EMPLOYMENT TRIBUNALS

Claimant: Mr P Fagan

Respondent: OCS UK & I Ltd

Heard at: Liverpool (CVP) **On:** 6 August 2024

Before: Employment Judge Horne

Representatives
For the claimant: Mrs J Fagan, claimant's sister-in-law
For the respondent: Mr J Bryan, counsel

A judgment signed by Employment Judge Horne was sent to the parties on 8 August 2024. The claimant requested written reasons for the judgment in accordance with rule 62 of the Employment Tribunal Rules of Procedure 2013 (now rule 60 of the Employment Tribunal Procedure Rules 2024).

REASONS

Delay

1. I apologise for the length of time it has taken to send these reasons to the parties. This was caused by my commitment to a long-running case that started shortly after the hearing in Mr Fagan's case, followed by the pressure of cases in a different jurisdiction. Although I explained to the claimant why he lost at the conclusion of the hearing, he has had to wait 7 months to see the reasons in writing. He should not have had to wait so long.

Complaints and issues

2. By a claim form presented on 25 April 2023, the claimant brought:
   2.1. a complaint of unfair dismissal, contrary to section 94 of the Employment Rights Act 1996 ("ERA") and alleged to be unfair within the meaning of section 98 of ERA; and
   2.2. a claim for damages for breach of contract by failing to give notice of termination (wrongful dismissal).
3. It is common ground that the respondent dismissed the claimant without notice after the claimant had been continuously employed for more than 2 years. The

reason given to him was his alleged conduct in having controlled drugs with him at work.

4. The issues in the unfair dismissal complaint are:

   4.1. Can the respondent prove that the sole or principal reason for dismissal was the respondent's belief that the claimant had controlled drugs with him at work?

   4.2. If so, did the respondent act reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant?

5. There is only one issue in the wrongful dismissal complaint. I have to decide whether the claimant committed gross misconduct by having controlled drugs with him at work. Gross misconduct by an employee has the effect, legally, of entitling an employer to terminate the contract of employment by accepting a repudiation of it. In the absence of gross misconduct, an employer who wants to terminate the contract is required to give contractual notice.

6. Further issues would arise if either complaint was well-founded.

Facts

7. The respondent is an outsourcing company. It provides facilities management services across multiple sites, managed from its central office in Bury St Edmunds. I do not know how many employees it has. One of its clients is Morrisons.

8. The claimant was employed by from 10 November 2019 until he was summarily dismissed on 10 February 2023. At the times with which we were concerned, his employer traded under the name, "Atalian Servest". Whatever the precise name of the employer at that time, it is common ground that the respondent bears the legal liability for the claimant's dismissal from his employment with that entity. I shall refer to it as "the respondent" for simplicity.

9. The claimant describes his role as "supervisor". For present purposes I will assume that this was his role title. He worked at Morrisons' site in Colne, Lancashire. At the times relevant to this claim, he belonged to a team reporting to the Hygiene Manager, Miss Victoria Costello, who was permanently based at Morrisons. In Miss Costello's opinion, the claimant was one of the best employees on site.

10. In January 2022, the respondent updated its disciplinary policy. Paragraph 10 of the disciplinary policy gave a list of examples of gross misconduct. One of those examples, at paragraph 10.1.17, was "possession…of illegal drugs". It is unclear whether the revised policy was brought to the claimant's attention. It does not matter. At all times the claimant knew and expected that an employee would lose their job if they were found to have brought illegal drugs onto the Morrisons site.

11. On 28 November 2022, the claimant was suspended. The conversation began in a smoking shelter where colleagues could hear what the conversation was about. The reason given to him was that he was suspected of having dropped illegal drugs.

12. The same day, Morrisons' Site General Manager, Mr Ian Mallard, e-mailed the respondent's General Manager, Mr Neil Costello, the e-mail read:

> "I've just been made aware of a … colleague having dropped the attached bag of (I'm suspecting) drugs in the canteen. The People Team have conducted a CCTV check and have confirmed the colleague to Vicky

> [Costello]. From a personal and professional point of view I cannot abide drugs. It is sad that a colleague feels the need to brings drugs into site and potentially be under the influence whilst working in an environment like ours. I'm sure your process will bring this out in the wash. The colleague will not be allowed back on site (we would follow the same process with a Morrisons member of staff)."

13. Embedded within the e-mail was a photograph of a small transparent zip-lock bag appearing to contain crystalline powder. There was no label on the bag.
14. Ms Costello was allowed to watch video footage in Morrisons' security room. She was shown a clip of the claimant in the canteen. She reported that the footage appeared to show the claimant dropping a white package.
15. The claimant was given written confirmation of his suspension by e-mail on 2 December 2022. He was instructed not to go to the Morrisons site.
16. By e-mail dated 14 December 2022, the claimant was invited to an investigation meeting with Miss Costello. At that stage, the claimant was still unable to view the CCTV footage. This was because it was only accessible using Morrisons' security equipment. That equipment was based on site, from which the claimant had been excluded. The respondent did not have a copy to download for itself, let alone forward to the claimant.
17. An investigation meeting took place on 19 December 2022 between the claimant and Miss Costello. The venue was a local hotel. Miss Harris took notes remotely on behalf of the respondent.
18. The notes read, relevantly,

> PF It was a Monday, I walked in at normal, 2pm went to get food, the same routine every day, I get food from the canteen, checked my fob it had 40p on, went downstairs put money on my fob and came back upstairs, got food and went back downstairs to the smoking shelter and spoke to Barry. The next minute Kyle came over and said can I have a word, I need to escort you off site. Drugs were found, and I said I wasn't carrying drugs. Not in my life.
> …
> I carry my phone, fob, and a pen. Sometimes I have salt and pepper to eat chips on our breaks. VC You have salt and pepper sachets in your pocket?
>
> [It was put to the claimant that it looked as if something had fallen from his pocket.]
>
> PF The only thing that could of fallen was salt or pepper. The salt is a small white packet and the pepper is brown.

19. On 3 January 2023, Miss Harris sent the investigation meeting notes to the claimant and asked him to review them. She chased him for a reply on 11 January 2023.
20. By 12 January 2023, Miss Harris had asked Miss Costello to speak to Morrisons to enquire whether the claimant would be allowed on site to view the CCTV footage.

It is unclear whether Miss Costello actually made that precise enquiry or not. What we do know is that the claimant was never allowed back onto site. We also know that on 16 January 2023, Miss Costello confirmed that she had requested the footage. Morrisons' Data Protection Team provided an update on 25 January 2023. According to their update, there had been a technical hitch in downloading the images. A copy of the footage was provided to Miss Costello the same day. She tried to e-mail the footage to the claimant in the form of attachments to three e-mails. Two of those e-mails failed to deliver. With IT support, she managed to compress the files. The compressed videos were successfully e-mailed to the claimant on 30 January 2023.

21. On 30 January 2023, the claimant provided his comments on the investigation meeting notes. He stated that there appeared to be "conversation missing". He did not mention anything in particular that had been left out. On 1 February 2023, the claimant e-mailed to say that he had only just seen Miss Harris' e-mail about the meeting notes which she had sent on 3 January. He attached some still frames from the footage which, he claimed, "clearly shows something stuck to my shoe and then has dropped off whilst I was walking". This e-mail was also silent about what ought to have been included in the original minutes. In response, Miss Harris provided an amended version. This contained a summarised discussion about CCTV.

22. By letter dated 31 January 2023, the claimant was invited to a disciplinary meeting. The letter stated that the disciplinary allegation was "Gross Misconduct – Possession of illegal drugs on site". One of the stated possible outcomes of the meeting was dismissal.

23. After an initial postponement, the disciplinary meeting took place on 6 February 2023. The reason for the postponement was to enable the claimant to be accompanied by his sister-in-law, Mrs Fagan.

24. The disciplinary meeting was chaired by the respondent's Operations Manager, Mr O'Brien.

25. In advance of the meeting, Mr O'Brien watched the footage over 30 times. His version of the footage was of better quality than the compressed video files that had been sent to the claimant. He formed the view, watching the footage, that it did not show the claimant walking the white object into the canteen on the sole of his shoe. Rather, he thought it showed a white package falling from the claimant's hand and falling to the floor. His viewing software allowed him to zoom in, so that the CCTV images were magnified. He zoomed into the object on the floor. To his mind, it resembled a clear bag containing white powder. It did not look like a salt sachet.

26. Mr O'Brien discussed the footage with Mrs Fagan during the disciplinary meeting. For the most part, the conversation was focused on what the footage showed. Mrs Fagan did not accept that it showed anything falling from Mr Fagan. As they talked, Mr O'Brien played the footage on his own equipment and positioned it so that Mrs Fagan could see.

27. At no point during the disciplinary meeting did the claimant suggest that he had dropped anything that could be mistaken for a white package. He did accept that the CCTV showed a white object on the floor.

28. Once the meeting had finished, Mr O'Brien went back over their discussion and distilled 12 points that Mrs Fagan had made. He discussed each one with Miss Harris and summarised their response in writing.

29. Some of the points were of obvious importance to the claimant, but did not affect the decision that Mr O'Brien had to make. Points like these included complaints about the manner of the claimant's suspension, the lack of disclosure to the claimant prior to suspension, discussion amongst colleagues of information about the disciplinary allegations, and a perceived lack of welfare support.

30. The other points were:

    30.1. There was a delay of 2 months between suspension and the disciplinary hearing – Mr O'Brien believed that the main cause of the delay was the difficulty in obtaining the CCTV footage.

    30.2. The claimant had not had a companion at the investigation interview – Mr O'Brien was satisfied that it was not normal procedure for him to have a companion at that stage.

    30.3. Lack of postal communication to the claimant – Mr O'Brien believed, correctly, that correspondence had been successfully sent to the claimant by e-mail.

    30.4. The investigation notes were incomplete – Mr O'Brien was satisfied that the claimant had had a reasonable opportunity to make additions to the notes to include anything that had been left out.

    30.5. The investigation notes contained a checklist that had not been completed – Mr O'Brien's understanding was that the checklist was generic and the steps that were important to this particular investigation had been carried out.

    30.6. The CCTV footage did not show the claimant with his hands in his pockets – Mr O'Brien disagreed, and identified the point in time when the claimant's hands were shown in that position.

31. Mr O'Brien knew that the original report from Morrisons contained an embedded photograph of a zip-lock bag. If that had been the object that had fallen to the ground as the claimant was walking in the canteen, there would have to have been some footage of someone at Morrisons picking that item up. It would have been captured on the same CCTV cameras as the ones that showed a white item falling. Mr O'Brien never saw any such footage. He did not ask Morrisons to provide it. Mrs Fagan never suggested during the disciplinary meeting that Mr O'Brien should make that enquiry.

32. Mr O'Brien knew that the claimant had not undergone any tests for the presence of controlled drugs in his body. Nor, to Mr O'Brien's knowledge, had anyone else on the Morrisons site. The absence of such tests did not shake his belief that the claimant had controlled drugs with him. He was not alleged to have been under the influence of drugs. In Mr O'Brien's opinion, possession of the drugs on site was enough to merit dismissal.

33. Having addressed Mrs Fagan's points, Mr O'Brien made his decision. In his view, the claimant had dropped a package of white powder which he believed to be controlled drugs. He was aware of Morrisons' "zero tolerance" policy towards drugs on site. In his view, the claimant should be dismissed.

34. By letter dated 10 February 2023, the claimant was informed that his employment was terminated without notice.

35. The claimant appealed against his dismissal. He set out his grounds in an e-mail dated 13 February 2023. Those grounds were:

> "
>
> 1. I dispute that the cctv shows that the package falls from my hands.
> 2. The cctv shows something stuck directly underneath my shoe.
> 3. The alleged drugs package has not been tested to determine identification.
> 4. I have offered a drugs test from the beginning of the allegations and this has not happened.
> 5. No drugs tests in the workplace have taken place despite alleged drugs being found on site.
> 6. I have never received anything in writing, only a few emails relating to confirmation of investigatory meeting notes, to which most were not discovered for some time due to having dropped into my email junk folder.
> 7. I wasn't shown any cctv footage for 10 weeks.
> 8. I was suspended in a public place.
> 9. My suspension and disciplinary procedures did not follow the Acas Code of Practice.
> 10. I am disputing the answers I received from Anthony O'Brien in relation to the questions that Julia Fagan raised at the Disciplinary Hearing.
> 11. The Acas Code of practice has not been followed which means that the disciplinary procedure and subsequent outcome has been unfair. I refer specifically to:
>
> A. Nothing in writing
>
> B. Not providing for matters to be dealt with speedily. It took 10 weeks to deal with the allegations and in taking so long my mental health has suffered. This could be a breach of contract also.
>
> C. Management had not investigated fully before any disciplinary action was taken.
>
> D. Suspension was used as a sanction.
>
> E. I was not kept informed of progress.
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> F. I was not contacted by Atalian Servest with regard to the impact on my mental health despite a legal Duty of Care.
>
> G. Atalian Servest did not make clear that the suspension was not a disciplinary action.
>
> H. My suspension was in a public place and as a result the extreme distress was exacerbated.
>
> I. No support was offered to me at point of suspension or at any time afterwards.

> J. The investigatory meeting was unfair as I was being questioned on the cctv footage and I had not seen it at this point and not for 7 weeks after. It was a total of 10 weeks before I had even viewed it. I was asked questions at the investigatory meeting despite telling Victoria Costello that I had not seen the cctv. Victoria continued to question me with specific questions that relate to the cctv. I could not answer the questions fairly."

36. The claimant's appeal was heard by Paul Johnson, the respondent's Industry General Manager. Two appeal meetings took place on 8 and 22 March 2023. The claimant was accompanied by Mrs Fagan at those meetings.

37. The footage was played in the claimant's presence during the appeal meetings.

38. Amongst the points raised by the claimant were that there was no image of a falling package at the timestamp claimed by Mr O'Brien.

39. At the second meeting, Mrs Fagan asked Mr Johnson to delay his appeal decision until the claimant had received some evidence which he had requested directly from Morrisons. She told Mr Johnson that she was expecting the evidence to arrive "in the next couple of weeks", being 30 days from their request dated 15 March 2023. Mr Johnson agreed to postpone the decision until 14 April 2023.

40. Mr Johnson decided that the original decision to dismiss the claimant was sound. In brief:

    40.1. He did not think it was necessary for the package to have been forensically tested. He concluded that the contents were drugs from the fact that "a white, powder-like substance was found in a clear zip-lock bag with no documents referencing its origin". Mr Johnson understood that Morrisons had disposed of the white powder on advice from the police. It is not clear how he came by that understanding.

    40.2. Whilst it would have been better if the claimant had had access to the CCTV footage earlier, he had received a copy in advance of the disciplinary meeting, and had watched it during the disciplinary and appeal meetings.

    40.3. The claimant must have received and read at least one of the e-mails sent to him because he had replied to one of them on 4 January 2023 and had attended meetings on the dates notified to him by e-mail.

    40.4. Mr Johnson agreed that Mr O'Brien's findings did not fit with the timestamps on the CCTV footage. In Mr Johnson's view, however, the findings were consistently 2 seconds out. When allowance was made for the 2-second gap, Mr Johnson thought they were sound.

    40.5. Mr Johnson agreed with Mr O'Brien's observations about the relevance of drug testing and the investigation checklist.

41. Mr Johnson also dealt with points relating to welfare checks and the manner of the claimant's suspension, but this did not affect the decision under appeal.

42. On 14 April 2023, Mr Johnson e-mailed the claimant to inform him that his appeal had been unsuccessful. Unknown to the claimant, Mr Johnson had actually substantially drafted that letter on 24 March 2023. This was disingenuous on Mr Johnson's part, because the outcome letter made it look as if Mr Johnson had kept to his promise not to make a decision until 14 April. As it turned out, however, the

claimant did not provide Mr Johnson with any further material between 24 March and 14 April 2023.

Relevant law

Unfair dismissal

43. Section 98 of the Employment Rights Act 1996 relevantly provides:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
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> (a) the reason (or, if more than one, the principal reason) for the dismissal and
>
> (b) that is … a reason falling within subsection (2)....
>
> …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

44. One of the reasons listed in subsection (2) is a reason that relates to the conduct of the employee.

45. Where an employee has been dismissed for alleged misconduct, it is usual for the tribunal to consider:

45.1. Whether the employer genuinely believed that the employee had committed misconduct;

45.2. Whether there were reasonable grounds for that belief;

45.3. Whether the employer carried out a reasonable investigation; and

45.4. Whether the sanction of dismissal was within the reasonable range of responses.

46. Authority for the importance of these questions can be found in *British Homes Stores Ltd v. Burchell* [1980] ICR 303 and *Iceland Frozen Foods v. Jones* [1983] ICR 17. They do not, however, replace the test in section 98.

47. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

48. The tribunal must consider the fairness of the whole procedure in the round, including the appeal: *Taylor v. OCS Ltd* [2006] IRLR 613.

Wrongful dismissal

49. Where an employee repudiates the contract of employment, the employer may choose to accept the repudiation, bringing the contract to an end. This releases the employer from the obligation to perform the contract by giving notice of termination.

50. An employee repudiates the contract by committing gross misconduct.

51. Gross misconduct has been defined as conduct that "so undermines the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment." I have here quoted the words of Lord Jauncey in *Neary v. Dean of Westminster* [1999] IRLR 288. I have modernised the language by replacing the word, "master" with "employer" and "servant" with "employee".

52. It is for the court or tribunal to decide objectively whether the contract has been repudiated or not. Such a finding requires the tribunal to reach its own view of the employee's conduct, independently of the opinion of the employee or the employer.

53. The burden of proving gross misconduct is on the employer. The standard is the balance of probabilities. The more serious the misconduct that the employee is alleged to have done, the more cogent the evidence the tribunal will generally expect to see before the allegation is proved. This does not alter the standard of proof. It is just that tribunals will generally start from the premise that it is unusual for an employee to want to risk losing their job and getting a criminal record. Without persuasive evidence that the employee has engaged in such conduct, the tribunal would generally find it is more likely that it did not happen.

Conclusions – unfair dismissal

54. I am satisfied that the reason for dismissal was the belief held by Mr O'Brien and Mr Johnson that the claimant had had controlled drugs with him whilst at work. That was a reason that related to the claimant's conduct. It has not been suggested by the claimant that he was dismissed for any other reason.

55. I must therefore decide whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant.

56. Before reaching a view on this question, I must make an assessment of the respondent's size and administrative resources. Doing the best I can, I consider the respondent to be a large employer. It has multiple sites, a head office, and at least one very large business as a client. It has at least one layer of middle management in between supervisor and General Manager. It could be expected to devote substantial administrative resources to carrying out fair investigations.

57. I also bear in mind that the claimant was suspected of conduct which, if proved, could jeopardise not only his employment with the respondent, but his prospects of finding other work in the facilities management sector. This meant that the respondent would not normally act fairly unless it made a reasonable effort to look for evidence that could point towards the claimant's innocence, as well as evidence that would point towards his guilt.

58. In my view, the respondent's investigation was reasonable.

59. I start with an overview. There was an investigation meeting, a disciplinary meeting and two appeal meetings. At all stages, the claimant knew exactly what

was alleged against him. The claimant was accompanied by a representative of his choice at all of those meetings except for the investigation meeting. There is no statutory right to be accompanied at an investigation meeting, and the respondent's policies did not require a companion either. The reliability of the notes of the investigation was boosted by giving the claimant an early opportunity to read the notes and to correct them.

60. I agree with Mr Johnson that it would have been preferable if the claimant could have seen the CCTV earlier. The delay did not, however, take the investigation outside the reasonable range. The respondent had to conduct it within the confines of what their client would allow. The claimant was not permitted by Morrisons to enter the site to view the CCTV. Reasonable efforts were made to obtain the footage and convert it into a format accessible to the claimant. This was done within a reasonable timescale.

61. The claimant did not have the opportunity to watch and re-watch the footage with the same clarity and zoom facility that Mr O'Brien had. Again, the investigation would have been better if this had been possible. But the claimant did have the chance to look at the footage on Mr O'Brien's equipment during the disciplinary meeting and at the appeal meetings.

62. The respondent could not test the contents of the zip-lock package themselves, because the respondent never had it. I have found that Mr Johnson genuinely believed that Morrisons had disposed of the package, although I do not know what basis was for his belief. In those circumstances, the respondent had to try to decide whether the bag contained illegal drugs or not based on the circumstantial evidence of the packaging.

63. The respondent could have drug-tested the claimant. Had this been done within hours of his suspension, the result could have had some evidential value. A person who has no drugs in their body is less likely to have recently had drugs in their possession than somebody who tests positive for having consumed drugs. But I need to be realistic about the importance of this line of enquiry. A person who brings drugs to work will not necessarily have recently consumed them. They may have been saving them for later. They may not indeed have had any intention of consuming the drugs themselves.

64. The respondent could have requested CCTV footage from Morrisons showing the canteen during the interval between the claimant's departure from the canteen and the claimant's suspension. If the footage showed the white object being picked up from the canteen, it would strengthen the evidence in Mr Mallard's e-mail that the object on the floor was the bag of white powder shown in the embedded photograph. Conversely, if the CCTV showed that nobody had picked anything up from that spot, it would tend to suggest that the claimant had been framed.

65. In my view, it was reasonably open to the respondent to reach a decision without requesting that footage. The claimant never asked Mr O'Brien to make that enquiry. It was inherently implausible that Mr Mallard would want to concoct a story of finding a bag of white powder. There was no apparent reason why anyone would want to find a pretext for dismissing the claimant. He was one of the best-performing employees on site.

66. Both Mr O'Brien and Mr Johnson had reasonable grounds for believing that the claimant had dropped something white onto the floor. The CCTV showed a white

object falling from the claimant's midriff area just before a white object was seen on the floor. There were reasonable grounds for thinking that this was the same object that was shown in Mr Mallard's e-mail. It was also reasonable of them to conclude that the contents were controlled drugs. Mr Johnson did not need to see a forensic analysis in order to reach that conclusion. He was entitled to draw an inference about what the white powder was from the way in which it had been packaged. That inference could well have been resisted if there were some credible evidence to suggest that the powder was legitimate, but there was none. The claimant explained that the powder could have been salt. The packaging did not look like a salt sachet.

67. The respondent therefore had reasonable grounds for believing that the claimant had controlled drugs with him on site.

68. Once the respondent had reasonably formed that belief, dismissal was well within the range of reasonable responses. The claimant knew that an employee who had illegal drugs on site would lose their job.

Conclusions – wrongful dismissal

69. Before making my findings, I remind myself of the starting point: the respondent says that the claimant did something that it is highly unusual for employees to want to do. Nevertheless, in my view, it is more likely than not that the claimant had controlled drugs with him at the Morrison's site.

70. I have viewed the CCTV images for myself, frame by frame. One of the camera angles shows the claimant walking across the screen. The footage from that angle shows a white object falling to the floor as the claimant walks. On another camera angle the claimant walks away from camera. This angle shows the floor without the white object, then the claimant walking, then the object present on the floor.

71. The two camera angles triangulate. The time of the falling object is just before the time of the object being seen from the other angle. The locations are the same.

72. Like Mr Johnson, I cannot think of any legitimate purpose for the white powder in the sachet. None has been suggested, apart from table salt, which this powder clearly was not.

73. Having controlled drugs on site was conduct that would so damage the relationship of trust and confidence between the claimant and respondent that the respondent could no longer be expected to continue to employ the claimant.

74. This was gross misconduct: a repudiation of the contract. The respondent was therefore entitled to terminate the contract the contract without giving notice.

Approved by Judge Horne

24 March 2025

SENT TO THE PARTIES ON
16 April 2025

FOR THE TRIBUNAL OFFICE

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