

EMPLOYER NEWS

Government focus on jobs sees record number of New Zealanders move from Benefits into work

- 113,400 exits into work in the year to June 2022
- Young people are moving off Benefit faster than after the Global Financial Crisis

Two reports released last week by the Ministry of Social Development show the Government's investment in the COVID-19 response helped drive record numbers of people off Benefits and into work. It also shows that Main Benefit numbers continue to fall, and young people are leaving the benefit system faster than expected.

- "COVID-19 had a significant impact across the benefit system in 2020 and saw a substantial increase in the number of New Zealanders needing support. However, this most recent report shows the system recovered faster than expected, and we did not hit the level of unemployment predicted at the start of the pandemic," Carmel Sepuloni said.
- "Compared to what happened following the Global Financial Crisis, the report found that this Government has delivered lower unemployment and fewer people on Main Benefits.
- "As at June 2022 there were nearly 23,900 fewer people receiving the Jobseeker Support Work Ready benefit than at June 2020.
- "Likewise the Youth Report followed young New Zealanders aged 16-24 through the pandemic to June 2022 and finds that young people were one of the fastest groups to recover from its impact.
- "Initiatives such as the Apprenticeship Boost programme, He Poutama Rangatahi and Mana in Mahi have supported young people into work, apprenticeships, and education as New Zealand moved through COVID-19 and into recovery. He Poutama Rangatahi has supported nearly 3,900 rangatahi into employment, education or training since 2018; Mana in Mahi has supported almost 5,800 placements by the end of February 2023; and the Apprenticeship Boost Initiative programme has paid more than 55,800 apprentices to date.
- "The report found that while there was a significant increase in young people receiving benefits in March 2020, it decreased faster than during the Global Financial Crisis. The GFC was the last time we saw a shock to the benefit system like this and it's pleasing to see we have applied the lessons learned during that crisis well.



"Youth Main Benefit numbers decreased by 22% over the 18 months following the COVID-19 peak in benefits, twice as fast as the 11% decrease over the 18 months following the GFC peak. By June 2022, youth main benefit numbers were closer to pre-pandemic numbers than other age groups.

New Zealand Government [22 March 2023]

Government target increased to keep powering up the Māori economy

A cross government target for relevant government procurement contracts for goods and services to be awarded to Māori businesses annually will increase to 8%, after the initial 5% target was exceeded.

The progressive procurement policy was introduced in 2020 to increase supplier diversity, starting with Māori businesses, for the estimated \$51.5 billion spent on government procurement every year.

"Māori businesses made up 6% of the total of government procurement contracts for the 2021/22 financial year. This meant more than 3,200 contracts were awarded to Māori businesses across the public sector, worth a total value of about \$930 million."

Minister Jackson says, "Through our capability uplift programme, we've supported 18 Māori businesses to secure government contracts worth a total of \$8 million.

The new 8% target will be reviewed in 2024. The other progressive procurement policy features will remain until the review, with some refinements to the services to Māori businesses and agencies.

New Zealand Government [23 March 2023]

New project set to supercharge ocean economy in Nelson Tasman

A new Government-backed project will help ocean-related businesses in the Nelson Tasman region to accelerate their growth and boost jobs.

"The Nelson Tasman region is home to more than 400 blue economy businesses, accounting for more than 30 percent of New Zealand's economic activity in fishing, aquaculture, and seafood processing," Oceans and Fisheries Minister Stuart Nash said.

"This new project will establish a blue economy cluster – a group of seafood and aquaculture companies with a common interest in growing the sector's sustainability and success.

Stuart Nash said the project is a great fit with the Fisheries Industry Transformation Plan currently under development.

- "The Fisheries Industry Transformation Plan is expected to identify the importance of collaboration across the sector, environmental sustainability, and innovation to the sector's success.
- "The new Moananui Blue Economy Cluster project will be another step towards turning the plan into action," Stuart Nash said.

New Zealand Government [23 March 2023]



Overseas merchandise trade: February 2023

Overseas merchandise trade statistics provide information on imports and exports of merchandise goods between New Zealand and other countries.

Key facts

This release refers to trade in goods only. February 2023 monthly values are actual and compared with February 2022.

- Goods exports rose \$41 million (0.8 percent), to \$5.2 billion.
- Goods imports rose \$40 million (0.7 percent), to \$5.9 billion.
- The monthly trade balance was a deficit of \$714 million.

Statistics New Zealand [21 March 2023]

Next steps for affected properties post Cyclone and floods

The Government via the Cyclone Taskforce is working with local government and insurance companies to build a picture of high-risk areas following Cyclone Gabrielle and January floods.

- "The Taskforce, led by Sir Brian Roche, has been working with insurance companies to undertake an assessment of high-risk areas so we can understand the scale of impact and what this means for rebuilding," Grant Robertson said.
- "It is important at this time to highlight some issues that can cause confusion or stress. First, having a red or yellow sticker on your property does not necessarily mean that a location will be deemed high-risk or that the land can't be rebuilt upon. These are assessments of immediate safety risk at the location, not future risk of flooding or viability of the land.
- "That means we can't simply use that assessment for this process, we'd get the wrong answers for affected people and property. That's why we are working with the insurance sector and local councils to get the best outcome," Grant Robertson said.
- "Second, there are a range of potential responses to the assessments that we do arrive at. Managed retreat (i.e. not rebuilding in the area) is one possibility, but so are other resilience measures, including building or enhancing stopbanks, changing the structure or location of buildings or building in a different way.

New Zealand Government [22 March 2023]



EMPLOYMENT COURT: ONE CASE

Fine imposed for non-compliance with Authority's orders

In September 2022, Auckland University of Technology (AUT) began a restructure with the aim of saving \$21 million in financial costs. To achieve that, AUT proposed to make a significant reduction in academic staff, and consulted the New Zealand Tertiary Education Union Te Hautū Kahurangi o Aotearoa Inc (the Union) on its proposal. However, the Union did not accept that the proposal complied with the terms of the collective agreement. Specifically, issue was taken with AUT's selection criteria. The Union's attitude was that AUT had effectively made selections based on personal attributes of staff, which it claimed was irrelevant to the redundancy process outlined in the collective agreement.

In December 2022, the Employment Relations Authority (the Authority) heard the matter and determined AUT's proposed actions were largely non-compliant with the collective agreement. It made compliance orders compelling AUT by 23 December 2022 to desist from terminating academic staff's employment; notifying the Union that it had complied with the order; not to terminate the employment of the Union's members until it had complied with the provisions of the collective agreement; and, identify specific positions as surplus.

Following the Authority's determination, the Union contended that AUT had not complied with all the terms of the Authority's order. The main issue for the Employment Court (the Court) was whether AUT had breached the compliance order by failing to identify specific positions as surplus.

The redundancy clause in the collective agreement provided that, where more than one position and more than one employee per position was potentially affected, then AUT would notify potentially affected employees and call for "voluntary severance". AUT would then determine which of the employees would be granted voluntary severance based on skill and experience. If there was only one position affecting only one employee, or if severance was not voluntary, then AUT would give at least two months' notice of termination to both the employee and the Union.

AUT contended it had complied with the order based on correspondence with its staff on 22 December 2022. It claimed that when the correspondence was read in combination, the order was satisfied because AUT identified the specific positions deemed surplus by reference to the name of the current position holder and the title of that person's role. And where there was more than one position and more than one employee per position, it asked for voluntary severance from employees holding equivalent positions.

The criticism of AUT's approach was twofold. Firstly, the Union submitted that the correct approach was to identify specified positions as surplus not the individual staff members. The breach of the compliance order was said to be that at the time a position was identified as surplus, the actual individual academic staff member facing dismissal was also identified. Second, the correspondence to those staff who were not named in the table described them as holding equivalent positions.

In its determination, the Authority acknowledged the collective agreement as "person-centric" and an essential component of the evaluation was the employee who was the current position holder. That detail was described by the Authority as part of the specificity required in identifying positions as potentially surplus. That is, once the selection criteria had been established and applied, the next was to identify 'specific positions', then notify all employees who occupied them. Once the surplus positions were established, the collective agreement required voluntary severance to be offered to the potentially affected employees.

However, AUT wrote to other staff in equivalent positions informing them at the same time that, because they held equivalent positions, they could seek voluntary severance without informing them they were potentially affected. While the Court accepted AUT was attempting to comply with the Authority's orders, its correspondence stepped outside the terms because neither the compliance order, nor the collective



agreement, referred to equivalent position holders being offered voluntary severance. Once the surplus positions were established, the collective agreement required AUT to offer voluntary severance only to employees potentially affected.

While the maximum available fine was \$40,000, the Court considered \$3,000 payable to the Union as proportionate. AUT's level of culpability was low, it had not committed previous similar breaches, and it had shown it initially attempted to comply with the order. Costs were reserved.

The New Zealand Tertiary Education Union Te Hautū Kahurangi o Aotearoa Inc v Vice Chancellor of the Auckland University of Technology [[2022] NZEmpC 2; 19/01/2023; Judge Smith]

EMPLOYMENT RELATIONS AUTHORITY: FOUR CASES

Employer held to have acted in a fair and reasonable manner during restructure process

Ms Havelkova was employed by Youth Hostels Association of New Zealand Inc (YHA) as a chef in their Tekapo café and bar from 17 April 2019 until she resigned on 31 August 2020. She claimed that YHA unjustifiably dismissed her during a restructuring process. In an alternative claim, she contended she was disadvantaged by YHA not acting in good faith, including truncating the consultation process and failing to provide a timely redeployment opportunity after disestablishing her position.

By contrast, YHA contended the restructuring was for genuine business reasons and based upon Ms Havelkova's position being initially superfluous to YHA's needs and exacerbated by financial difficulties from COVID-19 restrictions impacting international visitors. YHA said that after assisting Ms Havelkova with immigration issues, it concluded genuine consultation and considered feedback before deciding to disestablish Ms Havelkova's role but then had to adjust the scope of their restructuring. YHA said they subsequently, as soon as practicable, offered Ms Havelkova ongoing employment, but she voluntarily chose to resign.

In late February 2020, Ms Havelkova took leave to return to the Czech Republic to visit family. Unfortunately, her leave coincided with the first COVID-19 lockdown period in March 2020 and accompanying international border entry restrictions. This resulted in Ms Havelkova being initially unable to return to New Zealand on her due return date of 30 April 2020. The impact of halting international tourism upon YHA's business was immediate and significantly ongoing. This led to a need to restructure and reduce staffing overheads, and a letter to Ms Havelkova indicated her position and eleven others at Tekapo were potentially impacted. Feedback was sought by 20 May. Ms Havelkova did not provide feedback on the restructuring proposal by the due date.

Mr Cartwright, then General Manager, Hostel Operations, resolved to assist Ms Havelkova's return to New Zealand by delaying the communication of the decision to disestablish her role. With assistance from an immigration lawyer, Ms Havelkova was able to return to New Zealand on 26 May 2020. Mr Cartwright said upon hearing of Ms Havelkova's safe return, he issued by email, the previously withheld decision to disestablish her position. The effective date was 23 June 2020 and YHA also offered an alternative to redundancy of a six months' period of leave without pay with preferential appointment to any demi chef vacancy if one arose during the period. The parties met on 10 June 2020 and addressed the concern that Ms Havelkova's believed inadequate time had been afforded to her to make a choice on the restructuring options.



By mid-June 2020, YHA predicted that domestic tourism was greatly expanding and anticipated a need to adjust short term expectations upwards. This resulted in Ms Havelkova being offered and accepting a deferment of the disestablishment of her role until 31 August 2020. The next complication for Ms Havelkova was in early August 2020 when YHA resolved that two demi chef roles at Tekapo could be retained. Initially, Ms Havelkova indicated that she and her partner had found a house in Timaru to move to and planned to resign on 31 August 2020, commuting being impractical, but she was asked to contemplate the offer of ongoing employment.

On 10 August 2020, Ms Havelkova confirmed to YHA her last day would be 31 August 2020. YHA responded the same day checking that Ms Havelkova fully understood that YHA had resolved due to increased and anticipated business to retain her position and it was no longer disestablished and invited her to meet. Ms Havelkova did not respond further. Ms Havelkova resigned on 31 August 2020 and was paid out redundancy compensation, despite YHA having no contractual obligation to do so, as Ms Havelkova had turned down an offer of ongoing employment in the same role.

The Authority acknowledged the very difficult contextual circumstances and understandable distress such caused Ms Havelkova but found that the YHA had not acted in an unreasonable manner. They assisted Ms Havelkova's return by delaying communicating the restructuring decision to disestablish her role, met with her, and offered to consider any further feedback, but none was provided. The Authority carefully examined whether it was unreasonable to conclude the initial disestablishment of Ms Havelkova's role whilst she was in the Czech Republic and found it was not unreasonable. Ms Havelkova had ample opportunity to provide feedback, and given she accepted the genuineness at the time of the proposal, the Authority said little would have been gained by extending the consultation period. Also, at the 10 June 2020 meeting, YHA rectified any perceived procedural shortcomings by making an open offer they would consider any proposal Ms Havelkova put forward; however, none was forthcoming.

The Authority found that Ms Havelkova had not made out her personal grievances and no remedies were appropriate. Overall, the Authority found that the circumstances of Ms Havelkova's employment ending did not amount to an unjustified dismissal or an unjustified disadvantage.

Havelkova v Youth Hostels Association of New Zealand Incorporated [[2022] NZERA 561; 1/11/2023; D Beck]

Disparity of treatment claim not established due to distinguishing factors

Mr Young was employed as a bus driver by Cityline (NZ) Limited (Cityline) until 28 March 2020 when he was dismissed following an accident. Mr Young claimed his dismissal was unjustified based on disparity of treatment by Cityline with similar past incidents.

Mr Young was employed to drive both single and double deck buses. On 17 March 2020, he was driving a double deck bus and got into an accident after attempting to enter the Eastbourne garage, which is incapable of being accessed by a double deck bus. Damage was significant and cost \$98,000 to repair. Cityline stated the accident was not Mr Young's only incident that day as he also failed to stop at a compulsory final stop immediately outside the depot and did not complete either the timesheet or log off process required at that stop. He also exceeded the five-kilometre speed limit when driving through the depot and failed to park the bus in one of the requisite bays.

On 18 March 2020, Mr Pearson, Operations Manager, wrote to Mr Young advising that an investigation would be undertaken including the possibility the accident was caused by unsafe driving. The letter advised the allegations were serious and, if proven, could constitute serious misconduct. Mr Young attended the investigation meeting with a union representative and was given the opportunity to comment on the concerns. It appeared to Mr Pearson that Mr Young did not have an explanation which was seemingly confirmed by the representative who stated, on Mr Young's behalf, that he was on "autopilot mode". Mr Young's input was limited to apologising for the incidents. A disciplinary process was determined to be appropriate based on Mr Young not driving with the appropriate care or skill required.



At the disciplinary meeting, Mr Young was given the opportunity for further explanation to which the autopilot comment was again offered. Mr Pearson explained that was inadequate, but Mr Young confirmed he had nothing further to add. Mr Pearson reached a preliminary decision that dismissal was warranted and advised Mr Young he had three days to consider and respond. At the final meeting, Mr Young again apologised and stated he had nothing further to add. The union representative, on behalf of Mr Young, brought up two other similar incidents involving drivers who hit the building with double deck buses which resulted in lower level disciplinary action, suggesting that Mr Young be issued a final written warning as opposed to being dismissed. Mr Pearson considered this but due to material differences in the situations, Mr Young's incidents were deemed more serious. The preliminary decision to dismiss Mr Young was confirmed shortly after.

Mr Young claimed Cityline acted inconsistently with its own past precedents by dismissing him for this incident. He explained to the Employment Relations Authority (the Authority) this was the fifth incident involving a double deck bus driving into single deck bus garage, but it was the first to result in dismissal and hence the decision to dismiss was not one a fair and reasonable employer could have reached in the circumstances.

Mr Young referred to an incident that occurred a few weeks earlier, in which a driver had similarly hit the building with a double deck bus and was given only a final written warning. Cityline submitted there was no disparity as Mr Young had five allegations of improper conduct against him, whereas the other driver only faced two. Additionally, that driver had stopped at the compulsory final stop and completed the two required actions, whereas Mr Young had not.

The Authority was satisfied with this submission and determined there had not been a disparity. However, it stated that even if there had been, Cityline would have been capable of explaining the disparity. This was because Mr Young had been driving three times the speed limit whereas the other driver was driving at twice the speed limit. The other driver had also slowed down to the required speed before hitting the garage while Mr Young did not. Mr Pearson also emphasised the most important distinguishing factor being that warnings about this risk had recently been posted to three different media prior to Mr Young's incident, whereas the other driver had not had that benefit.

Therefore, the Authority determined there was no need to consider the third question of the Buchanan test. The Authority concluded there was no disparity, and even if there was, Cityline's explanation was adequate. Hence the decision to dismiss was found to be one that a fair and reasonable employer could have reached in the circumstances. Therefore, Mr Young's claim failed. Costs were reserved.

Young v Cityline (NZ) Limited [[2022] NZERA 576; 7/11/2022; M Loftus]

Constructive dismissal claim dismissed but unjustified disadvantage established

Mr Keighran was employed as a duty manager at Red Dining from 4 March 2020 until 17 September 2020 when he resigned. Mr Keighran claimed he was constructively dismissed and sought wage arrears, compensation for hurt and humiliation, reimbursement of legal costs and penalties for breaches of good faith, and failure to provide a copy of his employment agreement and payslips.

Red Dining was a restaurant owned by Kensington Tavern Limited (Kensington Tavern), a company owned and operated by Mrs McLean-Woods and Mr Woods. On 25 July 2020, Mr Keighran emailed Mrs McLean-Woods asking for a pay rise which was declined due to concerns about the ongoing effects of COVID-19 on the hospitality industry. The following day, there was an incident involving Mr Keighran and another employee, WMK, who had relatives employed at Red Dining. To prevent any conflict at the restaurant, Mr Keighran was advised he could have the next Monday off on pay whilst an investigation was underway, which he accepted.

During the investigation, a temporary roster change was made to keep WMK and Mr Keighran separated. Mr Keighran agreed to performing business related tasks from home for a week before another review of the situation was made. During the review, WMK's family advised they would act professionally, and it was decided that Mr Keighran could return to work. Concerned for his safety, Mr Keighran asked for



cameras to be installed. They subsequently were and Mr Keighran again requested a pay rise, which was declined. The following month, Mr Keighran messaged Mrs McLean-Woods stating that he was taking two weeks' annual leave and threatened to resign if he did not receive a pay rise.

After Mr Keighran returned to work, some staff members stated they were uncomfortable working with him. On 5 September 2020, there was a meeting between Mrs McLean-Woods, Mr Keighran, and two senior staff members where Mr Keighran was informed of new changes including that his position had been made redundant. This was because Ms McLean-Woods decided it was in his best interests that he would be overseeing the bar instead and she would take over as restaurant manager. Mrs McLean-Woods accepted the conversation became heated and she overstepped in the way she informed Mr Keighran of the change in role and lack of consultation.

Shortly after, Mr Keighran went home sick, did not return to work and subsequently resigned on 17 September 2020. He stated he left his role because Kensington Tavern followed a course of conduct with the deliberate purpose of coercing him to resign and because it breached its duty of good faith by demoting him to bar manager without consent. He also alleged he was unjustifiably suspended and unlawfully locked out of the workplace.

The Employment Relations Authority (the Authority) found that Mr Keighran was neither suspended, locked out of the workplace or unjustifiably disadvantaged while working from home as Kensington Tavern endeavoured to resolve the issues in a reasonable and safe manner. However, the Authority was satisfied Mr Keighran was disadvantaged at the 5 September 2020 meeting by having his role and duties unilaterally reduced without consultation.

Nonetheless, Mrs McLean-Woods did not engage in deliberate conduct with the dominant purpose of coercing Mr Keighran to resign as Mr Keighran had previously talked about resigning on two previous occasions. He remained on the roster throughout the period he was on leave. Kensington Tavern went above and beyond what could be expected in managing Mr Keighran back into the workplace, including installing security cameras at his request. The Authority considered it was the stress Mr Keighran was under from personal matters, unhappiness, and resentment at not receiving a pay rise which contributed to his decision to resignation. Moreover, there was evidence that a draft resignation letter by Mr Keighran dated 20 July 2020 was found on the work computer. Mr Keighran's resignation was therefore already foreseeable before the events alleged to have caused his constructive dismissal took place.

Mr Keighran gave evidence that he was embarrassed and humiliated in front of other staff members in what should have been a private meeting. Mrs McLean-Woods conduct was a breach of Kensington Tavern's good faith obligations to which entitled him to compensation of \$5,000 and reimbursement of the filing fee of \$71.56. Costs were reserved.

Keighran v Kensington Tavern Limited [[2002] NZERA 532; 14/10/22; A Gane]

Erroneous belief that employee resigned resulted in successful unjustified dismissal claim

Mr Ponga was employed by Double J Smallwoods Limited (Double J), a wood remanufacturing business. He claimed he was unjustifiably dismissed after leaving work early on 23 December 2020, which was Double J's last working day before its customary closedown for the holiday period. Mr Ponga sought compensation for hurt and humiliation and reimbursement of lost wages. Double J claimed Mr Ponga was not dismissed but had resigned when he left work early.

Double J customarily shuts down its operations on 23 December each year at around 3.30pm, or when orders are finished. Mr Ponga's written employment agreement stated he was required to work 40 hours per week, Monday to Friday between 7.30am to 5pm. On the last day, Mr Ponga left at around midday without explanation and without finishing the remaining orders.

Mr Spring, the site manager, raised it with Mr Gardner, a director and shareholder of Double J, and claimed he would follow up with Mr Ponga whether he had resigned. On 27 December 2020, Mr Spring and Mr Ponga spoke but they did not discuss whether he had quit or not. Mr Gardner was unable to make contact with Mr Ponga at this time. After not being able to speak with Mr Ponga, Mr Gardner



received advice that if he had resigned, then Mr Gardener was obliged to process his final pay. The advice he received suggested he visit Mr Ponga's residence to clarify before doing so. After several failed attempts to see Mr Ponga, Mr Gardner proceeded to make Mr Ponga's final pay on 31 December 2020. On 1 January 2021, Mr Ponga visited Mr Gardner's house to query the payment as he believed he had been overpaid. The reply was "No, you had walked off the job" and explained it was Mr Ponga's final pay.

Mr Gardner advised that all employees who had left early on 23 December 2020 had been asked for explanations and Mr Ponga was the only employee who had not provided one. Mr Ponga then explained that he left work early out of frustration because he felt unappreciated. Mr Ponga claimed Mr Gardner's response was, "if that's the way you feel, it's best that we part [ways] now".

Evidence before the Employment Relations Authority (the Authority) indicated that on 23 December 2020, Mr Ponga informed another employee that he was "finishing up" or words to that effect, which was then relayed to Mr Gardner. The Authority found such words could be understood as Mr Ponga finishing up just for the day or finishing up altogether. Given Mr Ponga had worked for Double J for ten years, the Authority held that the latter interpretation was not a reasonable one Mr Gardener could have reached. Mr Ponga's words were not directed at anyone with authority, and his subsequent conduct inquiring about his pay did not indicate a clear and unequivocal decision to resign. Rather, in the circumstances, the Authority considered Mr Gardener's actions on behalf of Double J amounted to an unequivocal sending away of Mr Ponga.

In all the circumstances, Double J's actions in assuming Mr Ponga had resigned, failing to make adequate inquiries with him, paying his final pay on 31 December 2020, and advising they should part ways without following a sufficient process was not what a fair and reasonable employer could have done in the circumstances. Mr Ponga has established a personal grievance for unjustified dismissal. The Authority considered that an adjusted award of \$10,800 to compensate Mr Ponga for hurt and humiliation was appropriate given his initial contribution to the situation giving rise to his grievance. He was also entitled to lost wages of \$3,811.50. Costs were reserved.

Ponga v Double J Smallwoods Limited [[2022] NZERA 543; 25/10/2022; S Blick]

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.

Five Bills are currently open for public submissions to select committee.

- International Treaty Examination on the Framework Agreement on the establishment of the International Solar Alliance (ISA) (23 March 2023)
- Climate Change Response (Late Payment Penalties and Industrial Allocation) Amendment Bill (6 April 2023)
- Māori Fisheries Amendment Bill (13 April 2023)
- New Zealand Superannuation and Retirement Income (Controlling Interests) Amendment Bill (24 April 2023)
- St Peter's Parish Endowment Fund Trust Bill (26 April 2023)

Overviews of bills-and advice on how to make a select committee submission-are available at: https://www.parliament.nz/en/pb/sc/make-a-submission/



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