Federal Court of Appeal | Cour d'appel fédérale

Date: 20220513

Docket: A-135-21

Citation: 2022 FCA 83

CORAM: **PELLETIER J.A.**
WEBB J.A.
RIVOALEN J.A.

BETWEEN:

SHERRY LEE NOWLAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the Registry

on March 9, 2022.

Judgment delivered at Ottawa, Ontario, on May 13, 2022.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: PELLETIER J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

RIVOALEN J.A.

I. Introduction

[1] This is an application for judicial review commenced by the applicant, Sherry Lee Nowlan, with respect to the decision of the Federal Public Service Labour Relations and

Employment Board (the Board) in *Nowlan v. Treasury Board (Department of Foreign Affairs, Trade and Development)* (2021 FPSLREB 34) dated March 31, 2021 (the Decision).

[2] The review involves the interpretation of section 12.1 of the National Joint Council's Relocation Directive (the Directive). Section 12.1 is incorporated by reference into the applicable collective agreement. The Directive provides that employee-requested moves shall be deemed to be an employer requested move unless the employer provides written certification that, had the vacant position not been filled as a result of an employee-requested transfer, it would have been filled through the normal staffing procedures without relocation expenses being incurred.

[3] The wording of the section at the time in question (April 1, 2009 version) was as follows:

Part XII - Employee-requested Relocation (April 2009)	***Partie XII - Réinstallation à la demande du fonctionnaire*** (Avril 2009)
12.1 Employee-requested Relocation	12.1 Réinstallation à la demande du fonctionnaire
12.1.1 The Departmental National Coordinator shall ensure that:	12.1.1 Le coordonnateur ministériel national veille à ce que :
(a) employees are provided with counselling and written confirmation on the applicable provisions of this Directive; and	(a) les fonctionnaires reçoivent des conseils et une confirmation écrite des dispositions de la présente directive qui s'appliquent; et
(b) copies of all correspondence are retained on the employee's relocation file.	(b) des exemplaires de toutes les lettres soient conservés dans le dossier de réinstallation du fonctionnaire.
12.1.2 An employee-requested transfer that results in an authorized relocation to a position at the	12.1.2 Une mutation demandée par le fonctionnaire qui donne lieu à une réinstallation autorisée pour qu'il

appropriate group and level which is vacant on arrival at the new place of duty shall be deemed to be an employer-requested relocation subject to the following:

occupe un poste du groupe et du niveau pertinents vacant à son arrivée au nouveau lieu de travail sera considérée comme une réinstallation à la demande de l'employeur.

(a) The relocated employee shall be reimbursed relocation expenses within the limits prescribed in this Directive, unless the deputy head or senior delegated officer provides written certification that, had the vacant position not been filled as a result of an employee-requested transfer, it would have been filled through normal staffing procedures without relocation expenses being incurred.

(a) On remboursera au fonctionnaire les frais de réinstallation en respectant les limites prévues par la présente directive, à moins que l'administrateur général ou un cadre supérieur investi du pouvoir nécessaire soumette un certificat attestant que, si le poste vacant n'avait pas été pourvu par suite d'une mutation demandée par le fonctionnaire, il l'aurait été par la voie normale de dotation en personnel sans entraîner de frais de réinstallation.

(b) When a position is so certified, the employee is entitled to:

(b) Lorsqu'un tel certificat est présenté pour le poste, le fonctionnaire a droit à :

- the sum of up to five thousand dollars ($5,000.00) in their Customized Fund;
- jusqu'à cinq mille dollars (5 000 $) dans sa composante sur mesure;
- the Core and Personalized Funds do not apply;
- les composantes de base et personnalisée ne s'appliquent pas;
- unused or remaining monies shall be returned to the Receiver General of Canada/department and are not payable to the employee as a cash-payout.; and
- les sommes inutilisées ou restantes sont retournées au Receveur général du Canada/ministère et ne peuvent être payées au fonctionnaire par décaissement;
- a contract with a relocation services supplier who will provide the employee with professional assistance such as counselling on the relocation benefits available, guidance on accommodation at the
- un contrat avec un fournisseur de services de réinstallation qui offre au fonctionnaire des services professionnels d'information sur les avantages en matière de réinstallation, des conseils sur l'hébergement au nouveau lieu de

new location and expense management.

travail et des conseils en matière de gestion des dépenses.

12.1.3 Relocation expenses include but are not limited to HHT, DHIT, Interim Accommodation, Travel to new Location, Movement of HG&E, Rental of Vehicle, Child Care and Pet Care.

12.1.3 Les frais de réinstallation comprennent notamment ceux de voyage à la recherche d'un logement, de voyage d'inspection de la nouvelle résidence, d'hébergement provisoire, de voyage jusqu'au nouveau lieu de travail, de transport des effets mobiliers, de location de véhicule, de garde d'enfants et de garde d'animaux de compagnie.

- There is no assistance for disposal or acquisition of a principal residence, including rental related expenses.

- Aucune aide n'est accordée pour l'aliénation ni l'acquisition d'une résidence principale, incluant les frais de location.

12.1.4 Employees may claim a Non-Accountable Incidental Expense Allowance in the amount of $650 as part of the $5,000.00 allocation of Customized funds.

12.1.4 Les fonctionnaires peuvent réclamer une indemnité pour frais accessoires non soumis à une justification de 650 $ à même la composante sur mesure de 5 000 $.

- Receipts are not required however they should be retained by the employee in the event of a tax audit.

- Le fonctionnaire n'est pas tenu de présenter des reçus, mais il devrait les conserver en cas de vérification fiscale.

- The employee must sign a statement certifying that the expenses were incurred.

- Le fonctionnaire doit signer une attestation que les frais ont été engagés.

12.1.5 The department is to arrange for the shipment of the relocating employee's HG&E through CRS.

12.1.5 Le ministère prend les arrangements pour le transport des effets mobiliers, par l'intermédiaire du FSR.

12.1.6 All commercial travel arrangements are to be made through the federal government's contracted travel services. Employees are governed by the NJC Travel Directive.

12.1.6 Tous les arrangements de voyage commerciaux doivent être pris par l'intermédiaire des services contractuels de voyages du gouvernement fédéral. Dans ce contexte, les fonctionnaires sont assujettis à la Directive sur les voyages du CNM.

[4] There is no debate that the employer did not provide such written certification in this case.

[5] The interpretation of section 1.4.2 of the Directive is also relevant in this judicial review. The wording of the section at the time in questions was as follows:

1.4.2 Payment of relocation expenses shall be authorized for employees who are:	1.4.2 Le remboursement des frais de réinstallation est autorisé pour les fonctionnaires :
• full-time and part-time indeterminate employees; or	• à temps plein et à temps partiel nommés pour une période indéterminée;
• part-time employees appointed to full-time indeterminate positions; or	• à temps partiel nommés pour une période indéterminée à des postes à temps plein;
• seasonal indeterminate employees; or	• saisonniers nommés pour une période indéterminée;
• term employees appointed to indeterminate positions; or	• pour une période déterminée nommés à des postes pour une période indéterminée;
• on Leave Without Pay (LWOP) for less than one (1) year; or	• en congé non payé pour moins d'un (1) an;
• on priority status as defined by the *Public Service Employment Act* (PSEA).	• bénéficiant d'une priorité en vertu de la *Loi sur l'emploi dans la fonction publique* (LEFP).

[6] The interpretation of section 2.2.2.2 of the Directive was also considered by the Board. This section provides that the employee must obtain written authorization within the proper delegation framework prior to incurring any relocation expenses. It reads as follows:

2.2.2.2 Obtain written authorization within the proper delegation framework prior to incurring any relocation expenses; employees proceeding with relocation related transactions prior to authorization or incurring expenses beyond those allowable under this Directive will be personally financially responsible for such expenses and could be disqualified from participating in this Directive.	2.2.2.2 Il obtient, conformément au cadre de délégation applicable, une autorisation écrite avant d'engager quelque dépense de réinstallation que ce soit. Le fonctionnaire qui conclut des opérations reliées à la réinstallation avant d'obtenir une telle autorisation ou qui engage des dépenses excédant les seuils prévus dans la présente directive doit assumer personnellement ces dépenses et risque de ne plus pouvoir se prévaloir de la présente Directive.

II. Facts

[7] The essential facts are not in dispute. The applicant was an employee working in the Ottawa office of the Department of Foreign Affairs, Trade and Development (the employer). She made it known to her supervisor that for family reasons she would like to relocate to the Toronto office, and she was prepared to be demoted in order to do so.

[8] The employer did just that. The employer advised that six positions would be created in regional offices, two of which were located in Toronto. The employer cautioned the applicant that the position would be a demotion and that it was unable to reimburse the applicant any relocation expenses. The applicant accepted this advice and relocated from Ottawa to Toronto. She was demoted from an EC-07 position to a CO-02 position. In the process, she took eight days of her own leave and incurred $26,124 in relocation expenses.

[9] By letter dated July 30, 2010, the employer offered the CO-02 position with a start date of September 7, 2010, but incorrectly stated that the office location was Ottawa. The employee

accepted and moved shortly thereafter to Toronto with the approval of the employer, and performed all of her work from the Toronto office. The employer never provided the written certification contemplated under section 12.1 of the Directive.

[10] Some months after her move, following the advice she received from her accountant, the applicant claimed her relocation expenses on her tax return, but the Canada Revenue Agency (CRA) rejected her claim.

[11] Sometime after this rejection, the applicant became aware of an inter-departmental memorandum of understanding regarding arrangements for positions such as hers to the effect that the regional office was to cover the cost of domestic relocation. A few months after this discovery, the employer provided the applicant with a second letter of offer in which the location of the office was changed from Ottawa to Toronto. The applicant signed this second letter.

[12] Shortly thereafter, the applicant turned to her employer and requested that it consider reimbursing her relocation expenses because CRA would not accept her claim. After more than two years of deliberation, the final position taken by the employer was that the applicant's request did not fall within the limits of the Directive because she did not obtain written approval within the proper delegation framework prior to incurring her relocation expenses.

[13] The applicant grieved the employer's decision to deny her relocation expense claim. She also claimed reimbursement of eight days of leave she took in order to arrange her move. The Board allowed the grievance in part.

III. The Decision

[14] The Board found that the applicant did not carry out the steps required of an employee under section 2.2.2.2 of the Directive, namely, seeking approval of all expenses before incurring them. However, the Board found that the applicant's failure flowed from the employer's mistaken decision that it could approve a relocation without approving the relocation expenses (Decision at para. 7).

[15] The Board proceeded with its interpretation of the Directive, referenced the collective agreement and considered the relevant sections at play (Decision at paras. 48 -50). The Board recognized at paragraph 51 of the Decision that like any other collective agreement grievance, it must apply the well-established principles of contract interpretation. Words are to be given their ordinary meaning, the provisions within an agreement or contract are to be read as a whole, effect must be given to every word, and specific provisions are to take precedence over general provisions.

[16] Relying upon this Court's decision in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at paragraphs 36 and 37 [*Delios*], the Board stated that when the language of the agreement is clear, it must be applied, even if the result may seem unfair or impose additional costs.

[17] The Board considered the scope of the employer's discretion when it came to authorizing a relocation. The Board reviewed the July 30, 2010, letter and found that the employer

understood that the applicant would have to relocate from Ottawa to Toronto for the offered position. The Board determined that the impact of the letter was clear: it authorized the applicant to stop working in Ottawa as an EC-07 and to start working in Toronto as a CO-02, effective September 7, 2010 (Decision at para. 63).

[18] At paragraph 64 of the Decision, the Board found no provision in the Directive that allows the employer the discretion, after authorizing the employee to start in a position in another location, "**not** to authorize that move as a relocation." Further, in the same paragraph, the Board held that section 1.4.2 of the Directive uses the mandatory language of "**shall** authorize relocation for full-time indeterminate employees", leaving no discretion to the employer on this point. [Emphasis in the Decision].

[19] The Board concluded that the Directive does not provide the employer with the discretion to decide whether or not to reimburse expenses (Decision at para. 65).

[20] The Board then focussed its attention on section 12.1.2 of the Directive, which determines whether the applicant's relocation should be considered as employee-requested or employer-requested.

[21] The Board concluded that having forgiven the applicant's failure to seek written authorization from the employer prior to incurring her relocation expenses, similarly, the employer should be forgiven for its failure to provide the written certification required of it pursuant to section 12.1.2 of the Directive. The Board determined that in this case, it had to go

beyond the purely technical rules of contract interpretation and apply common sense (Decision at paras. 77-79).

[22] The Board then considered and rejected the employer's argument that the grievance should be denied on the basis of promissory estoppel (Decision at paras. 84-96).

[23] The Board ordered that the applicant be paid $5000 as allowed under the employee-requested provision as reimbursement for moving expenses (Decision at para. 97).

[24] On the issue of the eight days of unpaid leave taken by the applicant, the Board applied section 2.2.1.10 of the Directive, which requires the employer to provide the employee with the leave necessary to carry out activities associated with the relocation. Taking note of the fact that the applicant was no longer an employee of the Federal public service at the time of the hearing, the Board awarded the applicant eight days of pay at the maximum level of the CO-02 group pay scale that was in effect the year of her relocation. As this represents employment income, the Board specified that this amount was to be paid subject to any deductions the employer is required to make (Decision at paras. 98-102).

IV. Standard of Review and Issues

[25] The parties agree that the reasonableness standard of review applies to the Board's decision (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [*Vavilov*]).

[26] The reasonableness standard is a deferential one, which examines the administrator's decision with respectful attention and attempts to understand the conclusion and the reasoning that brought it to bear (*Vavilov* at paras. 83-84). A decision is reasonable when it flows from an internally coherent chain of analysis and is justified in light of the relevant legal and factual constraints (*Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, 441 D.L.R. (4th) 269 at para. 2; *Vavilov* at paras. 84-85).

[27] When a decision-maker's reasons reveal that the decision is based on an unreasonable chain of analysis it will not meet the requisite standard of analysis of justification, transparency, and intelligibility (*Vavilov* at paras. 96 and 103-104).

[28] Having regard to the reasonableness standard, I would frame the issues before this Court as being:

A. Having found that the employer had no discretion to deviate from its obligation to reimburse relocation expenses to the employee under 1.4.2 of the Directive, was it reasonable for the Board to forgive the employer's mistake of not providing a written certification to the employee to authorize the move under section 12.1.2 of the Directive that would have resulted in the employee's entitlement to a reimbursement of expenses being limited to a maximum of $5,000?

B. In calculating the eight days of personal leave awarded to the applicant, was it reasonable for the Board to ignore evidence regarding the applicant's higher rate of pay?

[29] After the hearing before this Court, the panel invited counsel to provide further written submissions on the question of the Board's remedial jurisdiction. The panel noted, from paragraphs 77 to 82 of the Decision, that the Board fashioned a remedy in light of the parties' failure to comply with their obligations under the Directive.

[30] For the following reasons, I am of the view that the Decision is unreasonable.

V. Analysis

A. *Was it reasonable for the Board to adopt a "non-technical common sense" approach in its interpretation of section 12.1.2 of the Directive?*

[31] I start my analysis by agreeing with the Board's interpretation of section 1.4.2 of the Directive and the legal principles it relied on when it embarked on the task of reviewing the language of the Directive.

[32] As stated in paragraph [15] above, the Board, properly in my view, recognized at paragraph 51 of the Decision that the same principles that apply to contracts such as collective agreements apply to the text of the Directive. The Directive was incorporated by reference into the collective agreement, and as such, its words are to be given their ordinary meaning. The

provisions within the agreement or contract are to be read as a whole, effect must be given to every word, and specific provisions are to take precedence over general provisions (Palmer and Snyder, *Collective Agreement Arbitration in Canada*, 5th Ed., pp. 21 to 55; D.J.M. Brown & D.M. Beatty (Eds.), (2019) *Canadian Labour Arbitration*, 5th Ed., 4:2100 Thomson Reuters).

[33] The language of section 1.4.2 of the Directive requires that "[p]ayment of relocation expenses shall be authorized for employees who are: full-time and part-time indeterminate employees". As well, section 1.2.3 of the Directive provides that the Directive is "policy and not…permissive guidelines" and that the exercise of discretion is "confined to those provisions where discretion is specifically authorized."

[34] The ordinary language of section 1.4.2 is clear. The employer has no discretion to refuse an employee her relocation expenses. It was reasonable for the Board to find that the employer was mistaken when it advised the applicant that it could not provide her with any reimbursement for relocation expenses.

[35] The issue is whether the amount reimbursed should be the $5000 maximum under the "employee-requested" provision at section 12.1.2 of the Directive, or rather an amount closer to the actual costs of relocation incurred under the "employer-requested" provision of the Directive.

[36] The Board found that it could apply a "non-technical common sense approach" when it interpreted section 12.1.2 of the Directive. The relevant portion of section 12.1.2 states that "[a]n employee-requested transfer that results in an authorized relocation to a position at the

appropriate group and level which is vacant on arrival at the new place of duty *shall be deemed* to be an employer-requested relocation subject to the following: (a) *The relocated employee shall be reimbursed relocation expenses within the limits prescribed in this Directive, unless the [employer] provides written certification that …*" [My emphasis].

[37] Rather than apply the same legal principles and approach it took when interpreting section 1.4.2 of the Directive, the Board applied a common sense approach to its interpretation of section 12.1.2. The Board, relying on what it described as a mistake made by the applicant because she had not requested written approval prior to incurring the relocation expenses, determined that it could ignore the language of section 12.1.2. The terms "shall be deemed" create a deeming provision which requires the employer to reimburse relocation expenses, but this can be defeated if the employer provides written certification. Here, no written certification was provided. In my opinion, the Board's approach to the interpretation of section 12.1.2 is unreasonable for several reasons.

[38] First, the principles of legal interpretation of the language of section 12.1.2 were ignored and yet applied for section 1.4.2. The Decision lacks logical coherence because the Board is inconsistent in its approach to contractual interpretation.

[39] On the point of contractual interpretation, the Supreme Court has stated that the interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. While surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a

new agreement (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 57).

[40] Likewise, the leading textbook authors J.M. Brown and D.M. Beatty teach us that the first step in interpreting the collective agreement is for the decision-maker to review its language in its ordinary and normal sense, in the entire context of the agreement. If there is no ambiguity, the decision-maker should give meaning to the explicit language unless the result would be absurd or oppressive.

[41] Only if there is some ambiguity, that is the words are capable of more than one meaning, should the decision-maker assess extrinsic evidence (D.J.M. Brown & D.M. Beatty (Eds.) (2019) *Canadian Labour Arbitration*, 5th Ed., Thomson Reuters, at para. 4:2100). Similarly, this Court has reiterated, on judicial review of Board decisions, that while labour relations adjudicators are entitled to deference in their areas of expertise, including collective agreement interpretation, their interpretations must nevertheless be ones that the agreement's text can possibly bear (*Public Service Alliance of Canada v. Canada (Attorney General)*, 2016 FCA 184 at paras. 4-7).

[42] Here, there was no ambiguity. The failure by the Board to give the plain and ordinary meaning to section 12.1.2 of the Directive is, in and of itself, unreasonable. The certification process is mandatory should the employer decide it does not want to pay full relocation expenses. Should the employer decide not to provide written certification, then it will be required to pay "employer-requested" relocation expenses.

[43] In addition, the Board justifies its “common sense” approach by looking at the surrounding circumstances. It lays blame on the shoulders of the applicant for not obtaining the written approval of the employer before incurring her expenses. This factual finding is unreasonable because the applicant should not be blamed for her conduct as she was relying on the advice of her employer. The employer made the mistake. The applicant relied on it. She should not be faulted for that. It was unreasonable for the Board to conclude that the applicant’s failure to obtain prior written approval before incurring relocation expenses was her mistake. It was not. It stemmed from the employer’s mistaken advice that no reimbursement expenses could be provided to the applicant. The Board’s reasoning lacks logic and coherence.

[44] A further problem with the Decision is the Board’s reliance on a previous Board decision in *Carroll v. Treasury Board (Department of Public Works and Government Services and Department of Industry*) 2019 FPSLREB 23 [*Carroll*]. This decision is distinguishable from the present case because the provisions at issue in the collective agreement in *Carroll* were indeed ambiguous, in contrast to the clear language of the Directive at issue here. I also note that the Board did not follow a previous Board decision which dealt squarely with the interpretation of section 12.1.2 of the Directive (*Gresley-Jones v. Treasury Board (Canada Border Services Agency*) 2020 FPSLREB 65 [*Gresley-Jones*]). In *Gresley-Jones*, at paragraph 67, the Board confirmed that written certification is a necessary component of an employee-requested transfer under the Directive. Further, at paragraph 82, the Board confirmed that the employer cannot benefit from its breach of the collective agreement to deprive grievors of the legitimate benefit that their bargaining agent negotiated and obtained for them. As is the case before us, in *Gresley-Jones*, the grievors accepted what the employer’s delegated authority told them and acted on that

information. It would be absurd for the very party that provided the false information to use the employee's legitimate reliance on that false information to deprive that employee of a legitimate benefit.

[45] These prior decisions were not binding on the Board, but the Board fails to provide adequate reasons for dismissing *Gresley-Jones* and for relying on *Carroll.*

[46] The Board did rely on this Court's decision in *Delios*, namely that when the language of the agreement is clear, it must be applied, even if the result may seem unfair or impose additional costs. That is true for the present case. While the employer may well be faced with additional costs as a result of the application of the strict language of the Directive, the language is nonetheless clear and the provisions must be applied consistently and reasonably.

[47] The respondent did not raise the argument of promissory estoppel before this Court, and in any event, the argument had no merit before the Board. In my opinion, the employer cannot rely on the conduct of the applicant because the employee made no promise when she simply accepted her manager's advice that no relocation expenses would be paid.

[48] Regarding the post-hearing submissions on the issue of the Board's remedial jurisdiction, although the Board was not faced with a claim for damages based on negligent misrepresentation, it appears that the Board, under the guise of contractual interpretation, awarded a remedy on this basis. That is, the Board did not grant a remedy based on the

application of the wording of the Directive to what actually occurred, but rather based on a hypothetical scenario (Decision at para. 82). This renders the Decision unreasonable.

[49] I end my analysis by concluding that, taking into account all of the defects outlined above, the Decision is unreasonable because the Board failed to apply general principles of contract interpretation where the language was clear and unambiguous. The Decision lacked logical coherence. The Board also relied on a previous Board decision that was easily distinguishable on the one hand and discounted a highly relevant previous Board decision on the other. Finally, the Board based its remedy on a hypothetical scenario and did not apply the wording of the Directive to what actually occurred.

B. *In calculating the eight days of personal leave awarded to the applicant, was it reasonable for the Board to ignore evidence regarding the applicant's higher rate of pay?*

[50] Turning to the evidence regarding the applicant's request for reimbursement of eight days of leave, the Board awarded eight days at the lower CO-02 pay level. The evidence was that the applicant used five days of her own leave at the higher EC-07 level and three days of her own leave at the lower CO-02 level. It is unclear from the Board's reasoning if the applicant had used her personal leave, why all those days should be compensated at the CO-02 level when the bulk of them were taken when the applicant was compensated at the higher EC-07 level. The Board did not justify its reasons for awarding the entire eight days at the lower level, despite the evidence before it.

[51] This renders the Decision on this aspect of the award unreasonable.

VI. Conclusion

[52] Here, my review of the Decision reveals that it is based on an unreasonable chain of analysis and does not meet the requisite standard of analysis of justification, transparency, and intelligibility (*Vavilov* at paras. 96 and 103-104).

[53] For these reasons, I would allow the application for judicial review. I would quash the Decision and remit the matter back to the Board to be decided in accordance with these reasons, and I would award costs to the applicant.

"Marianne Rivoalen"
J.A.

"I agree.
J. D. Denis Pelletier J.A."

"I agree.
Wyman W. Webb J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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