



EMPLOYMENT TRIBUNALS

Claimant: Ms D Hay

Respondent: Mr K Koneswaran t/a Terry & Kent Newsagents

Heard at: London South
On: 18 and 19 May 2023

Before:
Employment Judge Heath
Mrs R Serpis
Mr C Rogers

Representation

Claimant: Mr P McNamee (Paralegal)

Respondent: In person

JUDGMENT

1. The claimant's claim of constructive unfair dismissal is well-founded and is upheld.
2. The claimant's claims of sex-related harassment in respect of 1) verbal abuse and 2) physical abuse on 18 June 2020 are not well-founded and are dismissed.
3. The claimant's claim of unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. This is a claim largely revolves around an allegation that the respondent verbally and physically abused the claimant on 18 June 2021. She claims that this conduct was both:
 - a. A repudiatory breach of contract entitling her to resign and claim constructive dismissal; and
 - b. Sex-related harassment.

Issues

2. The issues were agreed at a Case Management Preliminary hearing before EJ Green on 7 September 2022, and (in so far as they relate to liability) are appended to this decision. These were agreed to be the issues in the case by the parties at the start of the hearing.

Procedure

3. We were provided with a 72 page bundle. The claimant provided a witness statement and gave oral evidence. The respondent provided a witness statement and also gave oral evidence.
4. The witness statements were exchanged on 20 January 2023. The respondent provided a witness statement that attached a number of documents (all of which were in the bundle). On 12 May 2023 the respondent provided a further witness statement which was the same as his previous one, but with the addition of four paragraphs. The respondent explained that his son had been very ill and he could not keep to the tribunal deadlines and run a business as well as looking after his son. After some discussion, it was agreed that the respondent could rely on his updated statement, and the first one would be disregarded.
5. Ms Rajendram attended as a Sri Lankan Tamil interpreter to assist the respondent. The tribunal established with the respondent that he wished the whole proceedings to be translated for him. After hearing the evidence and oral submissions from both parties the tribunal deliberated to consider its decision. The tribunal gave an oral decision, after which both parties requested written reasons

The facts

6. On 4 November 2006 the claimant started employment as a shop assistant at Terry & Kent Newsagent in the High Street in Hythe in Kent ("the shop"). On 5 November 2019 the business was transferred to the respondent, and the claimant's employment transferred under TUPE.
7. The respondent is a sole trader running more than one newsagent.
8. The relationship between the claimant and respondent had a few issues, in that the claimant considered that the respondent was attempting to place too much responsibility on her for her position and salary. That said, we do not find that there was any conduct by the respondent which can be characterised as bullying or harassing during the period of her employment up to 19 June 2021.
9. The shop is reasonably small. As one goes in through the doorway there is a serving area with glass screens to the left. There are two small aisles within the shop with shelves and refrigerators. At the back left hand corner of the shop is a doorway which goes into a small stockroom which is around 14 foot by 7 foot. The stock room contains items of stock, an area where coats can be stored and a further doorway leading into the passageway which leads further to an exit and to an entrance to living accommodation occupied by the former owners. The stock room is quite small and full of boxes and stock.

10. The shop is monitored by seven CCTV cameras. We had the benefit of seeing CCTV footage from these cameras relating to the relevant event. The footage shows one larger screen showing the entrance of the shop and the serving area, and there are six smaller screens showing other areas. The screen in the top right hand corner monitors the stockroom.
11. On the night of 17 June 2021 there was a severe flood which led to around a foot of water entering the shop. The local fire service attended, and the respondent managed to clean up the shop ready for trading the following morning. We can accept the respondent's evidence that this was a stressful event for him.
12. On 18 June 2021 the claimant was at work the shop. The CCTV record has a timestamp indicating what time the footage was shot. At 12.52 am the respondent arrived at the shop and, after exchanging a few words with the claimant, began to clean freezer doors and mop up water on the floor with towels.
13. At 12.56 the claimant left the shop with a customer to speak with the landlady of the pub next door. The conversation concerned sandbags and some keys. The claimant came in shortly afterwards and explained what she had discussed with the landlady. The respondent said that what the landlady had said was a load of rubbish that there were no sandbags. The claimant went out again, followed by the respondent at 12.57.
14. It was clear from the reflection seen in the doorway and a small section of the front window that an animated discussion took place. The respondent was telling the pub landlady that there were no sandbags and what she was saying was rubbish.
15. At 12.58.27 very claimant came back in through the front door followed by the respondent a few seconds later. The footage shows the respondent was talking in an animated fashion to the claimant and waving his arms as he followed her. She turned towards him and raised her arm.
16. The respondent says that he was merely talking, or mumbling, to himself and not to the claimant. He said he was talking in a natural voice, not shouting in English rather than Sri Lankan Tamil. He said he was feeling stressed.
17. The claimant, on the other hand, said that the respondent was ranting and raving and that his temper was out of control. She said she raised her hand at one point to indicate he should stop speaking for her in the way that he was. She recalled that he said to her that she was a "stupid village idiot woman".
18. The footage had no audio, but the video very much supports the claimant's version of events. The respondent's account that he was talking to himself in a normal voice is not a credible account of what appears on

the video footage. He is clearly animated and angry, looking straight at the claimant and waving his arms.

19. There was a further exchange between the respondent and the claimant that was animated on both sides, with the claimant at one point raising a finger. Again, the respondent's account that he was simply talking to himself is not sustainable on a viewing of the footage. We find that the respondent was shouting angrily at the claimant and that she was telling him not to shout at her.
20. The respondent admits he used words to the effect of "village idiot woman", but says that he was using the words about the pub landlady. We are inclined to believe the claimant that he was talking to and about her.
21. At 12.58.57 the claimant walked towards the door of the stockroom to collect her belongings. She was due to end her shift in the 10 to 15 minutes and decided to leave early. The respondent followed her into the stockroom reasonably quickly.
22. The relevant action takes place in a smaller screen showing the stockroom at this point. The claimant can be seen going to the part of stockroom furthest away from the camera reaching for her coat. The respondent came in behind her and began to approach her at 12.59.06. It appears that the respondent is backing the claimant into a corner.
23. At 12.59.14 the footage shows the respondent reaching towards the claimant's face. The claimant at this point is partially obscured behind some shelving and stock. The respondent appears to draw closer and closer to the claimant until their heads are practically touching. At this point the claimant, apart from her head, is totally obscured behind shelving and stock and the respondent is facing away. The claimant and respondent appear to be in very close quarters for 18 seconds.
24. The respondent's account is that he had heard the claimant say that she was leaving. Despite there having been nothing in the past to indicate that she was thinking of leaving the respondent, he took this to mean that she was quitting her job. He says that he repeatedly told her not to go and that he liked her. He said he was trying to calm her down with a friendly gesture.
25. The claimant's evidence was that in the stockroom the respondent came closer and closer to her. He was repeatedly telling her that she could not go home She tried to warn him away but he ignored her. He extended his hand towards her face from the left side and she tried to evade him. She tried to push him away, and he came in closer and grabbed hold of her face, forcing her to look at him. She says that he came forward even closer and grabbed hold of her, holding her face, for around 20 seconds. The claimant attempted to push back and told him to let her go. He let go after around 20 seconds. We find that he was saying, words to the effect, that the claimant must listen to him.

26. Although the action in the stockroom is not as easy to see as the earlier action on the main screen, in part to do with the smaller screen and in part due to the position of shelving and stock, the claimant's account would appear far more likely. The respondent was unable to say what gesture he was adopting to calm the claimant down. It can be seen on the video that the respondent's hand went towards the claimant's face. It was quite clear that for 18 seconds the claimant and the respondent were in very close quarters. The respondent's implausible account of the earlier part of the incident diminishes his credibility in respect of the latter part. Taken as a whole, the footage appears to show an angry, agitated man following a woman into a small room, backing her into a corner and placing himself right next to her. The claimant's account fits better with what appears on the footage.
27. After the respondent let the claimant go it is clear that he was still talking to her, and he approached her again. He backed away, still talking, and then approached once more. The claimant disappeared from the back of the room. The respondent can be seen briefly going back into the shop, and then coming back into the stockroom again and disappearing from the door at the back of stockroom. The respondent reappeared a minute or so later.
28. We find that the claimant went out the back of the to seek refuge. She ran upstairs to where the former owners lived and hid behind a gate. She said, which we accept, that the respondent followed her and that she was terrified. She opened the gate and told him to move out of her way. The claimant was clearly upset and the respondent allowed her to pass and she left the building.
29. At 13.03 the respondent attempted to call the claimant. He texted her at 13.05 to say "*Please come I did not tell you anything the women store. I always like you. When I came this morning there is no sand in my front door*". At 13.08 he called the claimant again, and she answered him. The respondent said that he was not talking to the claimant but shouting at the woman next door. He said that he liked her and would not do anything.
30. This was a Friday, and the claimant did not work over the weekend.
31. On Monday 21 June 2021 the claimant attended the shop, although this was not a work day, to meet with the respondent. This was something both parties agreed to. We accept the claimant's evidence that she was frightened by what had happened the previous Friday. After the incident she had come to the conclusion that she would not be able to work for the respondent again. However, she was 61 years old, had no savings, had no partner to contribute to the household finances and had worked for the newsagent for 14 years. The claimant, not unreasonably, wished to explore how she could safeguard her position.
32. She spoke to the respondent about the possibility of him never being in the shop when she was there, and said that there could be no repeat of

the incident the previous Friday. The respondent agreed to this proposal. The claimant also raised the difficulties that she had with being overloaded with work. She said that if she were to come back to work this would have to change. The respondent agreed to this.

33. The claimant returned to work on Tuesday, 22 June 2021 in a very apprehensive state. We accept evidence that around this time she was seeking legal advice and speaking to ACAS. Additionally she has a skin condition which is exacerbated by stress. She was experiencing a flare-up of this condition.
34. The claimant worked for a couple more days. On Friday, 25 June 2021 the respondent was already in the shop, apparently in breach of the agreement which he had come to with the claimant. He told the claimant to get more staff, which again was in apparent breach of the agreement they had reached. The claimant asked the respondent for the CCTV footage from the 18 June 2021 as she understood that a camera would have been pointing to the area where the incident had taken place. The respondent asked the claimant if she was considering "going legal", that is to say taking legal action. The claimant replied that she was, and the respondent said it she could take a week's holiday.
35. On 25 June 2021 the claimant sent the respondent a letter in which she referred to a number of matters including:-
 - a. A complaint that she was incorrectly given managerial responsibilities, which she attempted to address with him;
 - b. Have been given inconsistent rest breaks and not being relieved by the respondent.
 - c. Inadequate communication about such things as deliveries of stock.
36. The claimant indicated that those issues caused her stress which led her to seek support from her GP. She went on to outline "*the most serious and final event*" which was the incident on 18 June 2021. She mentioned the respondent verbally abusing her, her removing herself from situation to get her belongings, and the respondent grabbing her and restraining her by her arms. She alleged she was shouting and panicking asking to be released, and alleged the respondent grabbed her face to ensure she was looking at him and listening to him. She outlined that she found this both frightening and humiliating. She indicated that as a result of the assault she no longer felt safe and able to continue working for the respondent. She requested a "*settlement to leave me financially stable for a reasonable period to find and commence a new job*".
37. The respondent replied on 1 July 2021 letter. He acknowledged the claimant's grievance of 25 June 2021, but said that he was unaware of the grievances. Regarding the incident of 18 June 2021, the respondent said:

"I confirm that I did not verbally abuse you but was talking to myself due to stress in my business while entering the store. I was surprised at your tense reaction to leave the store but now I am able to understand that you have mistaken me of verbally abusing you which was not. As a spontaneous reaction to your tensed reaction, I tried to calm down your reaction through friendly gestures which again you mistook that as humiliating. I express my sincere apologies for my friendly gestures to comfort you which has caused distress to you".

38. The respondent said that he had an adviser to deal with grievances and gave a name and address, requesting the claimant contact him. He concluded that he was expecting the claimant to confirm whether she wished to continue with her employment so he could make arrangements to fill her position and any final settlements.
39. On 19 July 2021 the respondent again wrote to claimant referring to correspondence of 6 and 15 July 2021 with his adviser. He alleged the claimant was trying to capitalise on the incident financial gain. He described the incident as *"not an intentional incident but friendly gesture to calm down your reaction of that day"*. He apologised for his friendly gestures to comfort the claimant which caused her distress.
40. It would appear that there were some without prejudice communications between the parties which were not put before us.
41. On 22 July 2021 the claimant wrote to the respondent saying:

"I confirm your behaviour has left me with no alternative but to resign with immediate effect, my last day will be 30 July 2021. I cannot possibly put myself in a position where you did what you did and fail to see how distressing your behaviour was, especially as you consider it was an act of kindness, it most certainly was not, it was a violent act and I genuinely feared for my safety, and will continue to do so".

42. The respondent replied on 26 July 2021, accepting the resignation, but indicating that he needed a proper signed letter. Again, there appear to be discussions between the parties which would put before us. On 16 September 2021 the respondent issued the claimant with a P45 and offered what appears to be a statutory redundancy payment together with a *"goodwill gesture payment"*.

The law

Constructive dismissal

43. Under section 95(1) Employment Rights Act 1996 ("ERA"), an employee is considered to have been dismissed in circumstances where *"the employee terminates the contract under which he is employed (with or without*

notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct". This is commonly known as constructive dismissal.

44. In order for there to have been a constructive dismissal there must have been:-
- a) a repudiatory or fundamental breach of the contract of employment by the employer;
 - b) a termination of the contract by the employee because of that breach; and
 - c) the employee must not have affirmed the contract after the breach, for example by delaying their resignation.
45. In *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221, CA, it was said "*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed*".
46. An employee can rely on breach of an express or implied term of the contract of employment. In cases of alleged breach of the implied term of trust and confidence the test is set out in the case of *Malik v Bank of Credit and Commerce International Ltd* [1998] AC 20; namely, has the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The test of whether there has been such a breach is an objective one (see *Leeds Dental Team Ltd v Rose* [2014] IRLR 8).
47. On the question of waiving the breach, the *Western Excavating* case makes clear that the employee "*must make up his mind soon after the conduct of which he complains; if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract*".
48. The authorities have recognised that deciding to give up a job is for most employees a very serious matter not taken lightly. Whether an employee has affirmed a contract by delay is not simply a question of time, but of context which can include the duration of employment, the financial position of the employee, and whether the employee was off sick (*Chindove v William Morrisons Supermarket Plc* UKEAT/0201/13/BA).

Sex-related harassment

49. Section 26(1) Equality Act 2010 provides: -

A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

50. Section 26(4) Equality Act 2010 sets out factors which tribunals must take into account: -

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

51. In short, there are three elements: the conduct must be unwanted, it must relate to the protected characteristic, and it must have the proscribed purpose or effect.

52. The Court of Appeal in Richmond Pharmacology v Dhaliwal [2009] IRLR 336 stated:-

“an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so.... We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

53. The Court of Appeal again emphasised that tribunals must not cheapen the significance of the words of section 26 Equality Act 2010 as “they are an

important control to prevent trivial acts causing minor upsets being caught up by the concept of harassment” (Land Registry v Grant [2011] ICR 1390).

54. The unwanted conduct must be “related to” the protected characteristic. This is a potentially broad test. The intentions of the alleged harasser might form part of the relevant circumstances for assessing whether the conduct was related to, in this case, sex, but it is not determinative. The EAT observed in *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and another* [2020] IRLR 495:

“Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be”.

Conclusions

Unfair dismissal

Repudiatory conduct

55. Our findings above that the claimant did rant and rave at the claimant, and called her a stupid village idiot woman. He therefore did verbally abuse her.
56. Our findings are also that he did both grab the claimant’s face and put his arms around her holding her tightly. We find that he did insist that she listens to him.
57. We conclude from these findings that the respondent laid hands on his employee in a manner that can be categorised as an assault. It is difficult to conceive of a situation where an employer would have proper and reasonable cause to do such a thing. There certainly was none here.
58. It is difficult to see how, objectively, this conduct could also be anything other than conduct which was likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. The claimant told us that she was in fear for her safety, and from what we have seen on the video and heard, we accept that she was fearful.

Resignation in response to breach

59. The claimant's letter of resignation sets out her reason for resigning as being the respondent's violent act. We will examine the evidence to see if there is anything that undermines this reasoning.
60. The claimant's evidence was that she knew immediately after the incident on 18 June 2020 that she was unable to continue working for the respondent. However, there were a host of reasons why she felt in a precarious position; she had worked for the respondent or his predecessor for 14 years; she had no savings; she had no partner to contribute to her financial position; and she was 61 years of age. We do not consider it unusual that she took steps to explore how to navigate a very difficult position.
61. Within that context, we do not see that her meeting with the respondent on 21 June 2021 as unusual. She sought to explore whether there was a possibility of putting in place boundaries and further arrangements which might allow at least two explore whether she could keep her job. Again, we do not see her returning to work for a matter of three days to explore whether these arrangements were workable as being unusual. When she found on 25 June 2021 that the respondent was in the workplace, in apparent breach of the agreement she had reached with him, it was understandable that she concluded that the brief exploration of alternative possibilities to resignation was unworkable.
62. 25 June 2021 was her last day in the workplace. Thereafter, she was on holiday for one week and off sick for two lots of two weeks.
63. It is clear from her letter of 25 June 2021 that the claimant believed herself no longer safe and able to continue working for the respondent. She says she is therefore seeking a settlement to leave her financially stable to seek further employment. We do not understand her saying here that she is leaving in order to take up another job.
64. We conclude that the claimant's resignation was in response to the breach.

Did the claimant affirm the contract before resigning

65. To an extent, conclusions in the section above deal with this. The question of whether the claimant affirmed the contract by delaying her resignation is not merely a question of time. We must examine the context. As set out above, the claimant was in a perilous situation for a number of reasons. We have concluded that it was entirely understandable, and, we conclude, reasonable, for the claimant to explore further possibilities before finally terminating her employment.

66. We also have regard to the fact that the claimant was only in the workplace for a matter of three days. Thereafter, she was either on annual leave or off sick before her resignation.

67. While the claimant returning to the workplace after the assault, and her delaying her resignation for just over a month might be seen as factors indicating affirmation, when the whole context is examined acting in a manner consistent with her viewing the contract as continuing. We consider that the claimant did not affirm the contract.

Fairness of dismissal

68. The respondent did not advance a potentially fair reason for breaching the contract in the manner that he did. Indeed, it would be difficult to conceive of one.

69. In the circumstances, the dismissal was unfair.

Sex-related harassment

Unwanted conduct

70. Again, we have found that the respondent verbally abused the claimant, using the words "stupid village idiot woman". We have also found that he assaulted her in the way she alleges.

71. It was entirely clear on the evidence that both the verbal and physical abuse were unwanted by the claimant.

Related to sex – verbal abuse

72. We will consider the verbal abuse first. The only reference to anything to do with sex, was the comment "stupid village idiot woman". The reference to "woman" means that this particular insult was at least to some extent related to sex.

Related to sex -physical abuse

73. We questioned the claimant ourselves reasonably closely about why she considered the physical abuse to be related sex. The claimant's response was as follows: - *"I don't think he would have grabbed a man like he grabbed me. I just feel the aggressiveness of it. I just don't think he would have done it if I were a man"*.

74. The claimant further confirmed that, although she found the claimant demanding, and that he could be loud, there was nothing about his previous or subsequent behaviour which she could label harassment. There was nothing else she pointed to as being discriminatory conduct or anything negative to do with her sex. In closing submissions, Mr McNamee said that the village idiot comment throws light on the respondent's attitude towards women.

75. As we set out below, we do not consider that the village idiot comment crosses the threshold into being sex-related harassment. It is a one-off comment from a man under pressure. We do not consider that such a comment is sufficient, given the context of previous unproblematic conduct, to provide significant support for the respondent being predisposed to some sort of discriminatory behaviour towards women.
76. The claimant's evidence that she did not believe that the claimant would have acted the way he did if she were a man is not to be discounted. The tribunal can well conceive of some men being less inclined to inflict violence on a woman than a man. However, there may be other factors at play, beyond simply the sex of the victim. There might be relative size, for example. While we do not discount the claimant's evidence, we would have expected this to have been explored with the respondent in cross-examination. It was never put to the claimant that he would have acted differently if the claimant was a man.
77. The claimant therefore was unable to provide any evidential basis for her contention that the respondent would have acted differently had she been a man, beyond her own suspicion.

Requisite effect – verbal abuse

78. We bear in mind the guidance in the authorities about transitory, trivial and unintended comments.
79. The comment "stupid village idiot woman" was made once in the heat of the moment by man under pressure speaking in what was not his first language. The respondent could have stopped at "stupid village idiot" but chose to add woman on the end. There is no doubt the claimant was being insulting (almost certainly intentionally so), and he did reference the claimant sex.
80. However, we also bear in mind that the claimant wrote a reasonably long letter articulating her problems with the respondent on 25 June 2021. She also set out her complaints in her ET1. In neither documents did she make reference to the village idiot comment. We have found as a fact that the comment was made, the respondent admitted it (although he says he was referring to the pub landlady). The significance of it not being mentioned until the claimant's witness statement is that it might be said that had the comment been of more significance to the claimant, she would have mentioned it in her grievance and ET1. The fact that she did not, reinforces our conclusion that this was a one off, heat of the moment, comment it did not cross the threshold into harassing conduct.

Wrongful dismissal

81. The claimant bears the burden of proving that she was wrongfully dismissed in that she was not paid her notice pay.

82. There is nothing in the claimant's witness statement about this, the respondent was not cross examined on the issue and there was nothing in the claimant's representative's closing submissions.

83. In the circumstances, the claimant has failed to discharge the burden to prove that her contract has been breached by the respondent's failure to pay notice.

Further matters

84. The matter will be listed for a remedy hearing. Further orders about preparation for this hearing were made orally at the hearing and confirmed in writing.

Employment Judge Heath
Date: 23 May 2023

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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