EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Jones	**v**	**Zhero Ltd**

Heard at: London Central (by video)

On: 18 & 19 December 2023

Before: Employment **Judge P Klimov** (sitting alone)

Representation:

For the Claimant: **Ms S Crawshay-Williams**, of counsel

For the Respondent: **Mr P Maratos** and **Mr Mawoko**, of Peninsula

For Mr Muklesur Bharuya: **Mr D Stirrat**, solicitor
(Rule 80 application respondent)

JUDGMENT having been announced to the parties at the hearing on 19 December 2023 and written reasons having been requested by Mr Stirrat on behalf of Mr Bharuya at the hearing, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Preliminary considerations

1. Rule 62 in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237 ("**the ET Rules**") states (*my emphasis*):

> **62.— Reasons**
> (1) *The Tribunal shall give reasons for its decision on any disputed issue*, whether substantive or procedural (including any decision on an application for reconsideration or for orders for costs, preparation time *or wasted costs*).
> (2) In the case of a decision given in writing the reasons shall also be given in writing. *In the case of a decision announced at a hearing the reasons may be given orally at the hearing* or reserved to be given

in writing later (which may, but need not, be as part of the written record of the decision). Written reasons shall be signed by the Employment Judge.
(3) *Where reasons have been given orally, the Employment Judge shall announce that written reasons will not be provided unless they are asked for by any party at the hearing itself or by a written request presented by any party within 14 days of the sending of the written record of the decision*. The written record of the decision shall repeat that information. *If no such request is received, the Tribunal shall provide written reasons only if requested to do so by the Employment Appeal Tribunal or a court*.
(4) *The reasons given for any decision shall be proportionate to the significance of the issue* and for decisions other than judgments may be very short.
(5) In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. Where the judgment includes a financial award the reasons shall identify, by means of a table or otherwise, how the amount to be paid has been calculated.

2. Regulation 14(1) of the Tribunal Regulations 2013 states that the Lord Chancellor shall maintain a register containing a copy of all judgments and written reasons issued by an employment tribunal which are required to be entered in the Register under Schedules 1 to 3. Subject to certain limited exceptions, all judgments and written reasons since February 2017 are entered in an online database, which can be accessed and searched at www.gov.uk/employment-tribunal-decisions.

3. The Tribunal does not have the power to order that a judgment or reasons not be entered in the Register (see *Q Ltd v L* 2020 ICR 420, CA).

4. Written reasons were requested by Mr Stirrat on behalf of Mr Bharuya. Written reasons were not requested by the claimant or the respondent. Mr Bharuya is "a party" to these proceedings only in so far as it relates to the claimant's application for a wasted costs order under Rule 80 of the ET Rules.

5. Together with my decision on the claimant's Rule 80 application, the judgment announced at the hearing also contained my decisions with reasons on the respondent's application for an extension of time to present a response under Rule 20, and on the claimant's application for a costs order against the respondent under Rule 76(1)(a) of the ET Rules. These two decisions did not concern Mr Bharuya. Mr Bharuya is not a respondent in the claim, nor was he a respondent to the claimant's Rule 76(1)(a) application.

6. When Mr Stirrat asked for written reasons at the hearing, I asked him whether his requests was limited to written reasons for my decision on the claimant's Rule 80 application, or for the entire judgment. Mr Stirrat said that he was asking for written reasons for the entire judgment.

7. On reflection, I find that in the absence of a request for written reasons from the claimant or the respondent with respect to my decisions on the respondent's Rule 20 application and/or the claimant's Rule 76(1)(a) application, it would be inappropriate for me to provide such written reasons upon request of Mr Bharuya, who is not "a party" in these proceedings, and whose involvement in the proceedings (since being replaced by Peninsula as the respondent's representative) is limited to defending the claimant's Rule 80 application against him.

8. In my judgment, providing written reasons on the respondent's Rule 20 application and the claimant's Rule 76(1)(a) application without either side asking for the reasons would be contrary to Rule 62. Although the full judgment with reasons was annunced at a public hearing (and as such is a matter of public record), the claimant and/or the respondent might still wish not to have the reasons published in the Register. Providing full written reasons upon request of Mr Bharuya will deprive them of that option.

9. Furthermore, providing written reasons upon request of a party, who is not a litigant in the proceedings and not the addressee of the decisions in question, will, in my view, be inconsistent with the overriding objective under Rule 2 of the ET Rules, which requires Employment Tribunals to deal with a case fairly and justly including, so far as practicable —
"*[..]*
(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
[..]
(d) avoiding delay, so far as compatible with proper consideration of the issues; and
(e) saving expense".

10. I, therefore, limit these written reasons to the reasons for my decision on the claimant's Rule 80 application.

Factual Background

11. By a claim form dated 14 July 2023 the claimant has brought complaints of disability discrimination (under s. 15, ss.20 & 21, s.26 and s.27 of the Equality Act 2010), automatically unfair dismissal (under s.104 of the Employment Rights Act 1996), unauthorised deduction from wages (s. 13 of the Employment Rights Act 1996), and breach of contract.

12. On 27 July 2023, the Tribunal sent by post to the respondent the standard form Notice of a Claim ("**the NoC**") together with a copy of the claim form (ET1 and Particulars of Claim) and a response pack. The parcel was sent to the following address: *Zhero Limited, Bickenhall Mansions, Bickenhall Street, London W1U 6BP.* The NoC stated that if the respondent wanted to defend the claim it must complete the response form and submit to the Tribunal, to be received by the Tribunal by 24 August 2023.

13. On 28 July 2023, the Tribunal listed the case for a case management preliminary hearing on 15 September 2023 and sent to the parties Notice of Hearing ("**the NoH**"), together with Agenda to be completed by both parties. The NoH was sent to the respondent at the following address: ***1*** *Bickenhall Mansions, Bickenhall Street, London W1U 6BP*.

14. This address is the office address of the respondent's accountants (Sanders Group), which the respondent also used as its registered address and

address for correspondence. Bickenhall Mansions comprises a number of offices and residential flats. The Sanders Group office is located on the basement level.

15. The NoH stated:

"*At the hearing, an Employment Judge will discuss the claim and response. The Judge will make orders to prepare the claim for a hearing and will fix a date for the next hearing*."
and that for the purposes of the hearing each party
"*must have a copy of the claim form, the response form and each person's completed agenda with you when you take part in the hearing*".

16. On 31 July 2023, Mr Smith of Sanders Group, scanned and emailed the NoH to the respondent's CEO, Mr Izak Oosthuizen.

17. The respondent failed to present a response by 24 August 2023.

18. On 7 September 2023 at 4:09pm, following obtaining from the claimant an email address for the respondent, the Tribunal emailed the respondent, stating:

Dear respondent,

Regional Employment Judge Freer has asked me to write to you as follows:

Your email address has been provided by the Claimant who has a claim against the company. The Tribunal asked for this because you, the Respondent, have not filed an ET3 defence to the claim and it may be that the ET1 claim and other papers, which were served by post, have not been received.

The Respondent is ordered, by return email, to inform the Tribunal and the Claimant:

1. Whether it submitted a response/ET3 and if so when and how (post/email). Please enclose a copy of that response and the covering email/letter under which it was submitted; or

2. Confirm that it has not submitted a response/ET3 and state whether it wishes to defend the claim. If so, it should send to the Tribunal, with a copy to the claimant, a response/ET3 together with an application for an extension of time to present the response. The application must include its reasons for not presenting the ET3 within the time allocation.

If the Tribunal does not hear from you, it is likely simply to issue judgment against the Respondent without further notice.

Please see attached ET1 claim form, Notice of claim and Notice of hearing

19. Mr Bharuya is a dual-qualified lawyer, Barrister-at-law in England and Wales and Attorney-at-law in France. He is the CEO and Founder of Westminster & Partners Ltd, trading as Westminster AI, a legal and business consultancy service, which company provided legal consultancy services to the respondent.

20. On 7 September 2023, at 5:44pm Ms N Botha, the respondent's Head of Finance, forwarded the Tribunal's email of 7 September together with the attachments to Mr Bharuya. In her covering email she wrote:

Hi Muklesur,

We have never received the ET documents, this is the first that I see of it. The only document we received from our accountants were the first document (2212276-2023) advising about the date for the 15 of September which we have planned for.

Our company structure is very much international where we have most of our remote workers deal with these types of disputes.

It is and will never be our intention to miss a deadline deliberately.

Could you please assist accordingly.

21. On Friday, 8 September 2023, the respondent and Mr Bharuya agreed that he would be representing the respondent in these proceedings.

22. On Monday, 11 September 2023, at 4:07pm Mr Bharuya wrote the Tribunal applying on behalf of the respondent under Rule 20 for an extension of time to present a response. In his application, Mr Bharuya said that:
"[he] *was entrusted with overseeing [the respondent's] legal operations across Europe and the UK*. "*We were recently appraised of the ongoing proceedings through the communication dated 7th September 2023*. "*Regrettably, we were not in receipt of the preceding correspondences, including the pivotal ET1 claim form and other pertinent documents, until this juncture*".
He explained the company's structure and stated the preferred method for communicating with the respondent.

23. The email went on to say:

"*Extension Request*

Given the constrained timeline, we are compelled to solicit an extension for submitting our ET3 response. […]

We are steadfast in our commitment to uphold the principles enshrined in the Employment Tribunals Rules of Procedure 2013, particularly Rule 20, which permits time limit alterations in exceptional circumstances, a provision we find ourselves invoking given the communication lapse.

We are actively engaged in a meticulous review of the claims, marshalling the requisite documents to craft a fortified response. We stand before the tribunal with a pledge of unwavering cooperation and adherence to the stipulated legal frameworks and timelines moving forward.

[..]"

24. On 12 September 2023, the Tribunal responded as follows:

"Dear parties,

EJ Brown has decided that the Respondent's application for an extension of time to present its ET3 Response will be considered at the case management hearing on 15 September 2023 at 10.00, when both parties must attend. The hearing will be conducted by CVP video hearing, so the parties must provide email contact details by return, in order that the hearing joining instructions can be sent to them. The Hearing will also consider further case management of the claim."

25. At the case management hearing on 15 September 2023, EJ Gidney noted that "*On 11thSeptember 2023 [the respondent] did apply for an extension, but it did not enclose a copy of the ET3 Grounds of Resistance*", and decided that: "*At the Case Management Hearing the Respondent still had not*

produced an ET3 Grounds of Resistance, or an application for an extension that complied with Rule 20 of the Tribunal's rules".

26. The claimant applied for a Rule 21 Judgment and for a costs order with respect to wasted costs of that hearing.

27. EJ Gidney decided that: "*In the absence of either an ET3 Grounds of Resistance or a valid R20 application to extend, I granted the Claimant a R21 Judgment (by way of separate Judgment) and made the following Case Management Orders*".

28. The Judge ordered that there should be a public preliminary hearing on 18-19 December 2023 to determine:

    (i) The Respondent's liability for the Claimant's claims;
    (ii) The quantum of the Claimant's claims;
    (iii) The Claimant's application for costs against the Respondent for the wasted costs of the hearing on 15th September 2023.

29. The Judge further directed that:

    "*The Respondent has until 4.30pm on 28th September 2023 to file and serve onto the Claimant its ET3 Grounds of Resistance and its application to present its defence out of time, in accordance with R20 of the Employment Tribunals Rules of Procedure. If it fails to do so then the hearing listed for 18-19th December will proceed as per paragraph 7 above* [i.e. to determine the above three issues]."

30. However, EJ Gidney ordered that if the respondent did make a valid Rule 20 application by 28 September 2023, the hearing should include the determination of that application first, and, depending on the outcome, then proceed to deal with the above three issues, if the respondent's application was refused, or to case management, if it was granted.

31. On 28 September 2023, Mr Bharuya submitted on behalf of the respondent a Rule 20 application for an extension of time together with ET3/draft response.

32. On 5 October 2023, the claimant wrote to the Tribunal opposing the respondent's Rule 20 application and making his costs applications against the respondent under Rule 76(1)(a) and against Mr Bharuya under Rule 80.

33. On 13 October 2023, EJ Gidney granted the respondent's application on the basis that it was not opposed by the claimant. It appears that the claimant's email of 5 October 2023 had not been passed to the Judge. However, upon the claimant's request, EJ Gidney reconsidered his decision to grant the respondent's application and restored his original decision to have it considered at the preliminary hearing on 18-19 December 2023.

34. On 13 December 2023, the respondent retained Peninsula as its representative in these proceedings, replacing Mr Bharuya.

The Hearing

35. At the hearing, the claimant was represented by Ms S Crawshay-Williams, of counsel, the respondent - by Mr P Maratos and Mr Mawoko, of Peninsula, and Mr Bharuya - by Mr Stirrat, solicitor.

36. I was referred to various documents in a 510-page bundle of documents. Mr Bharuya also submitted his bundle of 30 pages, including his witness statement. However, Mr Bharuya did not attend the hearing to give evidence. Mr Stirrat said that Mr Bharuya was in California and not able to attend. Mr Stirrat did not ask for a postponment. The respondent did not call any witnesses either. The claimant attended the hearing and prepared a witness statement on the substantive issues in the claim. However, in light of my decision on the respondent's Rule 20 application, it was not necessary to hear from the claimant.

37. In the middle of the hearing, having made his Rule 20 application and having heard the claimant's response to it, Mr Maratos unexpectedly applied to have the hearing postponed to call Mr Bharuya to give evidence. Both the claimant and Mr Stirrat, on behalf of Mr Bharuya, opposed the postponement application. I refused the application, because Mr Maratos was unable to articulate any exceptional circumstances, which would justify postponing the hearing in these circumstances, pursuant to Rule 30A of the ET Rules.

38. Upon the hearing of the parties' submissions on all three applications, I granted the respondent's Rule 20 application, and the claimant's costs application against the respondent under Rule 76(1)(a). I dismissed the claimant's Rule 80 application against Mr Bharuya. I gave reasons for all three decisions orally at the start of the second day of the hearing.

39. For the reasons explained in the introductory paragraphs, I am not providing written reasons for my decisions on the respondent's Rule 20 application and the claimant's Rule 76(1)(a) application.

Rule 80 Application

40. The claimant advanced his Rule 80 application against Mr Bharuya in the alternative to his Rule 76(1)(a) application against the respondent.

41. In essence, the claimant argued that Mr Bharuya had acted in an improper, unreasonable and/or negligent manner in not presenting a valid Rule 20 application for the preliminary hearing on 15 September 2023, which in turn caused the hearing to be wasted and the claimant to incur wasted legal costs with respect to that hearing (£850 + VAT).

The Law

42. Rule 20(1) of the ET Rules states (*my emphasis*):

20.— Applications for extension of time for presenting response

(1) An application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall set out the reason why the extension is sought and shall, except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation of why that is not possible and if the respondent wishes to request a hearing this shall be requested in the application.

43. Rule 80(1) of the ET Rules states:

80.— When a wasted costs order may be made

(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—
(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.
Costs so incurred are described as "wasted costs".

44. In *Mitchells Solicitors v Funkwerk Information Technologies York Ltd* EAT 0541/07, the EAT said that the authorities applicable to wasted costs rules in the cilvil courts are equally applicable in the employment tribunals and are "*sources of essential assistance*" for employment tribunals when dealing with wasted costs applications.

45. The two leading authorities analysing the scope of the wasted costs regime in the civil courts and the circumstances in which such orders can be made are *Ridehalgh v Horsefield* 1994 3 All ER 848, CA, and *Medcalf v Mardell and ors* 2002 3 All ER 721, HL.

46. In ***Ridehalgh*** the Court of Appeal said that the courts must adopt a three-stage approach when considering a wasted costs application:

- first, has the legal representative acted improperly, unreasonably, or negligently?
- secondly, if so, did such conduct cause the applicant to incur unnecessary costs?
- thirdly, if so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

47. In the same case the Court of Appeal clarified the meaning of "*improper*", "*unreasonable*" and "*negligent*" (subsequently approved by the House of Lords in ***Medcalf***) as follows:
    - "*improper*" covers, but is not confined to, conduct that would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty,
    - "*unreasonable*" describes conduct that is vexatious, designed to harass the other side rather than advance the resolution of the case,

- "*negligent*" should be understood in a non-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

48. Even when a party's conduct of the proceedings (or part) could properly be described as being vexatious or unreasonable, such conduct must not be readily attributed to the party's legal representative, nor automatically lead to a wasted costs order against the representative (see *Ratcliffe Duce and Gammer v Binns (t/a Parc Ferme)* EAT 0100/08 and *Hafiz and Hague Solicitors v Mullick and anor* 2015 ICR 1085, EAT)

Analysis and Conclusion

49. Ms Crawshay-Williams argued that Mr Bharuya acted improperly, unreasonably or negligently in not presenting a valid Rule 20 application despite the very clear instructions by REJ Freer in the email of 7 September. As a result of Mr Bharuya's improper, unreasonable or negligent conduct the claimant has incurred wasted costs with respect to the hearing on 15 September, that is because the respondent's application could not be considered at that hearing, and no case management orders could be given to progress the case further until and unless a proper application has been submitted by the respondent and decided by the Tribunal. That meant that the 15 September hearing was effectively wasted.

50. Mr Stirrat argued that Mr Bharuya's conduct could not be described as being improper, unreasonable or negligent. Firstly, the Tribunal's instructions in the email of 7 September 2023 did not strictly accord with Rule 20, because they did not give the respondent "the second option"; that is, instead of presenting a draft response, to provide an explanation why it was not possible to present a draft response together with the application, and that is what Mr Bharuya had done. In any event, considering the meaning of "improper", "unreasonable", and "negligent", as explained in ***Ridehalgh*** and ***Medcalf***, on the facts Mr Bharuya's conduct fell well above any of these thresholds. Finally, Mr Stirratt referred me to other authorities in support of his submission that a finding of negligence against a legal professional is a very serious matter and requires compelling evidence.

51. Although, Ms Crawshay-Williams argued in her reply to Mr Stirrat's submissions that all three heads of Rule 80 (improper, unreasonable, and negligent) were engaged on the facts, I do not accept that anything in Mr Bharuya's conduct, since being instructed on 8 September 2023, could be sensibly described as "improper" or "unreasonable" by reference to the respective standard, as explained in ***Medcalf***.

52. The issue, however, is whether his conduct of not presenting an application for an extension together with a draft response earlier, in particular not presenting a draft response before the hearing on 15 September, was a "*negligent omission*" on his part.

53. I accept, as I must, that EJ Gidney's decision at the 15 September hearing was that the 11 September application was not a valid application. Therefore, for the purposes of the respondent's Rule 20 application, I proceeded on the basis that a valid application for an extension was made by the respondent only on 28 September 2023. However, for the purposes of the claimant's Rule 80 application (which EJ Gidney did not consider at the 15 September hearing) I find that it is just and proper (and indeed necessary) for me to examine the 11 September application to decide whether it was negligent conduct on the part of Mr Bharuya to make it in that form.

54. In my judgment, Mr Bharuya's email of 11 September 2023 does contain an application for an extension, and it is in accordance with the requirements of Rule 20. I say that because, read as a whole, it contains both: (i) the reason why an extension is being sought, namely the respondent has only received the claim form on 7 September 2023, and now is engaged in, as Mr Bharuya put it, "*meticulous review of the claims, marshalling the requisite documents to craft a fortified response*"; and an explanation of why it is not possible to submit a draft response with the application, "*given the constrained timeline*", that is between 7 September (when the respondent received the claim form) and 11 September (when the application was made) – only two working days.

55. I accept that these two matters could have been articularted more clearly, however, on my reading of the 11 September email, it does contain all the necessary elements of a valid Rule 20 application. Of course, that is not to say that the reasons and the explanation provided in that email were "valid", in the sense sufficient for the application to be granted. This, however, is a different matter, that is determining the application on its merits, rather than considering whether the email of 11 September discloses a valid application to be determined.

56. It appears that EJ Brown was of the same view, when on 12 September 2023 she directed that: "*the Respondent's application for an extension of time to present its ET3 Response will be considered at the case management hearing on 15 September 2023 at 10.00*". (That document was not in the hearing bundle, but I located it in the Tribunal's file. It was sent to the parties by email at 10:44am on 12 September 2023. It was also mentioned in Mr Bharuya's witness statement).

57. Therefore, in these circumstances, I find that it cannot be sensibly said that Mr Bharuya not making a fresh Rule 20 application before the hearing on 15 September 2023 was a negligent omission on his part. He had every reason to expect that his 11 September application would be considered at that hearing on the merits.

58. To the extent it is said that Mr Bharuya's negligent omission was in not following the REJ Freer's order of 7 September 2023, considering the apparent discrepancy between the terms of that order and the Rule 20 requirements (i.e. the absence of "the second option"), in my view, the 11 September email can properly be read not only as an application under Rule

20, but also as an application to vary the REJ Freer's order to allow the respondent more time to submit a draft response/ET3, to which EJ Brown's response was that the application would be decided at the hearing on 15 September. Therefore, again, there was no real reason for Mr Bharuya to make a fresh application before the 15 September hearing.

59. If, however, Mr Brahuya's negligence is said to be in him not being able to persuade EJ Gidney at the 15 September hearing that his 11 September email did contain a valid Rule 20 application, which had to be decided on its merits, that is a matter between Mr Bharuya and the respondent. In any event, I have no evidence before me, upon which I could sensibly judge the eloquence and veracity of Mr Brahuya's submissions at that hearing to decide whether they were of such a poor standard as to be said to fall below the level expected of a reasonably competent barrister.

60. Ms Crawshay-Williams also criticised Mr Bharuya's last-minute attempts to secure counsel for the 15 September hearing. I think this is of little, if any, relevance to the issue I need to decide. The issue is not whether Mr Bharuya should have had someone else instructed to represent the respondent at the hearing, but whether him not presenting a fresh application for an extension together with a draft response before the hearing was a negligent omission on his part, which caused the claimant to incur wasted costs.

61. Finally, Ms Crawshay – Williams criticised Mr Bharuya's 11 September application, where he said on behalf of the respondent that the respondent had only been "*recently appraised of the ongoing proceedings through the communication dated 7 September 2023*". That statement was plainly incorrect. The respondent knew of the ongoing claim against it as far back as 31 July 2023, if not earlier. However, that by itself, in my judgment, is not sufficient to find negligence on the part of Mr Bharuya. His instructions at that time, as evident from the contemporaneous documents (namely, Ms Botha's email to him of 7 September) were that the respondent had only received the NoH and not the claim form. Of course, it could be argued that Mr Bharuya should have inquired with Ms Botha what steps the respondent had undertaken to ascertain the position in light of the content of the NoH before making that statement in the 11 September email. However, I heard no evidence on this specific issue, and even if Mr Bharuya did not take any such steps and simply proceeded on the basis of Ms Botha' statement that the respondent had not seen the claim form until 7 September and therefore until that time was not "*appraised of the ongoing proceedings*", I find that such omission on his part falls far short of the threshold of "negligent". In any event, I cannot see any causal link between that statement and the wasted costs incurred by the claimant for the 15 September hearing.

62. For all these reasons, I find that Mr Bharuya did not act or omitted to act in any improper, unreasonable or negligent way. It follows that the claimant's Rule 80 against him must fail.

63. For clarity, I must add that although the claimant's Rule 80 application was advance in the alternative to his Rule 76(1)(a) application, I granted the Rule

76(1)(a) application not because of any acts or omissions by Mr Bharuya (as the respondent's representative), but because the way the proceedings had been conducted by the respondent between 31 July 2023 and 7 September 2023, that is before Mr Bharuya was instructed to act for the respondent.

Employment Judge Klimov

24 December 2023

Sent to the parties on:

30/12/2023

For the Tribunals Office

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