Mr Dutton may have taken a different approach to dismissal.

68. Nevertheless, Mr Dutton did state that neither Mrs Dutton nor Ms Kemp wanted the claimant back at work.

69. Accordingly, whilst the claimant could have fairly dismissed the claimant, I am not

convinced that had a fair procedure been adopted that this would have been inevitable. Considering the nature of the respondent's family business and the parties involved I find that a dismissal was still possible. Had Mr Dutton had time to reflect on the incident in a more considered way there is a 75% chance that the claimant would have still been dismissed. If the respondent had conducted a fair hearing and afforded a right of appeal, the dismissal would have been within the range of reasonable responses.

Culpable and blameworthy conduct

70. As indicated, the Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

71. The claimant's conduct giving rise to contributory fault are twofold: Firstly, his refusal to obey a reasonable and lawful order. As set out above, there was no reason for the claimant to refuse to reload his van. This was standard practice in the respondent's business and something that the claimant had done on a number of occasions. This occurred on Wednesday 20th October and on Friday 22nd October. In both instances, Mrs Dutton was forced to back down and accept the claimant's unjustified objections.

72. Secondly, his abusive and unacceptable conduct towards his employers, Mrs Dutton and Ms Kemp. The claimant used offensive and personal language to both, which was also coupled with fear of physical violence in respect of Mrs Dutton. This gross insubordination took place in full view of fellow employees.

73. I find that these acts are blameworthy and significantly contributed to the dismissal such as to merit a substantial adjustment to both basic and compensatory awards.

74. I have considered whether the measure of contribution should be 100% but have taken into account the claimant's personal difficulties and the fact that a threat of violence was also used towards the claimant, albeit in very stressful circumstances. I find that the basic and compensatory awards should each be reduced by 75% to reflect the claimant's culpability.

75. In the course of the hearing, it became apparent that the claimant was not provided with a written contract, or statement of particulars of employment. Taking into account the size of the employer and the closeness between the owners of the business and its employees, I find that an award of four weeks' pay would be an appropriate award to make in this matter should this matter proceed to a remedies hearing.

Employment Judge Heathcote

Date: 8th July 2022

JUDGMENT & REASONS

SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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