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CONSIDERING REDUNDANCY IN A COVID19 WORLD?
LESSONS FROM THE FAIR WORK COMMISSION

Australia continues to sail through unchartered waters of the COVID-19 pandemic. Even though government-imposed shutdown restrictions triggered by the COVID-19 crisis have eased here in Western Australia, business as usual is still an impossibility for tens of thousands of enterprises in Victoria and New South Wales.

COVID-19 has certainly been a crisis of significant magnitude and a light at the end of the tunnel can be hard to see.

The COVID-19 pandemic has seen many businesses being forced to make difficult decisions, especially in relation to whether it can keep all, some, or none of its employees. Decisions continue to be about survival – even with the extension of JobKeeper until Mach 2021. Many employers may still need relief from all, or part, of their wages bill during the coming months. Some employers may also be contemplating the financial impact of large-scale redundancy payments as they try to keep their businesses afloat.

Navigating lawful redundancies is fraught with risk. If you take away only one thing from this article, it needs to be that **COVID-19 does not absolve employers of their legal obligations when it comes to redundancies**.

Recent decisions of the Fair Work Commission (**Commission**) are a clear reminder to employers that despite the current economic environment, employers are still required to comply with their legal obligations when making positions redundant.

This article details some of the recent redundancy rulings from the Commission in the hope that it may help you or your clients minimise the risks associated with redundancy.

Level 2, 111 Wellington Street, East Perth WA 6004 • PO Box 6314, East Perth WA 6892
T: +61 8 9388 3100 • F: +61 8 9388 3105 • E: reception@murfett.com.au
ABN 74 120 362 825 • W: www.murfett.com.au
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What is Redundancy?

A position is redundant when an employer no longer requires an employee's job to be carried out by *anyone*.

Genuine Redundancy under the *Fair Work Act 2009* (Cth)

A person's dismissal is a case of genuine redundancy, pursuant to section 389(1) and (2) of the *Fair Work Act 2009* (Cth) (**FW Act**) where:

- the employer no longer requires the person's job to be performed by anyone because of changes in the operational requirements of the enterprise;
- the employer complies with any obligation in the relevant modern award to consult with the employee regarding a redundancy; and
- it would not be reasonable to redeploy the person elsewhere within the employer's enterprise or the enterprise of an associated entity of the employer.

In circumstances where an employer falls foul of just one of the three limbs, the employer will not be able to avail themselves of the genuine redundancy protection.

Where the job is no longer required due to changes in operational requirements

A job involves 'a collection of functions, duties and responsibilities entrusted, as part of the scheme of the employee's organisation, to a particular employee'. It is the "job" that must no longer be required to be performed by anyone. Please note, duties can still survive and be assigned to another employee in a case of a genuine redundancy.

Employers should be mindful that if their decision to terminate an employee's position on the basis of a genuine redundancy is challenged by way of an unlawful termination claim, the onus will be on the employer to prove that, on the balance of probabilities, the redundancy was due to changes in operational requirements.

Redeployment

Section 389(2) of the FW Act states that a person's dismissal is not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:

- the employer's enterprise; or
- the enterprise of an associated entity of the employer.

Employers are obliged to:

- consider whether an employee can be reasonably redeployed; and

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- make all genuine attempts to redeploy the employee, within the company, or within an associated entity.

If there are no appropriate positions available for redeployment, then an employer can proceed to terminate the employee's employment on the basis of redundancy.

The Commission has determined that it is an essential part of the concept of redeployment under this section that a redundant employee be placed in another job in the employer's enterprise as an alternative to termination of employment. The job must be suitable, in the sense that the employee has the skills and competence required to perform it to the required standard either immediately or with a reasonable period of retraining.

The Commission will, in making a determination as to whether any dismissal was harsh, unjust, or unreasonable, consider whether an employer was aware of its obligations and whether there had been a reasonable consideration of the options.

Reasonable in the circumstances

Whether redeployment of an employee into a vacant position is considered reasonable will depend on the circumstances that exist at the time of the termination.

In determining whether redeployment is reasonable, a number of matters may be relevant, including:

- the nature of any available position;
- the qualifications required to perform the job;
- the employee's skills, qualifications, and experience; and
- the location of the job in relation to the employee's residence and the remuneration (pay and entitlements) which is offered.

The job must be suitable

The job must be suitable, in the sense that the employee should have the skills and competence required to perform it to the required standard either immediately or within a reasonable period of retraining.

Other considerations may be relevant such as:

- the location of the job, and
- the level of remuneration.

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Consultation Obligations

The obligation on an employer to consult about redundancy only arises when a modern or enterprise agreement applies to an employee and that modern award or enterprise agreement contains requirements (which they often do) to consult about redundancy.

Even in circumstances where a modern award does not apply, we strongly recommend that employers engage in a consultation process as a matter of course.

The meaning of the word '*consult'* encompasses more than informing the employee of a decision already taken. It means more than simply talking to someone. It means engaging in meaningful dialogue with the employee, giving them the opportunity to provide input before a decision by the employer is made. Unfortunately, there is no hard and fast rule as to what it means to consult for the purposes of the legislative and any modern award obligations.

Please note that an employer may be penalised if it is apparent that it treated consultation as a mere formality in the overall decision making process, and made a final decision before consulting the employee or did not intend to take on board any of her feedback.

If the consultation process is challenged, internal documents created by the employer could be reviewed to determine the genuineness of the consultation.

Generally speaking, consultation requires an employer to discuss the introduction of changes that will affect the employee, and to consider the views of the employee before making a final decision.

To discharge the obligation to engage in 'genuine consultation' an employer should:

- engage in consultation with the employee as soon as practicable;
- provide the employee with a real opportunity to provide his or her views and opinions on the proposed decision and the impact of the proposed change (including any impact in relation to his or her family or carer responsibilities);
- provide comprehensive information to the employee about the proposed decision and make sure it is in writing;
- remain open to suggestions;
- keep records of conversations involving consultation;
- give prompt consideration to any matters raised by the employee; and
- if deciding to implement the original decision to introduce changes or to terminate the employee's position on the basis of a redundancy, explain the rationale for this to the employee and provide the decision to him or her in writing as soon as practicable.

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A failure by an employer to meet its consultation obligations can result in a range of potential adverse consequences including:

- proceedings for breaches of an applicable modern award and the imposition of substantial civil penalties, being $13,320 per breach for individuals and $66,600 per breach for corporations;
- substantial legal costs; and
- a greater exposure to successful unfair dismissal claims.

Decisions from the Commission: COVID-19 does not absolve an employer of its legal obligations, specifically its obligation to engage in genuine consultation

Despite these unprecedented times, the Commission has taken the view that the COVID-19 pandemic is not an excuse to forgo processes when making employees redundant.

Employers must strictly comply with consultation obligations contained in any applicable modern award, enterprise agreement, industrial instrument, or company policy before deciding a role will be made redundant.

The COVID-19 pandemic is no excuse for failing to consult employees in a redundancy process.

In the following recent cases, an employer's failure to properly consult in relation to what was otherwise a genuine redundancy rendered the dismissal harsh, resulting in an exposure to an award of compensation (which can be as high as $76,800) plus any loss of wages during the period between the date of termination and the date of the hearing.

1. *Aimal v Battery Energy Power Solutions* [2020] FWC 3034 (10 June 2020)

In this action an employer's acknowledged failure to properly consult in relation to what was otherwise a genuine redundancy rendered the dismissal harsh as the employee was denied a "fair go all round". Whilst the award of compensation was only quite small (1 week), this case was the first which involved a dismissal in which the employer contended was the result of the economic consequences of the Covid 19 pandemic.

Commissioner Johns was very clear in his judgment that there was no excuse for employers not to comply with consultation obligations particularly in circumstances where the redundancy was caused by a significant downturn in work due to COVID-19 such that consultation should be relatively straightforward and not delay the process unduly.

2. *Australian Services Union v Auscript Australasia Pty Ltd* [2020] FWC 1821

Earlier this year, Auscript, a company which provides transcription services to courts and tribunals across Australia, decided to close its Adelaide and Hobart offices, and significantly

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downsize its Sydney office which resulted in 25 employees being made redundant. Following the decision, the ASU wrote to Auscript about the changes and its failure to properly consult with its employees or the union. Thereafter the parties entered into a "Consultation and Communication Protocol" (**Protocol**) to ensure that the union was kept across any further changes Auscript proposed to make in the workplace in respect of its members.

As a result of the implementation of self-isolation measures and social distancing requirements, courts and tribunals have had to abort face-to-face hearings and mediations and employ the use of audio-visual technology. Consequently, Auscript saw a 60% reduction in work which further necessitated a downsize in its operations and the redundancy of some roles.

On 27 March 2020, Auscript met with its employees and informed them that it was considering four options to ride out the COVID-19 pandemic.

During the meeting staff were provided with a document regarding the proposed changes and were directed to elect one the four options and advise management by 1 April 2020. As part of its 'consultation period', Auscript stood down its employees. The ASU were not given informed regarding Auscript's proposal; nor was it invited to participate in the consultation process.

Accordingly, the ASU made an application to the Commission to "avert further redundancies and to urge Auscript to consider, as part of a consultation process, a range of alternative options to redundancy". However, Auscript decided to press ahead with the closure of the Melbourne and Brisbane office and immediately informed its employees of the impending redundancies.

The Commission held that Auscript did not engage in a genuine consultation process and reaffirmed that:

> *"Consultation has a purpose and it cannot be conducted for mere show. If the consultation does not provide [the employee] with an opportunity to influence the decision, it is of no value and the requirement to consult and the consultation is hollow. By the same token at some point management must be able to make a final decision to terminate employment by reason of redundancy having taken into account the views of [the employee] through consultation*."

Consultation requires "a genuine opportunity for the affected party to express a view about a proposed change in order to seek to persuade the decision maker to adopt a different course of action". It is not to be treated as a "mere formality".

The Commissioner found that Auscript did not consult with the employees and although Auscript came to the conclusion that its future was unviable, other options should have been considered and explored including, stand down, utilisation of paid leave or leave without pay, career breaks, access to support programs and any other options. The Commission ordered the parties to resume consultation with its employees.

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3. *Freebairn v TJL Business Advisors and Accountants* [2020] FWC 3915

In this action, the Commission found a COVID-19-related redundancy to be harsh and unreasonable because the employer failed to meet its consultation obligations under a modern award. The Commission determined that had the employer conducted a proper consultation, the employee would likely have remained employed and become entitled to JobKeeper payments.

The employee was a part time Administrative Assistant in the employer's financial services firm. Her employment was covered by the *Clerks – Private Sector Award 2020* (**Clerks Award**).

In March 2020, as a result of the COVID-19 pandemic, the employer was required to examine its business and consider ways of ensuring its ongoing viability.

On 18 March 2020, all employees were informed that the employer was considering ways to ensure its future and that some employees were likely to be impacted by the subsequent operational decisions.

On 25 March 2020, the partners of the firm met to discuss the impact of the COVID-19 pandemic on their business and the options available to them. In that meeting the partners decided to reduce the hours of administrative staff.

On the afternoon of 25 March 2020, one of the partners met with one of the administrative employees to discuss the impact of the pandemic on the business. During that meeting, the partner informed the employee that all administrative staff would be impacted by significant changes that the business needed to make, primarily by way of a reduction in their hours.

The partner then showed the employee some calculations he had done which demonstrated that the employee would be financially better off if her employment ended and she claimed JobSeeker payments. The partner went on to explain that, for this reason, her position had been selected for redundancy. The partner asked the employee if she had any questions, comments, or suggestions. She said that she did not.

The partner then made the decision to terminate the employee's employment as the result of redundancy and provided her with a letter.

The employee subsequently submitted an application to the Commission alleging that her dismissal was unfair.

The employer raised a jurisdictional objection on the basis that the termination of employment was a genuine redundancy and the employee was jurisdictionally barred from bring her claim.

The Commission considered the meaning of a genuine redundancy under the FW Act*;* specifically, whether the employer had complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

The Commission held that the employer had failed to comply with its consultation obligations under the Clerks Award on the basis that it did not give the employee notice in writing of the changes it would be introducing. Specifically, the Commission commented,

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> *"The obvious purpose in providing such information, in writing, to employees is to give them an opportunity to understand the changes and to enable them to make sensible suggestions and ask relevant questions about the changes in the discussions with their employer* (at [28])."

Further, the Commission found that the employer did not discuss any measures to avoid or reduce the effects of the changes on the employee. On this finding, the Commission said,

> *"This obligation is not met by merely asking employees whether they have any questions, comments or suggestions. Nor is it met by informing an employee, as happened in this case, that the employee will be marginally better off financially by being dismissed and in receipt of JobSeeker payments than by remaining in employment on reduced hours* (at [31])."

Having failed in its consultation obligations, the employer failed to secure the protection of the shield of a genuine redundancy. Accordingly, the employer's jurisdictional objection was dismissed and the Commission moved to consider whether the termination was unfair.

The Commission found that, had proper and meaningful consultation taken place, either the employee or the employer would have suggested the option of the employee reducing her days of work from three to two per week, and that suggestion would have been accepted. Further, the Commission held that a proper consultation period would have extended the employee's employment to at least the end of March 2020, at which time the JobKeeper scheme was announced and the employee would therefore have remained employed and supported by JobKeeper.

The Commission held that an award of compensation to the employee was appropriate in the circumstances. Interestingly, the Commission took into account that, had the employee remained employed, she would have received a higher rate of pay under the JobKeeper scheme and so in awarding compensation, the Commission calculated her loss by reference to the amount she would have received under the JobKeeper scheme.

Key Lesson

It is important that employers remain cognisant of their consultation obligations when it comes to any major workplace change. The fact that Australia, and the world is in the midst of a pandemic is not an excuse to forgo the consultation obligations outlined in an award or enterprise agreement, nor will it be a sufficient justification for skipping consideration of alternative options before going down a redundancy path.

It is evident from the cases mentioned above that employers need to do more than just give lip service to consultation. Genuine consideration must be had to employee feedback on alternatives, and every option should be explored before making a person redundant in this climate.

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Decisions from the Commission: The employee's role is no longer required but the business cannot afford to pay redundancy pay; what do I do?

The Commission may reduce, on application by an employer, redundancy payments that would otherwise become due and payable to employees but where the employer does not have the cash reserves to make such significant payments.

To date, there have been three contrasting cases which have arisen amidst the COVID-19 pandemic and where the Commission has intervened regarding the amount of redundancy pay due and payable to employees.

The first decision concerned **Mason Architectural Joinery**[1], a small business employer, who sought permission to reduce an employee's redundancy pay from seven weeks to one week because it could not afford to pay the full entitlement.

Commissioner McKinnon calculated the former employee to be out of work and unpaid for only eight days due to the redundancy of his position as he started another job with a $2 per hour pay rise eight days after the termination date.

At the time of the hearing, the situation for Mason Joinery had improved slightly since the termination of the employee's employment and after having received no business income for two months, it had received one payment for a completed job and was hopeful of two new contracts coming through. It was still finishing pre-booked jobs although two had been lost due to the COVID-19 pandemic. Commissioner McKinnon was satisfied the employer was under such significant financial strain that it could not afford to pay the full entitlement and reduced the amount of redundancy pay to one week's salary.

Finding in the employer's favour the Commissioner noted,

> "*The business is trying to work through the current crisis and much depends on how long the situation lasts. I am satisfied that Mason Joinery is under significant financial strain and that it cannot afford to pay Mr Grant's full entitlement to redundancy pay*".

In the second decision, **Worthington Industries**[2], a manufacturer made applications to reduce the amount of redundancy pay for three employees from four weeks' pay to one. The employer made the employees redundant because of a reduction in production output due to competition and COVID-19. The employer asserted that based on customer advice and public announcements, they anticipated their sales will drop by up to 50% over the coming months.

Although the employer claimed that paying the full entitlement to the employees would cause financial hardship, Deputy President Clancy was satisfied the employer currently had the means to pay the full entitlements and would likely be eligible for the JobKeeper payments. In fact, the employer conceded that it currently had the means to pay the full amount and had money in the bank today to do so, (albeit submitting that it would be dealing with a deficit and cash flow problems in the coming weeks). It was this concession that resulted in the employer's

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[1] [2020] FWC 1897
[2] [2020] FWC 1912

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applications being ultimately rejected, and the employees remaining entitled to four weeks' redundancy pay.

Most recently, a pandemic-affected employer Sydney printer and manufacturer **Acme Preston**[3] has succeeded in having redundancy payments owed to four workers significantly reduced by almost 70%, with the Commission finding the employer's perilous cash position and obligation to remaining employees outweighed the impact on the redundant four.

Acme Preston applied to the Commission to reduce the amount of redundancy payments owed to four employees who had been made redundant in mid-April, following its decision to close a business which had been acquired just a year earlier.

The workers, one of whom was 61 and two of whom had worked for the business for more than a decade, were owed between six and 13 weeks' redundancy pay, which Acme Preston sought to reduce to either one or two weeks.

Acme Preston's chief executive told Deputy President Lyndall Dean that since acquisition the expanded part of the business had continued to operate at a loss despite injecting $200,000 from a company owned by him and three other family members.

The Deputy President was further told that arrangements to move the operation to a smaller, more cost-effective site were being considered when the COVID-19 pandemic hit, after which it was decided there was no option but to close the operation and make the four employees redundant.

The chief executive also explained that Acme Preston was not eligible for JobKeeper because the acquisition of another business in late 2019 meant it did not meet the program's reduction in turnover requirements.

In response, the employees told the Deputy President that they felt misled, and that the chief executive had been "dishonest and deceitful" in confirming their redundancies before explaining he would be applying to the Commission to reduce them.

The Deputy President, however, accepted that Acme Preston was under "significant financial strain" and could not pay the workers their full entitlements.

"*This is evident given the financial position of the company, and in particular the evidence that [it] currently held only $38,000 cash in the bank, and had wages for its remaining staff due the following week*," she said.

"*I am satisfied it does not have a reasonable source of other funds, having already borrowed from [the chief executive's] family business to the amount of $200,000*."

The Deputy President ordered that Acme Preston pay four weeks' redundancy to each of the workers owed between 12 and 13 weeks, and two weeks to the worker who was owed six.

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[3] [2020] FWC 3081

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Key Lesson

If an employer has the means to pay redundancy payments as at the date of termination, it is expected to do so. Projections of future loss in earnings will not be enough to establish that the employer does not have the capacity to pay.

Decision from the Commission: Can an employer reduce an employee's redundancy pay on the basis of the employee obtaining other acceptable employment

The FW Act provides that an employer which is liable to pay statutory redundancy under the FW Act may apply to the Commission for a determination which reduces that liability in circumstances where the employer "obtains other acceptable employment for the employee".

When determining whether an offer of alternative employment is "acceptable employment", the Commission will consider a number of factors, not just wages. These factors can include the employee's skills, experience and physical capacity, the rates of pay, hours of work, duties and conditions of employment relevant to the proposed job, whether the employee is provided with continuity of employment and the extent of any additional travel distances from home to the new workplace.

What constitutes "other acceptable employment" will often be a matter for dispute by the parties as is evident in the following case.

In the matter of ***Real Property WA Pty Ltd ATF Real Property WA Trading Trust T/A Real Property WA***[4] the employer's application to reduce the employee's entitlement to redundancy pay from six weeks to two weeks on the basis that it had offered her other acceptable employment was unsuccessful.

It was found that the new role offered by the employer required the employee to perform work for the same number of hours, performing duties she had previously performed for significantly less pay and accordingly was not acceptable. The reduction in pay would also have had a consequential adverse impact on other benefits such as her accumulation of superannuation savings. Further:

- the employee's job security was less secure because the new role required her to serve a three month probationary period;
- the scope of duties which the employee could be required to perform was reduced; and
- the employee's title was changed to one suggesting reduced seniority.

In all of the circumstances Deputy President Binet was not satisfied that the position which was offered to the employee was acceptable employment. Given that she was not satisfied that the position offered to the employee constituted acceptable employment for the purposes

[4] [2020] FWC 2013

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of section 120(1)(b)(i) of the FW Act the discretion to reduce the amount of redundancy pay payable to the employee was not available to the Commission.

The application was dismissed.

Key Lesson

When determining whether alternative employment is "acceptable" under s 120 of the FW Act, the FWC will apply an objective test: the personal preferences of an employer or employee will not determine whether an alternative role was acceptable.

The employee must not suffer a significant disadvantage by accepting alternative employment—the FWC will be reluctant to reduce the quantum of an employee's redundancy payment unless it is satisfied an employee will not be significantly disadvantaged in the new role.

An employer must carefully consider all aspects of the alternative position. In determining what may be considered "other acceptable employment", the Commission will objectively assess the alternative job offer against the redundant role. An alternative position does not have to be identical to the employee's previous position; however, the Commission's decision may turn on factors the employer might consider trivial, such as parking expenses in a new job location, distance, and the duties and conditions of employment offered.

Decision from the Federal Court: is an employee still entitled to redundancy pay when the employer changes the employment conditions but the employee continues working for the employer

Many employers in the current COVID-19 pandemic environment have debated the need to reduce employees' hours and assign them to different roles as an alternative to termination. The Federal Court of Australia, in the case of ***Broadlex Services Pty Ltd v United Workers' Union*** **[2020] FCA 867** recently dealt with the issue of whether an employee who was required to transfer from her full-time position to part-time was entitled to redundancy pay, because the employer no longer required the full-time job to be performed by anyone.

In this matter the Federal Court found that reducing an employee's hours from 38 hours a week to 20 hours a week, and her salary by about 40%, without the employee's consent (albeit continuing to work the reduced hours) amounted to a termination of the employee's employment for the purposes of section 119 of the FW Act thereby giving rise to an entitlement to redundancy pay.

In reaching this conclusion Justice Katzmann held that:

- there was a wrongful dismissal constituted by the employer's repudiation of the employment contract, which brought the full-time contract of employment to an end;
- the relationship in which the employee entered after she accepted the repudiation was a fundamentally different relationship (part-time employment) from the relationship the parties previously enjoyed (full-time employment); and

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- the employee was no longer a full-time employee but a part-time employee, performing a fraction of the work she formerly undertook for a fraction of the remuneration she formerly received.

Justice Katzmann was satisfied that because the reason for the termination was that the employer no longer required the full-time job to be performed by anyone, the employee was entitled to a redundancy payment under section 119 of the FW Act. Based on this, the Employer's appeal was dismissed.

We note that there was no attempt by the employer to argue that it had obtained "other acceptable employment" for the employee such that any redundancy payment payable could have been reduced under section 120 of the FW Act.

Further, please note that JobKeeper scheme allows eligible employers to give certain directions to eligible employees, requiring them to work reduced hours for a certain period. The decision is only relevant for those employers not covered by the JobKeeper scheme who are seeking to make changes in employment conditions of employees.

Key Lesson

Employers cannot change an employees' status from full time to part time without their written consent. If this change is done unilaterality, the employee is likely to be entitled to redundancy pay, even when the employee continues working for their employer.

CONTACT MURFETT LEGAL FOR ASSISTANCE

For further information or assistance contact Murfett Legal on +61 8 9388 3100.

Note: The above is a summary for general information purposes only. It is not intended to be comprehensive or constitute legal advice. You should seek formal legal or other professional advice in relation to your particular circumstances before relying on the content of this article.

Author: Murfett Legal
Email: reception@murfett.com.au

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