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UK People, Reward and Mobility Newsletter

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IN THIS ISSUE

In this issue we look at some of the key employment law developments that have taken place over the past month. In particular, we examine a recent unfair dismissal case involving employee covert surveillance in the workplace. We also look at how HMRC plans to tackle non-compliance with the new off-payroll working rules and consider the practical steps employers should be taking now. With Stress Awareness Month just around the corner, we also discuss how employers can promote and safeguard the mental wellbeing of their workplace and, lastly, we consider the risks associated with employers providing employees with access to financial advice.

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Two key takeaways from *Northbay Pelagic Ltd v. Mr Colin Anderson*

In cases involving covert surveillance in the workplace, we are most often confronted with the issue of employers monitoring employees. This was not the case, however, in *Northbay Pelagic Ltd v. Mr Colin Anderson*. In this case, the Employment Appeal Tribunal (EAT) was tasked with deciding whether an employer was entitled to dismiss an employee who had set up covert surveillance to monitor the use of his computer during a period of suspension.

Where an employer is looking to fairly dismiss an employee under the Employment Rights Act 1996 (ERA), the employer must be able to: (i) demonstrate that the reason for the dismissal falls within one of the potentially fair reasons listed in s.98 (1) of the ERA; and (ii) convince the Employment Tribunal that they have acted within the band of reasonable responses by choosing to dismiss the employee.

Facts

Mr Anderson was an employee and director of Northbay Pelagic Ltd (Northbay) and also represented a minority shareholder. Following the breakdown of his relationship with fellow directors and members of management, the company hired three independent HR consultants to carry out investigations and disciplinary procedures into three different employees, including Mr Anderson. Mr Anderson was subsequently dismissed on five separate grounds of alleged misconduct. One of the grounds, and arguably the most noteworthy, was the fact that Mr Anderson had set up covert surveillance in his office (of which he had exclusive use) in order to determine whether any of his colleagues had entered his office during his absence, without his permission, and sought to access information from his computer. To justify the dismissal, the employer argued that Mr Anderson's actions threatened the privacy rights of other employees and contravened the Employment Practices Code on Data Protection, therefore amounting to misconduct.

Judgment

Upholding the decision of the Employment Tribunal, the EAT held that, in the particular circumstances of the case, the covert surveillance set up by Mr Anderson did not amount to misconduct and Northbay was not entitled to dismiss him on this ground. In arriving at this decision, Lord Summers relied on a number of key findings in fact, including that:

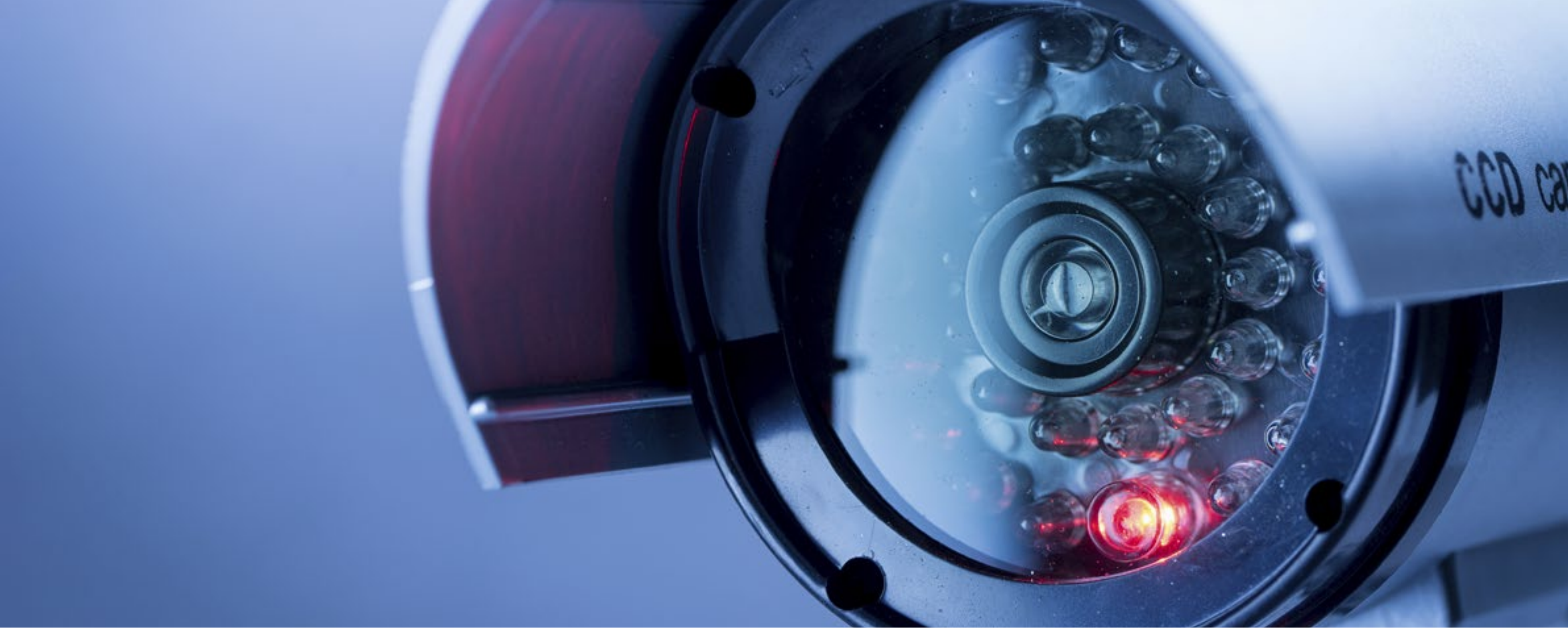
- the surveillance was limited to Mr Anderson's office only, and did not cover any communal areas within the workplace;
- no one was captured on the camera, and therefore no one's privacy rights had in fact been infringed;
- Mr Anderson was both a director of Northbay and a representative of one of its shareholders, and was also involved in other companies, and so had a number of different commercial and personal interests to protect; and
- there had become a fractured and somewhat spiteful relationship between the directors of Northbay and, as such, Mr Anderson had reason to believe his personal information may be tampered with during his period of suspension.

Importantly, the EAT noted that an individual's right to privacy is not an absolute right and that, in this case, the employer erred in only taking into account the privacy concerns of other employees within the business. Instead, the tribunal suggested that the employer ought to have carried out a balancing act to weigh up the potential threat to other employees' privacy rights against the interests of Mr Anderson in being able to protect his confidential information. In this instance, the threat to the privacy of others was low by virtue of the fact that the camera was set up in an office to which only he had access. The EAT therefore found that the particular circumstances of the case tipped the scales in Mr Anderson's favour.

A fair process?

The EAT's judgment has also helped to shed some light on an equally important procedural question: can an employer rely on a statement taken during the investigation of one employee, in deciding the outcome of *another* employee's hearing?

In short, yes. In this case, the HR consultant responsible for deciding the outcome of Mr Anderson's disciplinary hearing sought to rely on a statement she had taken during the investigation of another



employee. The EAT considered the ACAS Code and acknowledged that it is best practice for there to be a degree of separation between the investigation process and the disciplinary hearing, and that, where possible, these stages should be carried out by different individuals. However, the EAT was sympathetic to the fact that the ACAS Code does not account for situations where there are multiple, interconnected hearings. As such, the EAT concluded that:

"*There was no need for the investigation of the employees to be 'sealed off' from one another. It can be in the interests of accuracy and coherence that a statement from one witness can be used in several processes if it is relevant*."

The EAT took a very pragmatic approach here, also recognising that, from a resourcing perspective, it would be wholly impractical for employers to appoint different HR consultants to every allegation of misconduct against all employees under investigation. Therefore, whilst the EAT's overall decision was in favour of the employee, this particular aspect of the judgment will be very much welcomed by employers who find themselves conducting multiple, related investigations and hearings.

Conclusion

One of the most important takeaways from this case is that it does not give employees a blanket right to covertly monitor their workplace. Instead, this case should serve as a reminder to employers that covert surveillance set up by an employee does not *automatically* justify dismissal.

If an employer goes straight from the discovery of surveillance to the dismissal of the employee without first ascertaining the employee's motives and reasoning, the employer may find themselves responding to an unfair dismissal claim. Employers should therefore be mindful of the "5 Ws":

- Who is the target of the surveillance?
- What has the surveillance captured?
- Where has the surveillance been set up?
- When and for what duration has the surveillance been set up?
- Why has the surveillance been set up?

These contextual considerations can be used to help an employer conduct the necessary balancing act between the need to protect the privacy of their employees and the need to protect the legitimate interests of the individual conducting the surveillance.

The outcome of the case was, as ever, significantly influenced by the precise facts and circumstances. It will therefore be interesting to see whether future cases help to shed some further light on how and in what other circumstances the scales may be tipped in favour of the *employee* where covert surveillance is in question.

The second, and equally important, takeaway from this case is the much-welcomed commentary surrounding the question of procedural fairness in interconnected hearings. Employers can be assured that there is no need to "seal off" information in instances where they are faced with conducting multiple, interconnected disciplinary processes involving different employees. This should not only reduce the burden on the employer, but also make for a more consistent and coherent disciplinary process.

Ensuring compliance with off-payroll working rules: HMRC's policy

After a 12-month delay due to the COVID-19 pandemic, changes to the off-payroll working rules – officially known as IR35 – will finally come into effect from 6 April 2021.

As a reminder, IR35 concerns the tax status of an individual who provides services through an intermediary but who, without that intermediary, would otherwise be an employee of the end-user client. The changes will specifically affect large and medium size entities[1] (End Users) that engage workers through intermediaries (e.g. a personal service company).

What is the crux of the change? The responsibility for determining contractors' employment status for tax purposes will fall on End Users, rather than the individual contractors. This determination will not affect the contractors' status for employment law purposes but, if the contractors are deemed to fall within the IR35 rules, End Users will have to deal with paying contractors in the same way as their own employees, by deducting tax and employee National Insurance contributions (and paying them over to HMRC) prior to payment to the contractors and, crucially, paying employer National Insurance contributions on the contractors' fees.

This shift in responsibility is a major change for End Users, and the government has taken steps to help End Users and contractors prepare for the transition. The latest resource is HMRC's policy paper published on 15 February 2021, which confirms HMRC's approach to compliance.

Supporting compliance and challenging deliberate default

HMRC's general approach will be to support End Users who are trying to comply with IR35 (even in cases where an incorrect tax determination is made) and to challenge deliberate non-compliance (particularly in cases of suspected fraud or criminal behaviour).

1 Large and medium size entities are organisations in the private sector with an annual turnover in excess of £10 million and a workforce of 50 or more employees.

HMRC set out various measures it will take to support compliance, ranging from helping End Users identify and self-correct mistakes and monitoring patterns of non-compliance to better target additional support that might be required. The resources already established for End Users, such as the enhanced Check Employment Status for Tax (CEST) service (on the government website) one-on-one advice calls and webinars, will continue to be available.

As a further resource, the policy paper itself presents a variety of case studies to illustrate how HMRC will support End Users and deal with non-compliance. The case studies are useful examples of how the principles may apply in practice, although some questions are left unanswered (e.g. who is responsible for underpaid tax if an End User makes a mistake?). Relying on other resources, such as seeking guidance from legal advisers, is likely to be the most reliable way to fill these gaps.

Despite HMRC's latest guidance, some End Users may remain concerned that they might apply the IR35 rules incorrectly. HMRC seeks to reassure End Users by stressing that it will ensure genuine attempts at compliance do not lead to disadvantage. It will take a light touch approach to penalties for End Users genuinely trying to comply with IR35. To note, HMRC has specifically confirmed:

- there will be no penalties for inaccuracies relating to IR35 made in the first 12 months, even if the inaccuracy is identified after that period. However, penalties may be imposed if there is evidence of deliberate non-compliance;
- there will be no penalties for a mistake in applying the rules or making a status determination if reasonable care has been taken to avoid the mistake; and
- it will not use information it acquires thanks to the reformed IR35 to open a new compliance enquiry into returns for previous tax years, unless it has reasons to suspect fraud or criminal behaviour.

These points are good examples of HMRC's overall approach of supporting compliance, coupled with taking a hard line against deliberate default.

Despite its commitment to be lenient with End Users for the first 12 months of the new off-payroll rules, HMRC has promised that it will proactively challenge those who deliberately break them. It will monitor sectors known to engage large numbers of contractors, follow up on reports of non-compliance and investigate and challenge deliberate non-compliance or tax avoidance schemes. Depending on the circumstances, HMRC is prepared to name and shame deliberate defaulters.

What does this mean practically?

Overall, there are no major surprises in this policy paper, since it echoes what has been indicated in HMRC's previous publications on the IR35 reform. The policy paper is nonetheless a helpful reminder – in case this slipped one's mind after an unusual year – that the IR35 reform is imminent and the government will seek to support companies in adapting to the reform.

With April fast approaching and no further delay to the inception of the new rules in sight, companies are encouraged to press on with their final preparations for the IR35 reform. Companies can, at least to some extent, be assured that they will have a safety net while they find their feet, particularly given the 12-month penalty holiday in cases of genuine mistakes.

Given HMRC's confirmation that genuine attempts to comply with the rules will be met with leniency, it follows that companies should be thorough in documenting their assessments and any particular points of consideration in making that assessment. That way, should HMRC challenge the resulting tax determination, companies will be ready to demonstrate that reasonable care has been taken to comply with the new rules.

Further, in light of the support available, it is important companies keep abreast of any updates and where to find them since HMRC will expect companies to have taken its various resources into account. As with most changes, it helps to get oriented early on: try signing up for webinars, test out the online tool (Check Employment Status for Tax (CEST)) and keep some guidance notes from the government handy. Prepare now to make the most of HMRC's support.

Mental wellbeing in the workplace – getting the message right

For decades, there has been a taboo around mental health. The effect of this on the UK's workforce is often overlooked. As recently as 10 years ago, mental health was not something that most employers had on their radar, let alone promoted or prioritised. Staff were reluctant to talk openly about their mental wellbeing for fear of damaging their career prospects, being ridiculed, or, possibly worse, ignored entirely.

However, there has been a sea change. We are now seeing a real shift towards employees talking about mental wellness. Driving this change could be the arrival of Gen Z, who have no qualms in using outlets such as social media to widely broadcast their mental health struggles, opening up the conversation to people of all ages.

How does this change affect employers?

Around one in four people will experience a mental health problem every year, and absences relating to mental health are currently the most common cause of long-term workplace sickness absence in the UK. According to research published by the Centre for Mental Health, these absences cost employers almost £35 billion last year. And with work being listed as the most stressful factor in people's lives, according to a poll by mental health charity Mind, employers need to lead the way in tackling this issue.

The onset of COVID-19 and subsequent UK lockdowns have put a spotlight on the problem. Over the past 12 months, employees have suddenly been faced with restricted ways of working, long-term isolation from colleagues and uncertain job security. In 2020, 79% of British workers reported commonly experiencing work-related stress. This figure is up 20% from 2018, a not insignificant increase.

EDITOR'S TOP PICKS OF THE NEWS THIS MONTH

- IR35 – HMRC's approach to support and enforcement
- Whistleblowing: applying the public interest test
- UK legislative amendments expand health and safety protections to workers
- Dismissal for refusing to wear a face mask can be fair

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What obligations are there on employers?

All employers have a legal duty of care towards their staff, which requires them to safeguard their health, safety and wellbeing. Whilst traditional "health and safety" at work rules do not immediately bring to mind mental health, this is arguably the biggest occupational threat to employee wellbeing at the moment. The pandemic has not helped and, with most employees currently working from home, it becomes even more difficult for employers to pick up on warning signs from those who are struggling.

In many cases, mental health issues will fall within the meaning of a "disability" under the Equality Act 2010. Where that is the case, the employee will have additional legal protections and the employer will be expected to make reasonable adjustments to support the employee in the workplace.

Employers who fail to appropriately safeguard against these mental health risks open themselves up to claims for personal injury, discrimination and unfair or constructive dismissal claims, in addition to incurring the costs of lost productivity, staff turnover and sickness absence. You do not have to look far to find examples – in 2020, Elizabeth Aylott won an Employment Tribunal claim against her former employer after her bosses failed to reduce her workload, despite her mental health struggles. Ms Aylott has now been awarded losses of £168,000 – an expensive lesson for her employer to learn in the public forum.

If further incentive is required, studies also show that employers who are championing mental wellbeing are seeing positive results, both in terms of employee satisfaction levels and financial success. A study by Mind found that 60% of employees would feel more motivated if their employer showed support for their wellbeing, and businesses that champion mental health have also been shown to have increased productivity, by up to 40% in some cases!

What steps should employers be taking?

There are a number of ways that employers can actively promote mental wellbeing, despite the ongoing lockdown in the UK:

- **Create the right culture**. Businesses should start by encouraging staff at all levels to be open about their mental health experiences. A recent survey by Mind revealed that one in five people felt unable to tell their boss if they felt overly stressed at work. Normalising conversations about mental health at one-to-one catch-ups will allow employers to routinely identify any areas where support might be needed at an early stage.
- **Promote resilience**. Where possible, prevention is better than cure. Encourage staff to work on building up their resilience. This might include doing things that support good mental health, such as exercise or eating healthily.

- **Consider workplace adjustments**. These might help to alleviate the pressure on an employee who is experiencing mental health issues. Adjustments can take a variety of forms, but might include providing increased supervision, extra training or mentoring, help with workload or even assigning vulnerable employees a "buddy" to monitor how they are coping.
- **Invest in training**. Managers should be provided with regular training designed to help them recognise warning signs of stress. For many managers, this is not something with which they will be familiar or comfortable, so exposing them to training and guidance on how to approach these conversations will help to build confidence.
- **Get creative**. Small gestures, such as providing external financial advice to help manage day-to-day living costs and encouraging an end to unhealthy habits like working late nights, can all help. Some organisations even encourage employees to create "quiet rooms" at home, where employees can go to relax and reduce their stress levels during the working day.
- **Publish your values**. Having a policy on mental wellbeing is important, but publicly standing behind it is even more so. If key stakeholders in the business are seen to promote a policy designed to support mental wellbeing in the workplace, those values will filter down to employees at all levels and drive real change.
- **Ask the right questions**. No one gets it right straight away, but employee surveys can be a great way to benchmark their views in relation to an organisation's approach to mental health, as well as highlight areas that staff feel require more work.

What next?

Changing an organisation's approach to mental wellbeing in the workplace does not have to be complicated, and there is no fixed approach to tackling the issue. What is clear, however, is that now more than ever employers need to be alert to the prevalence of mental health issues in the workplace, and foster a culture where mental health is openly prioritised and discussed without stigma. Those businesses choosing to invest in and champion the mental wellbeing of their staff will be leading the way for years to come, both financially and in terms of staff engagement.

Should employers provide employees with access to financial advice and pay for it? The risks and pitfalls…

Background

Employers are increasingly providing employees with access to independent financial advice to support their financial wellbeing. To encourage greater employee take-up, employers may also pay for that advice. In particular, this is the case in relation to pension matters, given that the employer's pension arrangement is likely to be the most valuable benefit to the employee.

In recent years, there has been a marked increase in "pension liberation" fraud. This is where employees have been persuaded to transfer their pension benefits to an unregulated scheme, usually with the promise of being able to access their pension before the age of 55 (the minimum age that a pension can generally be paid), with penal tax charges for the employee and loss in pension savings. This has again emphasised the importance of the employer in supporting employees to have access to an independent financial adviser (IFA).

The benefits to the parties are clear. Employees will have access to an IFA on whom it is to be expected that the employer will have carried out due diligence, instead of being left to find one for themselves in the market. Employers may be able to negotiate better commercial terms where they engage a particular adviser than where they are paying towards an IFA of an employee's choice.

There are, however, risks for the employer if the employee suffers a loss as a result of negligent advice given (or fraud) by the IFA.

Employer duty of care

All employers owe a common-law duty of care to their employees. Employers have a duty to ensure the health, safety, welfare and mental wellbeing of their staff. This duty of care extends to provision of information, instruction and training, and is a personal, non-delegable duty. It cannot be discharged by entrusting the safety of one employee to another, or to an independent contractor.

Therefore, where an employee has suffered a loss as a result of negligent advice given by an IFA, the employee could make a claim against the employer. The employee could try to argue that the employer has breached its duty of care, where the employee's loss is attributable to any neglect on the employer's part when selecting and engaging the IFA and monitoring the suitability of the IFA after its engagement.

Can the employer be vicariously liable?

An employer can be vicariously liable for the actions of its employees or agents. It is difficult to establish that an employer has an employment relationship with the IFA, as the IFA would generally be a company independent of the employer carrying out its own independent business.

An employer could, however, be vicariously liable for its agents.

In the case of *Frederick & ors v. Positive Solutions (Financial Services) Ltd* [2018] EWCA Civ 431, the court considered whether an employer was liable to its employee for the fraudulent actions of an IFA whom the employer had engaged. In this case, the employee (and his family) of Positive Solutions remortgaged their property to invest in a fraudulent investment scheme set up by the IFA that had been engaged by the employer and, as a result, lost all their money.

In the first instance decision, the court decided that the employer, Positive Solutions, was vicariously liable for the loss caused by the agent. Although the IFA was not an employee of Positive Solutions, Positive Solutions had assumed the liability for the actions of the IFA when recommending it to its employee. The decision was overturned on appeal.

To determine vicarious liability, outside an employment relationship, the court considered the following tests: (a) was harm wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by the defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party); and (b) was the commission of the wrongful act a risk created by the defendant by assigning those activities to the individual in question? The Court of Appeal held that the employer could not be held vicariously liable for the loss the employee suffered because: (i) the misappropriation of the monies by the IFA was not done in any way as an integral part of Positive Solutions' business activities; and (ii) it did not occur within the course of the IFA's agency. In addition, the employer was unaware of the agent's acts which meant that the second stage of the test to establish a duty could not be satisfied.

The case highlights that the bar for establishing that the employer is vicariously liable for the actions of an IFA is quite high.

Steps employers can take to mitigate risks

- The key step that an employer could take to mitigate its potential liability is to carry out its due diligence on the IFA. This should be done not only before appointment, but also throughout the engagement of the IFA by the employer. If, at any time, the employer becomes aware of any negligent advice (and certainly of any fraudulent activity by the IFA), it should consider terminating the arrangement.
- Although clearly relevant factors, selecting an IFA purely on the basis of price, or because a previous business relationship exists between the employer and the IFA, should be avoided. Selection should be on the basis of wider, careful and documented due diligence.
- Checks should be carried out that the IFA is, and continues to be, authorised by the FCA. An employee could be entitled to compensation of up to £85,000 from the Financial Services Compensation scheme in certain circumstances, where the IFA is FCA registered.
- The employer should make it clear to its employees that the selected IFA is not the only option available on the market and that there are other IFAs that can provide similar services. The employer should also state that it does not personally endorse any independent advice provided by the IFA and will not be liable for the advice.
- Where the employer is paying for the advice, it should also consider offering to pay/make a (fixed) contribution to an IFA of the employee's choosing. This would avoid any argument that the employee had been encouraged or induced to use the employer's IFA only.
- The terms of the agreement with the IFA should be considered carefully:
  - The termination provisions should be flexible enough to allow the employer to terminate the agreement without delay where negligent advice has been given, or immediately where there is evidence of any fraud or the IFA ceases to be FCA authorised.
  - Cross indemnities. In *Frederick & ors v. Positive Solutions (Financial Services) Ltd* [2018] EWCA Civ 431, the Court of Appeal held that the indemnity from the IFA in favour of Positive Solutions did not impact on the issue of whether Positive Solutions was vicariously liable. It is not unusual for IFAs to seek indemnities from the company. These should be resisted on commercial grounds (the IFA is getting paid for the advice it provides and must accept liability) but also because it could be compromising the independence of the IFA (i.e. if the employer is effectively standing behind any liability the IFA could owe to the employee).

The pensions angle

In the context of pensions, the law actually requires an employee to obtain appropriate independent advice when transferring any defined benefits they may have to a money purchase arrangement, where the benefit is valued at £30,000 or more.

Where the transfer is employer-instigated, employers must pay for appropriate independent advice where they, or the trustees of the pension scheme, write to the members and set out the option to transfer in terms that encourage, persuade or induce a request to transfer.

The Pensions Regulator has issued guidance for employers in this area, which employers should aim to follow.

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