



New Zealand Employment Relations Authority Decisions

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Nagel v Nelson Underground Services Ltd (Wellington) [2016] NZERA 744 (22 March 2016)

Last Updated: 17 December 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON		
		[2016] NZERA Wellington 36 5569562
	BETWEEN	STUART NAGEL Applicant
	AND	NELSON UNDERGROUND SERVICES LIMITED Respondent
Member of Authority:	Michele Ryan	
Representatives:	Peter Kiely, Counsel for the Applicant Anjela Sharma, Counsel for the Respondent	
Investigation Meeting:	14 and 15 December 2015 at Wellington	
Submissions Received:	Oral and written submissions from both parties on 15 December 2015	
Determination:	22 March 2016	
DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY		

Employment relationship problem

[1] Stuart Nagel had recently been made redundant from a position in the telecommunications industry when he was offered a position with Nelson Underground Services (NUS) as a 'general labourer/operator'. NUS is a civil contractor involved in the installation of ultrafast broadband cables.

[2] Mr Nagel began his employment with NUS's Wellington branch on 11 March 2015 at 7am. Shortly after he was given a written individual employment agreement which contained a 90 day trial period provision. He signed the agreement and returned it the following day.

[3] Mr Nagel was dismissed 12½ weeks later. He claims he was unjustifiably disadvantaged when NUS issued him a written warning on 22 April 2015, and was later unjustifiably dismissed on 4 June 2015. He seeks compensation for each of those events, and wages and KiwiSaver contributions lost as a result of his dismissal. He requests the Authority make a recommendation to NUS in respect of its good faith practices and order a penalty for breach of his employment agreement when NUS failed to give seven days' notice of termination of employment or payment in lieu.

[4] NUS concedes that when Mr Nagel signed the employment agreement he was already working and therefore an existing employee. It accepts that the 90 day trial period provision is therefore unenforceable.¹ It says Mr Nagel's written warning and dismissal were both substantively justified and denies Mr Nagel was disadvantaged by the warning. NUS submits that, if Mr Nagel's claims are successful, any remedies awarded should be reduced by 80-100%.

[5] NUS also makes counterclaims against Mr Nagel for breach of an employment agreement. It alleges he failed to undertake his duties according to his contractual hours of work. It further says Mr Nagel provided inadequate notice when he was unable to attend work and/or work the prescribed hours. NUS says these matters evidence a breach of good faith and it seeks a penalty against Mr Nagel as a consequence.

The Authority's investigation

[6] Oral and written evidence was provided to the Authority by Mr Nagel, his partner, and also by representatives of NUS. I have not recorded all the information provided or reconciled each of the conflicts that arise from it. As permitted by 174E of the [Employment Relations Act 2000](#) this determination expresses conclusions of fact (based on the balance of probabilities) and law necessary to dispose of Mr Nagel's claims and NUS's counterclaims.

[7] This determination has been issued on the seventh day outside the statutory period of three months after the date on which the investigation meeting concluded. As permitted by [s 174C\(4\)](#) the Chief of the Authority has decided that exceptional

1 Under [s 67A](#) of the [Employment Relations Act 2000](#) a 90 day trial period is only enforceable if at the time the employment agreement was entered into, the employee had not previously been employed by the employer.

circumstances exist to allow a written determination of findings later than the latest date specified at [s 174C\(3\)](#).

Issues

[8] The Authority is required to determine the following:

- (a) was the written warning of 22 April procedurally and substantively justified?
- (b) was Mr Nagel's dismissal procedurally and substantively justified?
- (c) if the warning and/or if a dismissal was not justified, is Mr Nagel entitled to remedies?
- (d) did Mr Nagel contribute to the situation which led to his warning or to his dismissal?
- (e) should penalties be awarded, and if so against whom?
- (f) should a recommendation be made?

The law as it relates claims of unjustified disadvantage and unjustified dismissal

[9] NUS is required to establish that its actions as to the warning and the dismissal were each justifiable. Whether a disciplinary action or dismissal is justifiable is determined by reviewing the employer's actions against what a notional fair and reasonable employer could have done in all the circumstances at the time of the dismissal or action.² An employer must establish there were reasonable grounds for the dismissal. The Authority needs to also consider whether the procedure taken to reach that decision was fair. That inquiry includes assessing whether the employer, before taking action or deciding to dismiss;

- raised its concerns with the employee;
- gave the employee a reasonable opportunity to respond to the concerns, and
- genuinely considered the employee's explanation.³

2 [Section 103A\(2\)](#) employment Relations Act 2000

3 Section 103A(3) [Employment Relations Act 2000](#)

[10] [Section 103A\(5\)](#) provides that the Authority must not find an employer's action or a dismissal to be

unjustifiable solely on the basis of procedural defects if the defects were minor and did not result in the employee being treated unfairly.

[11] The Court has observed that “a failure to meet any of the [s 103A\(3\)](#) tests is likely to result in a dismissal or disadvantage being found to be unjustified”⁴.

Summary of relevant information leading to the written warning

[12] NUS says in February 2015 it identified an increase in employees furnishing timesheets late, which impacted on its ability to ensure weekly wage payments were paid correctly and on time. Over the following 3 months it regularly communicated to staff its requirement to have accurate timesheets returned at the end of each working day. In addition, if employees were sick, a completed leave form and relevant timesheet needed to be furnished.

[13] Between 11 March 2015 and 22 April 2015 Mr Nagel was late for work in seven instances, and had left early on four of those days. He was absent from work on five occasions (four of these were for bereavement).⁵ Mr Nagel did not return 5 timesheets at the end of a working day over this period.

[14] NUS says by mid-April 2015 it decided to proactively manage those employees who continued to be non-compliant with its instructions regarding time recording. On 22 April 2015 NUS issued written warnings to five staff members including Mr Nagel. In the afternoon he was approached by the Managing Director of NUS and handed a letter. The letter advised of the requirement for:

“timesheets to be filled out and completed at the end of each working day a (sic) with the correct start times and task information on it and handed to your supervisor/Project Manager or placed in the drop tray in the Taita yard at the end of the each day”.

[15] The correspondence concluded with a warning that further failure to adhere to timesheet and timekeeping requirements may result in additional action including summary dismissal. Mr Nagel was required to sign an acknowledgment that he accepted the letter’s contents and possible outcomes should he not adhere to its requirements.

⁴ *Angus v Ports of Auckland Limited* [\[2011\] NZEmpC 160](#) at [\[26\]](#)

⁵ on 25 March 2015, and 7-10 April inclusive attending a funeral

Was the written warning procedurally fair?

[16] There can be no real argument that NUS did not engage in any of the minimum standards set out at s. 103A(3) of the Act. Mr Nagel was given no opportunity to respond to NUS’s allegations or have his responses considered before it issued him with a warning. That process was seriously defective and resulted in Mr Nagel being treated unfairly. Mr Nagel’s warning was procedurally unjustified.

Was the written warning substantively justifiable?

[17] NUS says the warning was nevertheless substantively justifiable.

[18] The content of the warning letter centred exclusively on Mr Nagel’s failure to return an accurate timesheet at the end of each working day. At the Authority’s investigation it transpired that the impetus to issue the warning was primarily to address concerns that Mr Nagel was not filling out leave forms and too often starting late and finishing early.⁶ Those matters are not referred to in the warning letter at all and NUS is not able to bolster its justification for the warning by relying on the existence of alternative matters of concern.

[19] The parties dispute whether Mr Nagel was provided with an induction when he began employment and therefore whether he was advised of NUS’s timesheet processes. I do not accept the suggestion that Mr Nagel was unaware of his obligation to return accurately filled in timesheets at the end of each day. He conceded that NUS’s expectation concerning timesheets had been raised at daily tailgate and bi-weekly toolbox briefings throughout March and April. There is independent evidence also that he attended a team meeting on 1 April 2015 where leave form and timesheet procedures and compliance were emphasised.

[20] Mr Nagel further acknowledges he did not account for his lunch break when completing timesheets despite written instructions on the cover of the timesheet book to this effect. He says he did not read the cover instructions but was never told his timesheets were filled incorrectly.

[21] The written warning did not set out the dates on which timesheets were not returned at the end of the day. It was clear from the evidence that timesheets were handed in late on 2 April, and 14-17 April. Evidence given of behalf of NUS implies

6 evidence given by Brendan Dodd

there were additional instances where timesheets were not returned at the end of the day⁷ and prior to the warning. Mr Nagel's testimony during questioning seemed to acknowledge that fact. However apart from the dates referred to above it remained unclear when these omissions occurred.

[22] A sizeable portion of evidence centred on whether Mr Nagel was able to access the portacom office to furnish timesheets.

[23] Alongside other general labourers Mr Nagel's duties were performed out in the field. Employees tended to leave the yard in pairs in the morning and return in the afternoon or evening.

[24] Mr Nagel points to an incident where the yard was locked on his return and he was unable to deliver his timesheet. He says he was never advised as to the location of the yard key. I accept Mr Nagel was prevented from complying with NUS's timesheet directive in that instance. However I prefer the evidence of his supervisor, Mr Wilson, whose advised that Mr Nagel alerted him to the incident soon after and he [Mr Wilson] had made a point of informing staff of the whereabouts of the yard/portacom key at the next bi-weekly toolbox meeting. I consider it likely that Mr Nagel was aware of the key's existence going forward.

[25] Timesheets indicate Mr Nagel generally finished work at 5-30 or earlier. He says he was often prevented from returning timesheets because the yard was closed from 5pm or thereabouts. NUS disputes that point and says the yard was generally not locked until 6 to 6-30pm. Given the imperative to have employees return timesheets at the end of the day I consider it more likely that the yard was kept open to facilitate that requirement. On balance I am not persuaded that Mr Nagel was regularly precluded from returning his timesheet because he was unable to access the yard when he finished work.

[26] Mr Nagel agrees that between 14-17 April (inclusive) he did not furnish timesheets until the end of the week. By way of mitigation he says he had sole responsibility of his daughter's day-care arrangements which required him to finish work at 3pm and did not have time to return his timesheets.

7 separate to those associated with absences

[27] In the absence of NUS allowing Mr Nagel to comment on the allegations, and therefore no means for it to consider his explanations before the warning was dispatched, NUS has been unable to establish a reliable basis on which it can fairly conclude Mr Nagel was at fault. I am not satisfied that a fair and reasonable employer could in these circumstances issue the warning. I find the warning was substantively unjustified.

[28] NUS submits that Mr Nagel cannot have been disadvantaged by the warning as he did not protest the content of it, and by signing the document agreed to its effect. I do not accept that submission. Mr Nagel was given no opportunity to obtain advice before he was required to sign it and the failure to contest the warning does not diminish the fact that it was procedurally and substantively unjustified. I consider the warning disadvantaged Mr Nagel by putting his ongoing employment at risk.

Summary of relevant information leading to the dismissal

[29] Between receipt of the written warning and 4 June 2015 Mr Nagel was absent from work on a further 6 occasions. Of these, Mr Nagel filled out a leave form on 15 May 2015 having taken the previous day off. NUS treated the day as paid annual leave. NUS alleges Mr Nagel did not complete leave forms corresponding to the remaining absences. Mr Nagel disagrees and says he appropriately provided a leave form for 22 May 2015.

[30] On arrival at work on 4 June 2015, Mr Nagel was given a letter by the Project Manager informing him of his

dismissal with one day's notice and was told of its contents. The letter (dated 3 June 2015) referred to the 90 day trial period provision and stated:

After assessing your suitability of working with us we have decided you are unsuitable for employment with the Company...

[31] Mr Nagel raised his personal grievance claims on 10 June 2015. The parties eventually attended mediation but have been unable to resolve their differences.

Was the dismissal procedurally fair?

[32] At the time NUS dismissed Mr Nagel it considered it could rely on the trial period provisions, but its omission to ensure those provisions were agreed before Mr

Nagel's employment began means it is not able to avoid the obligation to justify its decision to dismiss Mr Nagel.

[33] Turning first to process, I find NUS's approach to Mr Nagel's dismissal was wholly defective for the same reasons identified with the written warning. Mr Nagel was given no opportunity to comment on the matters leading to the termination of his employment or on the dismissal itself before he was informed of the event. I find that his dismissal was, as with the warning, procedurally unjustified.

Was the dismissal substantively justifiable?

[34] NUS provided a range of factors it says justifies its decision to dismiss. It reports Mr Nagel repeatedly failed to complete and return accurate times sheets and leave forms. It says his attendance at work was unreliable as were his hours of work. NUS further states that Mr Nagel would give short notice, if at all, of absences or late attendance without explanation as to why. It says these matters, and taking into account Mr Nagel's lengthy experience within the industry, justified Mr Nagel's dismissal.

[35] Mr Nagel's written evidence tends to confirm NUS's criticism as regards short notice. There is no real dispute that he would text NUS within 15 minutes either side of his contractual start time at 7am.⁸

[36] Mr Nagel reported to work late 8 times over the course of his employment. He says these instances only occurred when he needed to drop his daughter at day-care. Timesheets reveal on these occasions Mr Nagel would generally begin work at 8am. I found that the warning letter could not have put Mr Nagel on notice about late starts but I accept Mr Wilson's evidence that at some point in mid-April he told Mr Nagel "*enough is enough*" and that he had to start work on time.

[37] Mr Nagel says no one ever told him he had to fill in a leave form.⁹ There is no evidence of individual instruction on the issue but I do not accept he was ignorant of NUS's policies on the matter. I have already found that Mr Nagel was informed of NUS's timesheet requirements at a meeting on 1 April 2015 at the latest. NUS's policy around leave records was also reinforced at that meeting.¹⁰ The predominant

⁸ 'Witness Statement of Stuart Nagel', para. 54d & k, para. 62a & f.

⁹ Witness statement para.51

¹⁰ Evident by the minutes of that meeting,

reason Mr Nagel did not fill out leave forms was likely because he knew he would not be paid for days he took off. Mr Nagel's written evidence states he was aware that during his first six months he could not claim sick or bereavement leave.¹¹ Mr Nagel agreed he did not inform anyone at NUS of his practice but says no one questioned why he was not completing leave forms.

[38] NUS points to the events of 21 May 2015 to support its position that Mr Nagel was unwilling to comply with its policies. Mr Nagel says he filled out a leave form on 21 May to take annual leave the following day. He says NUS lost the form. NUS denies that allegation and says Mr Nagel was absent on 22 May without providing a leave form or obtaining approval for the leave.

[39] By way of background, a team meeting had been held on the morning of 21 May 2015. Alongside a repetition of NUS directions in respect to timesheets and leave forms staff were advised, when applying for accruing annual leave, approval was needed from either the Managing Director or the General Manager. Mr Nagel spoke to Mr Wilson later in the day asking if he could take annual leave on 22 May. There is a dispute about what was communicated between them. Mr Nagel says Mr Wilson told him to fill in a leave form and that “*it would be ok*”. He says he understood that statement to mean his application would be approved. Mr Wilson says he advised Mr Nagel to submit a leave form and that it was up to senior management to approve the leave. On balance I prefer Mr Wilson’s evidence. The minutes from the meeting record staff were informed that accrued annual leave only could only be approved by one or other of the two most senior individuals within NUS. In those circumstances I consider it unlikely that Mr Wilson would give any indication one way or the other as to whether Mr Nagel’s leave would be approved.

[40] I am satisfied that by the time Mr Nagel was dismissed NUS had legitimate concerns with Mr Nagel’s overall approach to attendance, timekeeping and time- recording matters. This finding is not without qualification. Firstly, there is a good argument that the concerns that NUS says justified Mr Nagel’s dismissal can each fairly be regarded as performance matters.

[41] I do not accept, as is inferred by NUS, that Mr Nagel must, or should have, known his performance was in question at the time he was dismissed. A fair and

11 ‘Witness Statement of Stuart Nagel’, para. 50

reasonable employer is not able to simply impose disciplinary consequences when it perceives its expectations have been generally discussed but not met by an employee.

[42] I consider Mr Wilson likely alternated between providing support to, and expressing frustration with, Mr Nagel’s approach to attendance matters, but I am not satisfied those exchanges indicated to Mr Nagel that he needed to improve or he would be dismissed. Where an employee may potentially be dismissed for poor performance, s/he must be given explicit reasons for the dissatisfaction, clear instructions on how to improve and a reasonable period to achieve that end.¹² I note following Mr Wilson’s advice to Mr Nagel that he needed to start on time, Mr Nagel’s hours of work appear to have improved with only one further instance of a late start. I consider this matter was largely resolved at the time of his dismissal and cannot be regarded as a legitimate concern leading to his dismissal.

[43] As to the remaining concerns, with the exception of requiring daily provision of timesheets, there is no evidence that NUS drew to Mr Nagel’s attention that it was dissatisfied with aspects of his performance, which it now says was the basis of his dismissal.

[44] Alternatively, if the concerns about timesheet and leave form processes are better categorised as potential misconduct, NUS’s failure to advise Mr Nagel of those matters and provide him with an opportunity to comment, undermined its ability to establish that there were sufficient grounds to reasonably conclude Mr Nagel was at fault. In this respect NUS’s procedural failings have impacted on its ability to establish that the dismissal was substantively justified. Mr Nagel’s dismissal was substantively unjustifiable.

Remedies

[45] When a personal grievance has been upheld, section 128(2) of the Act requires the Authority to order the payment of a sum equal to the lesser of the sum actually lost or 3 months’ ordinary time remuneration. Section 128(3) provides that the Authority may use its discretion and order compensation beyond three months’ remuneration.

[46] Mr Nagel seeks \$14,700 in lost wages plus KiwiSaver contributions for the period between the date of his dismissal and beginning alternative employment 5½

12 *Trotter v Telecom Corporation of New Zealand* [1993] 2ERNZ 659

months later. He produced little documentary evidence of attempts to mitigate his loss. He reports that technology issues prevented him from producing this material. He was however able, without hesitation, to verbally list at least seven organisations he approached for work. I am satisfied he sought to mitigate his loss.

[47] I am unwilling to exercise my discretion to order reimbursement of wages beyond three months. Mr Nagel's supervisor Mr Wilson and a co-worker, Mr George Taingahue, both gave credible testimony (which I accept) of Mr Nagel's dislike of aspects of his duties and his unhappiness with his role. Given that evidence, which may in part explain the level of recorded absences, together with the short duration of Mr Nagel's employment, and the concerns NUS had with Mr Nagel, there is no guarantee his employment would have continued beyond three months. I decline to award reimbursement of remuneration beyond that prescribed at s. 128(2).

[48] Subject to my assessment as to contribution, the starting point for reimbursement of lost wages and KiwiSaver is \$8,400 (the gross sum equal to three months' wages) and \$252 respectively. I have taken into account that Mr Nagel was unable to work for two weeks in July following surgery and that he received payment of "about \$100" for a day's work for a friend. I have subtracted two weeks' wages plus \$100 and award reimbursement of \$7007.69 (gross) minus PAYE. Mr Nagel is also entitled to proportionate reimbursement of KiwiSaver contributions of \$210.23.

Compensation for humiliation, loss of dignity, and injury to the feelings

[49] I have taken a global approach to assessing whether compensation should be ordered in respect to Mr Nagel's grievance claims and, if so, the quantum of compensation that should be awarded.

[50] Mr Nagel says he felt humiliated by the way NUS informed him of the warning and the dismissal. He reports that his humiliation was exacerbated on both occasions because each had been conveyed in front of co-workers. He accepts that on both instances his colleagues were not within earshot when management spoke to him on the matter.

[51] I agree that the imposition of a warning and/or a dismissal is likely to cause distress particularly in circumstances where the recipient employee had not been given an opportunity to explain and be heard on the issues. Mr Nagel advised the Authority that he considered \$5,000 was an appropriate level of compensation. I find

that sum both reasonable and appropriate. Subject to findings as to contribution NUS is ordered to pay compensation of \$5,000.

Contribution

[52] I am required to consider the extent to which Mr Nagel's actions contributed to the situation that gave rise to each of his personal grievance claims and whether to reduce the remedies that he would otherwise have been awarded.¹³

[53] Dealing first with the warning, the frequency of Mr Nagel's failure to furnish accurately recorded timesheets at the end of the working day remained unclear although the evidence points to at least five instances which Mr Nagel does not dispute. Given that NUS repeatedly communicated its requirement to have timesheets furnished at days end I find his behaviour contributed in a causative and blameworthy way to NUS's decision to issue the warning.

[54] It is submitted on behalf of Mr Nagel that where an employee has been dismissed pursuant to an unenforceable 90 day trial period provision the employee cannot be said to have contributed to the situation leading to dismissal. I do not accept that a personal grievance finding due to a defective 90 day trial limits the inquiry to that "situation" only. In *Ark Aviation Ltd v Newton*¹⁴, a case where an employer dismissed an employee without undertaking a fair inquiry, the Court of Appeal found:

...matters of which an employer was aware at the time which, directly or indirectly, impacted on its decision to dismiss may be shown to be actions contributing to the situation, or fault on the part of the employee resulting in the dismissal. They then will form part of the "situation which gave rise to the personal grievance" under ss40(2) and 41(3). There is no threshold ss40 and 41* that requires knowledge of awareness to derive exclusively from a sound process, provided it is of sufficient substance to be the basis for legitimate concern at the time of the dismissal".*

* materially similar to s.124 [Employment Relations Act](#) but not identical provisions in the [Employment Contracts Act 1991](#).

[55] As regards the issues around absenteeism and notification of absenteeism, I have no doubt Mr Nagel pushed

the boundaries of what may be reasonably acceptable, but there is no evidence that these matters were brought to his attention.

13 s. 124

14 [\[2001\] NZCA 350](#); [\[2002\] 2 NZLR 145](#); [\[2001\] ERNZ 133](#)

[56] Mr Nagel's failure to fill out leave forms are matters relevant to the situation leading to his personal grievance of an unjustified dismissal. Mr Nagel agreed he knew NUS employees were required to complete and return leave forms following an absence. Despite that awareness he did not comply with the directive nor did he inform his supervisor that he was not abiding by the instruction, or why. I find his actions were careless and demonstrated a level of disregard for his employer's requests and policies. That conclusion is reinforced when I consider Mr Nagel's decision to take leave on 22 May 2015 despite not obtaining approval for the leave. These actions were causative and are sufficiently blameworthy to warrant some reduction to his remedies.

[57] Taking into consideration all of the above I assess Mr Nagel's contribution to his dismissal as 25%.

Should a recommendation be made?

[58] Mr Nagel requests the Authority to make a recommendation to NUS with respect to its statutory obligations of good faith. Having assessed NUS's witnesses and evidence I consider it likely that NUS is inexperienced with its statutory duties when contemplating disciplinary action. I find its failure to apply the legislative requires set out at s. 4(1A) and minimum procedural standards as described at [s. 103A\(3\)](#) of the [Employment Relations Act](#) were significant factors in each of Mr Nagel's personal grievance claims. Pursuant to [s. 123\(ca\)](#) I recommend NUS take steps, either by obtaining legal advice or information through an Human Resources expert, to ensure it becomes familiar with those obligations as contained in the Act.

Should penalties be awarded?

[59] Both parties allege the other breached the employment agreement and each seeks a penalty. I am not satisfied that either party has sufficient grounds to support an order for the specific purpose of punishing a wrongdoing.¹⁵

[60] I find NUS's breach of Mr Nagel's notice provisions was inadvertent and made in circumstances where it considered the applicable notice period was that contained in the 90 day trial period provisions. Mr Nagel has been compensated for his losses through the personal grievance remedy mechanisms.

15 [\[2004\] 2 ERNZ 488](#)

[61] Mr Nagel's failure to comply with reasonable and lawful instructions relating to timesheets and leave forms has already been considered and has resulted in a reduction to his remedies. NUS's duty of good faith obliged it to advise Mr Nagel of its dissatisfaction about the way he notified absences if it wished to address the concern. I am not persuaded that it is appropriate for NUS to have ignored its own obligation to be responsive and communicative yet seek penalty action against Mr Nagel for the same deficiency. I decline to order penalties in all the circumstances.

Costs

[62] Costs are reserved.

Summary of Orders

[63] Nelson Underground Services is to pay Mr Nagel:

- i. \$5,255.7716 (gross) as reimbursement of lost wages, pursuant to s. 123(1)(b) and s. 128(2);
- ii. \$157.6717 as reimbursement for the lost benefit of KiwiSaver, pursuant to s. 123(1)(c)(ii);
- iii. \$3,75018 as compensation for humiliation, loss of dignity and injury to feelings, pursuant to s. 123(1)(c)(i).

Michele Ryan

Member of the Employment Relations Authority

16 Lost wages of \$7007.69 minus 25%.

17 Employer's KiwiSaver contribution of \$210.23 minus 25%

18 Compensation awarded minus 25%

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