

Our Weekly News Digest for Employers

Friday, 28 August 2020



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Breach of Holidays Act 2003 but claims for wage arrears declined

Mr Wei was employed on two occasions by Sunlight JMB Future Limited (Sunlight), a retail food business which operated a takeaway shop called 'Country Roast'. His first period of employment was in 2017 and second period of employment in 2018, which ended on 24 September 2018. Mr Wei claimed he was owed monies in respect of arrears of wages and holiday pay however Sunlight JMB Future Limited claimed Mr Wei was not owed anything and that he was not entitled to any penalties.

Following the conclusion of his last period of employment, there was an exchange of messages related to Mr Wei's final pay and tax status. Sunlight submitted that during those exchanges, there was no suggestion made by Mr Wei that he was paid incorrectly. Mr Wei filed a Statement of Problem with the Employment Relations Authority (the Authority) on 11 September 2019 and claimed he was owed \$18,900 in unpaid wages and \$10,920 in unpaid holiday pay entitlement. He sought to recover unpaid wages in relation to both periods of employment.

Mr Wei claimed that whilst he worked at Sunlight, he was paid \$8 per hour in cash. He had no evidence in support of this claim however argued that Sunlight withheld a copy of the record of his working hours which he had signed. Ms Zhang, Manager of Country Roast said she asked Mr Wei for his bank account details and IRD number but this was not provided to her. She said that Mr Wei was paid \$15 net per hour in cash, and she reserved monies in respect of the tax payment for Mr Wei. She wrote the net payment in a notebook, next to the record of hours worked for that week and asked the employees to sign that book. Mr Wei refused to sign the book acknowledging details of payments made to him.

Although Sunlight provided a copy of the notebook entries, the Authority held that this was not compliant with the statutory requirement to keep wage and time records as per section 130 of the Employment Relations Act 2000 (the Act). The Authority therefore had discretion to accept the employees' claims. In exercising that discretion, the Authority may have regard to any evidence presented by the applicant and the credibility of the basis of the claim. Mr Wei was unable to provide evidence of the hours worked, nor could he recall any precise details. Sunlight had presented detailed records of Mr Wei's hours worked and the related portion of pay. There was no plausible reason offered by Mr Wei as to why other employees of Sunlight were paid correctly and Mr Wei was not. The Authority held that there were no arrears of wages due to Mr Wei.

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Mr Wei claimed that he was owed holiday pay in respect of the periods he worked at Sunlight. He worked less than 12 months in both 2017 and 2018 therefore he was entitled to be paid holiday pay to the rate of 8% of his gross earnings. Section 27(1) of the Holidays Act 2003 (the HA), states that when an employee's employment comes to an end, the employer must pay the annual holiday pay in the pay that relates to the employees' final period of employment. A copy of a cheque was provided by Sunlight to the Authority which represented the net payment due to Mr Wei as holiday pay for the two periods in which he worked at Sunlight during 2017 and 2018. The cheque was dated 6 November 2018 and therefore not compliant with section 27 of the HA. The Authority determined that the difference between the net amount received and the calculated gross amount of annual holiday pay was owed to Mr Wei for the periods he worked during 2017 and 2018. The Authority also determined that there were no valid penalty actions in respect of any claims raised by Mr Wei.

Wei v Sunlight JMB Future Limited [[2020] NZERA 253; 25/06/2020; E Robinson]

Failure to Honour Terms of Agreement a Serious Matter

Mr Schaare claimed that Retaining Waikato Limited (RWL) did not adhere to a mediated settlement agreement under s149 of the Employment Relations Act 2000 (the Act). The parties agreed that Mr Schaare was to be paid \$1,000 under s123(1)(c)(i) of the Act and \$800 (plus GST) towards legal costs within 7 days of the receipt of an invoice. Additionally, a certificate of service was to be provided within 7 days. The Record of Settlement, which was certified by the mediator, was final, binding and enforceable.

Five days after the due date Mr Schaare's representative contacted RWL's representative requesting payment. He was advised a response would be provided by the end of the day. Two weeks later, RWL made payment of \$1,000 and provided a certificate of service to Mr Schaare. However, RWL said they did not intend to make the agreed payment of \$800 towards legal costs.

The Employment Relations Authority (the Authority) noted that the payment and certificate of service were not paid or provided by the agreed date, and that payment for legal expenses had not been made. RWL had failed to comply with the Record of Settlement. The Authority therefore ordered RWL to pay \$800 (plus GST) within 7 days.

The Authority also noted that the Act encourages parties to resolve employment relationship issues themselves. Records of Settlement represent a resolution so a failure to honour an agreement is a serious matter. Public confidence would be undermined if settlements could be breached with impunity. The Authority determined that a penalty of \$400 was appropriate given the intentional breach, payable within 14 days. It also ordered RWL to pay Mr Schaare the filing fee of \$71.56 within 7 days.

Furthermore, Mr Schaare had applied for costs. The principle of reasonable contribution to costs 'actually and reasonably incurred' is well established. The matter was considered via telephone conferences occupying approximately half an hour. Based on the Authority's usual tariff, this equated to \$321. Accordingly, RWL was ordered to pay this amount to Mr Schaare within 14 days.

Schaare v Retaining Waikato Limited [[2020] NZERA 220; 4/06/2020; E Robinson]

Order granted for wage arrears

Mr Mathew was employed as a service station assistant by Karapiro Motors (1975) Limited (Karapiro) from 20 June 2016 to 3 October 2017. Mr Mathew claimed that he was not paid correctly when his employment ended in 2017.

During a case management call on 22 April 2020, Mr Mathew confirmed that he was claiming arrears of wages in the sum of \$1,711.50. Prior to the call, Karapiro had emailed payslips that confirmed Mr Mathew was owed \$1,712 for unpaid holiday pay and for work undertaken on public holidays. The parties were given the opportunity to resolve the matter outside of the Employment Relations Authority (the Authority) by having the claimed sum deposited into Mr Mathew's bank account by 24 April 2020. As this sum was not paid, Mr Mathew pursued his claim in the Authority.

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The Authority was satisfied that Mr Mathew was owed \$1,712 in holiday pay and for work undertaken on public holidays during the period of October 2016 to August 2017.

Karapiro was ordered to pay Mr Mathew \$1,712 as arrears of wages under section 131 of the Employment Relations Act 2000 (the Act), within 14 days of the date of the determination. Karapiro was also ordered to reimburse Mr Mathew \$71.56 for his filing fee.

Mr Mathew also claimed compensation under section 123 of the Act. However, compensation is only available in circumstances where the Authority determines that an employee has a personal grievance. As Mr Mathew had not claimed a personal grievance, and as the relationship ended in 2017 making it likely that any personal grievance would have been raised out of time, Mr Mathew's claim for compensation was declined.

Mr Mathew also sought interest on the arrears of wages and costs associated with his claim. As neither claim was included in the statement of problem, Karapiro was not on notice that these sums would be claimed. The Authority therefore declined to grant interest or costs.

Mathew v Karapiro Motors (1975) Limited [[2020] NZERA 264; 30/6/2020; V Campbell

Application to have party joined to proceedings granted

Ms Findlay sought to join Mr Murdoch to the proceedings before the Employment Relations Authority (the Authority) under section 221 of the Employment Relations Act 2000 (the Act).

On 11 May 2019, Ms Findlay raised a personal grievance on the basis of unjustified disadvantage and dismissal by email to "Steven Murdoch (for Steve's Painting and Decorating Limited)." On 15 October 2019, a statement of problem was lodged in the Authority, naming the respondent as "Steve's Painting & Decorating Limited". On 12 February 2020, the company was placed into liquidation. The liquidator gave consent for the proceedings to continue but indicated that they did not intend to participate in any investigation meeting.

Ms Findlay applied to have Mr Murdoch, the sole director of the company, joined to the proceedings. The reason provided for this application was due to an error in assuming the identity of the employer was Steve's Painting & Decorating Limited. It was claimed that when looking closer at the nature of the relationship, it was apparent that the employer was Mr Murdoch personally. Mr Murdoch did not accept that he employed Ms Findlay personally.

There was limited information available about the identity of the employer and there was no written employment agreement, despite it being a requirement under the Act for almost 20 years. The Authority viewed the reason given for the change in employer with skepticism in light of the company going into liquidation. The Authority accepted there was information to support that payments were made from the company's bank account to Ms Findlay but noted that payment is not determinative of the identity of the employer.

The Authority noted that the onus was on Ms Findlay to establish the identity of the employer on the balance of probabilities. The identity of the employer needs to be determined at the outset of the employment relationship with the knowledge of all the relevant communication between the parties.

For the Authority to properly investigate and determine the issue it would need to hear evidence on the matter. If the proposed respondent, Mr Murdoch, was not joined to the proceedings the Authority would not hear evidence from him and there was a possibility of further proceedings increasing costs.

Mr Murdoch was joined to the proceedings and directions were given for lodging a statement of reply and statements of evidence. An investigation was set for 20 July 2020.

Findlay v Steve's Painting & Decorating Limited (In Liquidation) [[2020] NZERA 245; 24/6/2020; H Doyle

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Personal Grievance claim denied

Mr Williamson worked for the Gore District Council from 2011 until he was dismissed in February 2019. Mr Williamson raised personal grievances of unjustified dismissal and unjustified disadvantage but later abandoned the unjustified disadvantage claim. The Council said it justifiably dismissed Mr Williamson. Despite mediation, the parties did not reach an agreement.

The purpose of Mr Williamson's position as a senior roading officer was to assist the roading manager with the management of the Council's roading network. On 11 June 2018 the Council's customer request management system was notified of two reports about the condition of Lady Charlton Road, Gore, a rural road. Both reported mud on the road, one describing it as "very slippery" and the other as "on a blind corner and very dangerous". The reports were assigned to Mr Williamson for follow up. Mr Williamson attended the site promptly and directed the cartage contractors to clean the road. Mr Williamson said he re-inspected the site on 13 June, deemed the road satisfactory with no other work required. The data log showed the issues were both closed on 15 June.

On Saturday 16 June, the son of local residents, Mr and Mrs Parish, driving on Lady Charlton Road lost control, causing damage to his car. This was reported to Police and they requested Council to clean the road. On about 19 June Mr Williamson agreed to meet Mr and Mrs Parish at the collision site to discuss the state of the road. Mrs Parish initially sought damages from the cartage contractor working on Lady Charlton Road on 11 June. The contractor and its public liability insurer contacted Mr Williamson who confirmed he had inspected the road on 13 June and found it to be in acceptable condition. The contractor's insurer declined liability for the damage to the car. Mrs Parish also engaged with the Council direct and made a formal complaint. Mrs Parish was advised that the Council accepted no liability for the collision and damage to her son's car.

Mr Williamson was involved in providing information to the Council as it responded to the approaches from Mrs Parish. Mrs Parish eventually made a presentation at a Council meeting. In her presentation, she highlighted discrepancies with what Mr Williamson had said and stated at different points. One of the inconsistencies concerned the date Mr Williamson claimed he inspected the road after requiring the contractor to clean up the mud. Two managers from the Council were present at the meeting during Mrs Parish's presentation. One of the managers checked the Council's E-Road system which was used to record Council vehicle movements. The records did not show Mr Williamson's Council allocated vehicle on Lady Charlton Road on either date mentioned by Mrs Parish in her presentation. After the Council meeting the information was reported to Mr Parry, the Council's chief executive.

Mr Parry asked for the E-Road vehicle tracking records for Council vehicles on Lady Charlton Road between 11 and 22 June. The E-Road information did not report Mr Williamson's Council vehicle on Lady Charlton Road on either 12 or 13 June, the two days referred to as when Mr Williamson had inspected the road after it was cleaned up. Mr Parry decided to initiate a disciplinary investigation.

The E-Road data showed Mr Williamson's allocated vehicle driving and stopping on Lady Charlton Road on 11 June. Mr Williamson's vehicle was recorded on Lady Charlton Road on 18 June and again on 20 June. In summary the data did not record Mr Williamson's vehicle being used to inspect the clean-up work on Lady Charlton Road, between 11 June and 18 June. The concern which arose was that Mr Williamson had not checked the clean-up work before the collision on 16 June but claimed that he had. Mr Williamson made that claim to the contractor, the contractor's insurer, Mr and Mrs Parish and several Council officials. During the disciplinary investigation, Mr Williamson stood by his claim. He offered no reasonable explanation to refute the concern. Mr Parry concluded that Mr Williamson had misled him, causing his trust and confidence in Mr Williamson to be severely damaged.

The Authority outlined that an employer must consider relevant factors when determining whether to dismiss, even if serious misconduct is established. The Authority considered the point raised for Mr Williamson and found that the Council's decision to dismiss in all the circumstances was justifiable. Mr Williamson did not have a personal grievance against the Council so his claim was dismissed.

Williamson v Gore District Council [[2020 NZERA 261; 29/06/2020; P Cheyne]

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For further information about the issues raised in this week's cases, please refer to the following resources:

[Full and Final Settlements](#)

[Discipline](#)

[Holidays Act](#)

[Mediation](#)

Employer News

Continued focus on Women needed as Gender Pay Gap holds steady

Whether it's the ease of working in your dressing gown or cutting out your commute, remote working has definitely got its perks. "As we rebuild after COVID-19, our commitment to paying women fairly remains firm," says Minister for Women Julie Anne Genter, after today's release of the national gender pay gap from Stats NZ.

"The official pay gap statistic shows the nationwide gender pay gap remains statistically stable at 9.5 per cent – but when and how the data was collected will conceal many of the impacts of COVID-19 on women.

Data was collected from March to July – during and immediately after COVID-19 Alert Levels 3 and 4 .

"Weekly earnings for women increased 4.8 per cent and 3.1 per cent for men – which does not count the large numbers of women in precarious or low paid work who may have lost their jobs or are receiving the wage subsidy, leaving higher earning women in the remaining workforce.

"Gender equity matters now more than ever - women, particularly non-European women, are more impacted by the labour market effects of pandemics and economic downturns.

"Affordable childcare has a huge impact on women's availability for work, and will be critical in supporting women back into the workforce in the COVID-19 recovery.

"Government initiatives – such as the wage subsidy, minimum wage increases and pay equity settlements with teachers and nurses - will have supported both men and women during this difficult time, however we need to be vigilant to support women in their employment to avoid a repeat of the long-term impacts on women from the Global Financial Crisis.

"I congratulate those employers in New Zealand who are supporting women by closing their gender pay gaps and have fair and inclusive workplaces.

"The gender pay gap is not immovable - it responds when chief executives decide to support diversity and pay equality and make changes to support women within their organisations."

The [Ministry for Women has made guidance available](#) on a range of gender pay gap-related topics so that all employers can measure their gender pay gaps, and take action to pay women fairly.

"There is clearly more work to do so our daughters get paid fairly, like our sons.

"This Government is delivering for women by passing pay equity legislation, delivering record pay settlements for female dominated workforces, and closing the gender pay gap with the Action Plan in the public sector," says Julie Anne Genter.



New Zealand Government [26 August 2020]

Disabled people fare worse in work and wellbeing

Disabled people are faring worse than non-disabled people across a range of wellbeing and labour market outcomes, Stats NZ said today.

Data from a new supplement, added to the June 2020 quarter of the household labour force survey, shows that disabled people were more likely than non-disabled people to rate their lives poorly in a number of key aspects, including overall life satisfaction, how worthwhile they felt their life was, and family wellbeing.

Disability status is strongly correlated with age.

“Older people are more likely to be identified as disabled,” wellbeing and housing statistics manager Dr Claire Bretherton said.

“However, people aged 65 years and over are less likely to participate in the labour market, and can have quite different wellbeing outcomes to younger people.”

Because of this age effect, the data used here is restricted to adults aged 18 to 64 only.

Within this age group, 44 percent of disabled people rated their overall life satisfaction poorly (0–6 on a scale from 0 to 10), compared with just 15 percent of non-disabled people.

Additionally, almost a third of disabled people gave a low rating for how worthwhile they felt their life was (30 percent), and 29 percent rated their family’s wellbeing poorly.

Mental wellbeing is measured using the World Health Organization’s WHO-5 Wellbeing Index, with poor mental wellbeing classified as having a weighted score of 51 or below. In the June 2020 quarter, nearly half (46 percent) of disabled people aged 18–64 experienced poor overall mental wellbeing according to this index, compared with one in five non-disabled people (19 percent).

“The WHO-5 Wellbeing Index asks respondents about their experience of five positive aspects of subjective mental wellbeing. These include feeling cheerful, calm and relaxed, and active and vigorous, waking up feeling fresh and rested, and whether they felt that their life was filled with interesting things,” Dr Bretherton said.

“Disabled people were less likely than non-disabled people to have experienced each of these aspects.”

In addition, one in nine disabled people reported feeling lonely most or all of the time (12 percent). This was three times the rate of non-disabled people (3.9 percent).

Disabled people were less likely to feel safe when walking alone in their neighbourhood, more likely to experience discrimination, and reported lower levels of trust when compared with non-disabled people.

Almost a quarter of disabled people do not have enough money for everyday needs

Many disabled people also face financial difficulties. Twenty-three percent of disabled adults under 65 felt they did not have enough money to meet their everyday needs. This dropped to 6.5 percent for non-disabled people of the same age.

When looking at all sources of income combined, the median income for disabled people was \$400 a week, compared with \$900 for non-disabled people. This median is calculated using all incomes reported in the survey (including wages and salaries, self-employment earnings, and government transfers such as benefits or ACC payments) and it includes people who have no income at all.

Disabled people were far less likely than non-disabled people to be employed, and those who were employed were less likely to work full time.

The employment rate for disabled people (aged 18–64) was 39.9 percent, less than half the rate for non-disabled people in the same age bracket (81.4 percent). Twenty-seven percent of disabled people with a job worked part time (fewer than 30 hours a week), compared with 17 percent of non-disabled people.

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Employed disabled people were more likely to report low levels of perceived job security than employed non-disabled people. Of those who were working, 17 percent of disabled people thought there was a high or almost certain chance they would lose their job in the next 12 months, significantly higher than 6.7 percent of non-disabled people.

The median weekly earnings for disabled people being paid a wage or salary was \$936. This compares with \$1,080 for non-disabled people. The median hourly earnings for disabled people was \$25.00, which is \$2.40 less than the hourly median for non-disabled people.



Statistics New Zealand [26 August 2020]

Income falls first time on record

Median weekly incomes were lower in the June 2020 quarter than they were a year ago, down 7.6 percent to \$652 a week, in the wake of COVID-19, Stats NZ said today.

The median is the midpoint, meaning half of workers earned above this amount and half earned below. Stats NZ uses the median value because it is less influenced by very high or very low earners than a mean average.

Median incomes from all income sources dropped for the first time since the series began in 1998. The measure captures income from wages and salaries, government transfers (such as New Zealand Superannuation and Jobseeker Support), and self-employment.

“A number of factors have contributed to this fall, such as people away from jobs without pay due to the COVID-19 pandemic and more people receiving government transfers,” labour market statistics manager Andrew Neal said.

“More self-employed earners were seen in lower income brackets as well, with median weekly incomes down almost \$100 a week.”

The three income sources involved showed a mixed picture.

Median weekly earnings from wages and salaries increased 4.3 percent in the June 2020 quarter, along with income from government transfers, up 6.7 percent since 2019.

In contrast, self-employed earnings dropped 12.5 percent.

While earnings from wages and salaries appear to have risen, this is mainly because many people from lower-income industries reported no earnings. People who said they did not have any income were not included in the figures for wages and salaries, therefore lifting the median weekly income. However, they were included in the overall income measure.

More people receiving government transfers will also have brought the overall median down, as the amounts they receive tend to be less than those from other income sources.

Wages and salaries higher

Median earnings from both weekly and hourly wages and salaries increased over the year and broadly affected most age groups. Median weekly earnings rose \$44 (4.3 percent) to \$1,060. Median hourly earnings increased \$1.47 (5.8 percent) to \$27 per hour.

The increase in median wages and salaries is shadowed by a sharp rise in paid employees who reported no hours worked and no wage and salary income. The number of people in such circumstances increased 54,700 (75.3 percent) to 127,300. Of these, 76,300 said that it was due to COVID-19.

“People reporting the pandemic as their reason for being away from their jobs and not being paid were more likely to be from younger age groups, and the retail trade and accommodation industry,” Mr Neal said.

“Both these groups tend to have lower incomes.”

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The rise in people away from work led to a lower number of wage and salary earners, especially among lower-income groups. The resulting compositional change meant that those remaining were more likely to be in higher income brackets, increasing the median income measure.

High-end incomes drop for self-employed earners

In the June 2020 quarter, median weekly earnings for self-employed people decreased \$96 (12.5 percent) to \$671. This is the largest percentage fall since the series began, with the second largest in 2008, when earnings fell \$58 (8.6 percent).

Contributing to this was a fall in the number of people in the top one-fifth of self-employed people (who earned \$1,918 a week or over), while the number of people in the bottom 40 percent of self-employed earners increased (those who earned \$479 a week and under).

“Self-employed people may be working fewer hours, have reduced their takings from business cashflows, or have had less business, among other reasons,” Mr Neal said.

Government assistance increases for young and old

The number of people receiving government transfers increased over the year, up 2.1 percent to 1,200,300 people in the June 2020 quarter. The median amount received rose as well, increasing 6.7 percent to \$364 weekly. This includes any payments, such as Jobseeker Support, New Zealand Superannuation, and student allowances.

The largest increases occurred within the 20–24-years age group, up 8.6 percent to \$267 a week, and the 60–64-years age group, up 14.5 percent to \$335 a week. Following closely was the 65 years and over age group, up 3.2 percent to \$371 a week.

Gender pay gap unchanged

The gender pay gap was steady at 9.5 percent in the June 2020 quarter and has remained relatively the same since 2017.

The gender pay gap shows the difference in median hourly earnings for men and women.

Hourly earnings from wages and salaries rose by a similar amount for both men and women. In the June 2020 quarter, median hourly wage and salary earnings rose \$1.26 (4.7 percent) to \$28.26 for men, and \$1.07 (4.4 percent) to \$25.57 for women.

[Organisational gender pay gaps: Measurement and analysis guidelines](#) has more information about gender pay gaps and how to calculate them for your organisation.



Statistics NZ [26 August 2020]

Legislation

Note: Bills go through several stages before becoming an Act of Parliament: Introduction; First reading; Referral to select committee; Select committee report, Consideration of report; Committee stage; Second reading; Third reading; and Royal assent.

Bills open for submissions: 13 Bills

13 Bills are currently open for public submissions to select committees.

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[Overseas Investment Amendment Bill \(No 3\)](#) (N/A)

[Protected Disclosures \(Protection of Whistleblowers\) Bill](#) (N/A)

[Rights for Victims of Insane Offenders Bill](#) (N/A)

[Education \(Strengthening Second Language Learning in Primary and Intermediate Schools\) Amendment Bill](#) (N/A)

[New Zealand Superannuation and Retirement Income \(Fair Residency\) Amendment Bill](#) (N/A)

[Insurance \(Prompt Settlement of Claims for Uninhabitable Residential Property\) Bill](#) (N/A)

[Child Support Amendment Bill](#) (N/A)

[District Court \(Protection of Judgment Debtors with Disabilities\) Amendment Bill](#) (N/A)

[Arms \(Firearms Prohibition Orders\) Amendment Bill \(no 2\)](#) (N/A)

[Oranga Tamariki \(Youth Justice Demerit Points\) Amendment Bill](#) (N/A)

[Crown Pastoral Land Reform Bill](#) (N/A)

[Electoral \(Integrity Repeal\) Amendment Bill](#) (N/A)

[Land Transport \(Drug Driving\) Amendment Bill](#) (N/A)

Overviews of bills - and advice on how to make a select committee submission - available at:

<https://www.parliament.nz/en/pb/sc/make-a-submission/>

Full text of bills available at: <http://www.parliament.nz/en-nz/pb/legislation/bills>

The Employer Bulletin is a weekly update on employment relations news and recently published legal decisions. It is EMA's policy to summarise cases that contain legal issues relevant to employers. The purpose of the Employer Bulletin is to provide and to promote best practice in employment relations. If you would like to provide feedback about the Employer Bulletin, contact advice@ema.co.nz

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