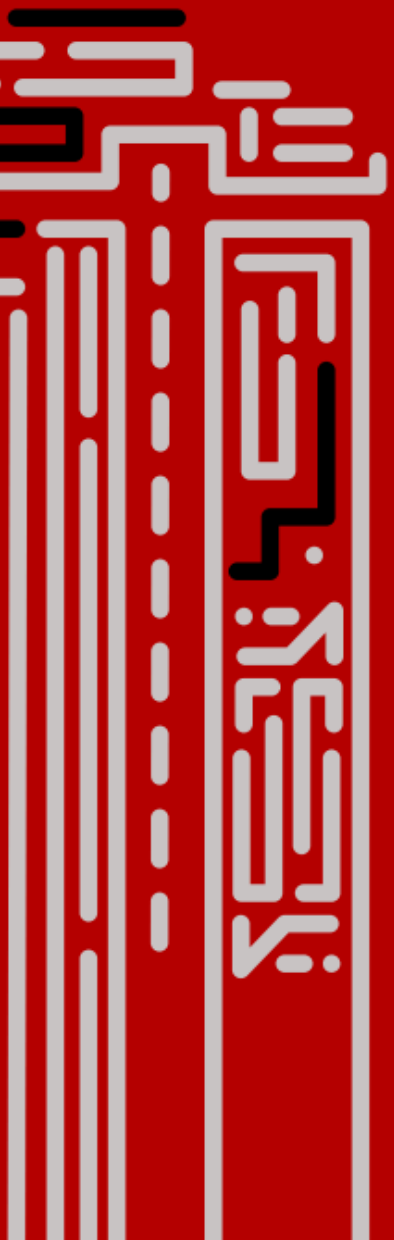
MUNYAO, MUTHAMA & KASHINDI
ADVOCATES & COMMISSIONERS FOR OATHS

Legal Alert:

A digest of a recent decision by the Supreme Court of Kenya on the employer's duty to reasonably accommodate sick employee, indirect discrimination at the work place and employee's right to be heard before termination of employment

"…the onus was on the Respondent to investigate the extent of the incapacity or the injury and all the possible alternatives short of dismissal… The Respondent also failed to demonstrate that they tried to accommodate the Appellant in his current state. As such, these actions by the Respondent amounted to indirect discrimination due to differential treatment."



Introduction

Samuel Gitau Gichuru versus Package Insurance Brokers [2021] eKLR (Petition No. 36 of 2019)

The Supreme Court of Kenya [Mwilu (DCJ & VP), Ibrahim, Wanjala, Njoki & Lenaola, SCJJ] in a decision delivered on 22nd October 2021 held that an employer must provide reasonable accommodation to a sick or incapacitated employee or to demonstrate that they would incur undue hardship in providing such accommodation. The court concluded that the employer's failure to reasonably accommodate the employee amounted to indirect discrimination. The court also addressed an employee's right to be heard before termination of employment for incapacity.

Brief facts of the case

The Appellant, Samuel Gitau Gichuru was employed by the Respondent (also referred to as the employer), Package Insurance Brokers, as the Operations Manager in January 2010. In November 2013, he was diagnosed with a tumour and had to undergo spinal cord surgery in India as per his doctor's recommendation. He returned in mid-January 2014. During this time, he was receiving his full salary. The employer increased his salary in February 2014. After treatment, Samuel returned to work. Shortly thereafter, his employer noticed that Samuel was having some difficulties, as he could not move around unaided. On 14th April 2014, the employer wrote to Samuel requesting him to proceed on sick leave until such a time when he could move around the office unaided. In that letter, the employer also asked him to produce a medical report from his doctor.

Due to Samuel's failure to submit the medical report, his employer wrote to him on 22nd May 2014 raising this concern as well as their intention to suspend him unless he produced the report within 30 days. Samuel availed his medical report six days later. The report recommended that he was to resume duty in two months. Subsequently, the Respondent suspended Samuel on 23rd June 2014. Samuel was aggrieved by this decision. He was convinced that his employer disregarded his doctor's recommendation. He wrote to his employer challenging the suspension and terming it as unfair termination disguised as suspension. The Responded denied these allegations.

On 1st August 2014 the Respondent sent Samuel a termination letter stating that they had carried out investigations which revealed that he had covered up for non-performing accounts which was contrary to the employer's policy and that he had irregularly invited brokers to renew their insurance policies. Aggrieved by the dismissal, Samuel filed a suit for unlawful and unfair termination at the Employment and Labour Relations Court.

Proceedings before the Employment and Labour Relations Court

Samuel's case was that the termination was discriminatory and unlawful. He asserted that it was a feeble attempt by the Respondent to justify constructive dismissal. The Respondent contended that it had done everything in its power to support him and facilitate his treatment. It had also given him a pay rise despite his previous absence from work. It maintained that he delayed in submitting the medical report. It also contended that Samuel's inability to move compromised his capacity to work and it needed to take into account the company's business interests.
The matter was heard and determined by Ndolo J who found that the Respondent had discriminated against Samuel on account of his illness. The judge held an employer is entitled to dismiss an employee on medical grounds but due procedure must be followed. The judge also held that the Respondent was under an obligation to facilitate a decent and humane way of Samuel's exit given that he was evidently unwell. The judge held that the Respondent had failed to follow due procedure. The reasons for termination were poor performance, misconduct and on medical grounds. These should have been ascertained by a clear procedure. The Court entered judgment for the Claimant totaling to a consolidated sum of KShs.7, 781,450/=plus costs and interest made up of;

a. KShs.5,000,000/= as damages for discrimination;
b. 12 months' salary in compensation for unlawful and unfair termination of employment in the sum of KShs.2,384,100/=;
c. One (1) month's salary in lieu of notice at KShs.198,675/=: and
d. Salary for the month of July 2014 at KShs.198, 675/=.

The Respondent was aggrieved by this decision and it filed an appeal at the Court of Appeal.

The decision of the Court of Appeal

On the issue of discrimination, the Court of Appeal (Waki, Makhandia & Sichale, JJA) did not agree with the trial court. The court took the position that the fact of the matter was that Samuel was unwell and he still needed medical attention that hampered his performance. According to the court, it was on account of ill-health that Samuel could not perform like other employees who enjoyed good health. It is not that all employees of the Appellant were sick and that Samuel was singled out for dismissal vis-à-vis other sick employees.

The Court of Appeal added that Samuel was not given differential treatment from other sick employees, and being the only one who was sick, he could not be heard to say that he was discriminated against. The court concluded that there was no discrimination and that if anything, it would appear that the employer-supported Samuel in the course of his treatment.

On the issue of unfair termination, the Court of Appeal found that Samuel was not afforded an opportunity to defend himself and was not taken through any disciplinary process as provided for in Sections 43 (1) and 45(2) of the Employment Act, 2007. The court thus held that the termination was unfair and unlawful.

In the end, the Court of Appeal partly allowed the appeal set aside the award of KShs 5,000,000 and reduced the 12 months' compensation of KShs.2,384,100/= to 8 months being the sum of KShs 1,589,400. The one month's pay in lieu of notice and the salary for the month of July 2014 were left undisturbed.

Samuel was dissatisfied with the decision of the Court of Appeal and appealed to the Supreme Court.

The decision of the Supreme Court

a) Indirect discrimination

Samuel's case was that he was subjected to discriminatory and undignified treatment due to his illness. The Respondent did not take any steps to accommodate his ease of movement. He was subjected to the same conditions as the other employees who were not ill. The Supreme Court rejected the argument that Samuel delayed in submitting his medical report. Even if he delayed, the Respondent would not have suffered any prejudice by considering the report. Furthermore, they had not given him any specific timelines for submission of the report the first time.

The Supreme Court referred to and was persuaded by comparative jurisprudence from the United Kingdom, South Africa and Canada on the salient features of indirect discrimination. The Supreme Court took the position that Samuel was victimized just by a cursory glance at the chronology of the events. The Court was of the view that the Respondent was so eager to get rid of Samuel that they had to circumvent the due process in a bid to find fault by conducting an extraneous investigation when in fact they had given him a raise due to his good performance. The court observed that other implicated employees were not investigated during the same period and concluded that Samuel was subjected to differential treatment on account of his disability.

The Supreme Court, therefore, overruled the Court of Appeal's decision on discrimination and agreed with the trial court which had found that Samuel was discriminated.

(b) Reasonable accommodation by the employer

The Supreme Court stated that the Respondent ought to have considered the medical report or conducted its own investigation as to Samuel's medical condition. The Court found that the Respondent had not made any attempt to provide reasonable accommodation to Samuel. It had not made any attempt to ease his movement around the office such as providing a ramp or even flexible working hours. It also failed to demonstrate that it would have incurred undue hardship in taking such steps. It was therefore unreasonable and arbitrary for the Respondent to decide that Samuel was no longer productive because of his inability to move around the office unaided.

The Court also found that the issue of gross incompetence, which was the Respondent's reason for the termination of Samuel's employment, was a mere afterthought. The Respondent ought to have properly investigated the extent of the incapacity and considered all the possible alternatives short of dismissal. The Court also cited with approval, a Canadian case[1] that states that even though the law does not require an employer to hire or continue to employ an employee who has become disabled, they must examine whether an appropriate work environment would allow such an employee to continue doing their job.

[1] MacNeill v. Canada (Attorney General) (C.A.) 1994 CanLII 3496 (F.C.A.).

(c) Unfair termination of employment

On this issue, the SCORK found that the procedure followed to terminate the contract violated Section 41 and 45 (2) of the Employment Act in that Samuel was not given a chance to defend himself or respond to the allegations against him. Section 41 of the Employment Act provides for the procedure for termination. It states that:

> ***(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation***
>
> ***(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.***

Section 45 (2) provides that:

> ***A termination of employment by an employer is unfair if the employer fails to prove—***
>
> ***(a) that the reason for the termination is valid;***
> ***(b) that the reason for the termination is a fair reason—***
>
> ***(i) related to the employee's conduct, capacity or compatibility; or***
> ***(ii) based on the operational requirements of the employer; and***
>
> ***(c) that the employment was terminated in accordance with fair procedure.***

An employer must prove that termination was grounded on a valid and fair reason and that fair procedure was followed. In this case, Samuel's employment was terminated without notice and he was not heard. Interestingly, the Court was of the view that the employment Act does not expressly provide for dismissal on medical grounds. The court added that an employer should demonstrate that they conducted medical assessments which showed that the employee was incapable of performing before dismissing him on medical grounds. The Court noted that the law does not give an employer a blanket right to dismiss an employee at will. It does not matter how grave the employee's conduct is- the employee is still entitled to be heard before dismissal. The court was categorical that *"The right to be heard is the cornerstone of fair labour practices".*

In the end, the Supreme Court held that Samuel's dismissal was unlawful and unfair.

Our analysis of the Supreme Court's decision

The Supreme Court is the apex court of the land. It is the first time in as far as we are aware that it has addressed the procedure on termination of employment for incapacity. It dwelt on the employer's obligation to reasonably accommodate sick employee. Employment and Labour Relations Court (ELRC) has previously addressed the requirement for employers to reasonably accommodate employees when terminating employment on medical grounds. For instance, in **Kenya Plantation and Agricultural Workers Union v Rea Vipingo Plantations Limited & another [2015] eKLR**[2] the ELRC, Rika J, held that reasonable accommodation goes beyond the grant and exhaustion of sick leave. It could entail temporarily modifying the job to suit the employee's medical restrictions, limiting working hours, physical modifications and reassignment of an employee to a different job within the same enterprise. The Court further held that the duty to reasonably accommodate sick employees is predicated on the right to equal opportunity to all persons.

In **Kennedy Nyanguncha Omanga v Bob Morgan Services Limited [2013] eKLR**[3] Ndolo J held that an employer is required to give support to the employee to recover and resume duty.

[2] Case No. 138 of George Kashindi & Irene Kashindi, 'Kashindis' Digest of Employment cases: A Comprehensive digest of employment and labour relations in Kenya' (2020) Page 357.

[3] Case No. 139 of George Kashindi & Irene Kashindi, 'Kashindis' Digest of Employment cases: A Comprehensive digest of employment and labour relations in Kenya' (2020) Page 358.

Similarly, Makau J. in Sospeter Bangoya Oyange v Bob Morgan Services Limited [2018] eKLR held that:

> *"Although the letter of appointment provided for no prior notice when terminating the claimant's employment on medical grounds, that stipulation of the contract cannot be used to oust a mandatory and express statutory provision in section 41 of the said Act. Consequently, the failure to follow fair procedure rendered the termination of the claimant's services on medical grounds unfair within the meaning of section 45 of the Act."*

Employers have to be concerned and be aware of the obligation to reasonably accommodate sick employees seeing how the Supreme Court drew a link between discrimination and reasonable accommodation. In particular, the court held that the failure to reasonably accommodate Samuel amounted to indirect discrimination.

Our laws provide for both direct and indirect discrimination. Article 27 of the Constitution provides that:

> ***(1) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***
>
> ***(2) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).***

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Section 5 of the Employment Act, 2007 Act provides that:

> ***(1) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—***
>
> ***(2) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status;***
>
> ***(3) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.***

Jurisprudence on indirect discrimination in employment has been lacking. In fact, the Supreme Court observed that it had previously grappled with the issue in the case of Samson Gwer & 5 others v. Kenya Medical Research Institute & 3 others [2020] eKLR. We are glad to note that the apex court dealt with the issue in the current case in as much as did not expressly define indirect discrimination. It, however, cited with approval several previous local cases by lower courts and other foreign comparative jurisprudence which distinguish between direct and indirect discrimination. Direct discrimination occurs when a person is treated differently or less favourably than someone else because of protected categories such as race, colour, religion and others set out in Article 27 and Section 5 of the Employment Act. Indirect discrimination on the other hand, is generally understood to mean a practice, policy or rule which applies to everyone in the same way, but it has a worse effect on some people than others.

We also note that the Supreme Court stated at paragraph 77 of the judgment, that:

> ***"It is important to note that under the Employment Act, there is no express provision for dismissal on medical grounds. However, the employer is required to demonstrate that medical assessments were conducted which rendered the employee incapable of performing."***

In making this statement, we cannot tell if the court considered Section 45 of the Employment Act which states that a fair reason for termination may relate to an employee's capacity. Section 41 (1) (quoted above) also expressly states that an employer ought to notify and hear an employee before terminating them on the grounds of physical incapacity. Nevertheless, nothing much turns on the Court's statement since it went ahead and covered this provision with emphasis on the words "physical incapacity" and in essence concluded that termination of employment on medical grounds is a fair reason for termination subject to necessary safeguards to an employee.

What does this decision mean to employers?

Despite the existence of the previous cases especially by the Employment and Labour Relations Court on the issue of reasonable accommodation, our experience drawn from advising and representing employers has been that many employers are not aware of this obligation.

This is possibly due to the fact that the duty to reasonably accommodate sick employees is not expressly set out in the Employment Act.

The Supreme Court has now upheld the position that employers should reasonably accommodate sick employees or demonstrate that they would incur undue hardship in reasonably accommodating sick employees. This means that an employer must prove that it offered alternatives short of dismissal before making a decision to dismiss for it to show that it reasonably accommodated the employee. Reasonable accommodation goes beyond grant and exhaustion of sick leave and may include:

a. Reassignment of employees to different roles
b. Temporary modification of the job to suit the employee's medical restrictions
c. Reviewing or limiting working hours
d. Physical modifications of the work environment

This is not an exhaustive list and what amounts to reasonable accommodation would depend on the circumstances of each case.

The Supreme Court made it clear that the obligation to reasonably accommodate employees is not absolute and is subject to certain exceptions. The exception addressed by the court is if an employer can demonstrate that they would incur undue hardship or burden in trying to reasonably accommodate a sick or disabled employee. This is captured by the Supreme Court's citing with approval of the Canadian case of **MacNeill v. Canada (Attorney General) (C.A.)** 1994 CanLII 3496 (F.C.A.) in which it was held that:

> ***"The law does not require that employers hire or continue to employ persons who are or have become disabled; it does, however, oblige them to examine whether an appropriate and not unduly burdensome change in the work environment would allow such persons to do, or to continue doing their job."***

Another area of non-compliance for many employers is failure to hear employees when dismissing them for medical reasons yet this is a requirement expressly provided for in Section 41 of the Employment Act. All the three courts, the Employment and Labour Relations Court, the Court of Appeal and the Supreme Court agreed that the failure to hear Samuel meant that the termination of his employment was unfair.

It is upon the employer to prove that the reason for termination is valid and fair. For incapacity, this entails producing a doctor's report or expert opinion as was stated by the Supreme Court. Once a doctor certifies that an employee is not capable of performing their role, it does not end there. The employer must then consider reasonable accommodation or demonstrate that it cannot reasonably accommodate an employee. Before penning the termination letter after all these have been done, the employee must be heard as would any employee being dismissed for misconduct or poor performance

The employer owes the employee a duty of confidentiality when assessing their medical records. It is also sufficient for the employer to receive the doctor's certificate of fitness without disclosing the full medical report that infringes the employee's or prospective employee's health status. This was held in the case of A M M v Spin Knit Limited [2013] eKLR.

Some employers believe that they can circumvent this requirement by relying on contractual provisions to terminate the employee on medical grounds without notice and without hearing them. This is not possible as clearly held by all three courts.

A mere explanation of the reason for termination on medical grounds would also not suffice. Such was the finding of the Court in ***Samuel Wanyonyi Wamalwa v Wells Fargo Limited [2017] eKLR***[4] where Rika J held that the decision to terminate the employee on medical grounds by explaining could not be validated by the fact that the employer had reasonably accommodated the employee for 270 days. The Judge posed the question, "How does the Employer prove the reason through a monologue?" Failure to conduct a proper hearing would amount to unfair termination even where there is overwhelming evidence of an employee's inability to work.

[4] Case No. 140 of George Kashindi & Irene Kashindi, 'Kashindis' Digest of Employment cases: A Comprehensive digest of employment and labour relations in Kenya' (2020) Page 362

Conclusion

The employment and labour relations legislative framework in Kenya is relatively new. The main legislation enacted in 2007 significantly changed labour law in certain material respects and greatly enhanced the rights of employees. The promulgation of the Constitution in 2010 also elevated the rights of employees by, among other things, enshrining the right to fair labour practice as a fundamental right and freedom. The Constitution also created the Employment and Labour Relations Court and made it of equal status to the High Court. The Magistrates' Courts now have jurisdiction to entertain certain employment and labour relations claims.

One of the most significant changes brought about by the current legislative framework is perhaps the requirement for substantive and procedural fairness in the termination of employment which formed the underlying theme of the decisions by the courts in all three levels. It is no longer possible to terminate employment for convenience by issuing notice. Termination must be for just cause and fair procedure must be followed. Many employers have suffered the wrath of the law for flouting these requirements.
There have been significant pronouncements by the courts in employment and labour matters since the enactment of the current legislation. In fact, fundamental principles governing the employment relationship are mostly shaped by case law.

We thus regularly keep tabs of the jurisprudence developed by the Employment and Labour Relations Court which is continually refined and settled by the Court of Appeal and the Supreme Court and issue such alerts from time to time. It is important for employers to regularly be appraised in order to manage or mitigate litigation risk.

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Irene Kashindi is recognised in Band 1 in Employment by Chambers Global 2021. She is widely lauded as one of the field's most prominent lawyers, with a practice encompassing contentious and non-contentious work.

She is regularly instructed by notable regional employers in sectors including telecoms and consumer goods in connection with executive dismissal and labour disputes. Clients consider her to be*"thorough and very professional"* and appreciate her for going *"above and beyond what is required."*

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Awards & Accolades

Legal 500
Employment (Tier 2)

Munyao Muthama & Kashindi has attracted an impressive number of Kenyan corporates, such as Safaricom, along with financial institutions, agencies and trade unions. The firm has a fine record in contentious and non-contentious matters, including headline unfair dismissal claims, labour relations and collective bargaining. Irene Kashindi is a recognised employment specialist, covering both contentious and non-contentious matters. George Kashindi provides further senior-level experience.

Testimonials:

"*In my view, what makes MMK Advocates unique is their ability to be in touch with our needs, and the nuanced attention and legal advice that they provide to us. Their strength is an ability to provide in-depth research and provide information/reports that aid with decision making."*

Chambers & Partners
Employment (Band 3)

Respected employment and labour relations practice handling a breadth of contentious and non-contentious work. Its notable disputes capabilities cover issues such as constructive dismissal and terminations, with extensive experience appearing before the Employment and Labour Relations Court and Appellate Court. This is complemented by its advisory practice, including investigations. The firm advises a range of public and private organisations from the education, manufacturing and governmental sectors.

Testimonials:

Commentators consider the practice group to be *"knowledgeable and competent,"* further noting: *"The culture of the company is to give very well-researched and detailed information."*

Another source said: "*The team is well-coordinated and dedicated to its work."*

Awards & Accolades

Chambers & Partners
Employment (Band 3)

Testimonials:

Commentators consider the practice group to be *"knowledgeable and competent,"* further noting: *"The culture of the company is to give very well-researched and detailed information."*

Another source said: "*The team is well-coordinated and dedicated to its work."*

Kashindis' Digest of Employment Cases

Our partners, Irene and George Kashindi, have recently (in August 2020) co-authored "***Kashindi's Digest of Employment Cases"*** which analyses select cases by the Employment and Labour Relations Court, the Court of Appeal and the Supreme Court.

The Digest covers cases more than *25 key thematic areas* in **employment** and **labour relations** ranging from **recruitment** to **termination/retirement** of employment and important matters in between.
The Digest is now **very popular** and has been **acclaimed as a valuable resource** to both employers and employees in employment and labour relation matters.

About Our Employment & Labour Relations Practice

Our Employment & Labour Relations practice was ranked in Band 3. Chambers Global described the practice as "*well respected in employment and labour relations practice handling a breadth of contentious and non-contentious work notable disputes capabilities cover issues such as constructive dismissal and terminations, with extensive experience appearing before the Employment and Labour Relations Court and Appellate Court...This is complemented by its advisory practice, including investigations*".

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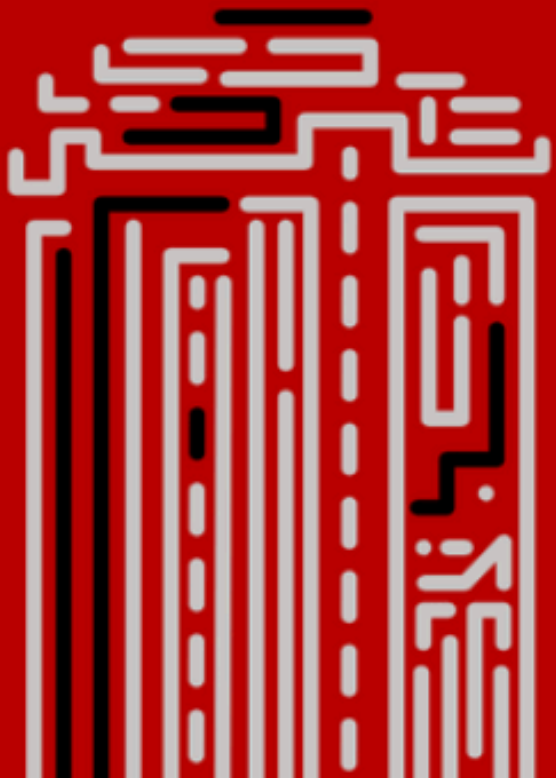

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