Consultation on creating a modern framework for industrial relations

Consultation response from Lewis Silkin LLP Lewis Silkin is a leading specialist employment law practice. We have around 279 specialist employment and immigration and data lawyers, including 42 partners, based in London, Oxford, Manchester, Leeds, Cardiff, Dublin, Belfast and Hong Kong. We are ranked in the top tier of employment practices by the independent legal directories and many of our lawyers are recognised as leading practitioners in employment law. This response is submitted on behalf of Lewis Silkin, rather than our clients, and is based on our experience in practice of advising predominantly medium to large-sized employers across the private sector. We are happy for you to publish our response.

Section 1: a principles based approach

1. *Do you agree or disagree that these principles should underpin a modern industrial relations framework?*

   Is there anything else that needs consideration in the design of this framework?

We agree that these principles should underpin a modern industrial relations framework.

However, we note that many of the reforms to trade union law proposed in the Employment Rights Bill are incompatible with these principles. In particular, the Government is proposing to significantly reduce the thresholds of support which a trade union must satisfy to secure statutory recognition, by removing the requirements for: (i) the union to show a majority of workers in the proposed bargaining unit are likely to favour recognition at the time of the union's application; and (ii) at least 40% of workers in the proposed bargaining unit to vote in favour of recognition in any ballot. The result of these changes would be that a union with very low membership and support could secure recognition if the wider workforce is apathetic or unengaged: in theory, it would be possible for a union to secure recognition with the support of just 10% of the workers in the proposed bargaining unit. In such a scenario, the vast majority of workers in the bargaining unit would have no say over their terms and conditions of employment. This situation would only be exacerbated if the threshold for membership were reduced from 10% to as low as 2%.

We also note that none of the reforms proposed either in the Employment Rights Bill or this consultation seek to ensure that industrial action is, in fact, always a last resort. For example, there is no proposal that a trade union must put to its members an offer by an employer before the trade union calls on them to take industrial action. The practice of trade unions calling on their members to take industrial action instead of balloting them on an offer put forward by their employer with a view to resolving a dispute will therefore be allowed to continue. This is of course particularly regrettable when the trade union's refusal to ballot its own members occurs despite many of its own members calling to be balloted because they wish to vote in favour of their employer's offer.

2. *How can we ensure that the new framework balances interests of workers, business and public?*

The Government should ensure that reforms in the Employment Rights Bill are not one-sided. For example, whilst the Government is proposing to 'simplify' the process for statutory recognition applications in order for workers to secure trade union recognition if that is their wish, it is not equally proposing to 'simplify' the process for statutory de-recognition applications in order for workers to secure trade union de-recognition if that is their wish.

More generally, it is difficult to understand how, by making it easier for trade unions to disrupt businesses by calling industrial action, the new framework in any way seeks to balance, on the one hand, the interests of workers with, on the other hand, the interests of business and the public.

Section 2: unfair practices during the trade union recognition process

Extending the Code of Practice on access and unfair practices during recognition and derecognition ballots to cover the entire recognition process

3. *Do you agree or disagree with the proposal to extend the code of practice on access and unfair practices during recognition and derecognition ballots to cover the entire recognition process from the point when the CAC accepts the union's application for statutory recognition?*

   Please explain your reasoning and provide any evidence on cases that support your view.

We first note that the current rules on unfair practices apply to both parties. However, the government's proposal only refers to an employer utilising unfair practices. We presume that this is an oversight and that the government would, of course, propose equally to restrict an unscrupulous trade union, given its key principle of balancing the interests of workers and businesses.

We agree in principle with the proposal to extend the provisions of the Code of Practice on Access and Unfair Practices relating to unfair practices to cover the entire recognition process. In our experience, employers already typically seek to comply with the spirit of the Code's provisions on unfair practices throughout the entire recognition process. However, extending the provisions of the Code which relate to access would be less appropriate – it would not be appropriate to grant access to a bargaining unit for these purposes until it has been finally identified and it has been confirmed that a ballot will be held.

As a point of detail, the statutory definition of unfair practices specifically refers to practices which are undertaken '*with a view to influencing the result of the ballot*'. However, in many cases where a recognition application is accepted, no ballot is ever held (because more than 50% of the workers in the proposed bargaining unit are union members). If the scope of the Code of Practice is extended, there should be consequential amendments to the definition of unfair practices so that it encompasses practices which are undertaken '*with a view to influencing the result of a ballot, if a ballot were to be ordered*'.

Employers required to share the number of workers in a proposed bargaining unit and prevented from altering that number

4. *Do you agree or disagree with the proposal to introduce a requirement that, at the point the union submits its formal application for recognition to the CAC, the union must provide the employer with a copy of its application?*

   Please explain your reasoning.

We agree – this would be a proportionate measure which would assist the parties.

5. *Do you agree or disagree that the employer should then have 10 working days from that date to submit the number of workers in the proposed bargaining unit to the CAC which could not then be increased for the purpose of the recognition process?*

   Please explain your reasoning.

We disagree with this proposal.

It is a central principle of the statutory recognition framework that recognition should only be ordered where it reflects the democratic will of the workers in the bargaining unit. This restriction would remove the ability for new joiners who are employed on the date of the ballot to participate in it, notwithstanding the fact that they will still be affected by its result. This measure also ignores the reality that many employers will likely need to recruit staff for legitimate commercial and operational reasons during a statutory recognition process. Given that we are not aware of any examples of employers seeking to use mass recruitment as a means of thwarting a recognition application, it is our view that this proposal is disproportionate and unjustified.

We further note that this proposal appears to be inconsistent with the Government's broader goal in the Employment Rights Bill of making employment rights and protections available to employees from 'Day 1'. In particular, to the extent that the abuse of mass recruitment is a genuine issue, it is likely to already be addressed by the Government's proposals to remove the period of qualifying service from unfair dismissal protection. As these proposals are likely to require employers to go through redundancy consultations to dismiss any workers who were hired solely for the purposes of thwarting a recognition application, the practice is likely to be rendered commercially unviable in any event.

At the very least, if the Government remains minded to introduce this measure, there should be: (i) specific carve-outs for, as a minimum, all workers who commence employment after the union makes it application but who received job offers before that date, or, preferably, whose roles an employer was already proposing to fill before that date; and (ii) an obligation on the trade union to include specified wording when copying its application to the employer to put the employer on notice that it must provide this information to the CAC within 10 days.

Further, in order to ensure that trade unions are equally restricted from artificially inflating membership in a proposed bargaining unit, the Government should also legislate to prohibit trade unions from providing discounted or even free membership to workers in a bargaining unit for a temporary period merely for the purposes of winning a trade union recognition application.

6. *Can you provide any examples where there has been mass recruitment into a bargaining unit to thwart a trade union recognition claim?*

   Please provide as much detail as you can.

No.

7. *Are there any alternative mechanisms that you consider would prevent mass recruitment into a bargaining unit for the purpose of thwarting union recognition applications?*

   Please provide as much detail as you can.

Please see our response to question 8 below – if the Government is minded to introduce new restrictions on recruitment into a bargaining unit in advance of a statutory recognition ballot, it would be more proportionate to adopt a purposive approach, rather than a 'blanket' restriction on all recruitment.

8. *Do you have any views on a possible alternative to place a new obligation on employers not to recruit into a proposed bargaining unit for the purpose of seeking to prevent a union from being recognised?*

   How would this alternative work in practice?

This alternative approach would be more proportionate than the 'blanket' restriction on recruitment addressed in question 5 above.

This approach could be implemented by amending the existing restrictions on unfair practices in Schedule A1 of TULR(C)A, to include a new unfair practice of offering a person employment for the purpose of seeking to influence the outcome of an application.

Reaching a voluntary access agreement

9. *Do you agree or disagree with the proposal to introduce a 20-working day window to reach a voluntary access agreement from the point when the CAC has notified the parties of its decision to hold a trade union recognition ballot?*

No. While we do not object in principle to introducing a prescribed window for the parties to agree voluntary access arrangements, in our experience, 20 working days would be insufficient. It is also unclear what purpose this reform would serve if the Government proceeds with its separate proposal to prohibit unfair practices to cover the entire recognition process.

10. *If no agreement has been reached after 20 working days, should the CAC be required to adjudicate and set out access terms by Order?*

    If yes, how long should CAC be given to adjudicate?

No. It would run counter to good industrial relations if, despite the parties being on the cusp of voluntarily agreeing arrangements between themselves, the CAC were to be required to impose terms on them by Order.

11. *Once 20 working days have expired, should the CAC be allowed to delay its adjudication in instances where both parties agree to the delay?*

    Should this delay be capped to a maximum of 10 working days?

Yes. As noted above, it would be contrary to good industrial relations practice for the CAC to be required to impose terms on the parties by Order in circumstances where they would both prefer to continue negotiating. For the same reason, it would also be contrary to good industrial relations practice for any delay to be capped.

Making an unfair practice claim

12. *Which (if any) of the options provided do you agree with in terms of the tests set for making an unfair practice claim?*

    Please explain your reasoning?

First, the Government notes that no union complaints to the CAC have ever succeeded. It then asserts that this is because it is difficult to prove that an unfair practice has changed or was likely to have changed the outcome of a vote, and because it is difficult to obtain evidence from workers who may be frightened. We respectfully suggest that, given that Parliament has legislated for the CAC to be the arbiter of facts in respect of alleged unfair practices, then the fact that no union complaints have succeeded should more properly be interpreted as meaning that no complaint of alleged unfair practices has in fact ever been well-founded.

It is our view that Option 1 would be the best of the proposed amendments to the test for making an unfair practice claim in schedule A1 to TULR(C)A. We do not object to the principle that there should be no materiality threshold for bringing an unfair practices claim.

We do not support Option 2. Removing the requirement to show that the practice changed or was likely to change the vote of an actual worker in the bargaining unit, and replacing this with a purpose test based on the behaviour of a hypothetical worker would introduce increased legal uncertainty and scope for disputes.

We do not support Option 3, on the basis that this would be an unjustified interference with the principle of open justice.

13. *Should the government extend the time a complaint can be made in relation to an unfair practice to within 3 months of the date the alleged unfair practice occurred?*

No. As the consultation itself recognises, the current framework effectively prevents 'sour grapes' complaints. Enabling the losers of ballots to bring complaints for up to 3 months after the close of the ballot would introduce unwelcome uncertainty for all parties, create an additional strain on the CAC's limited resources, damage industrial relations and unnecessarily delay the next steps in the statutory recognition process.

However, we recognise that the current framework can raise practical challenges for parties which become aware of alleged unfair practices shortly before the close of the ballot. A more effective solution for this issue would therefore be to introduce a short 'cooling off' between the ballot closing and the results being published, such as 10 working days, during which the parties could prepare and make any unfair practice complaints. The crucial feature of this amendment would be that any complaints would still have to be submitted before the announcement of the results, preventing any 'sour grapes' complaints.

Section 3: Political funds

14. *Do you agree or disagree with the proposal to remove the 10-year requirement for unions to ballot their members on the maintenance of a political fund?*

    Please provide your reasoning.

We do not propose to comment on the proposals relating to political funds as such, save as to note that, as a supplement to our answer to question 1 above, this proposal does appear to conflict with key principle 3, which states that "*unions must remain accountable to their members*", to repeal a mechanism that ensures that unions remain accountable to their members.

15. *Should trade union members continue to be reminded on a 10-year basis that they can opt out of the political fund?*

    Please provide your reasoning

Please see our answer to question 14 above.

16. *Regulations on political fund ballot requirements are applicable across Great Britain and offices in Northern Ireland belonging to trade unions with a head or main office in Great Britain. Do you foresee any implications of removing the 10-year requirement for unions to ballot their members on the maintenance of a political fund across this territorial extent?*

Please see our answer to question 14 above.

Section 4: simplifying industrial action ballots

Securing a mandate for negotiation and dispute resolution

17. *How should government ensure that our modern framework for industrial relations successfully delivers trade unions a meaningful mandate to support negotiation and dispute resolution?*

We respectfully suggest that neither legislative reforms nor any other steps by government can deliver trade unions a meaningful mandate to support negotiation and dispute resolution. Trade unions will only ever enjoy such a mandate if they themselves reverse the trend of workers choosing not to join trade unions and win their support by demonstrating that they offer them a value proposition in the modern labour market.

Indeed, it is for this reason that we respectfully suggest that many of the Government's reforms in the Employment Rights Bill in fact undermine its laudable objective for trade unions to have a meaningful mandate. For example, it is hard to see how enabling a trade union to secure recognition, and with it the entitlement to negotiate, with only 1/20th of the level of support that it currently requires and with only 2% support among a workforce can be said to further a policy objective of ensuring that trade unions have a meaningful mandate.

Industrial action ballot provisions

Section 226A (Notice of ballot and sample voting paper for employers)

18. *Do you agree or disagree with the proposed changes to Section 226A of the 1992 Act to simplify the information that unions are required to provide employers in the notice of ballot?*

    Please explain your reasoning.

We disagree. In particular, we support the retention of the requirements to state: (i) the total number of employees in each of the categories of workers being balloted; and (ii) the numbers of workers concerned at each workplace. These categories of information are important to enable employers to understand which of their employees the union proposes to ballot, which in turn assists them to ensure that they have both the trade unions and the employer's positions on the dispute before the members are called upon to choose how to cast their ballot.

However, we would support the removal of the separate information requirements in respect of union members covered by check-off arrangements under section 226A(2)(c)(ii) of TULRCA. This is a sensible change, given the limited value to employers of the information provided under that provision, and would be consistent with supporting the trend away from check-off as part of modernising industrial relations practices, especially given the risk for employers of holding any list of union members given the relatively recent introduction of regulations on blacklists.

19. *Do you have any views on the level of specificity Section 226A of the 1992 Act should contain on the categories of worker to be balloted?*

We do not believe it would be appropriate to seek to prescribe the specific approach which should be taken in respect of the categorisation of workers, in light of the diversity of unionised workplaces. The Code of Practice on Industrial Action Ballots and Notice to Employers already notes that there are many ways to categorise a group of employees, such as occupation, grade or pay band.

Section 231 (Information as to result of ballot) and 231A (Employers to be informed of ballot result)

20. *What are your views on the proposal to amend the requirement that unions should provide information on the results of the ballot to those entitled to vote and their employers 'as soon as reasonably practicable'?*

We believe that the current requirement remains fit for purpose - in our experience, most trade unions inform employers of the outcome of industrial action ballots on the same working day as they receive the ballot results.

We do not necessarily recognise the need for a time period to be specified in statue, which appears to be inconsistent with the Government's broader objective of simplifying industrial action ballots.

21. *What do you consider is a reasonable time requirement for unions to inform members and their employers of the outcome of the ballot?*

If the Government remains minded to amend sections 231 and 231A of TULR(C)A by prescribing a specified time period, the requirement should be to inform members and employers of the ballot outcome by no later than the next working day after the closing of the ballot.

22. *What do you consider are suitable methods to inform employers and members of the ballot outcome?*

    Should a specific mechanism be specified?

In our experience, the vast majority – if not all – of trade unions inform employers of the outcome of industrial action ballots by email. This practice is straightforward and effective for all parties.

We do not necessarily recognise the need for a specific mechanism to be specified in statute, which appears to be inconsistent with the Government's broader objective of simplifying industrial action ballots. However, if the Government nonetheless wishes to do so, email should be the specified method.

Section 234A (Notice to employers of industrial action)

23. *Do you agree or disagree with the proposal to simplify the amount of information that unions must provide employers in the industrial action notice?*

    Please explain your reasoning.

We disagree. In particular, we support the retention of the requirements to state the total number of affected employees in each of the categories listed. This information is important to enable employers to understand which employees the union is calling out on industrial action, which in turn assists employers' contingency planning and to provide relevant employees with information in order to enable them to make an informed decision on whether to participate in the action. In some cases, this information can also be important to enable employers to assess whether there is a risk that industrial action will endanger health and safety. Removing these statutory requirements will increase the practical disruption and economic cost of industrial action, thereby conflicting with the government's stated objective of delivering economic growth.

However, we understand that the Government proposes to remove the separate information requirements in respect of union members covered by check-off arrangements under section 226A(3)(a)(ii) of TULRCA. This is a sensible change for the reason we outline in response to question 18 above.

For completeness, we strongly suggest aligning the levels of information required in the separate contexts of notices of ballots and notices of action.

24. *What are your views on the degree of specificity Section 234A of the 1992 Act should contain on the categories of worker?*

Please see our answer to question 19 and note that, as for question 23, we strongly suggest aligning the level of specificity required in the separate contexts of notices of ballots and notices of action.

Section 5: timing and duration of industrial action

25. *Do you agree or disagree with the proposal to extend the expiration date of a trade union's legal mandate for industrial action from 6 to 12 months?*

Please explain your reasoning and provide any information to support your position.

We disagree. The introduction of a 6 month expiration date for industrial action mandates has been an effective and balanced reform by providing parties with extra time after a ballot outcome is known to resolve disputes before industrial action had to be called or else the trade union would lose its mandate. However, allowing a trade union to call industrial action for a materially longer period without having to reballot its members would conflict with key principle 3 on accountability, especially unless the Government adopts our suggestion above in response to question 1 of requiring a trade union to put any offer by an employer to its members before it may call on them to take industrial action.

We also disagree with removing the option of allowing employers and unions to agree that the expiry date should be extended. We have direct experience of this mechanism having proved helpful in enabling the resolution of an industrial dispute and, given that any extension requires the employer's consent, we can see no reason to remove a mechanism that has assisted parties to secure a successful resolution to a dispute.

26. *What time period for notice of industrial action is appropriate?*

    Please explain your reasoning.

In our view, the current 2-week notice period of industrial action is appropriate and consistent with the principle of balancing the interests of workers, businesses and the wider public, by allowing businesses and the wider public to prepare for the disruption caused by industrial action by workers.

We also note that we have direct experience of industrial disputes being resolved in the second week after a trade union has given notice. Our view is therefore that, by reducing the current notice period in the way that it is doing through its Employment Rights Bill, the Government will reduce the opportunity for employers and unions to resolve disputes before industrial action is taken and thereby risk in fact increasing the level of industrial action.

Section 6: updating the law on repudiation of industrial action

27. *Which (if any) of the options provided do you agree with in terms of modifying the law on repudiation?*

    Please explain your reasoning.

The existing law on repudiation of industrial action is fit for purpose, proportionate and strikes an appropriate balance between the interests of workers, businesses and the wider public.

However, if the Government is minded to amend the law in this area, we believe that Option 3 would be the most appropriate. Replacing the requirement for the union to act "*without delay*" with a prescribed statutory time period would provide greater clarity regarding the union's obligations, although it is unclear why trade unions should be afforded as long as 3 working days (which could be 5 calendar days) given the particular damage to businesses and the wider public of 'wildcat strikes'.

In contrast, Option 1 would introduce unhelpful ambiguity to this area as – without a new Code of Practice – there would be significant ambiguity about the scope of "*reasonable endeavours"*, which could lead to future disputes.

Option 2 would be insufficient, given the potential damage to industrial relations, businesses and the wider public by 'wildcat strikes'. As a practical matter, simply posting a notice on the union's website would not be enough to draw the repudiation to the attention of the union's members.

28. *Currently the notice by the union is prescribed by legislation. Do you think that prescription of the notice should remain unchanged?*

If not, what changes do you propose?

Yes – we believe that the prescribed wording in section 21(3) of TULR(C)A is fit for purpose and sufficiently clear.

29. *Do you agree or disagree that the current legislation on repudiation should be left unchanged?*

    Please explain your reasoning.

We believe that the existing law on repudiation of industrial action is fit for purpose, proportionate and strikes an appropriate balance between the interests of workers, businesses and the wider public.

Section 7: clarifying the law on 'prior call'

30. *Do you agree or disagree with the government's proposal to amend the law on 'prior call' to allow unions to ballot for official protected action where a 'prior call' has taken place in an emergency situation?*

    Please explain your reasoning.

No. The current law does not prevent a trade union from taking official protected industrial action if union members have walked out in emergency situations in fear of their safety. It only prevents such action if the union members have walked out in fear of their safety *following their union calling on them to do so*.

The Government should not legislate in a way that would in any way facilitate trade unions calling on their members to take industrial action without following due process given that alternative courses of action already exist, such as raising the issue as a critical health and safety matter or warning its members of the underlying issue and then allowing them to exercise their own judgment as to whether they are in fear of their safety.

31. *What are your views on what should be meant by an "emergency situation"?*

We would suggest that the definition of 'emergency situation' should be consistent with sections 44 and 100 of the Employment Rights Act, which would require a person to be subject to danger which is serious and imminent. This would strike a balance between the interests of workers, businesses and the wider public and would provide all parties with a welcome degree of clarity, as they would be guided by the body of case law on those existing statutory provisions.

32. *Are there any risks to the proposed approach? For example, increased incidences of unofficial action or of official action which does not have the support of a ballot and is taken without the usual notice to employers?*

    Please explain your reasoning and provide any information to support your position.

Yes - in practice, any relaxation of the restrictions on 'prior call' invariably risks an increase in incidences of unofficial industrial action and/or unprotected industrial action, which is likely to result in damage to both industrial relations and the wider economy. To the extent that the Government is minded to introduce this reform, this risk will be best mitigated by ensuring that the definition of 'emergency situation' is as clear as possible – please see above for our response to question 31.

Section 8: right of access

33. *Do you agree or disagree with the proposed approach for the CAC to enforce access agreements?*

    Please explain your reasoning.

We agree in principle with the proposed framework for the enforcement of access arrangements. In particular, we welcome the multi-stage approach to the resolution of complaints, which will encourage the parties to voluntarily resolve disputes over access arrangements. However, the effectiveness of this framework will depend on the steps which parties are required to take in respect of access agreements being clear, reasonable and practicable.

As noted in our response to question 36 below, we also welcome the Government's indication that orders by the CAC requiring specific steps to be taken would not have the same legal status as a court order. However, the appropriateness and effectiveness of this enforcement framework will in large depend on the value of the penalty fines which the CAC will have powers to impose.

34. *Do you have any initial views on how the penalty fine system should work in practice?*

    For example, do you have any views on how different levels of penalty fines could be set?

The value of penalty fines should be proportionate to the seriousness of the breach and to the loss incurred by the other party – they should not be awarded on a punitive basis. The CAC should also take into account: (i) the resources of the party which is subject to the fine, and (ii) whether they have previously been found to have breached an access agreement by the CAC.

While we do not support the introduction of fixed fines, there should be a statutory cap on the maximum value of penalty fines, to provide parties with appropriate certainty about the enforcement regime. £50,000 per complaint would be an appropriate level for this statutory cap, noting that we would only expect the CAC to impose penalty fines at this level for the most serious breaches.

We also suggest that the Employment Appeal Tribunal instead of the CAC should be the appropriate body to impose any fines. This would be consistent with the system for fines to be imposed under both the Transnational Information and Consultation of Employees Regulations 1999 and the Information and Consultation of Employees Regulations 2004. Even more importantly, it would ensure that the CAC, consistent with its role in trying to resolve disputes in a way that promotes good industrial relations, remains a forum for determining issues as opposed to imposing penalties on one of the parties before it.

35. *Do you think the proposal for a penalty fine system is proportionate or not, and would it be effective?*

    Please explain why.

In principle, a penalty fine system could be a proportionate method of enforcing the new proposed framework for trade union access, noting that the CAC would have powers to impose fines on either party if it breaches the access agreement. However, in practice, this will depend on the value of penalty fines which the CAC will have powers to impose. In particular, we believe that any fines should be proportionate to the consequences of the breach, rather than punitive in nature.

36. *Do you consider there to be any alternative enforcement approaches the government should consider? For example, should a CAC order requiring specific steps to be taken (Step 2 above) be able to be relied upon as if it were a court order?*

    What other approaches would be suitable?

We welcome the Government's indication that the CAC would not have powers to grant mandatory injunctions or order specific performance in relation to access agreements. Given that access agreements relate to access to employers' private property, we would have serious concerns that taking an approach of that kind would be an unjustified interference with the right to protection of property under Article 1 of the First Protocol of the European Convention on Human Rights.

An alternative approach would be to publish details of parties which contravene access agreements on a public register. This would create non-financial incentives for parties to comply with their obligations under access agreements.

Section 9: going further and next steps

37. *Are there any wider modernising reforms relating to trade union legislation that you would like to see brought forward by the government?*

    If yes, please state these and why.

We welcome the Government's intention to launch a working group on the use of modern and secure electronic balloting for trade union statutory ballots, as we recognise that this is an area in which the existing legislation is increasingly out-of-step with other practices in the wider economy.

We would also welcome the Government consulting on providing trade unions and employers with additional flexibility to use collective agreements to vary statutory requirements, such as those on collective redundancy consultation, in a manner analogous to their ability under regulation 23 of the Working Time Regulations 1998 to enter into collective agreements to modify the application of certain parts of that legislation.

Response prepared on behalf of Lewis Silkin LLP

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