

EMPLOYER NEWS

EEO Commissioner welcomes pay transparency legislation but says equity should not be delayed

Te Kāhui Tika Tangata Human Rights Commission has welcomed proposed pay transparency policies designed to close the gender pay gap for workers across Aotearoa New Zealand.

The Government has announced it is progressing with pay transparency laws that would require around 900 organisations with over 250 employees to report on their gender pay gap.

The announcement comes after five long years of sustained advocacy and campaigning led by the Commission alongside women's groups, unions, businesses, young workers, private individuals, public service, Tangata Whenua and especially our Pacific communities through the Pacific Pay Gap Inquiry — a collective effort aimed to eliminate discriminatory pay practices that breach the rights of New Zealanders and lead to large pay gaps.

The Pacific Pay Gap (PPG) Inquiry report released last year by the Commission found that in 2021 for every dollar earned by a Pākehā man, Pākehā women were paid just 89 cents. For Māori men that drops to 86 cents and Māori women 81 cents. Pacific men were paid just 81 cents and Pacific women only 75 cents when compared to Pākehā men.

Among the recommendations was the urgent introduction of pay transparency legislation to ensure all workers have access to pay information, equal employment opportunities, and promotions and are fairly rewarded for the work they do.

A nationwide survey conducted by Talbot Mills Research in May 2023 found nearly 2 out of every 3 New Zealanders consider pay gaps to be a 'significant' or 'very significant' issue (64%), with a similar number supporting new pay transparency policies (63%).

"Everyone has the right to work, freedom from discrimination, the right to equal pay for equal work. Any Government of the day has an obligation under Te Tiriti to work with Māori to secure equitable outcomes – closing pay gaps through ethnic pay gap reporting is a good place to start."

Te Kāhui Tika Tangata Human Rights Commission [11 August 2023]



Bold action needed to close employment gaps for disabled people

Even when disabled people overcome the many barriers to gaining employment, the latest Stats NZ figures show an increased income gap of \$225 per week less (median wage or salary) compared to what was already an alarming gap of \$144 pw in 2021.

In combination with the additional costs of disability, the income gap creates real material hardship.

"As called for by the Committee on the Rights of Persons with Disabilities, governments need to consider affirmative actions to address the persistent employment gaps for disabled people," says Kaihautū Tika Hauātanga Disability Rights Commissioner Prudence Walker.

"We need bold measures if disabled people and tangata whaikaha Maori are to secure their rights to equal employment opportunities.

To reduce such significant gaps in a reasonable timeframe, we need very deliberate and affirmative actions designed with disabled people and tangata whaikaha Maori in both the public and private sectors," says Walker.

Affirmative action might look like recognising employers who are proactive in employing disabled people and eliminating existing barriers to work. Organisations could explicitly prefer suppliers who have good systems for employing disabled people.

Te Kāhui Tika Tangata Human Rights Commission [17 August 2023]

Investigation underway into the exploitation of Indian and Bangladeshi nationals in Auckland

Led by Immigration Compliance and Investigation but expected to encompass other areas of MBIE such as the Labour Inspectorate, officers have begun talking to the 115 Indian and Bangladeshi nationals who were living in overcrowded and unsanitary conditions in 6 houses across Auckland suburbs.

MBIE's investigators have spoken with 115 Indian and Bangladeshi nationals who arrived in New Zealand on Accredited Employment Work Visas (AEWV) with the promise of employment when they arrived. Individuals have indicated they paid a substantial amount for the visa and a job, yet most are still waiting for any paid work.

These individuals were accommodated in properties that were not fit to house so many people. The conditions of the accommodation were unhygienic, unsanitary, and inappropriate.

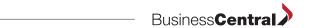
Investigators will now speak to a number of witnesses, including the individuals involved to gather evidence and build a complete picture of the situation and gather evidence.

The Indian High Commission has been engaged to provide support to their nationals.

MBIE is working with the individuals to help them understand their options. This may include applying for a Migrant Exploitation Work Visa, obtaining employment with a new employer, or making suitable arrangements to leave.

INZ is working to contact offshore visa holders who are linked to this case to notify them not to travel until they receive further contact.

Immigration New Zealand [17 August 2023]



Retail spending falls in June 2023 quarter

The total volume of retail sales fell 1.0 percent in the June 2023 quarter, according to figures released by Stats NZ. This comes after falls of 1.6 percent and 1.1 percent in the March 2023 and December 2022 quarters respectively, after adjusting for price and seasonal effects.

The largest contributors to the fall in the June 2023 quarter were food and beverage services, down 4.4 percent, and hardware, building, and garden supplies, down 4.8 percent.

Motor vehicle and parts retailing had the largest rise, up 3.7 percent this quarter, after a 2.1 percent fall in the March 2023 quarter.

"Increased sales reported by vehicle dealers this quarter were likely influenced by impending changes to the Clean Car Discount scheme in July," business financial statistics manager Thomas Cooper said.

Without adjusting for seasonal patterns and price effects, the value of total retail sales was \$29 billion in the June 2023 quarter, up 2.5 percent (\$725 million) compared with the June 2022 quarter.

Statistics New Zealand [23 August 2023]

Better bus driver pay, more reliable services under new public transport framework

Legislation replacing the outdated public transport model with a fairer system that supports paying bus drivers a decent wage, thereby retaining drivers and improving service reliability, passed its third reading last night.

The new Sustainable Public Transport Framework under the Regulation of Public Transport Bill supports the Government's commitment to better public transport, Transport Minister David Parker said.

The new framework provides for long-term sustainability of public transport by ensuring fair and equitable treatment of workers throughout the system, through planning and service provision, David Parker said.

- "Regional councils will be able to own assets and operate services if that is the best option for their communities. Collaboration will be encouraged between councils to plan inter-regional services and better-connect public transport infrastructure and services.
- "A fairer and more sustainable public transport system will help improve pay and conditions for the workforce and make more liveable cities. These changes will create a more reliable system for the future," David Parker said.

New Zealand Government [24 August 2023]



EMPLOYMENT RELATIONS AUTHORITY: FIVE CASES

Authority establishes what is an otherwise working day

Wendco (NZ) Limited (Wendco) had a collective agreement with Unite since 2007. Unite claimed that Wendco breached the collective agreement (the agreement), regarding the way it assessed union members' contractual public holiday entitlements. Unite claimed that 33 of its members (the affected members) had not received their contractual public holiday entitlements for the Christmas 2020 and New Year 2021 period. Unite sought penalties, interest and costs. In addition, Unite applied for a compliance order for Wendco to comply with the agreement and the Holidays Act 2003 (the Act).

Wendco decided which days and hours each union member would work, by allocating weekly rostered shifts according to their agreed availability. There was a contractual process in place for union members to be employed on the basis of "Agreed Working Times" for a guaranteed number of hours per week. Employees could only be rostered to work within their agreed working times. If the rostered hours were not available for the employee to work, then Wendco still had to pay the employee not less than their individual guaranteed hours of work in that week.

The agreement only required Unite members to work on a public holiday if they volunteered and if they had been rostered to do so. Unite believed Wendco failed to correctly determine whether the Christmas 2020 and New Year 2021 public holidays "would otherwise be a working day" for each of the affected members. Wendco said that because it always closed all of its restaurants on Christmas Day, it would not otherwise be a working day. The only union members who received wages for an unworked paid public holiday on 25 December 2020 were those who had not had their guaranteed hours met that week.

Wendco said an employee would not be entitled to a paid unworked public holiday unless the employee had volunteered to work on the public holiday and if they had not been rostered to work their guaranteed hours of work on other days during the public holiday week. In this case Wendco would pay the employee for a public holiday not worked in order to meet their obligations for guaranteed hours under their employment agreement. Wendco did not consider the employees' usual work pattern which was unacceptable to the Authority. It stated that approach excluded, restricted and reduced the employees' entitlement to a paid unworked public holiday. The Authority agreed the public holiday had to fall within the employees' agreed working hours. However, it was unreasonable that an employee first had to volunteer to work the public holiday as that approach allowed Wendco to roster employees in a way that deprived union members of their statutory entitlement to a public holiday not worked.

These were minimum rights under the Act and entitlements that could not be 'rostered' away. Wendco's position that Christmas Day could not ever be an otherwise working day for any employee, because the restaurants were closed, was not accepted. Christmas Day could otherwise be a working day for employees who usually worked that day of the week. Unite's claim that the affected employees were therefore entitled to a paid unworked public holiday on Christmas Day, as per the agreement, was successful.

The agreement allowed the parties to have agreed on a test to establish what constituted an otherwise working day, but they did not do so. That omission left it open to the Authority to adopt an objective test to determine whether the employee regularly worked the day the public holiday fell on. In some cases, reviewing four weeks of an employee's regular days of work made that clear, for some it needed to be 13 weeks or for some in between. The Authority acknowledged there was not a "one size fits all approach". The Authority considered the most decisive factor would be the requirement for the parties to consider whether "but for" the public holiday the employee would have worked on the day concerned. That factor led back to the need for there to be an individualised assessment of the particular employee's normal work pattern in the lead up to the public holiday. When considering the employee's work pattern in the lead up to the public holiday all leave entitlements under the Act, including sick leave and bereavement leave, needed to be counted as a working day.

The Authority held Wendco breached the agreement because it failed to pay a number of affected members a public holiday not worked where they were contractually obligated to under the agreement. The total number of breaches was yet to be determined. Whether or not costs should be payable would be addressed at the conclusion of these proceedings.

Unite Union Incorporated v Wendco (NZ) Limited [[2023] NZERA; 02/05/23; R Larmer]



Employer misinterpreting employees' intention to resign leads to unjustified dismissal

JRL was a charitable organisation that carried out a 24-hour health service in the UK. It employed 24 workers based in New Zealand who worked night shifts in UK time. From 4 May 2021, CSJ was employed as a supervisor reporting directly to the JRL New Zealand manager. His terms of employment were governed by an individual employment agreement dated 12 April 2021. CSJ's primary role was to provide online supervision to workers whilst they undertook digital conversations with persons in the UK who accessed JRL's service. CSJ worked 20 hours per week in 4-hour shifts at his home. JRL was CSJ's secondary employment.

CSJ raised two personal grievances at the Employment Relations Authority (the Authority). First, for unjustifiable disadvantage by JRL for breaching minimum employment standards by not allowing CSJ, among other employees, to take statutory rest breaks. The second grievance was for being unjustifiably dismissed from his employment. He sought compensation.

CSJ's employment agreement was silent on the provision of rest and meal breaks and there was no workplace policy on the implementation of rest and meal breaks. JRL's witnesses gave evidence as to why taking rest and meal breaks in the middle of the work period would be impractical and unreasonable. Initially JRL assumed that the 'admin' time stipulated in the employment agreement covered this, however, it recognised that this assumption was incorrect.

On 22 February 2022, CSJ raised several work-related issues with his New Zealand manager, including his own objections to managerial decisions around hiring and promoting staff and the failure of management to address staff performance. As a result, CSJ said at the time he was considering resigning and said he would reflect on this over the next two weeks while he was on leave. The New Zealand manager said that she discussed CSJ's frustrations in a video meeting and made some changes in the workplace.

On 4 April 2022, CSJ emailed the New Zealand manager which was interpreted as a resignation letter. However, CSJ clarified his position further by an email during the same work shift saying that he "will have a think about it first, was another knee-jerk reaction". On 13 April 2022, CSJ and the New Zealand manager had a video meeting where he was informed that his resignation was discussed with the UK director who reviewed the emails and accepted CSJ's resignation based on the rationale provided.

By email dated 22 April 2022, CSJ challenged the decision to end his employment. The UK director responded to CSJ that his resignation had been accepted. In response, CSJ replied that he wanted to keep his job and that he had just bought a new property. He requested a conversation to discuss the issue. Authority found CSJ's New Zealand manager to be a credible witness. She believed CSJ's statement that he was "wanting to resign", and the fact he had earlier declined a series of meeting invitations, implied the resignation was genuine. She then communicated the alleged resignation to her UK director. The Authority found CSJ's statement was at best vague, and a good employer should have followed up with the employee after a cooling off period. The 4 April 2022 email stating CSJ was "wanting to resign" on its plain and ordinary meaning was future focused. After CSJ had further clarified the situation, his dismissal could not be substantively justified. JRL could not reasonably conclude that CSJ's email amounted to resignation. The Authority submitted that a reasonable person would have understood CSJ's words to mean that he was contemplating resignation but had not yet formed a firm intention to resign.

The failure of JRL to provide the statutory legal requirements of paid rest and meal breaks during CSJ's employment, affected his working conditions to his disadvantage. The failure was not an action an employer acting fairly and reasonably could have taken. The dismissal was unjustified as he had not resigned which meant that it was carried out unfairly and contrary to minimum legislative requirements. The Authority was satisfied that CSJ experienced significant harm for humiliation, loss of dignity and injury to feelings precipitated by actions of JRL. On that basis, JRL was ordered to pay CSJ reimbursement of 3 months' salary being \$11,000, compensation for hurt humiliation and injury to feelings of \$5,000 and \$10,000 for unjustified dismissal and wage arrears of \$1,833 for unpaid rest breaks. Costs were reserved.

CSJ v JRL [[2023] NZERA 282; 31/05/2023; A Gane]



Employer followed fair and reasonable process in dismissal

Mr Cunningham worked for HealthAlliance NZ Limited from 2012 until 17 July 2020, when he was dismissed at the end of a progressive disciplinary system. He raised a personal grievance of unjustified dismissal and a complaint of his manager bullying him.

HealthAlliance provided IT services to District Health Boards in the North Island. It had procedures and processes to retain control over changes, in particular tracking each change. Following the change control process helped with troubleshooting, enabled co-worker checks of peer review and management approval, and gave confidence to customers in the system's integrity. HealthAlliance ensured these processes were accessible, notified staff on the processes and any updates, and regularly trained them. It had a general expectation of leaning towards risk aversion and caution.

In August 2019, Mr Cunningham did not follow the relevant change process, then compounded the issue by raising the change retrospectively. HealthAlliance held a disciplinary meeting resulting in a letter of expectation. The letter advised that system changes required a formal request and to be raised in advance. If doubtful, Mr Cunningham would log the request and consult his manager. If in future Mr Cunningham did not meet these notified expectations, a formal disciplinary procedure could follow.

In September 2019, an issue arose from a change Mr Cunningham made without consulting anyone. HealthAlliance ran another disciplinary meeting. Mr Cunningham explained that the situation was an emergency, but HealthAlliance felt that even in light of the emergency, he still made an unauthorised change and should have followed the steps outlined in the letter of expectation. It gave Mr Cunningham a formal first written warning as per its disciplinary policy.

In October 2019, Mr Cunningham complained that his manager bullied him. HealthAlliance ran an investigation, removing the manager from any decision-making. It did not substantiate the allegation but considered that Mr Cunningham had that perspective as the manager had previously run HR management processes poorly.

In February 2020, a co-worker raised two incidents of Mr Cunningham berating him. In early March 2020, again Mr Cunningham did not follow the change process leading HealthAlliance to run disciplinary meetings for both these matters. Mr Cunningham accepted the issue of conduct but contested against the issue of failing to follow change process. He claimed that the change control was not required as he was not in a 'production' environment. HealthAlliance provided a detailed analysis of system mode, to support that the change occurred on a production server but even if Mr Cunningham had been in development mode, HealthAlliance felt that he should have followed the process from the letter of expectation.

HealthAlliance concluded Mr Cunningham did not meet minimum standards of conduct and behaviour of his role, and that his conduct was disruptive to his team, which impaired HealthAlliance's trust and confidence in him. HealthAlliance wrote that he committed misconduct by breaching their policies, failing to perform duties to an acceptable standard, and irresponsible or unacceptable behaviour which could cause offence. He committed serious misconduct for refusing or failing to obey a reasonable instruction, conduct that could seriously damage HealthAlliance's reputation, and negligence which seriously affected their provision of service. Summary dismissal was proposed and after feedback through Mr Cunningham's representative, HealthAlliance dismissed Mr Cunningham on 17 July 2020.

The Authority assessed whether HealthAlliance made a fair and reasonable dismissal. It found that before dismissing Mr Cunningham, HealthAlliance sufficiently investigated the allegation against him; raised its concerns to him; gave him a reasonable opportunity to respond, with preparation time and ability to gather a representative; and genuinely considered the response, with its decision supported by all the circumstances, including past disciplinary processes. HealthAlliance had a duty to investigate Mr Cunningham's key dispute fully and thoroughly; the Authority found it conducted a fair and objective assessment and examination and could reasonably come to its conclusion on the facts and allegation. It found HealthAlliance was entitled to group the two issues' impacts, resulting in irreparable damage to its trust and confidence in Mr Cunningham. HealthAlliance also considered whether there were alternatives to dismissal.



Ultimately, the number of chances HealthAlliance gave, re-emphases of its rules and following its progressive warning system, meant its process was fair and reasonable. HealthAlliance therefore justifiably dismissed Mr Cunningham. On the bullying complaint, HealthAlliance showed it took the complaint seriously and ran proper process, so caused Mr Cunningham no disadvantage. The Authority said it was for the parties to discuss costs and that HealthAlliance could apply for an order for Mr Cunningham to pay a contribution for its legal fees.

Cunningham v HealthAlliance NZ Limited [[2023] NZERA 296; 7/6/2023; A Dumbleton]

Termination found to be justified despite flawed process

Ms Mercer was employed as an assistant manager from 14 April 2020 to 24 November 2021 by North Beach Limited (North Beach) which operated as a clothing retailer. On 6 October 2021, North Beach began a consultation process about mandating COVID-19 vaccines in the workplace. This was commenced as a 'COVID-19 Workplace Risk Assessment Survey' which was sent to all staff. North Beach received a 71 per cent response to its survey. On 11 October 2021, it circulated to staff a 'Notice of Proposal for Change – Requirement for Customer Facing Roles to be Vaccinated'. On 27 October 2021, North Beach confirmed via email its intention to proceed with the proposal, noting that staff would need to have received their first dose of the vaccine by 15 November 2021, and the second dose by 15 December 2021. The email further stated if employees chose to remain unvaccinated, they would be dismissed with their 4-week notice period ending on 15 December 2021.

On 5 November 2021, Ms Mercer was advised by a regional manager that if she had not received a medical exemption or received her first vaccination by 15 November 2021, her employment may be terminated on 23 November 2021, four weeks after the 27 October 2021 email. On 15 November 2021, Ms Mercer declared she had been unable to receive a medical exemption and needed more time to consider alternative vaccination options. On 16 November 2021, North Beach confirmed its decision to terminate Ms Mercer's employment.

On 15 November 2021, North Beach advertised externally for a full-time stock controller position. The role was never presented to Ms Mercer as an option for redeployment. However, even so, she was aware of the advertisement but did not apply for it by the time her employment ended. North Beach determined that this role was suitable for someone who was vaccinated as the role required interaction with vulnerable employees.

Ms Mercer raised a personal grievance claiming unjustified dismissal arising from North Beach's decision to terminate her employment under a mandatory vaccination policy. The Employment Relations Authority (the Authority) found the mandatory vaccination policy was transparent and comprehensive in its making and had the support of most staff. The Authority concluded that Ms Mercer's dismissal for being an unvaccinated worker was substantively justified.

Since Ms Mercer only received two weeks' notice rather than the six weeks' notice provided for in her employment agreement, \$3,956 plus interest was ordered to be paid. The Authority was satisfied that Ms Mercer suffered a loss of dignity and injury to feelings as a result of her notice period being cut short. The Authority quantified the loss and harm in terms of loss of dignity and injury to feelings at \$10,000 that North Beach was ordered to pay to Ms. Mercer.

Regarding the advertised stock controller role, North Beach's evidence was that the stock controller position was a vaccinated role because of two vulnerable employees who worked in the Albany storeroom. Even if the role was discussed with Ms Mercer, her unvaccinated status meant she would not have succeeded. However, even so, a fair and reasonable employer could have had a more open and bilateral discussion with Ms Mercer about the stock controller position. In a situation where there was a flawed consultation process, but the substantive outcome is justified, the lost remuneration that an employee was entitled to should be limited to the amount of time it would have taken to get the process right. In this case, the Authority estimated no more than one week would have been sufficient for North Beach to complete the consultation process correctly with Ms Mercer and to explain to her why she was not suitable for the stock controller position. Accordingly, the Authority found that Ms Mercer was entitled to a further one week's lost remuneration equating to \$989 gross. North Beach was ordered to pay Ms Mercer the filing fee of \$71.56. Costs were reserved.

Mercer v North Beach Limited [[2023] NZERA 301; 09/06/2023; P Fuiava]



Claims brought by employee deemed to be outside the Authority's jurisdiction and legislated timeframe

Mr Roberts was employed as a Corrections Officer at the Department of Corrections (the Department) and was a member of the Corrections Association of New Zealand (CANZ). On 27 November 2018, he sustained a work-related injury that required him to take time off work. He raised a personal grievance on 14 December 2018 alleging that the Department did not do all it could have done to keep him safe and breached the collective agreement and the Department's code of conduct.

On 11 November 2019, Mr Roberts raised a further grievance as he felt the concerns were not addressed. His claim was for penalties relating to the alleged breaches along with a claim of unjustified disadvantage relating to a short payment of his ACC compensation while he was away from work. The Department was of the view the grievance was raised outside the statutory ninety-day period for raising a personal grievance. The Department also contended the Employment Relations Authority (the Authority) had no jurisdiction to rule on the other matters.

In considering if the personal grievance had been lodged within the statutory timeframe the Authority observed that the 14 December 2018 letter took the form of correspondence from the CANZ Union which set out allegations leading up to the injury to Mr Roberts. It did not refer to Mr Roberts, except in passing. It did not raise a personal grievance on his behalf. There was no explanation or suggestion that Mr Roberts had been unjustifiably disadvantaged, under the Employment Relations Act 2000 (the Act), and there were no remedies sought for him in CANZ's 14 December 2018 email.

The Department thought CANZ was raising general ongoing complaints about a range of matters that concerned its members without specific reference to Mr Roberts. The Authority observed that this was a fair and reasonable view, based on the content of the communications that were exchanged between the parties. The 14 December 2018 email did not comply with section 114(2) of the Act, use the words "personal grievance", state the type of grievance, nor state the remedies sought. The Authority ruled it had no jurisdiction to investigate the personal grievance claim.

In consideration of the claim for a shortfall of Mr Roberts' ACC compensation payments the "top-up" to 100 per cent of base salary is noted in some information pages for staff that relate to the Department being an accredited employer. There are no other policy or contractual documents in which the ACC 'top-up' is recorded. There was no contractual obligation in the collective agreement for the Department to pay Mr Roberts 100 percent of his total gross earnings while on ACC. The top-up appears to be a discretionary benefit that is given to all employees. Mr Roberts's claim that the Department had to 'top up' his ACC payments to equal his total gross earnings is without a contractual or statutory basis. The Authority ruled it did not have jurisdiction to consider this claim.

Regarding allegations of a breach of the code of conduct, the Authority ruled it did not give rise to a breach of contract claim, because it was not a contractual term of Mr Roberts's employment.

The incident causing the injury to Mr Roberts was "directly and indirectly" connected to, and arose out of, his covered personal injury. He could not claim separate damages for any breaches that gave rise to that incident and his consequent injury, because that was covered by the Accident Compensation Act 2001. The Authority ruled that it did not have jurisdiction to investigate or determine Mr Roberts' damages and/or compensation claim.

The penalty claims in the statement of problem were not commenced within the 12-month statutory timeframe required by s 315(5) of the Act and there was no good reason to extend the time for Mr Roberts to commence his penalty actions beyond the statutory 12-month time limit. The Department, as the successful party, was entitled to a contribution towards its actual legal costs. The parties were encouraged to resolve costs by agreement.

Roberts v The Chief Executive of the Department of Corrections [[2023] NZERA305; 13/06/2023; R Larmer]



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.

There are currently six Bills open for public submissions to select committee.

Mclean Institute (Trust Variation) Bill (30 August 2023)

Fair Trading (Gift Card Expiry) Amendment Bill (14 September)

Sale And Supply Of Alcohol (Cellar Door Tasting) Amendment Bill (14 September)

Employment Relations (Restraint of Trade) Amendment Bill (18 September 2023)

Whakatōhea Claims Settlement Bill (31 October 2023)

Emergency Management Bill (3 November 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/

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: comms@businesscentral.org.nz or for further information, call the AdviceLine on 0800 800 362



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