



EMPLOYMENT TRIBUNALS

Claimant: Mr I Stringer

Respondents: British Broadcasting Corporation

Heard at: Leicester

On: 15 to 18 April 2024 and in
Chambers on 2 May 2024

Before: Employment Judge Welch
Mr K Rose
Ms L Woodward

REPRESENTATION:

Claimant: Mr R Magara (Solicitor)

Respondent: Mr J Crozier (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

Detriment for making protected disclosures

1. The complaint of being subjected to detriment for making protected disclosures is not well-founded and is dismissed.

Automatic Unfair Dismissal for making a protected disclosure

2. The complaint of automatic unfair dismissal is not well-founded. The claimant was not automatically unfairly dismissed.

Unfair Dismissal

3. The complaint of unfair dismissal is not well-founded. The claimant was not unfairly dismissed.
4. The preliminary hearing for case management in respect of remedy on 8 July 2024 has been vacated.

RESERVED REASONS

Background

1. The claimant was employed by the respondent from 10 November 2007 until his dismissal on 19 July 2022. The claimant brought a claim on 28 November 2022, following a period of ACAS early conciliation from 18 August 2022 until 29 September 2022.
2. The case had previously been case managed by Employment Judge Heap on 2 March 2023. The Case Management Summary provided detail on the claims being brought and a draft list of issues which were subsequently amended and agreed by the parties at the start of the hearing (see below).

The proceedings

3. The hearing took place at Leicester Employment Tribunal and all parties and their witnesses attended in person. The Tribunal was provided with an agreed bundle of documents of over 1,600 pages. There were members of the public in the hearing and others who attended remotely via CVP.
4. The claimant wished to adduce a supplementary bundle of documents, but with the exception of a few documents which were agreed, this was objected to by the respondent on the basis that the documents were irrelevant and/or may be prejudicial. This being a case management issue, we converted the hearing to a private hearing for the purposes of considering whether all or part of the supplemental bundle should be allowed in evidence.
5. Having heard from both parties, we excluded a couple of documents which we considered to be both irrelevant and unhelpful to the Tribunal in considering the claim.

We allowed the other disputed documents, which were provided as background only.

Reasons were given during the hearing.

6. It was further agreed that the whistleblowing policies for the years 2021 and 2022 would be produced, and one further email chain was permitted to be entered as evidence by the respondent, there being no objection from the claimant. The hearing was converted to a public hearing and the observers were then permitted to return.
7. We were helpfully provided with a chronology which the respondent had prepared but which was agreed by the claimant, subject to a couple of clarifications.
8. It was agreed that the hearing was to consider liability only and a further hearing would be listed prior to the end of the hearing.
9. We therefore heard evidence for the claimant from the claimant himself. On behalf of the respondent, we heard from:
 - a. Mark Moran, dismissing officer;
 - b. Adam Smyth, appeal officer;
 - c. Jonathan Lampon, Assistant Editor for BBC Newsbeat; and
 - d. Jasdeep Harrad, HR Business Partner.
10. All of the witnesses had provided written statements which stood as their evidence in chief. They were subjected to questions from the other party and the panel.
11. The evidence and submissions were completed at the end of the fourth day, and the Tribunal reserved its decision.
12. It was agreed that the hearing would deal with liability first and only go on to consider remedy should the claimant succeed in any of his claims. Therefore, the issues on liability were agreed towards the start of the hearing as follows:

List of issues

Protected Disclosure

13. It is admitted and agreed that the claimant made a protected disclosure on 20 July 2021 to Stuart Thomas.

Reason for dismissal / Automatically Unfair Dismissal

14. What was the sole / principal reason for the claimant's dismissal?
- a. The claimant says that the sole / principal reason was that he had made the protected disclosure for the purposes of s.103A ERA 1996;
 - b. The respondent says that the sole / principal reason was his conduct, and a fair reason for the purposes of s.98(2)(b) ERA 1996.

Ordinary Unfair Dismissal

15. If the respondent establishes the potentially fair reason at para. 14.b, above:
- a. Did the respondent carry out a reasonable investigation into the alleged misconduct;
 - b. Did the respondent have a genuine belief that the claimant had committed acts of misconduct;
 - c. Did the respondent have in mind a reasonable basis to sustain that belief;
 - d. Further (see EJ Heap's List of Issues at para.8), did the respondent's process and/or decision fall outside the range of reasonable responses in light of the claimant's further contentions that:
 - i. It took seven months to tell the claimant what he was accused of during the disciplinary process;
 - ii. There was a change of hearing managers as those who had been appointed were not fit to carry it out;
 - iii. There was a defective investigation;

- iv. He was treated inconsistently with others in truly parallel circumstances (relying upon those individuals identified at para. 16.c below)?
 - v. The procedure was unfair;
 - vi. There was a breach of the ACAS Code.
- e. Was summary dismissal within the range of reasonable responses open to the respondent in light of its belief in the claimant's conduct?

Whistleblowing Detriment

16. Further, for the purposes of s.47B ERA 1996, was the claimant subject to the following detriments:

- a. Not being given a promotion to lead the sports team and/or additional management responsibilities that he says he was promised;
- b. Being subject to the disciplinary investigation; and/or
- c. Being treated differently and unfairly compared to:
 - i. Gary Lineker;
 - ii. Martin Ballard;
 - iii. Jimmy Carpenter.

17. If so, was any such detriment done on the grounds that the claimant had made the protected disclosure?

Time Limits (detriment claim only)

18. To the extent that any detriment occurred more than three months prior to the claimant lodging his ET1 (subject to extension for Early Conciliation between 18.8.22 and 29.9.22):

- a. Was it not reasonably practicable for the claimant to bring his claim within the three months of the act complained of (or act(s) where there was a

series of acts); and

b. If so, was it brought within a reasonable period thereafter?

Findings of fact

19. The claimant was originally involved with the respondent on a casual basis from August 2002. However, for the purposes of this Tribunal, his period of continuous employment commenced on 10 November 2007.
20. On 16 June 2008, the claimant became a Broadcast Journalist for BBC Radio Leicester. The claimant was employed as a BBC Journalist (Sport) and assigned as the Leicester City football commentator. He had a public profile and was well known as the Leicester City correspondent for BBC Radio Leicester.
21. His employment was evidenced by an offer letter dated 2 June 2008 [P 77 – 78], which was sent care of his workplace, as he was moving house. The claimant cannot recall seeing this letter, although this may not be surprising since it was sent to him 16 years ago. The letter enclosed an editorial policy compliance form and advised the claimant that, *“as a member of BBC staff, you are required to familiarise yourself with, and work in accordance with, the BBC Editorial Guidelines and all its supplements.”*
22. The offer letter enclosed two copies of a contract of employment [P 79 – 83]. There was no signed copy of the contract on file before the Tribunal. We find that the claimant had seen this contract despite him not recalling doing so.
23. The contract of employment provided:
“clause 14 (a) You are expected to acquaint yourself with all the BBC’s rules, regulations, policies and procedures... In particular, all staff involved in programme making, are subject to and expected to observe and abide by the policies contained in the BBC Editorial Guidelines. All employees are subject to and are expected to observe and abide by the BBC’s rules, regulations, policies and

procedures from the commencement of their employment.”

24. The contract went on to provide at clause 18(b):

“You will be required to complete and sign the declaration of personal interest form on taking up this appointment.

The interests you are asked to declare may include but are not limited to:

- *business interests that you or close members of your family may have with customers or suppliers;*
- *family relationships or close personal contacts with customers or suppliers;*
- *your outside or private activities or work which would interfere with your BBC work or give rise to a conflict of interest (actual or potential);*
- *your membership of voluntary organisations, statutory bodies, etc. which give rise to a conflict-of-interest (actual or potential).”*

Clause 19 stated:

“You will not allow your outside interests or private activities to interfere with your BBC work or permit any conflict (actual or potential) to arise between your BBC duties and your outside or private interests to affect your ability to carry out your duties effectively, or to place the BBC in a position whereby it is brought into disrepute or its reputation for impartiality is likely to be affected (irrespective of whether or not it’s reputation is actually affected).”

20. The claimant signed an editorial policy compliance form [P 89-90] in December 2007 which provided a requirement for the claimant, as a member of BBC staff, to *“familiarise yourself with, and work in accordance with, the BBC Editorial Guidelines and all its supplements. The Guidelines set out clear editorial values and principles in relation to accuracy, impartiality, fairness, privacy, crime, harm and offence, children, politics, religion, and matters of editorial integrity and independence, external relationship, interacting with our audiences, the law and accountability.....failure to work within the Guidelines would be regarded as a*

disciplinary matter.”

21. The Editorial Guidelines themselves contained sections on Independence from External Interests [section 14 P 238-251] and Conflicts of Interest [section 15 P 252- 266]. These stated:

14.1 The BBC's reputation is, *“based upon its fundamental values of editorial integrity, independence and impartiality.... In order to achieve that, our impartiality, editorial integrity and independence must not be compromised by outside interests and arrangements.... Specifically, we must not give undue prominence to products, services or trademarks, though we can refer to them and credit them where it is editorially justified. And people working for the BBC must not accept gifts or hospitality from anyone who might believe it will give them a business advantage.”*

14.3.20 says, *“We must not give the impression that we are endorsing a commercial product or service when linking to a commercial platform.”*

15. Section 15 of the Editorial Guidelines provides guidance on conflicts of interest. *“A potential conflict of interest arises when there is the possibility that an individual's external activities or interests may affect, or be reasonably perceived as affecting, the BBC's impartiality and its integrity, or risk damaging the BBC's reputation generally or the value of the BBC brand. Conflicts of interest may occur in any area of our work.”*

The guidelines go on to say that the BBC's policy on personal interests forms part of the contract of employment that applies to BBC employees. The principles are said to *“apply to everyone, but the application of the principles varies according to an individual's role and their level of involvement with BBC content.”*

22. The Guidelines go on at paragraph 15.2.10 [P 257] to say: *“Individuals must not accept personal benefits, or benefits for their family or close personal relations, from organisations or people with whom they might have dealings*

on the BBC's behalf. Unacceptable personal benefits include goods, discounts, services, cash, loans, gratuities or entertainment outside the normal scope of business hospitality."

23. The Guidelines state at paragraph 15.3.1 [P 257]:

"All individuals engaged by the BBC are required to declare any personal interests which may affect their work with the BBC. These should be set out on a Declaration of Personal Interest form and it is the responsibility of individuals to ensure that it is maintained and is up to date...."

"Significant financial interests should be declared by all production and editorial staff working for the BBC if they are in any way connected with the area in which they work or the subject matter they cover."

24. The BBC Declaration of Personal Interests Policy provides at P330 *"Individuals have an ongoing responsibility whilst working for the BBC to remain vigilant for actual or potential conflicts arising from their personal interests. Individuals must declare any actual and potential conflicts at the point they arise."*

25. The claimant signed an Editorial Policy Compliance form in 2007 [P 90] which provided an obligation to familiarise himself and work in accordance with the BBC Editorial Guidelines and all its supplements. Also, he was referred to the Editorial Guidelines by his line manager Mr Purohit on 28 January 2019 [P 581] when he confirmed that, having referred this up, the claimant was able to attend events, but went on to say, *"...as BBC employees we have to be careful in these situations, and so I'm sure you'll understand my caution. If you haven't already it may be worth looking at what our Guidelines require from us."* This email provided a link to the Guidelines. We are therefore satisfied that the claimant knew, or should have known, his responsibilities under the Guidelines.

26. it is clear that the claimant had previously completed declarations of personal interest,

since there were copies of these contained within the bundle [P 87, 88, 645-651]. We are therefore satisfied that the claimant was aware of the need to complete these forms declaring any conflicting interest.

27. The respondent has a Personal Use of Social Media Policy [P 380-382] which confirms that staff are not prohibited from using social media platforms in a personal capacity. However, it highlights that the BBC's reputation for impartiality and objectivity is crucial. *"Staff should take reasonable steps to ensure their activity on social media platforms does not undermine the BBC's, nor their own, professional impartiality or reputation and or bring the organisation into disrepute."*
28. The respondent's whistleblowing policies [which were provided as separate documents to the Bundle] provided protection for individuals raising concerns, such that, *"you can be assured that your position will not be at risk if you raise a genuine concern"* and *"The BBC will not tolerate any sort of victimisation of anyone raising a genuine concern and anyone responsible for doing so will be subject to disciplinary action."* The 2022 policy also stated that the respondent would not tolerate anyone attempting to identify a whistleblower.
29. The respondent has a Disciplinary Policy [P 350-2], which includes various principles. One of which is: *"Employees should be informed of the allegation/s against them and given the opportunity to state their case before any decision is reached."*
30. The claimant was subjected to training during his employment with the respondent. He attended Safeguarding BBC Values training on 7 June 2013 and an Anti-Bribery UK online course on 31 August 2020.
31. The claimant did not appear to have taken training particularly seriously. He referred in his appeal meeting to completing training modules as quickly as he could: *"You have to*

do it and you just click through and get it done.” to “get management off his back”. We accept that the claimant may have been busy and felt that his time was valuable, but it is clear that he had a cavalier approach to the training and policies of his employer.

32. Mandatory training was brought in for all BBC staff and freelancers by Tim Davie, Director General of the BBC in or around October 2020 regarding a commitment to impartiality. Employees were required to book themselves on to on one of the available courses.
33. On 15 March 2021, the claimant along with a number of other BBC employees at Radio Leicester, were emailed by Mr Purohit [P 600] about the sessions for mandatory training for those with on-air roles, which confirmed that there were 2 modules, one aimed at those presenting news or magazine programmes, and one for those working in Sport. The claimant should therefore have enrolled on one of the Sport training modules. Many individuals had already undergone the training but a significant number had not, including the claimant.
34. On being chased again by Mr Lampon on 15 March 2021, the claimant confirmed on 23 March 2021 [both P 600] that he had booked onto a course scheduled for 29 March 2021. The course he had booked on was aimed at BBC news journalists rather than Sport journalists. No one could explain the difference in the training. Having started the course, the claimant left the course intending to attend the one aimed at Sports Journalists. He contacted Sheila Monteith by message [P 1511]. There was evidence of messages from the claimant attempting to get onto a Sports specific training module, but he was not able to do so.
35. The claimant was heavily involved in social media. He had a large following on Twitter of between 50,000 to 65,000 followers during the latter years of his employment. There was no evidence before us as to whether his BBC links, or his previous appearance as

a candidate on the Apprentice was responsible for this large following. It was clear that he made many tweets on his personal Twitter account, which were not necessarily related to sport. The Tweets he made often promoted goods and services of companies, which his following would have seen.

36. The claimant had been asked by Mr Purohit, his line manager at Radio Leicester, to run from Leicester to Wembley Stadium in honour of a fan who had cycled the same route many years before to watch a football match. As the BBC only supports two charities, the claimant was unable to mention the charities for whom he was running on his BBC account. There were discussions within the BBC about what could be said about the run, and what the claimant and other reporters could say or Tweet.
37. It was agreed that BBC Radio Leicester would provide some coverage of the run, but it was clear that Mr Lampon had various discussions with the respondent's Editorial policy team about whether the respondent would allow coverage of the run. Following these discussions, Mr Lampon made clear in an email on 7 May 2021 [P 622] what could and could not be mentioned. This email was sent to the claimant and others working at Radio Leicester. This set parameters on what could and could not be said and included a section entitled: "*For Ian*", which stated, "*You can Tweet as much as you'd like and keep listeners/ followers up to date along your journey on your personal account. Please don't use [Radio Leicester] Sport/ [Radio Leicester] News Twitter accounts to [re-tweet].*"
38. Mr Lampon followed this up by resending this email on 10 May 2021 [P 627] and saying, "*please read this carefully as it's what's been signed off by Editorial Policy and we need to stick to the guidance*".
39. The claimant's evidence was that he was told by Mr Lampon on the same day as the follow up email that he could get as many "*freebies*" as he wanted, so provided he used

his own social media account and not a BBC one. This conversation was witnessed by Ms Heathcoate who was a Flight Lieutenant who provided free physiotherapy support to the claimant on his run to Wembley, and also provided some free physiotherapy supplies [P 894]. We prefer Mr Stringer's evidence on this, as supported by the letter from Ms Heathcoate and therefore accept that he was told by Mr Lampon that he could get as many freebies providing he did not tweet on the respondent's Twitter accounts about it.

40. The claimant obtained a number of free items, including but not limited to, a Garmin tracker for the run, free shot drinks, headphones, accommodation and insoles for running shoes. Having seen emails from the claimant requesting support/ goods or services, not just for the Wembley run, we accept that the claimant invariably mentioned his work for the BBC, in fact some of the emails were from his BBC email account, although he said that this was because it was his default email account when using his mobile phone to send emails. The emails referred to his thousands of followers on social media, and we are satisfied that this was done as a way to obtain these goods or services, as the providers would get coverage on the claimant's social media accounts by being referred to by the claimant in his tweets. Some of the emails even specifically referred to what the claimant would be able to do for the organisations from whom he obtained goods or services.

41. We are satisfied that the claimant agreed to promote companies in return for the goods and services they provided. This is evidenced by various emails within the Bundle, including ones between the claimant and Garmin [P 459 and 462], where he was asked of "*media opportunities you'd (sic) do off the back of this*" to which the claimant replied, "*Yes we already have some media opportunities.... Sky Sports has promised me a piece on Sky but being a BBC staff member I have to be careful what I say here...* ".

Garmin replied, *“If you’re (sic) happy to do some posts, shoutouts etc, and keep us in the loop on what you’re (sic) doing media wise, we’ll (sic) get you two new watches over...”*

42. The respondent never raised any concerns about the claimant’s tweets throughout his employment until the disciplinary investigation leading to his dismissal.
43. The claimant was provided with use of two new lease cars for at least 4 years during his employment with the respondent. There was no charge for him using these vehicles and they were, in effect, his own cars for the period during which he used them. His evidence, which was not disputed by the respondent, was that he was personal friends with the Director of Total Motion, who has subsequently passed away. The cars, which were new, high value cars, were leant to him from 23 November 2018 and throughout the rest of his employment with the respondent.
44. Total Motion is a Leicester based vehicle rental firm, and it was the claimant’s evidence that these were loaned to him, to avoid them sitting on a forecourt whilst not being leased. There was a letter provided by the Director of Total Motion dated 12 May 2022 for the disciplinary investigation [P 893] which confirmed this. However, it was clear that the claimant retained the same vehicles for extended periods of time and whilst this letter refers to there being no written agreement or contract, there clearly was for the second car he was loaned, the Audi, as referred to below. Therefore, we consider that the vehicles were allocated to him for lengthy periods and there was no evidence that the cars were requested back at any time during these periods.
45. There was no documentation provided relating to the first vehicle he was loaned, (a BMW 530e M Sport) which he retained from 23 November 2018 until June 2021 when he exchanged this for his second vehicle. There was documentation for the later vehicle (an Audi A3 Sportback 40) being a Contract Hire Schedule [P 442] which confirmed a

hire period of 12 months for a monthly rental of £0.

46. The claimant mentioned the good service he received from Total Motion, together with information on the vehicles, on his personal social media accounts on various occasions, as evidenced in the Bundle. The claimant did not provide a declaration of conflict of interest form, nor did he seek any kind of approval or confirmation from his employer about the loan of these vehicles.
47. We find that the vehicles were provided by Total Motion and as a result of receiving them, the claimant posted messages to his followers which promoted the company and the cars themselves. If this had been a private agreement between friends, with no commercial aspect, there would have been no need to post tweets about the company, and the signage of the company would not have been added to the vehicle for one of the posts. We consider that this was aimed at promoting this company to the claimant's followers and to show that he was their customer and to reference the good service he was receiving.
48. In the claimant's PDR in June 2021, the claimant was told by Mr Purohit that he would consider promoting him to a position with greater responsibility. He applied for promotion to a Community Senior Journalist role in June 2021, and was interviewed along with three other applicants.
49. On 5 July 2021, the claimant was informed that he had been unsuccessful in securing the role that he had applied for. The respondent's evidence, which we accept, was that whilst he had performed very well at interview, another candidate had more relevant recent experience.
50. Following this, Mr Purohit and Mr Lampon discussed development opportunities for the claimant, including the claimant acting up to manage the sports team, and taking over responsibility for some of the sports team's rotas, but we accept Mr Lampon's evidence

that there was no guarantee of greater responsibility. We note that nothing came of this due to the claimant's suspension. There was evidence of earlier emails between the claimant and Mr Purohit [P 1644] on 14 and 15 June 2021 where the claimant offered to undertake additional responsibility, but Mr Purohit indicated that further thought was required as to the future management structure of the team in which the claimant worked, so the claimant was asked to "*bear with*" Mr Purohit, as he was, "*trying to find a longer term solution to how sport is managed/overseen.*" Therefore, it was not possible to do this at that time.

51. The claimant made a verbal protected disclosure on 20 July 2021 to Stuart Thomas, the Area Manager for BBC local radio. He complained that another journalist had been forced by Mr Purohit, the claimant's line manager, to break Covid rules provided by the BBC and the Government. The claimant's colleague had been told to come in to present a show despite having been in contact with someone with Covid.
52. Mr Thomas investigated this and contacted Mr Purohit within 24 hours although did not tell him that it was the claimant who had complained about his actions.
53. Mr Purohit was angry about the complaint that had been raised, and, from the evidence of Mr Lampon, tried to find out who had reported him, which is against the BBC's whistleblowing policy set out above. We accept that Mr Purohit believed that it was either the claimant or one other person who had reported him to Mr Thomas.
54. At a meeting in July 2021, the acting news editor, Jo Haywood, raised concerns regarding the claimant's use of Twitter, particularly about him endorsing commercial products and businesses. We accept Mr Lampon's evidence that Jo Haywood initially raised this, and that this was not in response to anything said by Mr Purohit. We further accept that there had been discussions over time between the claimant's colleagues about the appropriateness of some of the claimant's tweets, and that colleagues were

concerned that they were not within the respondent's guidelines. Although, as stated above, these were not raised with the claimant.

55. Following this meeting, Mr Purohit and Mr Lampon agreed that Mr Lampon would contact Tim Burke, Senior News Editor and Head of Editorial Standards to seek guidance on the breaches by the claimant. We accept that Mr Purohit directed Mr Lampon to contact Tim Burke as evidenced by the email from Mr Lampon dated 22 July 2021 [P653].
56. Mr Lampon had contacted Mr Burke on one occasion previously concerning the appropriateness of tweets made by another worker within Radio Leicester, although these did not relate to commercial endorsements, but political comment. This did not result in disciplinary action being taken against the individual concerned, as they agreed to remove the posts.
57. The email sent by Mr Lampon to Mr Burke was not a neutral email merely attaching tweets for advice; it went further in saying, "*he repeatedly continues to post tweets endorsing commercial products and other businesses and it's rather tiresome. Time perhaps to bring the big guns in?*". This suggested to the panel that the claimant had been spoken to, although there was no evidence of this and we accept the claimant's evidence that he was never spoken to about any concerns with his posts.
58. The email referred to named turmeric shots which had been delivered twice to BBC Radio Leicester and said we, "*understand from his sports colleagues the new Audi [mentioned above] he's driving is leased at a low cost because he mentions Total Motion and works for the BBC.*"
59. His email attached various tweets, including those recommending his Audi and tagging Total Motion [P 654]. One recommending headphones saying, "*they're very clever*" which tagged the supplier [P655] and another saying, "*heard lots of good things about*

these guys so giving it a go" relating to turmeric shots, and again, tagging the maker.

60. Mr Burke responded to the email on 22 July 2021 [P658] with a short reply, saying, "*Good grief.*" He copied in Chris Burns, Central Local Radio Manager, and asked whether he was allowed to investigate this.
61. Mr Purohit added further information to Tim Burke in replying to his email, [P664] which referenced the claimant's involvement with a local, "*wonderful charity, but he plugs them an awful lot on air....*"
62. On 15 September 2021, Ms Burns emailed the claimant to meet him for a chat. He did not know that he would be suspended at this meeting, although we accept that it would not be usual to flag that before meeting with the individual to be suspended.
63. At this meeting on 16 September 2021, the claimant was suspended by Ms Burns and Mr Thomas, which was confirmed by letter [P 740]. It was accepted that there were "*allegations of a breach of the BBC Editorial and Impartiality Guidelines.*" The letter referred to serious issues coming to the attention of the claimant's line manager, Mr Purohit, and said that he was immediately suspended "*pending investigations into allegations of a breach of the BBC Editorial and Impartiality Guidelines*". Although no further detail was provided. This was the last day that the claimant worked in the respondent's offices.
64. The claimant went off sick with stress and anxiety on 17 September 2021 and never returned to work prior to his dismissal.
65. Tim Burke carried out an investigation into the matters raised by Mr Lampon as directed by Mr Purohit. His report dated 24 September 2021 [P422 to 553] made clear that he had carried out a thorough, independent investigation, including, having carried out a "*keywords searched, from mid-October 2020 to the end of July 2021*" where, "*there were in excess of 300 "shout outs" to companies or individuals who have given their*

services to [the claimant].” It also referenced, that “in almost every email to companies requesting products [the claimant] mentions his work for the BBC and his 51,000 followers”.

66. The summary [P 554-555] investigation concluded:

“The abuse of the social media policy leads me to a conclusion that [the claimant] should be given a final written warning of these actions.

The failure to declare the gift of the Audi A3 and the breach of the Editorial guidelines I regret to conclude that [the claimant] should be dismissed on notice from his position as a BBC Journalist.”

67. The claimant raised a grievance via his legal representatives on 2 December 2022 [P 765 -775]. This raised complaints over a campaign of bullying and harassment which had taken place over the previous 2 years and that he had been subjected to detriments as a result of making protected disclosures.

68. This was chased by the claimant’s representative, and, due to the absence of the recipient, the Head of BBC England, was forwarded by her assistant to Ms Burns. We accept that this was an error on the part of a personal assistant, who was unaware that part of the grievance concerned Ms Burns.

69. A grievance hearing took place via Zoom with Mr Ashton, Divisional Finance Director, News and Current Affairs [minutes at P 811- 828] on 24 February 2022 and 1 March 2022. Mr Richards, the Head of whistleblowing within the BBC’s Corporate Investigation Team also attended and the claimant was accompanied by a colleague [P 833-849]. The outcome letter was sent on 2 August 2022 [P 398- 413]. There was considerable delay in sending the outcome, and the letter sought to explain that this was due to annual leave, sickness absence and the size of the investigation. The decision upheld some of the allegations against Mr Purohit, and also confirmed that

some of the matters raised would be investigated and appropriate action would be taken. It found that a disciplinary investigation should be held against Mr Purohit as to whether the discussion where he speculated that the claimant was the likely source of the protected disclosure was a breach of the BBC's whistleblowing policy but that the subsequent incidents were not in response to the complaint raised.

70. The claimant was invited to a disciplinary hearing by letter dated 13 May 2022 [P 895]. The allegations were that "*in a number of your social media posts between February 2020 and September 2021 you have used your social media accounts on which you are identified as a BBC employee to publicise goods and services of commercial organisations in exchange for use/access to free goods or benefits from these companies. You also communicated with commercial organisations using your BBC email in order to ask for support for a personal project/s and alluded to a possible coverage or exposure for their organisation via the BBC*" and that this was a breach of the BBC Editorial Guidelines, the BBC Declaration of Personal Interests Policy and the BBC Personal Use of Social Media Policy. The letter made clear that if the allegations were found to be true, this would be considered gross misconduct and one possible outcome may be the termination of the claimant's employment. The hearing was scheduled for 16 May 2022, and the claimant was given the right to be accompanied.
71. The first disciplinary hearing took place with Mr Harkins on 16 May 2022 [the minutes for which appear at P 1594-5]. It appeared from these, that Mr Harkins was not able to manage the disciplinary hearing and had numerous adjournments during the hearing in which to take advice. Following an adjournment, it was confirmed that Mr Harkins would not be the disciplining officer for the claimant's disciplinary hearing, and that another disciplinary officer would be appointed.
72. Mr Moran, Programme Manager at the time, was appointed as disciplining officer on 1

June 2022. He was informed that Mr Harkins was unable to continue as disciplinary officer due to wellbeing concerns. Mr Moran was not local to the claimant or Radio Leicester, had no knowledge of the claimant, worked outside of the claimant's area of work and had no knowledge of his protected disclosures, something which was not questioned by the claimant. We found him to be an honest witness, who clearly considered that the claimant had committed gross misconduct.

73. The notes from the disciplinary hearing which took place by Zoom on 16 June 2022 were at P 986 –992. The claimant was accompanied at the hearing. It was clear from the minutes of the meeting that the claimant was given the opportunity to answer the allegations against him and raise any concerns or mitigation he wished to.
74. The outcome letter which was sent on 19 July 2022 [P384- 390] apologised for the delay in sending the outcome, which was said to be because of Mr Moran catching Covid and in order to consider all the points the claimant had raised.
75. The letter upheld all of the allegations against the claimant and decided that the actions amounted to gross misconduct and that the appropriate response was summary dismissal without notice. It was clear that the main focus of the disciplinary hearing was the provision of what Mr Moran termed as “*gifts*” and focussed primarily on the cars which Total Motion had provided. His decision on this aspect alone was that his failure to declare both the BMW and the Audi constituted a breach of the BBC Declaration of Personal Interest policy and Editorial Guidelines and constituted gross misconduct. He found that failure to declare such high value gifts, nor refer them to a head of department “*goes completely against the Editorial Guidelines both in sentiment and fact. Regardless of whether it has been gifted from a friend or not, it is simply not acceptable conduct of a BBC journalist.*”
76. He went on to find that the claimant had breached the Editorial Guidelines and the

BBC's Social Media Policy by making unjustifiable "*shout outs*" to a number of commercial companies and that there was no overriding editorial need nor justification to provide pictures of the company product, nor mention of the specific company name.

77. It was apparent that Mr Moran had considered alternative sanctions as set out in his outcome letter, but that he considered that the serious nature of the claimant's misconduct against the background of the importance which the BBC places on the guidelines and policies, led to a fundamental and serious breach of the trust and confidence between the claimant and the respondent. He was "*shocked*" by the claimant's assertion that he was not aware that what he had done was wrong.
78. The claimant appealed on 2 August 2022 [P 1605-6] and confirmed in his email that with the benefit of hindsight he accepted that he had committed a serious error of judgment in accepting vehicles from Total Motion and that he should have declared this as an interest at the time. However, he did not consider that sufficient weight had been given to the mitigating factors outlined in the hearing.
79. Mr Smyth was appointed to hear the claimant's appeal. At the time he was Interim Director of BBC Northern Ireland, and again had no prior involvement with BBC Radio Leicester or the claimant. He also had no knowledge of the claimant's protected disclosure, which again was not questioned by the claimant.
80. An appeal hearing took place via Zoom on 5 September 2022 [P 1071- 1082]. During the appeal hearing, the claimant referred to tweets posted by Mr Purohit, his line manager. These were clearly inappropriate and may well have breached BBC Guidelines, however, they were not similar in nature to the claimant's tweets, since they did not promote or endorse products. Therefore, they are not relevant to our decision. In any event, Mr Smyth contacted the Controller of Production BBC England and requested that these tweets be investigated.

81. The claimant appealed against the grievance outcome and was invited to an appeal hearing by letter sent by email on 9 September 2022 [P1086]. The initial grievance appeal meeting was postponed by the claimant as his representative was not available. It went ahead on 11 October 2022 via Zoom, and was chaired by Ms Busby, Managing Editor, News Content and Ms Skeaping, External Expert. The appeal was not upheld and an outcome was subsequently sent on 20 April 2023 [P 414-421].
82. Mr Smyth, the disciplinary appeal officer, carried out further enquiries following the disciplinary appeal meeting. He met with Mr Moran, the dismissing officer, Mr Lampon and a witness to the conversation between Mr Lampon and the claimant at which Mr Lampon was said to have referred to obtaining freebies.
83. The claimant emailed Mr Smyth on 14 October 2022 [P1180] to say that he had not been judged in the same way as Gary Lineker, who had been allowed to continue in his role without suspension. He referred to driving his *“friend’s car for a short time”* and asserted that he was not being judged by the same standards as Mr Lineker and was being singled out and treated differently.
84. Mr Smyth upheld the decision to dismiss the claimant and sent an appeal outcome letter on 18 October 2022 [P 391-7]. It held that the level of sanction was appropriate. It said, the claimant’s *“endorsement of two major car marques, BMW and Audi, and the leasing company which supplied them, left Mark Moran with no option but to apply the highest penalty available....it was your receipt of cars worth tens of thousands of pounds, without you even having made your line manager aware under the DOPI framework and in significant breach of [the respondent’s] Editorial Guidelines, which led to your dismissal.”*
85. The claimant relied upon being treated differently and unfairly compared to Gary Lineker, Martin Ballard and Jimmy Carpenter as part of his detriment claim for having

made protected disclosures.

86. We accept that it was clear from the documents provided that these individuals either posted on social media, endorsed products, hosted events or carried out work and were paid for doing so. However, it was also clear that two of the three people relied upon were freelancers and not employees of the respondent. Further, that their work for others was well known by individuals within the respondent, and in one case at least, the individual had completed the required Declaration of Personal Interests form, such that approval had been given. Therefore, we find that these individuals were not in comparable circumstances to the claimant.

LAW

87. A dismissal is 'automatically' unfair if the reason or principal reason is that the person dismissed has made a protected disclosure. Section 103A of the ERA provides that *"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

Ordinary Unfair dismissal

88. The respondent has to prove the reason for the dismissal and that it was one of the potentially fair reasons provided by section 98(1) and (2) Employment Rights Act 1996 ('ERA'). The respondent relies upon the reason in s 98(2)(b) ERA namely, "conduct".

89. Once an employer has shown a potentially fair reason for dismissal, section 98(4) ERA provides that *"the determination of the question whether the dismissal is fair or unfair ... (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case."*

90. Since this is a misconduct dismissal, we must bear in mind the guidance given by the EAT (approved repeatedly since) in BHS v Burchell. We therefore need to ask the following:

- a. Did the respondent genuinely believe that the claimant was guilty of misconduct?
- b. Did the respondent have reasonable grounds upon which to form that belief? and
- c. Did the respondent carry out as much investigation as was reasonable in the circumstances?

91. The Tribunal must also consider whether the procedure followed by the respondent was reasonable, including whether it complied with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

92. It is necessary for the Tribunal to be satisfied that dismissal was, in all the circumstances, within the range of reasonable responses of a reasonable employer and that a fair procedure had been followed by the employer (Iceland Frozen Foods Ltd v Jones), as subsequently approved by the Court of Appeal in other cases. This is authority for the well-known proposition that a Tribunal must not substitute its own decision on the reasonableness of a dismissal for that of the employer; rather, the Tribunal must decide, objectively, whether the decision to dismiss was within the range of reasonable responses of a reasonable employer.

93. Both the basic and compensatory awards may be reduced under sections 122 and 123 ERA 1996 by reason of contributory conduct on the part of the employee.

94. A Tribunal may also reduce the amount of compensation, by the appropriate percentage, to reflect the possibility that the employee might have been dismissed fairly in any event even if procedurally unfair – the so-called ‘Polkey’ principle. Such a

reduction is only applicable to the compensatory award. There is no reason why an award may not be reduced for both Polkey and contributory conduct.

Detriment for making Public Interest Disclosure

95. Section 47B ERA provides the protection for workers who have made protected disclosures from being subjected to detriments. It provides:

“47B Protected disclosures

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.”

96. The burden of proof in detriment claims is set out in section 48(2) of the ERA: *“On a complaint under subsection ... (1A) ... it is for the employer to show the ground on which any act, or deliberate failure to act, was done.”*

97. The concept of ‘detriment’ is very wide, and a detriment can exist if a reasonable worker would or might take the view that the action of the employer was, in all the circumstances, to his detriment. ‘Detriment’ can include general unfavourable treatment and there is no test of severity that the Tribunal must apply.

98. However, there must be a causal link between the detriment and the fact that the worker made a protected disclosure. The provisions of section 48(2) of the ERA mean that, once a claimant shows that there was a protected disclosure, and a detriment which the respondent subjected the claimant to, the burden shifts to the respondent to show that the worker was not subjected to the detriment on the ground that he made the protected disclosure. In order to succeed, we must be satisfied that the protected disclosure had more than a trivial influence on the acts complained of.

99. Tribunals can draw inferences as to the motivation of the person subjecting the worker to a detriment.

Submissions

100. The respondent provided written submissions and also addressed us orally. The claimant gave oral submissions. We set out the submissions in brief:

Respondent's submissions

101. It was accepted that the claimant had raised a protected disclosure on 20 July 2021.

There is nothing unusual or escalatory in doing so.

102. The reason for the dismissal is to be determined as to what motivated a particular decision maker ie "*what reason did he or she have for dismissing or treating the complainant in an adverse way*" (Kong v Gulf International Bank [2022] ICR 1513 CA approving Simler LJ in the EAT). The sole exception being where someone determines that the employee should be dismissed for a reason but "*hides it behind an invented reason which the decision maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.*" Jhuti v Royal Mail [2020] ICR 731 SC. The necessary ingredients being:

d. A manipulator;

e. with a hidden motive;

f. an invented reason; and

g. a decision maker manipulated and persuaded to dismiss for the invented reason, in ignorance of the hidden motive.

103. All ingredients are required for the uncommon scenario in Jhuti and would only arise on extreme facts. None apply in this case.

104. The respondent says the reason for the dismissal was conduct. Neither the dismissal officer nor the appeal officer knew of the protected disclosure, which formed no part of their decision. This was unchallenged by the claimant.

105. For ordinary unfair dismissal, BHS v Burchell must be considered and, if satisfied, the

Tribunal must consider whether the decision was within the range of reasonable responses and not substitute its own view.

106. The respondent contended that the claimant knew the rules and understood the respondent's position on the issues for which he was disciplined. The investigation was reasonable and the specific complaints about the process were not made out. The decision to dismiss was within the range of reasonable responses and was fair.

107. The claims for detriments for making a protected disclosure must be materially influenced by the disclosure, meaning not a minor or trivial influence. There had been a fractured relationship between the claimant and Mr Purohit for a number of years, on the claimant's own evidence. Development or acting up had been discussed, but there was no guaranteed promotion. There was no evidence that there was a desire to give the claimant development opportunities either before or after the protected disclosure.

108. In considering the instigation of a disciplinary investigation as a detriment, It was important to consider knowledge of the protected disclosure at this time. Neither Mr Purohit nor Mr Lampon knew that the claimant made the protected disclosure on 21 July 2021. Nor was Mr Purohit the sole author of raising the concerns to Mr Burke.

109. The different treatment of individuals was not an entirely clear allegation. Whatever the allegation, the decision to dismiss and uphold the dismissal was not done because of the protected disclosure.

Claimant's submissions

110. The claimant's submissions were that an adverse inference should be drawn from the failure of Mr Purohit to attend as a witness and no explanation being given when he could give material evidence.

111. Turning to the list of issues, the claimant contended that there was a strained but professional relationship between Mr Purohit and the claimant, which got worse

following the protected disclosure. Mr Purohit was trying to find out who had complained about him, which was a breach of the respondent's whistleblowing policy, for which nothing was done.

112. Mr Lampon gave the impression he had liaised with Mr Burke but in cross examination confirmed that this was on just one prior occasion. His email was not neutral, and was not asking for support. Nothing had been raised with the claimant prior to approaching Mr Burke.

113. The Jhuti case confirms that where a manager hides the true reason for a dismissal behind poor performance, which is adopted by the decision maker, this can form the basis of an automatic unfair dismissal claim succeeding. The protected disclosure was accepted by both parties, and the Tribunal had a duty to look behind the investigation and find that the true reason here was the claimant's protected disclosure. The investigation would not have happened without Mr Purohit's involvement.

114. Turning to ordinary unfair dismissal, the respondent did not carry out a reasonable investigation. It was one sided, the claimant was not spoken to. There was a false narrative in the email of 22 July 2021 and Mr Purohit's email of the same day.

115. The claimant was suspended for 7 months without knowing the allegations against him. Then was given 4 days' notice of the disciplinary hearing. Mr Harkin was then removed as disciplining officer and Mr Moran was brought in. He did not allow the claimant more time to read the documentation, which he acknowledged in cross examination he should have done. He had not taken into account comparators and had only assessed the claimant's actions.

116. It was accepted that Mr Moran had a genuine belief in the claimant's misconduct, but that it was not reasonable to sustain that belief. The guidelines are not sufficiently clear, and Mr Moran had accepted in cross examination that the claimant knew the companies

in his personal capacity. He made his decision based on personal sentiments and not the wording in the Guidelines/ policies.

117. The decisions therefore fell outside the range of reasonable responses. The claimant had been treated inconsistently with others, including Mr Purohit who had committed far worse.

118. As to the detriments claim, it was noted that the claimant was to be given further management responsibilities, but this came to a standstill by July 2021, despite the claimant's attempts to take this forward.

119. The claimant had been subjected to a detriment by being treated differently to others within the respondent's organisation.

Conclusion

120. The panel came to these conclusions unanimously, having found the facts outlined above and having carefully considered all of the evidence, the legal principles summarised and the submissions of both parties.

121. We note that it was accepted that the claimant made a protected disclosure on 20 July 2021 when he contacted Mr Thomas about his line manager, Mr Purohit's alleged breach of Covid guidelines.

122. In considering whether this protected disclosure was the reason or principal reason for the dismissal, we took into account the evidence of the dismissing officer, Mr Moran, and the appeal officer, Mr Smyth, who we found to be honest and compelling witnesses.

123. They did not know of the claimant's protected disclosure at the time of the claimant's dismissal and/or appeal and we accept that to be the case. The reason for their decision to dismiss and to uphold that dismissal was because they considered the claimant had committed gross misconduct by accepting the "gifts" of expensive vehicles from a company, without declaring this in accordance with the respondent's policies.

124. We considered whether the case of Jhuti had any effect on our decision. We do not accept that this is a case which is similar to the case of Jhuti. Mr Moran and Mr Smyth were provided with clear evidence on which to base their decisions. This is not a situation where the decision-makers were deceived into dismissing the claimant and/or upholding his dismissal. Further, the dismissing officer and appeal officer were not provided with the email which Mr Purohit had arranged to be sent to Mr Burke nor his follow up email. Mr Burke is senior to Mr Purohit in any event, and the reason for dismissal was not an invented one but one which was based on Mr Burke's independent investigation.

125. Therefore, we are satisfied that the reason for the claimant's dismissal was conduct and that the protected disclosures formed no part of the dismissing officer's reasons for dismissal. Therefore, the automatic unfair dismissal claim must fail.

126. For the ordinary unfair dismissal claim, we accept, as stated above, that the reason for the claimant's dismissal was conduct, which is a potentially fair reason for dismissal. We have to consider whether the dismissal was fair in accordance with section 98(4) ERA.

127. In considering the leading case on conduct dismissals, BHS v Burchell, we find that the respondent had an honestly held, genuine belief that the claimant had committed acts of misconduct, something which appeared to be accepted by the claimant in closing submissions.

128. We find that this belief was based on reasonable grounds. Both Mr Moran and Mr Smyth based their decision to dismiss on the provision of valuable cars to the claimant, which was not disputed by the claimant, and for which he had not completed a Declaration of Interest form.

129. Whilst the claimant's representative directed Mr Moran and Mr Smyth to the wording

of the respondent's Guidelines and policies, and suggested that these did not support the decision to dismiss, we accept that the respondent had reasonable grounds upon which to base the decision to dismiss the claimant.

130. We accepted the evidence of the respondent that employees within its organisation talk about potential conflicts of interest and impartiality decisions every day with the Editorial staff. Both Mr Moran and Mr Smyth could not understand how the claimant could not see the potential for problems and breach of the respondent's guidelines and policies in accepting such expensive cars. In their minds, whether the donation of the cars was personal or commercial, there was a serious risk of bringing the respondent into disrepute, particularly in light of the political backdrop in which the respondent was working.

131. The respondent had carried out an independent investigation, whereby Mr Burke undertook a review of the claimant's social media posts during the period October 2020 and July 2021 and identified commercial "*shout outs*", which then resulted in a search of the claimant's BBC email account against key words. This was within the range of procedures and investigations which an employer acting reasonably might adopt.

132. We are therefore satisfied that the information available to the respondent after the investigation, was sufficient for the respondent to form a reasonable belief that the allegations were made out.

133. As to the additional points relied upon by the claimant to show that the process and/or decision fell outside the range of reasonable responses, we deal with each in turn:

134. Firstly, we accept that it took 7 months for the claimant to be informed of the specific allegations against him. He knew what he had been suspended for, but not the actual allegations until the invitation letter was sent to him. This was a very long time for the claimant to have to wait. We acknowledge that the claimant was signed off sick

following his suspension, and that he submitted a grievance, although the latter does not appear to have affected the disciplinary process. However, we do not consider that the delay in handling the disciplinary affects the fairness of the process.

135. It is apparent that the first disciplinary officer was replaced by Mr Moran. We consider that this was appropriate in the circumstances, as it was clear from the minutes of the aborted disciplinary hearing that Mr Harkins was not able to deal with the claimant's hearing. Therefore, this again does not affect our decision on the reasonableness of the process.

136. We do not accept the claimant's assertion that the investigation was defective. As stated above we find that this was within the range of reasonable investigations.

137. There were no truly parallel individuals relied upon by the claimant in showing that he had been treated inconsistently with others. As explained in our findings of fact, the comparators relied upon were either different in status, had not carried out similar conduct to the claimant and, in one case, had completed a Declaration of Interest form.

138. We find that there was not a breach of the ACAS code such as to render the dismissal procedurally unfair.

139. We therefore find that summary dismissal was within the range of reasonable responses open to the respondent in light of its belief that the claimant had committed the conduct relied upon.

140. Turning to the detriment claim for making protected disclosures, we do not find that the claimant was subjected to any detriment in relation to promotion and/or development opportunities. Whilst the claimant applied for promotion for which he was not successful, there was no guarantee of acting up and/or development opportunities. We accept that the claimant had been told prior to his protected disclosure by Mr Purohit that he wished to find a longer term solution to the management of the Sports team.

We do not accept that the reason for the claimant being denied development opportunities and/or promotion was linked in any way to his protected disclosures.

141. It is clear that subjecting the claimant to a disciplinary investigation amounts to a detriment. It is also accepted that the claimant made a protected disclosure. Therefore, the respondent has the burden of proving the reason for the detriment. In order to succeed, we need to be satisfied that the protected disclosure was a material influence on the employer's actions. It is not necessary for the protected disclosure to be the sole or even the principal reason for the detriment, it just needs to be more than minor or trivial.

142. We must say that we were troubled by Mr Purohit's involvement in the email to Mr Burke which prompted the disciplinary investigation, and that he suspected the claimant and/or one other person of complaining about his alleged breach of Covid guidelines. However, we are satisfied that the initial complaint was not prompted by Mr Purohit, but by Ms Haywood and other employees within the claimant's team.

143. Mr Purohit directed Mr Lampon to send the email to Mr Burke, and the email was not neutral in its terms, however, this email was drafted by Mr Lampon and not Mr Purohit. Mr Burke could have decided that no action was required in respect of the claimant's alleged conduct, as he had done on one previous occasion when Mr Lampon had raised concerns over another employee's posts. However, on seeing the posts attached to the email and reading the email from Mr Lampon, he considered that a disciplinary investigation was required. There was no suggestion that Mr Burke was aware of the claimant's protected disclosure.

144. We are therefore satisfied that the reason for the disciplinary investigation was because Mr Burke considered an investigation was required following his viewing the copy posts provided and Mr Lampon's email. The detriment must be more than just

related to the disclosure. There must be a causative link between the protected disclosure and the reason for the treatment such that the protected disclosure “materially influences” (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. We do not find that to be the case in respect of the disciplinary investigation.

145. Finally, the claimant’s assertion that he was treated differently and unfairly compared to his named comparators. We do not consider that the claimant was subjected to a detriment. The individuals relied upon were in materially different circumstances to the claimant such that it is not possible to say that the claimant had been treated differently or unfairly when considering their treatment. As we have found that there is no detriment strictly speaking we do not have to consider whether any such treatment was done on the grounds that the claimant made a protected disclosure. However, for completeness, we find that there is no causal link between the claimant’s protected disclosure and any such detriment.

146. Having found that the claimant’s claims fail and are dismissed, it is unnecessary to consider the out of time point raised by the respondent in respect of the detriment claims.

147. All claims are therefore dismissed, and the case management hearing to discuss remedy has been vacated.

148. We wish to add to this Judgment, our thanks to the representatives of both parties. Their professionalism and cooperation during the hearing greatly assisted the panel in considering this case.

Employment Judge Welch
20 May 2024

Judgment sent to the parties on:

...21 May 2024.....

For the Tribunal:

.....

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