Date: 20080716

Docket: T-1607-07

Citation: 2008 FC 873

Ottawa, Ontario, July 16, 2008

PRESENT: The Honourable Mr. Justice Louis S. Tannenbaum

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

FRANÇOIS DEMERS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The undersigned has before him an application for judicial review of the decision of a grievance adjudicator dated August 16, 2007. In this decision, the adjudicator allowed the respondent's grievance and ordered that the fine imposed on the respondent be repaid to him. The adjudicator also ordered the employer to compensate the respondent for the salary and benefits lost as a result of his sick leave.

[2] The employer is the Correctional Service of Canada (hereinafter CSC) and the respondent is a correctional officer for the CSC.

[3] The applicant, the Attorney General of Canada, is alleging that the adjudicator erred in fact and in law or exceeded his jurisdiction by reversing the fine and by ordering that the employer compensate the respondent for the benefits and salary lost as a result of his sick leave.

Statement of the facts

[4] The respondent has been working as a correctional officer for the CSC since 1977. At the time of the incident he was working at the Cowansville Institution.

[5] In June 2005, the CSC adopted a new dress code and the officers' uniform was changed. These changes were designed in collaboration with the Union of Canadian Correctional Officers (hereinafter UCCO).

[6] The former uniform required that the agents wear a tie, while the new uniform prohibited wearing a tie. The evidence established that the tie for the work uniform was eliminated at the suggestion of the officers themselves.

[7] The respondent refused to take off the tie notwithstanding the new dress code and the new guidelines, as he had always worn a tie while performing his duties.

[8] On October 28, 2005, the respondent's supervisor, Pierre Sansoucy, wrote a memorandum (exhibit 14) to Mr. Demers which read:

[TRANSLATION]

WEARING THE UNIFORM
Sir,
Karine Dutil A/U.M. of sector 2 mandated me to meet with you regarding the wearing of the new uniform. We have been informed that you do not wear the new uniform. As you are aware, a dress code has been in effect since the arrival of the new uniform. The failure to observe this dress code will result in disciplinary action which could go so far as suspension. I spoke with the national and local union representative on this subject. They support the Service in implementing the wearing of the uniform. Therefore, if you have not complied with this dress code, I would ask you to immediately do so. I will meet with you when I return from vacation to see whether you have complied with this requirement.
I am counting on your usual cooperation.
Pierre Sansoucy C/S sector 2
c.c.: employee file; K. Dutil U.M.
P.S. I will place a code accompanied by this memorandum in your locker.

[9] The undersigned is satisfied that Mr. Sansoucy gave the respondent a copy of the dress code with the memorandum (exhibit 14).

[10] It would be worthwhile to refer to certain sections of the dress code:

8. Employees must wear CSC uniforms, and CSC-issued occupational clothing items, in strict compliance with this document. No visible additional items or substitution of "look-alike" items are permitted, unless authorized in this document.
9. … Uniformed employees . . . will not:
   f. mix uniform and non-uniform clothing items, for casual or other wear (e.g. baseball cap);

> g. alter the original look of the uniform (work or dress) in any way.
>
> [Emphasis added.]

[11] In the arbitral award, at paragraph 41, the adjudicator said:

> I note that the dress code does not prohibit wearing a tie.

I find it difficult to understand this finding by the adjudicator. Sections 8 and 9 of the dress code are clear to the effect that "[e]mployees must wear CSC uniforms . . . and that "[n]o visible additional items . . . are permitted."

When something is not permitted, it is therefore prohibited. The dictionary *Le Petit Robert* indicates that the antonym of [TRANSLATION] "permission" is [TRANSLATION] "prohibition."

[12] On November 29, 2005, the respondent received another memorandum (exhibit 17). This memorandum reads as follows:

> [TRANSLATION]
>
> WEARING A TIE
> Sir,
> I met with you on November 29, 2005, to advise you that wearing a tie with the work uniform did not satisfy the Service's dress code. I advised you that you would be subject to disciplinary action if you refused to comply. I advised you that you would have to wear the uniform in accordance with the dress code and be well-attired out of respect for the image of the Service that you represent. You told me that wearing a tie was essential because it is your perception that this imposes respect when dealing with clientele. You also told me that you were ready for the disciplinary action that would be taken against you in order to avail yourself of your rights. You explained to me that you did not understand the Service's rationale on this point. I

> explained to you what I knew and why the tie was no longer being worn with the work uniform. I told you that I understood your opinions but that I did not approve of your approach. In closing, I told you again that the next time I saw you wearing a tie or dressed in a manner that did not comply, there would be disciplinary action. I asked you a final time to comply.
> I thereby advised you that you had been reported by a supervisor for your harsh words about him. I told you that I would see you again regarding that matter and that you were exposing yourself to disciplinary action.
> For your information.
> Pierre Sansoucy C/S
> c.c.: record; UM

[13] It is also in evidence (exhibit 18, *en liasse*) that on November 27, 2005 and December 4, 2005, the respondent was advised that he was not allowed to wear a tie while he was working.

[14] Exhibit 20 refers to meeting between the employer's representatives and the respondent, held on December 5, 2005. This reads as follows:

> [TRANSLATION]
>
> MEETING OF DECEMBER 5, 2005
> On Monday morning at 7:00 a.m., we met with François Demers in the conference room of administration 3. He was accompanied by Mario Martel and Francine Boudreault from the Union. Management was represented by Karine Dutil A/U.M. and Pierre Sansoucy S.C.O. The first subject was the tie worn by Mr. Demers. I repeated before all of those in attendance how we would proceed against Mr. Demers if he continued to insist on wearing his tie. He told us that he would exhaust all of his options. He told us that he wanted to have his written warning before leaving the institution. This was done. The second matter was the report that was made by the supervisor, Murielle Leblanc. He explained the situation from his perspective. Ms. Dutil explained to him that the report no longer stood, that

management had misinterpreted Ms. Leblanc's report. Mr. Demers explained that he had reported Ms. Leblanc and that he wanted additional explanations and that he was dissatisfied. In the end, he told us that he was declaring war.
Pierre Sansoucy C/S
c.c.: François Demers; Dossier; U.M. pav. 9 "

[15] Exhibits 22 and 23 were filed in evidence and respectively read as follows:

[TRANSLATION]

MEETING OF DECEMBER 8, 2005
Sir,
On December 8, 2005, at about 7:00 p.m., I met you with Mario Martel of the Union and Alessendria Page U.M at administration 3 of the Cowansville Institution. I ordered you to remove your tie and not to wear it during your shift. You refused and disciplinary action followed (fine).
Pierre Sansoucy C/S
c.c.: record; U.M

Summary of the facts
Mr. Demers began to wear his new uniform only in the beginning of November 2005 even though he had received the … in about June 2005. When he put on his new uniform, he added and wore a tie. He was warned four times to remove it and he was given a written warning on 05/12/05 for his refusal to remove it. Despite all of these efforts, he continued to wear it.

Employee's declaration
The employee maintains that a tie is part of the uniform. He will continue to wear it and is prepared to do whatever is necessary to that end. To him, a tie imposes discipline on the clientele.

Disciplinary action
Faced with Mr. Demers's refusal, I had no choice but to impose a $75 fine for wearing his tie.
Correctional Supervisor Pierre Sansoucy 05/12/08

[16] When Mr. Demers was warned about wearing a tie and he refused to take it off, he stated that for him it was essential because the tie called for respect from the clientele. He explained his reasons to the psychiatrist who assessed him on February 13, 2006, in the following words:

> [TRANSLATION]
>
> . . . that a tie is a tool which is as useful as handcuffs or any other tool. A tie lends reverence but also helps him establish a boundary between him and the inmates.

[17] After imposing the $75 fine on December 8, 2005, the respondent left the institution in tears (see exhibit 5) and went to the hospital. He was diagnosed with “adjustment crisis”(exhibit 25) and on January 17, 2006, his physician ordered that he stop working for three months.

[18] When Mr. Demers received warnings before December 8, 2005, and even when he received the written warning on December 5, 2005, he had not given any signs that would have indicated the above-described reaction and diagnosis.

[19] On December 13, 2005, Mr. Demers filed an application for benefits with the *Commission de la santé et de la sécurité du travail* (hereinafter CSST) for an industrial accident. This application was refused and, at the time of the hearing before the adjudicator, was before the *Commission des lésions professionnelles du Québec*.

[20] Other events followed:

(A) On December 25, 2005, Mr. Demers filed the following grievance:

> [TRANSLATION]
>
> Description of the grievance:
>
> Abuse of authority by the employer leading to discrimination and harassment, all because of a tie.
>
> I am being prohibited from earning a living, since I no longer have access to the institution.
>
> Corrective actionS requested:
>
> 1. Make wearing a tie optional in the dress code.
>
> 2. Reimburse me for all lost sums of money.
>
> 3. Be present at all levels at the employer's expense.

(B) On December 26, 2005, Mr. Demers reported to the Cowansville Institution saying that he wanted to return to work, claiming that he was no longer on industrial accident leave, but rather that he had been off work since December 8, 2005. As he did not have a medical certificate attesting that he was able to return to work, he was refused access to the institution.

[21] At the request of the CSC, on February 13, 2006, Mr. Demers was examined by Dr. Lafontaine, psychiatrist. His report was filed in the record before the adjudicator as exhibit 1. I believe it worthwhile to refer to certain passages from this assessment, including the findings:

[TRANSLATION]

ASSESSMENT MANDATE:
The purpose of the assessment is to respond to the following questions:

1. What is your diagnosis?
2. What is the foreseeable date of consolidation of the injuries?
3. Is treatment warranted?
4. Are there functional limitations?
5. Do you foresee a permanent impairment?
6. What would be a foreseeable date for return to normal work, i.e. without working selected positions?

. . .
PERSONAL PSYCHIATRIC HISTORY:
Negative.
FAMILY PSYCHIATRIC HISTORY:
Negative..
. . .
CURRENT FOLLOW-UP:
There was only one meeting on December 8, when he was at the emergency clinic. He was seen only once by a psychiatrist, who diagnosed with a conflict with the employer. He saw his family physician, Dr. Laguë, who on January 17, 2006, had him stop work for three months for situational adaptation disorder.
. . .
SUMMARY OF RELEVANT FACTS:
Mr. Demers tells us that his condition was caused by his employer's intransigence. He adds that it is also the employer's arrogance and the pressure that it put on Mr. Demers that were such that when he stopped working, he left his work in tears.
. . .
Mr. Demers recognizes that he has a hot temper, but he will not give up, he tells us. He feels that the employer is aggressive. He is under the impression that they are trying to crush him. Mr. Demers acknowledges that he is not easy-going. He tells us that he learned from his mother that when we have convictions, we must stick with them, and that is what he is doing now. He tells us that if he cannot work wearing his tie, he will have to be dismissed.
. . .
MENTAL ASSESSMENT:
. . .
Occasional irritable humour and affect, at times, but generally Mr. Demers is not depressed. He is somewhat anxious however. We note that there is a slight tremor in his hands. His thinking is normal,

> in terms of form and substance. The ideic substance is not melancholy, hypochondriatic, suicidal or psychotic. The associative processes and perceptual modalities are normal:
> . . .
> ANSWER TO MANDATE:
> 1. DIAGNOSIS
>   Axis I Adaptation disorder with anxiodepressive humour.
>   Axis II No diagnosis.
>   Axis III No diagnosis.
>   Axis IV Stress factors: labour relation problems.
>   Axis V The global functioning scale is 70-75.
> 2. WHAT IS THE FORESEEABLE DATE OF CONSOLIDATION OF THE INJURIES?
>   At this time, I find that the condition is consolidated as of the date of the assessment: February 13, 2006.
> 3. IS TREATMENT WARRANTED?
>   No specific treatment is warranted.
> 4. ARE THERE FUNCTIONAL IMPAIRMENTS?
>   There is no medical psychiatric functional impairment.
> 5. DO YOU FORESEE A PERMANENT IMPAIRMENT?
>   There is no permanent impairment either.
> 6. WHAT WOULD BE A FORESEEABLE DATE FOR RETURN TO NORMAL WORK, I.E. WITHOUT WORKING SELECTED POSITIONS?
>   As for returning to work, this seems to me to depend rather on the administrative situation that exists with respect to Mr. Demers. In terms of medical psychiatric impairments, Mr. Demers does not have any and he is not unfit to do his work.

[22] Following Dr. Lafontaine's assessment, the CSC asked Mr. Demers in a letter dated March 6, 2006, (exhibit 30) to return to work on March 15, 2006. I refer to the following passages from this letter:

> [TRANSLATION]
>
> At our request, you submitted to the medical assessment on February 13, 2006, at the office of Dr. Sylvain Louis Lafontaine. Dr. Lafontaine's medical expert report confirms that you do not have

> any functional limitation or any permanent medical impairment and that you have been able to return to work as a corrections officer I since February 13, 2006.
> Further, Adam Poch, Labour Relations Advisor at Regional Administration, confirmed to us on March 1, 2006, that CSST had refused your industrial accident claim.
>
> Considering that we have not received any medical report from your attending physician since the day of your absence and considering the results of the medical assessment of February 13 to the effect that you are fit to return to work, **we ask you to report for work on <u>March 15, 2006, on the day shift</u> and to confirm your presence to Pierre Sansoucy, corrections supervisor, on receipt of this notice.**
> . . .

[23] Following this letter, there was a telephone conversation on March 7, 2006, between Mr. Demers and his supervisor, Mr. Sansoucy. This conversation was summarized in a memorandum (exhibit 30) which reads as follows:

> [TRANSLATION]
>
> SUMMARY OF RETURN CALL OF 2006-03-07
> Sir,
> On March 7, 2006, at about 1:30 p.m. I returned your call. You told me that you had received a letter from the Service by Purolator asking you to return to work on March 15, 2006. You told me that you were on vacation as of that date. I explained to you that you did not have enough leave credits to take the vacation that you had requested given that you had been on unpaid leave since December 23, 2005. I explained to you that you had enough credits for three 12-hour days but that then you would have to return to work or give me a medical note to justify your absence. You told me that I should do as I pleased and that in any event, I would do as I wanted. I asked you when you would be returning to work, you told me 2012. Then I told you that your industrial accident had been refused and that we would have to talk when you returned to determine how you would repay the Service. Then you asked me if you should wear a tie

> or not! I told you not to wear a tie and that if you did there would be disciplinary action. I asked you again when you were returning to work and you told me that I would know in due course.
> Pierre Sansoucy, S.O.C .
> c.c.: employee record; C. Guérin S.D; K. Dutil, U.M.

[24] Mr. Demers did not return to work.

[25] On August 1, 2006, at the request of the CSC, Dr. Lafontaine carried out a second assessment (exhibit 2). I observe that, while the findings of this report are quoted in the adjudicator's decision, the adjudicator did not however refer in her decision to the findings of the same physician in his report dated February 13, 2006. There is no doubt that between the date of the assessment on February 13, 2006, declaring him medically fit to return to work, and the assessment dated August 1, 2006, Mr. Demers' health had declined to the point that he could no longer work . However, if we believe the substance of the telephone conversation of March 7, 2006, if he had been given permission to wear his tie, he would have returned to work at that time.

[26] In his battle against the dress code, Mr. Demers' representative wrote to the employer on January 17, 2006. This missive reads in part as follows:

> [TRANSLATION]
>
> With respect to wearing a tie as such, our client explained many times to his superiors that this element helped distance him from the clientele and ensured discipline and respect. His 28 years of service attest to this.
> . . .

> Please advise us whether the CSC will maintain this position toward Mr. Demers and whether it will still prohibit him from wearing his tie.
>
> Mr. Demers will for his part continue his efforts to put an end to this prohibition and to effectively and professionally fulfill his duties.
>
> It goes without saying that our client will hold the CSC liable for all the damages that he may incur in regard to this prohibition, including the salary loss and related damages, where applicable.

[27] The employer replied to this letter on January 25, 2006, stating as follows:

> [TRANSLATION]
>
> Sir,
> The uniform was selected by a national committee composed of members of the national union executive and senior officials of the Correctional Service of Canada. The dress code came from this committee. In the scale of issue of uniforms, there is no tie for the work uniform. Accordingly, Mr. Demers must comply with this dress code.
> In regard to his loss of salary, your client, Mr. Demers, has been on industrial accident leave since December 8, 2005. To resume working, he must provide the employer with a certificate from his physician confirming to us that he is able to return to work.
> Sincerely,
> Claude Guérin
> Deputy Director

The $75 fine

[28] The adjudicator decided that the employer was not justified to impose a fine and ordered the CSC to repay this amount to Mr. Demers (see the findings of the arbitral award).

[29] The uniform was designed in collaboration with the union (exhibits 14 and 29, testimony of Mr. Sancoucy). All of the officers except Mr. Demers agreed to comply with the dress code and stopped wearing the tie with their work uniform. Although the adjudicator had determined that the code did not prohibit wearing a tie, in my opinion it was prohibited.

[30] The employer asked Mr. Demers on at least four occasions to remove his tie and finally there was a written warning but Mr. Demers continued to defy the employer who, in my opinion, had no choice but to fine him $75, an amount that is albeit quite modest.

[31] The standard of review which applies to the decision to set aside the fine is that of reasonableness. I am of the opinion that the disciplinary action was justified and that the adjudicator's decision to set it aside was unreasonable.

The order to compensate Mr. Demers

[32] At this time, we should refer to the following paragraphs of the arbitral award:

> 121. There is consistent jurisprudence to the effect that, where an employee is absent because of an industrial accident or for an extended period of time, the employer may require a medical certificate of fitness for work before authorizing the employee to return to work. In this regard, the respondent cited *Stinson, Lorrain, and Ricafort*, as well as paragraph 7:6142 of *Canadian Labour Arbitration*.
>
> 122. Nevertheless, it is my view that the principles stated in the decisions on which the respondent relies do not apply in the specific circumstances of this case for the following reasons. I have concluded that the fine imposed on Mr. Demers was an unjustified disciplinary penalty. According to the respondent's evidence, psychological distress over being prohibited from wearing a tie became apparent

> before the meeting on December 8, 2005, as shown by the e-mail of December 2, 2005, from Mr. Desrosiers to Mr. Sansoucy. That distress emerged in acute form during the meeting on December 8, 2005, and this was recorded in an observation report. The respondent, therefore, cannot deny that the CSC was aware of Mr. Demers' personal situation or that it could have taken preventive action. The CSC did not concern itself with Mr. Demers' well-being until February 2006, when it asked him to undergo a psychiatric assessment so he could return to work. As has already been explained, the psychiatrist confirmed the attending physician's opinion as to the reason Mr. Demers had been absent since December 8, 2005.
>
> 123. I emphasize the psychiatrist's conclusion that Mr. Demers' stress increased because the CSC stood by its decision to prohibit the wearing of a tie. As a result, he is now unfit to return to work for an indefinite period. The second psychiatric assessment confirmed that Mr. Demers' condition had worsened. Both psychiatric assessments concluded that Mr. Demers' condition would last as long as the CSC insisted that he not wear a tie.
>
> 124. These facts lead me to conclude that Mr. Demers went on sick leave against his will as a direct result of the stress caused by the CSC's continued intransigence about the prohibition on wearing a tie. Having found that the CSC did not try to find a reasonable solution for Mr. Demers before imposing a penalty on him, contrary to what the dress code allows, I am of the opinion that Mr. Demers should not lose any income as a result of taking involuntary sick leave. Accordingly, I order the respondent to compensate Mr. Demers for the lost benefits and income resulting from such sick leave.

[33] According to the adjudicator, the employer was intransigent because he asked Mr. Demers to comply with the dress code. As I already stated, in my opinion the employer had no choice. The dress code had been established and all of the officers had complied with it except Mr. Demers. We cannot describe requests made regarding compliance with the rules as "intransigent." In the case of Mr. Demers, we observe that it was indeed him who was being stubborn. He was the one who

declared war and who explained to Dr. Lafontaine that if he could not work wearing his tie his employer would have to dismiss him.

[34] In her decision, the adjudicator referred to Mr. Demers' psychological distress. Bear in mind that the adjudicator's field of expertise is in labour relations and, unless she refers to the opinion of either a physician or a psychologist in determining that a certain event caused psychological distress to Mr. Demers, she is clearly exceeding her powers.

[35] At paragraph 122 of her decision, the adjudicator determined that the psychological distress manifested itself before the meeting of December 8, 2005, as indicated by the e-mail dated December 2, 2005, from Mr. Desrosiers to Mr. Sansoucy. The adjudicator refers to exhibit 19. I cannot find that this document establishes that Mr. Demers was in a state of psychological distress. Indeed, this e-mail was followed 20 minutes later by a second e-mail attesting that even though Mr. Demers had left the institution at 7:00 p.m., he had returned around 7:20 p.m. to work his shift.

[36] The evidence established that on December 8, 2005, after receiving the fine, Mr. Demers was emotional and in tears. However, the adjudicator did not have the required expertise to determine that there was an acute manifestation of this distress during the meeting of December 8, 2005. In fact, the meeting in question was not the one where Mr. Demers received the fine.

[37] Dr. Lafontaine's assessment dated February 13, 2006, established that Mr. Demers does not suffer from any mental illness and that there is no permanent impairment. Further, it was determined that no further treatment was required.

[38] Dr. Lafontaine's second report, about six months later, has a diagnosis of "severe major depression."

[39] Bear in mind that Mr. Demers refused to return to work in March 2006 when Dr. Lafontaine stated that he was fit to do so. The last time that he had been asked to remove his tie was on December 8, 2005. Two months later, i.e. in February 2006, he was declared medically fit to resume work but he refused to return.

[40] I am of the opinion that Mr. Demers is responsible for his current predicament. I am also persuaded that in December 2005 the employer could not have known that Mr. Demers was in the circumstances described in the medical report dated August 1, 2006 (exhibit 2). In my opinion, the employer did not err in any way and the adjudicator's decision ordering the employer to compensate Mr. Demers is unreasonable.

[41] Before the adjudicator, the applicant also raised the argument that she did not have the power to decide the grievance at issue based on the provisions of paragraph 209(1)(*a*) of the *Public Service Labour Relations Act* (paragraph 49 of the decision). Considering my findings in regard to both of the adjudicator's orders, I need not address this argument.

JUDGMENT

FOR THE ABOVE REASONS, THE COURT ORDERS AND ADJUDGES that

(1) The applicant's application is allowed;

(2) The adjudicator's decision is set aside;

(3) The grievance is referred back to the Public Service Staff Relations Board with the direction that the grievance be dismissed in accordance with the reasons of this decision;

(4) Without costs.

"Louis S. Tannenbaum"
Deputy Judge

Certified true translation

Kelley Harvey, BCL, LLB

List of doctrine and authorities

1. *Public Service Labour Relations Act*, c. P-33.3
2. Brown and Beatty, *Canadian Labour Arbitration (4th edition) online*, paragraph 7:3610
3. *Bédirian v. Canada (Attorney General)*, [2007] F.C.J. No. 812
4. *Byfield and Canada Revenue Agency*, 2006 PSSRB 119
5. *Dayco (Canada) Ltd v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada*, [1993] 2 S.C.R. 230
6. *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226
7. *Lorrain and Treasury Board (Solicitor General of Canada)*, 1985 PSSRB No. 5
8. *Noel and Treasury Board*, 2002 PSSRB 26
9. *Re Hunter Rose Co. Ltd. And Graphic Arts International union, Local 28-B*, 27 L.A.C. (2d) 338, 1980
10. *Ricafort and Treasury Board (Department of National Defence)*, 1988 PSSRB No. 321
11. *Ryan v. Canada (Attorney General)*, [2005] F.C.J. No. 110
12. *Stinson and Treasury Board (Department of National Defence)*, 1989 PSSRB No. 74
13. *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085
14. *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701
15. *Gauthier v. National Bank of Canada*, 2008 FC 79
16. *Chopra v. Canada (Treasury Board)*, 2005 FC 958
17. *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1607-07
STYLE OF CAUSE:	Attorney General of Canada v. François Demers
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	May 28, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	TANNENBAUM D.J.
DATE OF REASONS:	July 16, 2008

APPEARANCES:

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