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# Question

- How do you approach capability dismissals in long-term sickness cases where:
  - (1) OH is sitting on the fence, but a return to work seems unrealistic, and
  - (2) the employee insists on returning but repeatedly and quickly falls sick again?



# Long Term Absence

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In cases of long-term absence, case law has established that fairness will involve the following key elements:

- Ascertaining the up-to-date medical position.
- Consulting with the employee.
- Considering adjustments and the availability of alternative employment.
- Impact of absence on the employer.

When investigating the medical position, an employer should be judged by the standards of the reasonable employer, not by the standards of whether it left no stone unturned.

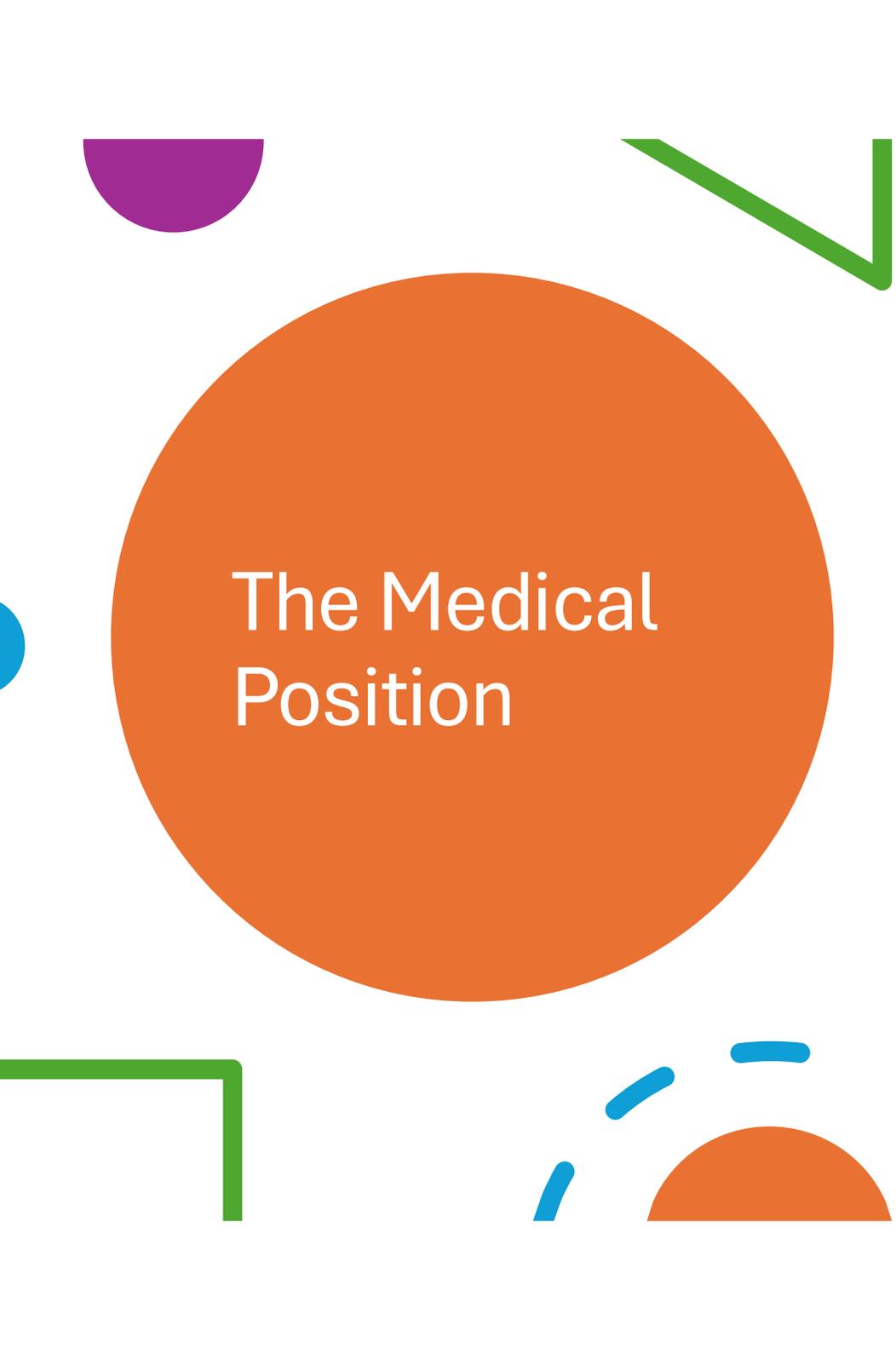




# Medical Advice

Medical advice can:

- Establish the reason for absence and whether any illness is genuine.
- Indicate the likely length of continued absence.
- Assess the effect of an illness on an employee's ability to do their job, and what, if any, adjustments can be made to help them to return to work.
- Assist in arranging a phased return to work from long-term sickness absence.
- Establish whether an employee is likely to qualify for any employment benefits, such as permanent health insurance (PHI) or early ill-health retirement.



# The Medical Position

- Sources of Medical Evidence
  - GP report
  - Consultant report
  - Occupational Health report

**OH v GP report**

# GP report



01

**GP report** – focuses on the medical condition and any ongoing or planned treatment

02

May advise light duties or a phased return but will not usually give detailed recommendations

03

The report will have a cost attached

04

Time – there is often delay in getting reports

# OH report

01

Similar cost  
to a GP  
report

02

Faster

03

Focused on  
workplace  
capability  
aspects

04

Often more  
detailed and  
more  
practical

# Consulting with the Employee

- The employer should always consult with the employee rather than relying solely on the expert's opinion (*East Lindsey District Council v Daubney*).
- An employee may wish to challenge the medical opinion in some way or ask for a counter-report. If such a request is denied or ignored, there is a *risk* that the dismissal will be unfair
- **BUT** an employer is entitled to take a medical opinion at face value, unless a reasonable employer would not have relied on a report of that nature. *Liverpool Area Health Authority (Teaching) Central & Southern District v Edwards [1977] IRLR 471*.

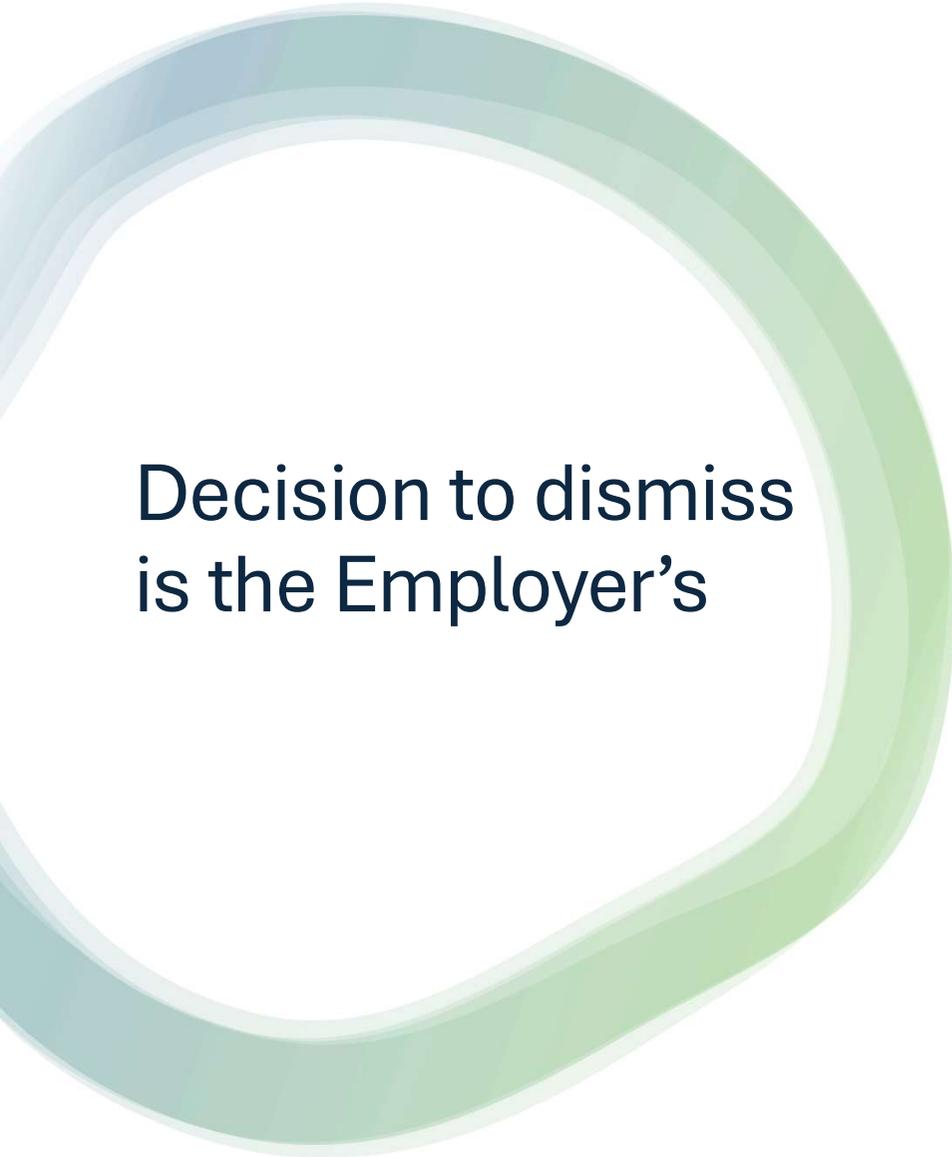




## Consulting with the Employee

- *CFS Management Services Ltd v Thomas*  
*[2012] UKEAT/0511*

It was held to be unreasonable of an employer to rely on a medical report which was obviously flawed, a fact that should have been appreciated by the employer.



## Decision to dismiss is the Employer's

- *DB Schenker Rail (UK) Ltd v Doolan [2010] UKEAT/0053/09,*

The decision to dismiss is a managerial one, not a medical one. While the views of experts will help the employer in coming to a decision, the experts do not dictate the outcome.

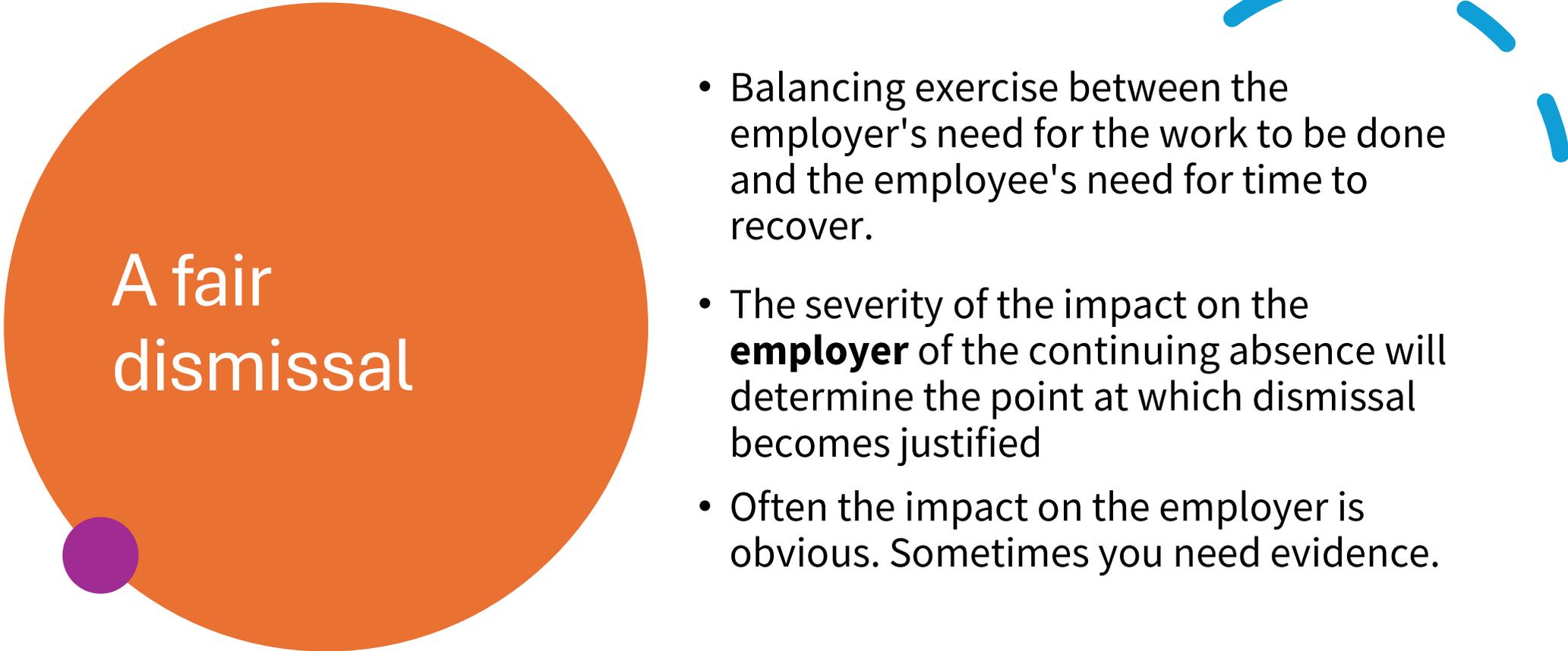
# What if the employee refuses to consent to supply medical information?

- Employer's job is to seek up to date medical information
- If the Employee refuses consent, the Employer must proceed on the basis of the knowledge and information it has
- Rarely works in the Employee's favour



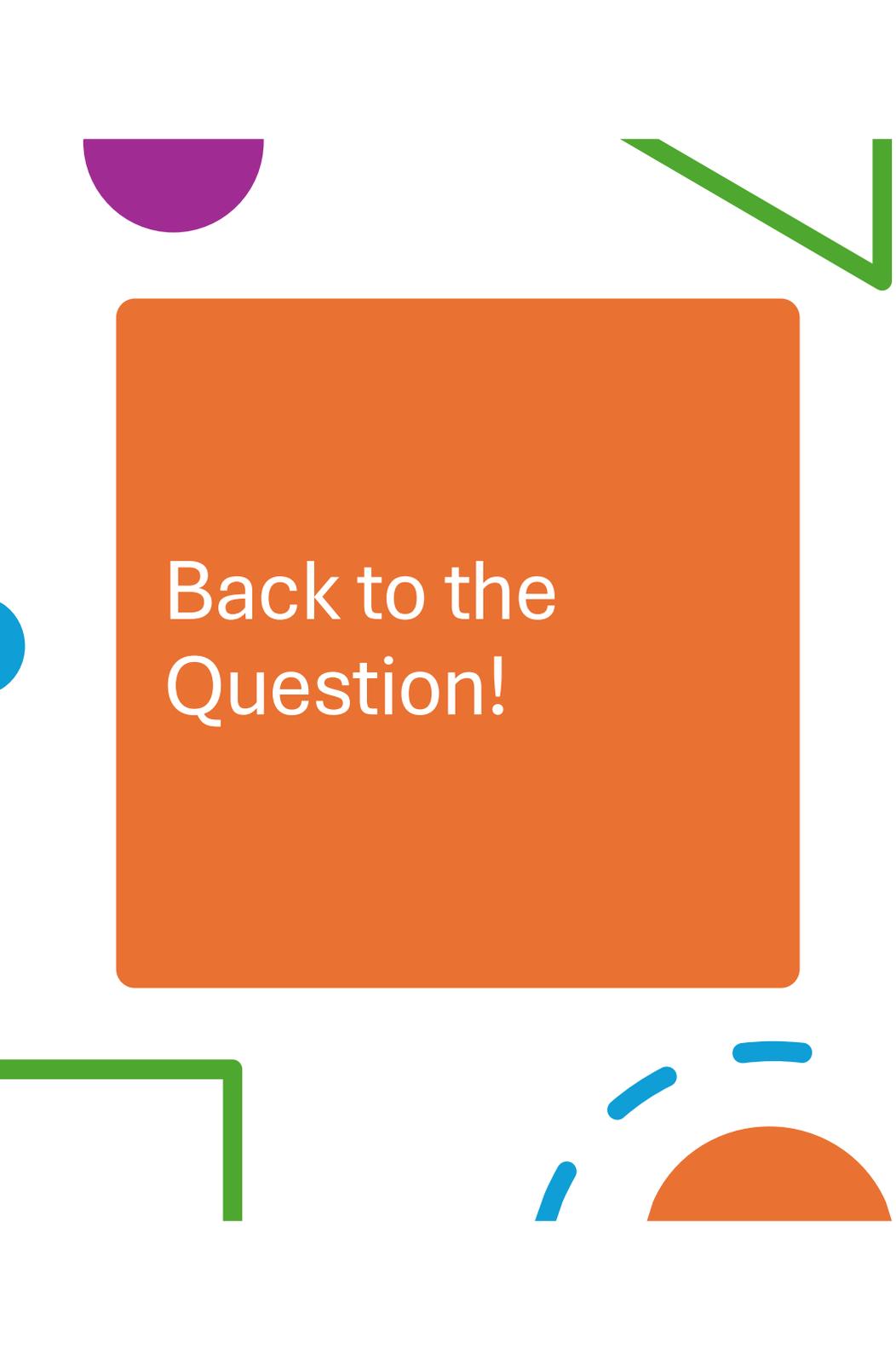
## Alternative Employment

- An employer should consider whether there is any suitable alternative employment before taking the decision to dismiss (*Williamson v Alcan (UK) Ltd* [1978] ICR 104 and *First West Yorkshire Ltd v Haigh* [2008] IRLR 182).
- However, it is not under a duty to create a job where none exists (*Merseyside v Taylor* [1975] ICR 185).
- Do consider options to retrain, and/or relevant reasonable adjustments



## A fair dismissal

- Balancing exercise between the employer's need for the work to be done and the employee's need for time to recover.
- The severity of the impact on the **employer** of the continuing absence will determine the point at which dismissal becomes justified
- Often the impact on the employer is obvious. Sometimes you need evidence.



# Back to the Question!

- (1) OH is sitting on the fence, but a return to work seems unrealistic, and
- (2) the employee insists on returning but repeatedly and quickly falls sick again?

A practical approach

# Occupational Health



Can you ask for a second report, including up to date information on attendance, or a second opinion from another OH or GP?



Can you go back with specific questions to pin them down on the issue of fitness for work?



What is your other available evidence telling you?



Remember, the OH report is not the final word

# Consult with Employee

Put the evidence of the continued absences to them – are they being unrealistic about their health?

Explore whether there are any adjustments which make a difference to attendance.

Can you agree a target attendance within a time frame? Be clear on targets and the consequences of not meeting them.

Is alternative employment an option?

# Dismissal

If the absences continue, and adjustments do not help/are not relevant, there is a point at which the adverse impact on the employer of the ongoing absences, justifies dismissal.

Record the impact on the business - include it in your consultation notes and in correspondence to the employee. Ask the line manager to prepare a report on the impact.

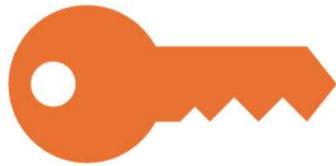
## Final Word

- No one source of information trumps all others – a fair decision will be based on all the information available

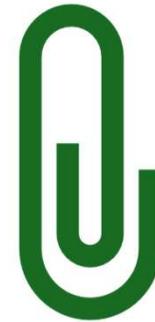
## Final Word

1. Up to date medical information
2. Consultation with Employee
3. Consideration of adjustments and alternative employment
4. Impact on business

# Final Word



Process is key – You get more marks for your working out than your answer.



Keep good records – NOTES NOTES NOTES!

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