



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Shah

**Respondent:** Department for Work and Pensions

**Heard at:** Manchester Employment Tribunal

**On:** 10, 11, 12 and 13 July 2023

**Before:** Employment Judge M Butler  
Ms L Atkinson  
Dr H Vahramian

## Representation

**Claimant:** Mr J McCabe (Lay Representative)

**Respondent:** Mr P Kieth (of Counsel)

# JUDGMENT

1. The claim of victimisation is not well founded and is dismissed.
2. The claim of indirect race discrimination is not well founded and is dismissed.
3. The claim of indirect religious belief discrimination is not well founded and is dismissed.

# REASONS

## INTRODUCTION

4. Oral reasons for the judgment were handed down at the conclusion of the hearing on 13 July 2023. These are the written reasons as requested by email by the claimant.
5. The claims in this case were brought through a claim form that was presented on 16 June 2021. This claim was case managed by Regional Employment Judge Franey on 27 August 2021. At this hearing, the list of issues to be determined in this case were recorded.

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6. The tribunal at the final hearing were provided with an evidence bundle that ran to some 521 pages. And it was also presented with a supplemental bundle that ran to 42 electronic pages.
7. The tribunal heard evidence from the claimant. And heard evidence from Ms Howatson, Mr Rothery and Mr Clarbourn. These were the three individuals who had had contact and or involvement with the claimant during the recruitment process in question, with Mr Clarbourn being the vacancy holder for the role and the ultimate decision maker.
8. There were a few occasions where the tribunal needed to interject with respect the questions being put by Mr McCabe on behalf of the claimant. There were quite a few occasions where Mr McCabe was progressing a case more akin to an unfair dismissal complaint with a focus on fairness, rather than on the issues that were live in this case. There is no criticism of Mr McCabe for this, however, the tribunal had to manage the case to ensure the focus was on issues relevant to those matters to be determined.
9. The tribunal made use of the time available to it, to ensure that both parties could properly participate in these proceedings.

**LIST OF ISSUES**

10. It was confirmed at the beginning of the hearing that the issues in this case remained those recorded by Regional Employment Judge Franey at the Case Management Hearing on 27 August 2021. The issues were at p.61 of the bundle. I merely replicate them here for ease.

**Victimisation section 27 Equality Act 2010**

11. It being accepted that the claimant did a protected act by bringing Employment Tribunal proceedings against the Home Office in 2019 under case number 2304537/2019 and others, and that the withdrawal of the job offer communicated on 18 February 2021 was a detriment, can the claimant prove facts from which the Tribunal could conclude that the respondent subjected the claimant to that detriment because of that protected act?
12. If so, can the respondent nevertheless show that there was no contravention of section 27?

**Indirect race/religious belief discrimination section 19 Equality Act 2010**

13. Did the respondent apply a provision, criterion or practice (PCP) that an applicant for Civil Service employment who had previously had Civil Service security clearance refused for a reason that could not be disclosed to them would fail Baseline Standard clearance and be refused employment?
14. If so, did or would such a PCP put persons with whom the claimant shared the characteristics of being of Asian heritage and/or of being Muslim at a particular disadvantage when compared with persons with whom the claimant did not share either protected characteristic?
15. If so, did the PCP put the claimant at that disadvantage when the offer of employment was withdrawn on 18 February 2021?
16. If the claimant has proven facts from which the Tribunal could conclude that there has been a contravention of section 19, can the respondent nevertheless show

that there was no contravention, whether because the PCP was a proportionate means of achieving a legitimate aim (to be specified in the proposed amended response) or otherwise?

APPLICATION TO AMEND

17. On the afternoon of day 2 (the claimant having completed his evidence on day 1, Ms Howatson and Mr Rothery having completed their evidence during the morning session of day 2), Mr McCabe made an application to amend the claim to broaden the PCP on which the claimant brought his indirect discrimination complaint.
18. The PCP that formed part of the amendment application was explained to be: where an applicant does not provide information when asked to disclose reasons for loss of security clearance, they will be deemed to fail Baseline Standard clearance and be refused employment.
19. Mr McCabe made submissions on behalf of the claimant. Mr Kieth, on behalf of the respondent, opposed the application.
20. The application was refused, having considered, and applied the balance of hardship and injustice test. And after having considered what prejudice would be caused to the parties by either allowing or refusing the application
21. In short, the reasons for refusing the application were as follows:
  - a. this application was introducing a new line of enquiry. And therefore, it was considered a substantial amendment. This would require consideration by the respondent, and ultimately would lead to the incurring of costs.
  - b. The timing of the application weighed heavily against allowing the application. Despite Mr McCabe suggesting that this could not have been made sooner, this is some time after all disclosure has been completed and witness statements exchanged. There was no new evidence introduced through cross examination that supported that the application could only be made on receipt of new information. This was the second day of a four-day hearing. And it was after the majority of witnesses, including the claimant, had given evidence.
  - c. The manner in which the application was made also weighed against allowing it. The application appeared to be spurred by the tribunal at the conclusion of the claimant's evidence inviting the claimant to consider overnight whether he was maintaining a complaint of indirect race/religious discrimination, given the concessions he had made under cross examination and given the lack of evidence that he had brought in respect of that complaint. Rather than raising it first thing on day 2, before Ms Howatson and Mr Rothery's evidence, the claimant and Mr McCabe waited until the afternoon.
  - d. The claim would be significantly out of time if it was allowed. And the claimant proffered no evidence or explanation as to why time would be extended to allow the claim.
  - e. If the application was allowed then the respondent would need time to consider its position and update its ground of resistance. It would likely require evidence to be introduced. And it would likely require the claimant to be recalled, and potentially other witnesses of the respondent. This would lead to a need for further days to be added to the listing.
  - f. Finally, and importantly, the claimant would suffer no prejudice by refusing the application as it had no prospects of success. It had no prospects of success from the outset on numerous grounds. First, the claimant's own evidence was that he had provided the respondent with information when requested. In other words, the claimant's own evidence was that the PCP

subject to the application did not apply to him. And secondly, the claimant had brought no evidence to satisfy the initial burden that rested on him in respect of any such claim. So even had it been allowed, it ultimately would have failed for want of evidence.

## LAW

### Indirect discrimination

22. Section 19 Equality Act 2010 ("EqA") states:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

### Victimisation

23. Section 27 EqA states that:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

...

- (c) Doing any ... thing for the purposes of or in connection with the EqA 2010.
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

### Burden and standard of proof

24. Section 136 EqA provides, so far as is relevant:

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

25. However, cases which show no more than an assertion of a difference of treatment and a difference of protected characteristic (per Mummery LJ at paragraph 56 of

his judgment in *Madarassy v Nomura* [2007] ICR 867):

“...only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.”

### CLOSING SUBMISSIONS

26. A written document was presented on behalf of the respondent and the claimant. And oral closing submissions were made on behalf of both the respondent and the claimant. These are not repeated here but have been considered in reaching this decision.

### FINDINGS OF FACT

We make the following findings of fact based on the balance of probability from the evidence we have read, seen, and heard. Where there is reference to certain aspects of the evidence that have assisted us in making our findings of fact this is not indicative that no other evidence has been considered. Our findings were based on all of the evidence, and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why we made the findings that we did.

We do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us.

27. The respondent, in or around the second half of 2020 were undertaking several large recruitment exercises. This included a recruitment exercise for Executive Officers for the Universal Credit team in Rochdale, with a similar exercise for a team based in Oldham.
28. In respect of these exercises, there was a division of responsibility during the recruitment process.
29. The Government Recruitment Service (‘GRS’) had an involvement in the recruitment process. It would receive and consider the application forms, it would undertake any required testing, undertake the interviews and it would complete pre-employment checks. The GRS was responsible for raising any associated risks with candidates, before drawing up a merits list. However, it did not make decisions on appointment.
30. The Employee Service (referred to as SSCL) was also involved in the recruitment process. It was responsible for onboarding matters for successful candidates.
31. The Vacancy Holder was the person that had the ultimate decision making responsible in respect of who to appoint. Where any risks raised as part of pre-employment checks, this matter is passed to the vacancy holder to undertake any necessary checks and then they will decide whether to proceed with appointment or not (p154 and p.367).
32. As part of Baseline Personnel Security Standard checks (‘BPSS’), if there are discrepancies or concerns raised about a candidate, which includes in respect of pre-employment checks, the candidate concerned should have the opportunity to explain to the vacancy holder (p.278). After which the vacancy holder will make any final decisions in respect of whether to continue to employment.

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33. The claimant applied for two roles with the respondent. He applied for the role of Executive Officers in the Universal Credit team in Rochdale and separately for the role of Executive Officer in the Universal Credit team in Oldham
34. The claimant, for the purposes of these applications was an external candidate. This had the consequence that the claimant had to be put through and was required to pass the Baseline Personnel Security Standard checks (BPSS)
35. In the claimant's pre-employment check form for the Rochdale role, the claimant when completing the form, included in employment history part confirmation that he had been dismissed previously from the Civil Service. He provided a dismissal date of 26 August 2019. That it was from the Home Office. And where he was to provide the reason for dismissal he wrote: "Other substantial reason- my security Check clearance was not renewed which led to my contract being terminated."
36. On 23 September 2020, the claimant was told that he had reached the required standard for the role at the Oldham site, however as there was not a job immediately available for him, he would be placed on a reserve list that would expire in 3 months (p.100).
37. In respect of the role in Rochdale, the SSCL wrote to the claimant on 12 November 2020 to explain that pre-employment checks had been successfully completed (p.517).
38. On 07 December 2020, the claimant received an email, extending the reserve list period for the Oldham role by a further 3 months. This was now expected to expire on 23 March 2021 (p.112).
39. On 09 December 2020, Ms Howatson was trying to make contact with the claimant concerning the Oldham role; however, was unsuccessful in those attempts.
40. On 10 December 2020, the claimant was made a conditional offer for the Oldham role by email from Ms Howatson (p.113). Within this email it was made clear that this offer would be pending clearance of checks, and that the provisional start date for the role was 18 January 2021.
41. On 11 December 2020, the claimant received an email from CSHR. This again made a provisional offer of employment to the claimant for the role the Oldham site, but it was again made clear that this offer was subject to clearance of pre-employment checks. The claimant was invited to complete a pre-employment checking form (p.115-116).
42. On 14 December 2020, the claimant emailed Ms Howatson with information concerning a provisional start date for the role and made Ms Howatson aware that he would need time off to attend to an Employment Tribunal for a claim that he had brought. This was the first time that the claimant raised with Ms Howatson that he had brought any Employment Tribunal claim of any sort. The claimant provided no detail of the substance of that claim, other than it would last for 10 days. The claimant in his email raises a question about whether he needed to complete the process again as he had already passed the pre-employment checks for the Rochdale post (p.119).
43. On the 16 December 2020, the claimant received an email from CSHR. This confirms that the claimant accepted the provisional role in Oldham. The subject matter of this email is entitled 'Reminder to complete Pre-Employment checking form'.
44. On 16 December 2020 and 23 December 2020, both the claimant and Ms

Howatson were attempting to make contact with one another around queries the claimant had in respect of the role, including whether he needed to complete pre-employment checks again. Again, these attempts were unsuccessful.

45. Between 23 December 2020 and 29 December 2020, the claimant, despite not having made contact with Ms Howatson, completes the Pre-Employment Checks form in respect of the Oldham role. His form is at pp 223-230. He again explains in that form he had been dismissed previously from the Civil Service. He provided a dismissal date of 26 August 2019. That it was from the Home Office. And where he was to provide the reason for dismissal he wrote: "Other substantial reason- my security Check clearance was not renewed which led to my contract being terminated." He provided the exact same information that he had presented for the Pre-employment checks for the Rochdale role.
46. The inclusion of employment history on the pre-employment check form (in respect of both roles the claimant applied for) was to assist the respondent in reaching conclusions about a candidate's integrity, which was an important principle for working with the respondent. And further, if somebody included that they had been dismissed, it would be reasonable for a prospective employer to want to know more about the circumstances of dismissal. This was accepted by the claimant under cross examination.
47. There is a spectrum of reasons for which security clearance may not have been renewed with the Home Office. Some of these would be relatively minor, such as looking up one's own details on a restricted system or matters relating to relationships, whilst others would be more serious, such as selling national secrets. The claimant's application form gave no indication as to whether his security clearance was not renewed for a more minor offence or a more serious offence. The respondent would need to ask questions around whether security clearance was not renewed for something serious, to understand whether appointing the claimant into a role could pose a security risk. Again, this was all accepted by the claimant under cross examination.
48. On 08 January 2021 (p128), the claimant received an email from a Heather, who is part of the DWP recruitment team. This explains that pre-employment checks were currently underway for the Oldham role. The claimant was asked to provide some further detail regarding reasons for having not had security clearance renewed. This email also requested consent to share any such information to the vacancy holder, who would be making the decision.
49. The claimant responded to a Heather via a no-reply email address on 10 January 2021. The claimant provided no further information around why his security clearance had not been renewed leading to his dismissal. In short, he repeated, albeit in different words, that which he had already recorded on his pre-employment check form. Instead, he provides further information about the Home Office, which was not the purpose of that enquiry. The claimant did not give any indication that he would consent to any information he provided being shared with the vacancy holder.
50. The claimant received an indication that his email of 10 January 2021 in reply to the Heather email was not delivered (p.133). The claimant does not forward his reply to anybody else after receiving this reply.
51. On 14 January 2021, Ms Howatson was checking on the progress of Pre-Employment Checks of candidates on this system. She raised a query with DWP recruitment as it was noted on the system that the Vacancy Holder had been chased for a response on a previous dismissal. Ms Howatson also raised a query concerning that the claimant had passed employment checks on another vacancy

(p.151).

52. On 15 January 2021, the claimant wrote to Ms Howatson to explain that he had decided to go with the Oldham role rather than the Rochdale role, and that they could agree a start date once pre-employment checks had been completed. It is clear on this correspondence and that of Ms Howatson's response on 18 January 2021 (see p.140) that this offer was all pending clearance of employment checks.
53. On 25 January 2021, at 10.17. An email was sent from Civil Service Jobs to The DWP recruitment team explaining that on the basis of the information provided by the claimant, pre-employment checks could not be completed (p.153). This was on the basis that more information had been requested to progress the checks, but no further information, as far as what had been sent by the claimant and received by the respondent, had been received. But further, this email also indicates that this was to be passed back to the business (ie the Vacancy Holder) to make a decision as to whether to progress with the appointment. This email also refers to a risk assessment having been raised in respect of the claimant.
54. Ms Howatson received a response on 25 January 2021 from GRS, explaining that a full risk assessment had now been fully raised (p.151).
55. The risk assessment recorded that "Candidate was dismissed from HO as his security check clearance was not renewed".
56. At some point between 25 January and 01 February 2021, Ms Howatson had a conversation with Mr Clabour about the risk assessment in so far as it applied to the claimant. Mr Clabour informed Ms Howatson that he was going to send her an email in respect of it (p.153), although he never did.
57. At some point before 01 February 2021, which is before Mr Clabour makes any decision in relation to the claimant, Mr Clabour is informed that the claimant is involved in an Employment Tribunal claim.
58. For the avoidance of doubt, although Ms Howatson, Mr Rothery and Mr Clabour had knowledge of an Employment Tribunal claim being pursued by the claimant at the time that the offer of employment was withdrawn, they did not have knowledge that that claim involved complaints of discrimination. They only had knowledge through what the claimant had previously told Ms Howatson, and the claimant accepted under cross examination that at no point did he raise that his claim involved complaints of discrimination. The claimant relies solely on the fact that he had explained that his claim was leading to a hearing of 10 days that should have led those individuals to understanding that it was a complaint of discrimination. There is no evidence that any of those individuals knew that those proceedings involved allegations of discrimination.
59. On 01 February 2021, Mr Clabour emailed Ms Howatson. At this point no decision had been made in respect of the claimant's appointment, however, a potential deadline for the process to be completed was being considered (p.155). The role insofar as being offered to the claimant, pending pre-employment checks being complete, was still live and had not been withdrawn at this point.
60. Ms Howatson responded to Mr Clabour on 05 February 2021. She explained that she would ask the claimant to contact Mr Rothery on the following Monday. Ms Howatson also updates Mr Clabour in respect of information had been sought from another candidate, which had now been received.
61. On 05 February 2021, Ms Howatson contacted the claimant by email. She asks him to contact Mr Rothery on Monday 08 February 2021 (p.157).



62. Both the claimant and Mr Rothery around this time were trying to make contact with one another but missed each other.
63. Ms Howatson contacts the claimant again by email and asks him to call Mr Rothery between 11.30 and 12.30 (p.162). In this email, Ms Howatson also indicates to the claimant that they were seeking a start date of 15 March 2021 for the role. Again, at this point, the respondent intended on progressing the offer of the role, but this would still be dependent on the claimant satisfactorily passing pre-employment checks.
64. On 10 Feb 2021, the claimant spoke to Mr Rothery. During that phone call we find the following was discussed:
- a. Mr Rothery asked the claimant for information as to why he had lost his security clearance with the Home Office, and explained to the claimant that this information was required for the purposes of pre-employment checks (para 10 Rothery WS, which was accepted by the claimant under cross examination).
  - b. The claimant told Mr Rothery that the reasons for his security clearance not being renewed was not relevant to the role, and that he was not told of the reason behind why his security clearance was not renewed. And that he had been informed that he would not have to disclose any reasons in future applications for the civil service.
  - c. Mr Rothery on the basis of what the claimant had explained to him understood the claimant to be reluctant to provide further information concerning reasons behind why his security clearance was not renewed, and did not consider that the claimant had provided him with any information on it.
  - d. The conversation then turned to start dates for the role. Again, the role was still a live role for the claimant at this point.
65. Mr Rothery was involved in several large-scale recruitment exercises around this time. He was involved in numerous discussions with candidates. And he kept no record of what was discussed with the claimant, despite him knowing that what was being discussed would have a bearing on the progress of the claimant's application.
66. Mr Rothery then called Mr Clarbour and passed on information from the conversation he had had with the claimant. However, what Mr Rothery explained to Mr Clarbour was that the claimant was reluctant to disclose information around why security clearance was not renewed and that there was no further information given by the claimant on this matter. We accept this as accurate by Mr Rothery. This was not challenged by the claimant. It is supported by the evidence we have from Clarbour and is also consistent with evidence given by Ms Howatson around what Mr Rothery explained to her, and from her understanding of what Clarbour was told. On balance we find that it is this that was explained to Mr Clarbour by Mr Rothery.
67. Mr Clarbour then decided to withdraw the job offer to the claimant. The reason for this was because he was not satisfied that appointing the claimant would not be a risk to the respondent, and this was based on the information that had been passed back to him following enquiry by Mr Rothery. Mr Clarbour made this decision based on a risk being identified in a risk assessment (p.508), and the information that he received from Mr Rothery, which did not remove or satisfy the risk that was identified. That is the reason for withdrawing the job offer, and a reason the claimant never challenged when cross-examining the witnesses of the respondent. Instead, when the claimant was cross examined, he explained that he had no

reason to doubt Mr Clarbour's explanation.

68. Following a decision being made by Mr Clarbour, Ms Howatson completed the risk assessment with the decision on it (see bottom p.508). She wrote under the heading details and justification of decision: 'Candidate failed to disclose when asked the reason for previous dismissal, have checked with G7 and HR Casework and decision has been made to not pass checks on this case'.
69. The claimant is informed of the decision by email from Ms Howatson on 05 March 2021 (see p.190). It is explained to the claimant:

"Government Recruitment Service needed more information regarding your dismissal from your previous employer.

In these circumstances a risk assessment is issued to us as the Vacancy Holder and as a result a DWP Business Manager rang you to speak with you, they asked for further information regarding the dismissal.

Based on the information you provided during that discussion a decision was made not to continue with the offer of employment due to the potential risk to the business."

70. This is the reason that the job offer was rescinded.

## CONCLUSIONS

71. Turning to the indirect discrimination complaint first.
72. The claimant when cross-examined gave evidence that the PCP on which he brings his indirect race/religion or belief discrimination is not one applied by the respondent. And further he accepted that it was not one applied to him. In those circumstances, the claim of indirect discrimination must fail.
73. But furthermore, the claimant has not brought any evidence that would establish that he was part of a race or religious group that was subject to the disadvantage on which he brings his claim.
74. Thirdly, given our findings above, the reason why the job offer relating to the Executive Officer role Oldham was eventually withdrawn was not because of him having lost security clearance for reasons that could not be disclosed (the PCP on which he brings this complaint). Rather, it was for reasons connected to the risk associated with employing the claimant in circumstances where the respondent was unable to complete pre-employment checks as the claimant was providing no information around the circumstances of his previous dismissal.
75. Turning to the complaint of victimisation.
76. The tribunal did conclude, albeit narrowly, that the claimant satisfied the initial burden that rested on him with respect the victimisation complaint.
77. In circumstances where the claimant applied for the Rochdale role. Where he passed through pre-employment checks for the Rochdale role with no issue, despite providing information about his previous dismissal from the Home Office. In circumstances where the claimant did not appear to understand the respective roles in the process of GRS, SSCL and vacancy holder and how responsibilities were split. Compared to how the decision and approach differed within a couple of months in respect of the Oldham role where he provided the exact same

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information, and this being after he had informed Ms Howatson and Mr Rothery, something Mr Clabour was made aware of, of lengthy Employment Tribunal proceedings (which are often but not always involve discrimination complaints) that were accepted by R as being a protected act. The tribunal concludes that those are facts from which the tribunal could conclude, in the absence of any other explanation, that the ultimate decision to withdraw the Oldham role could have been because of that protected act. The difference in treatment in circumstances where the same information is presented and the same process is followed in respect of two similar roles, but a different conclusion is reached where the only real difference appears to be knowledge of the Employment Tribunal proceedings is key to our conclusion. We are conscious as a tribunal of the low threshold intended with the initial burden of proof in Equality Act on complaints.

78. However, this is only the first stage of the exercise. Having satisfied the initial burden of proof that is placed on the claimant, the burden of proof under s.136 of the Equality Act 2010 is then passed to the respondent to establish whether there was a reason not connected to the protected act that caused the treatment in question. And given our clear findings as to what the actual reason behind the decision was, then the respondent satisfies the burden that then rests on it in respect of a reason for the treatment that has no connection to the protected act in question.
79. The tribunal was satisfied that the respondent witnesses did not have knowledge, either actual or constructive, that the Employment Tribunal proceedings that were the protected act in this case involved discrimination complaints, and therefore the decision to rescind could not have been tainted by a protected act. And secondly, when turning to the reason for the treatment, we have found that the reason for the treatment was for failing pre-employment checks, and not for having done a protected act. In those circumstances, the victimisation complaint fails and is dismissed.

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Employment Judge Mark Butler

Date\_15 August 2023\_\_\_\_\_

JUDGMENT SENT TO THE PARTIES ON

25 August 2023

FOR THE TRIBUNAL OFFICE

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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