

Episode 6 – Employment

NOTES

WHO'S HERE?

This episode features regular hosts Paula Leask (CHSS Community Coordinator) and Dr. Amy Small (GP and Long Covid advocate).

This week's guest is David Martyn, Head of Employment Rights for [Thompsons Solicitors](#). Thompsons are the largest firm of discrimination and employment lawyers in Scotland working for employees and trade union members. David and his team have spent much of the last three years advising unions and charities on how to use the law to improve Covid related health and safety in the workplace and to assist employees to enforce their rights where those have been breached.

WHAT ARE WE TALKING ABOUT?

This episode deals with employment, disability, and your rights at work, which many people with Long Covid have reported worrying about. Key points include:

- Long Covid is not always classed as a disability, but it can be. If your Long Covid is significantly affecting your ability to do things day-to-day, it may well qualify as a disability.
- If you have a disability, you are protected under the Equality Act. This means that employers should make reasonable adjustments to help you work, and should not treat you differently because of your health, **provided you can still do your job**.
- Your employer should give you a fair chance to recover, but they are legally able to end your contract if you are no longer able to perform your work duties.
- A trade union can help you to manage your work situation and advocate for you if you need changes to your work environment.
- Unfortunately, if you are self-employed or on a zero-hours contract, you do not have access to support around unfair dismissal or discrimination.
- It is important to research carefully before taking any legal case forwards, and you should always go through ACAS if you have a legal complaint about your treatment at work. You should also always try to resolve the issue with your management directly first, before resorting to legal action.

FIND OUT MORE

- [ACAS](#) (the Advisory, Conciliation, and Arbitration Service) is a statutory organisation that offers information and mediation to employees and employers. They also have a page dealing specifically with [Long Covid](#).

- [Citizens Advice Scotland](#) can offer financial and legal advice while you are struggling with employment issues.
- A summary of your legal employment rights with a disability can be found [here](#), through the UK Government's website.
- The Chartered Institute of Personnel and Development (CIPD) has [a range of guides for employers](#) who want to help people with Long Covid back to work.
- If you are in a trade union, speak to your steward or representative. If not, you can find an appropriate trade union for your job through the [TUC's online Union Finder](#).
- You can find support through the CHSS Advice Line: 0808 801 0899
- CHSS has a booklet on [Returning to Work](#), which can be found online through the link, or ordered in print through our website. If you are unable to return to work full-time and are struggling financially as a result, we also have a booklet on [Financial Support](#).

EPISODE TRANSCRIPT

PAULA: Hello and welcome to Chest Heart and Stroke Scotland's Long Covid podcast, Long Covid & Me.

[INTRO MUSIC]

PAULA: My name is Paula Leask, and I would like to welcome my lovely co-host, Dr Amy Small. Hi, Amy.

AMY: Hi, everyone.

PAULA: Today our podcast is around employment and finance, and joining us today is our special guest, David Martin. Thank you so much for joining us today, David, hiya!

DAVID: No, it's a pleasure, hi there.

PAULA: Thank you. What I would like to ask you is: we've had so many people asking questions around Long Covid and working. Can you tell us how Long Covid can affect a person's working life?

DAVID: Yeah, I mean, it's been really interesting from the perspective of employment and how employers have dealt with Long Covid. The effects have been myriad, all the way

from the worst-case scenarios where we've had people who have lost their jobs as a result of Long Covid, and other people who are still living with Long Covid and working with Long Covid successfully, and other people who have maybe had periods of time where they've been unable to work. And it's maybe intermittent - it comes and goes - and we see employers having to make adjustments to allow people who may have intermittent periods of absence or incapacity relating to the condition. So, there's been a range of impacts.

In terms of, I suppose, the legal aspects, the cases have been quite interesting because they're only beginning to make their way through the courts at the moment. So, all we've really had to do - and this is the same with COVID and the majority of aid employment law - is we've kind of been making it up as we go, because the courts haven't been able to give us any guidance. Because once an issue arises, and a big question arises about what's the right and wrong thing to do and how do we interpret the law, it generally takes about 18 months to two years for any cases to start emerging as a result of that. So really, at this stage, we're still predominantly providing guidance based on traditional concepts of employment and discrimination law in the Employment Rights Act and the Equality Act of 2010.

I think the main issue with Long Covid, the main question arising with Long Covid, is whether or not it is a qualifying disability, because I think that feeds into a lot of the questions that employers are asking themselves. That is a definition which is contained in the Equality Act. It's quite a lengthy definition. The definition, effectively, of somebody with a qualifying disability is: do they suffer from a condition which has a long term, substantial adverse effect on their ability to carry out day-to-day activities?

I think, early on, we saw some interesting statement from, example, from ACAS; and ACAS quite boldly said, "yes, Long Covid is a disability" in some guidance that they produced, but then quickly following comments from a number of employment law practitioners, they had an intermediate reversal of it, and said, "Well, actually, we didn't mean to say it was in every case. We meant to say that it *could* be a disability in many cases." And I think that probably is the right position in the majority of disability cases that we look at.

The important thing is to take the effects of the disability on an individual case-by-case basis, and you have to assess those effects for each individual. And I think, particularly with Long Covid, from what we understand medically: the manifestation of Long Covid is very different for different people. And we are still - certainly I think the medical advice that we're getting is - really catching up with the condition.

So, I think it is a bit bold to say, yes, Long Covid is necessarily a qualifying disability in all circumstances. But what's very clear is that it *can* be a qualifying disability. It can last longer than twelve months, and it *can* meet that definition of having a substantial adverse effect on your ability to carry out day-to-day activities.

Now, interestingly, day-to-day activities is not the activities of your job. So, if your job is particularly strenuous, and you're doing a lot of physical labour, that's not necessarily a day-to-day activity. That's a quite unusual activity that you're carrying out. Day-to-day activities are things like: getting up, getting washed, getting dressed, being able to cook and clean and

run for a bus. You know, ordinary, day-to-day activities that a person who's not suffering from that condition wouldn't think twice about being able to do.

But we've seen, I think, in the more severe cases of Long Covid, we're certainly in a situation where a strong argument could be made to say that day-to-day activities have been severely impaired as a result of the condition.

So: what does all that mean for the more serious cases? Well, where somebody is a disabled person, it places an obligation on their employer to comply with the terms of the Equality Act 2010. The predominant protection that exists within that statute is the obligation to make reasonable adjustments where, because of a person's disability, they suffer detriments when compared with other persons who don't suffer from that same disability.

So, it's quite easy to think of examples where that might be quite easy for a reasonable adjustment to be put in place. Very early on, I think there was contacted one of the teaching unions, somebody who was suffering from Long Covid, you know, she taught a class, which was on the 3rd floor of the school. There was no lift. She had to walk up to the 3rd floor of the school.

And they said, you know, what should we do? She can't do that. It's really impacting... you know, she can't teach for the following class, she's had to walk to the top of the stairs. How do we get around that?

And the very simple answer is: you've got to make a reasonable adjustment. And what was reasonable in that circumstance, we put forward, was to say: Well, why don't we just move the location of that class? Is there any reason why her class can't be swapped with the Primary 4 class, which is on the ground floor of the building? The answer is, no, there's not.

But that's the sort of adjustment you would expect - really simple, pretty much cost free, but alleviates a disadvantage and allows the individual to stay in school or stay at work. So that's the sort of thing that you might see in terms of reasonable adjustments. That's been maybe the most powerful tool that employees have.

I have seen some, maybe, more nefarious examples of people actually suffering discrimination because of their disability. So, effectively, they are saying: "look, I've got Long Covid", and you may have sceptics saying: "Well, we just don't believe that's a real condition." And they would be suffering abusive or derogatory or intimidating comments as a result of having said "I have this condition". And that would be like any other form of disability harassment. You simply cannot make those sorts of comments where somebody has a disability. So that's been another slightly more sinister aspect.

I think that's probably happening less and less the more the medical evidence gathers, and that gathered apace in relation to defining the nature of the condition. But that's certainly something we saw early on in the process.

The biggest issue I think, for people is going to be in relation to, really, sickness absence. If people have got periods of absence where they're off sick, what is going to happen to them during those periods?

That will predominantly depend on their contract of employment. So, whether they have paid sick pay and how long that sick pay is going to last is likely to be something that's guaranteed within the terms of their individual contracts.

Now, we have seen a lot of public sector workers - and I think particularly the NHS, though I haven't checked this recently - there has been a commitment to vary individual contracts to say: look, someone who's off with Long Covid, we will support them financially for a longer period than would ordinarily be the case with another condition. You can see why that's fair, particularly if somebody's picked up hospital acquired COVID, but that's going to be the predominant support. Unfortunately, the default position really is that there is a right to a very limited statutory sick pay, and if you don't have it written into your contract then the right to paid leave is really pretty minimal in terms of your sickness absence.

Of all those scenarios I set out in the beginning, I think the worst scenario is going to be in relation to long-term periods... And I think, Amy, you were maybe talking earlier on about: we're beginning to reach a period where we have people who are off for a year, 18 months, and for whom the prognosis does not look good in terms of their ability to return even with reasonable adjustments. And I suppose the question there is: what is the law in that scenario?

I mean, ultimately, the law will force an employer to behave reasonably in terms of their treatment of somebody who is off work. But ultimately, if that person is not capable of coming back to their previous job, or even an amended version of their job or an adjusted version of their job, then the employer can't be expected to employ them indefinitely. And there does come a time when they are entitled to move to look at bringing that contract of employment to an end.

The sorts of things they should do: they should absolutely explore whether adjustments can be made, in exactly the same way as in the disability case that I've mentioned. They should be looking at retraining people into alternative jobs, going across the whole organisation to see if there are other vacancies available, whether more senior vacancies or more junior vacancies. They should be adopting a rigorous approach to obtaining medical evidence. You know, they should be making sure that they're not making a decision based on speculation about whether somebody might get better or might not get better. They should be basing their decision on the best medical evidence that's available at the time. And they should give people sufficient time to recover.

So, if the medical evidence is saying: look, this is an improving position, we hope that within three or four months with, you know, diet, exercise, things that are beginning to show improvement, we hope this person will be in a better position. With that sort of evidence, you would expect the employer to wait to see what evidence emerged from those further investigations.

But if we are in a situation where somebody really is unable to continue working, there does come a time where the employer is able to terminate their contract, and potentially to do that fairly and not in breach of the law.

Broadly speaking, that's the legal picture. Mainly the law of what we call unfair dismissal comes into those scenarios, but also I think the discrimination statutes will also come in, and that should be influencing a lot of what employers are thinking about this.

AMY: It's really interesting, because when you are faced with this, you know, the risk of losing your job, your livelihood, your career is absolutely terrifying. And I was in that position in April 2020. I was a GP partner, so my employment was slightly different because I fall under partnership agreement - but my colleagues, after six months, could vote to expand from the practice if I was unable to fulfil my partnership duties. Which they did, because they were terrified that I would have a chronic relapsing-remitting condition, which would be unable to fulfil my duties and be a, you know, good member of the team.

So, I got some initial advice from my union, but in those days, it was still quite new. And I think it still is quite new. I think a lot of people that I see in forums are getting varying advice from the unions, depending on which rep they talked to.

I went and sought out a lawyer, I asked friends who I should speak to...

Where should people be looking for advice? At what point do I contact a lawyer? How much is that going to cost me? What advice can I get without having to pay thousands and thousands of pounds? Because that's the kind of thing that, when you're in that situation and you're already looking at losing a livelihood, at what point do you consider spending money on this? Is it sensible, or do you just bow your head and get on with it?

So, I guess those are the sorts of things that I know people are going to be curious about.

DAVID: I mean, I think there's a couple of things.

In terms of trade unions, I think trade unions have been a really positive influence for workers in this regard. The difficulty would be if you're not already a member of a trade union, then trade unions are sort of loath to assist generally, where somebody's not already a signed-up member. Obviously in a lot of professions, people are already signed up to trade unions as part of their professional memberships, but in other workplaces they aren't.

Where we've seen people who've been trade union members, collective advocacy can be really helpful and really beneficial, because people remain very worried about putting their heads above the parapet and talking about these things and trying to advocate for their own rights, because they're just, they're worried it'll put a target on their back. So trade unions are very helpful in terms of providing advice, and also providing advice to lawyers if the worst happens and you are discriminated against or you're dismissed unfairly. So I think trade unions are a good place to go for advice.

If you're not already a member of a trade union, the Citizens Advice Bureau do provide some advice and representation, although they have very limited funding.

Actually, one of the leading cases on Long Covid at the moment has been run by the University of Strathclyde's law clinic. So, they have a free legal service, managed by very experienced solicitors but run by law students. There are many, many law students, so they have significant resources. Yes, they are very inexperienced, but they are very good at taking forward cases on a *pro bono* basis. So, there's one of the great innovations in employment and discrimination law recently, has been the University of Strathclyde's law clinic's work. That is definitely a good resource.

ACAS is always there. So, ACAS is effectively the state conciliation service that's designed to mediate between employer and employee disputes, you know, and they have free advice, helplines. And their job is, if you have an issue - in fact, if you're going to raise a claim or any sort of case against your employer, you have to go through ACAS first. And the reason for that is: ACAS, whilst they have to be independent, they are very good at helping you frame your issue in a way the employer (or more likely, the employer's legal representative) will understand as being a legal issue for them that they have to deal with.

So, ACAS are very good at helping with that. They can't take sides, they can't advocate for you, but they can provide a good conduit for conversations to take place in circumstances where people don't really know what the sort of legal nature of their dispute is.

But I think you have to be very careful. You know, discrimination employment law is quite a specialist area of law, and I probably wouldn't be going into a high street solicitor and paying them a thousand pounds to write a letter for you, because it might just not work. You know, I think the internet's a reasonably good resource to try and find out as much as you can about these issues. And I think probably trying to find a specialist employment or discrimination lawyer, who would write a focused letter on your behalf if there was a genuine issue to take forward.

But it's a difficult situation, because lawyers really shouldn't be taking on clients and charging the money to do stuff which they think might not be successful if it came to court, but very often that's exactly what clients want them to do. So people will quite happily do that. So, I think going down a legal route is something to be very cautious about. Lots of research. There are free advocacy groups that people can approach.

But if the worst comes to the worst - ultimately, if you are dismissed from your job or if you've been discriminated against - the most important thing you can do is to remember that the timescales are very, very tight. If you want to actually legally challenge your employer, don't sit on the issue for too long. You have three months minus a day from the date when you've either been dismissed or you've been subject to the discrimination in which to raise a claim. And it's really important not to wait, because the tragic thing we see is obviously lots and lots of people who have really good cases, but who come to us, you know, six or eight months down the line, and there's not a lot we can really do for them at that stage.

AMY: That's so helpful. I didn't know any of that, about timeframes and stuff. It's all so difficult, isn't it, when you're ill? Because you're ill and you're ill and your life's falling apart around you.

And so that's something that we really need to get that information out to people because they won't be aware of it. Thank you. That's really helpful.

PAULA: Yeah, completely agree. Really helpful information there. Also, to ask: what if a person can't go back to work? What next?

DAVID: Yeah... I think if they can't go back to work, it's probably helpful having some form of discussion. A couple of things to say, so...

Let's assume we've got someone who, their medical condition is so serious that they can't do any sort of work, the prognosis is that there is no likelihood of things improving in the medium to long-term - ultimately, the discussion has to take place about leaving employment.

That's probably a scenario where you would, if you're looking to negotiate an exit from your employment, you can try to take control of that by trying to get a lawyer or representative to speak your employer and saying: "Okay, look, rather than make you go through the process of dismissing me, I'm prepared to have a sensible discussion with you about, you know, receiving some sort of payment in exchange for leaving work and signing what's called a settlement agreement."

And these are incredibly common, but nobody ever knows about them unless you've had one, because they are obviously always confidential. So, a settlement agreement would try to look at all of the payments that you're owed, and probably add something on top of that to say: this is buying off the risk of a potential claim.

Now, the sorts of payments you would be owed are things like notice pay. You could argue for a payment for an equivalent to redundancy pay, although it's not really something that would be payable if you were dismissed because of your illness. And I think the most important thing's probably holiday pay?

It might sound somewhat strange, but in terms of... it was quite a lot of cases run by my colleagues in England, maybe about ten years ago, where we were trying to say it's a bit like maternity pay. If you're off on sick leave, you can't both be on sick leave and be on holiday at the same time. So, we were saying, these are two entirely separate things. And where you have exhausted your sick pay, your holiday pay should still accrue, and you should still be able to take it at your full rate of pay. So, we have some sickness absence cases where even if an employment contract says, "look, you can't carry over your holiday from one year to the next", the courts have said, well, that's not-- that can't be enforceable in circumstances where you could not take your holiday because you were too sick.

So, it's a technique, I suppose, both on termination of employment, but also if you're still going through a long period of sickness absence and you haven't been paid for a while, to say to your employer: "I'd like to take my holidays, please."

Then they might say to you: "What? What do you mean? You're off on longterm sick."

"No, I've got a right to take annual leave, and I'm going to take annual leave. Here are the dates I want to take in the future, and you'll need to pay me at my full rate of pay for the holidays that I'm planning to take."

And it's not a lot of money, but, you know, it can be a month, two months of pay for somebody who's not had any pay for quite a long time, it can be quite important.

AMY: I think it's really important, isn't it, to have these little things that we can sort of look forward to, you know, glimmers of hope and things like that?

I mean, I guess in my own story, my world fell apart at that point, but I managed to get an amazing job with Chest Heart and Stroke. I am now locum as a GP. I'm much more flexible, my work hours suit both me and my illness when it flares. And actually, my life is much better than it was before.

And I think sometimes what can feel like the worst thing in the world... you know, I'm really lucky that it's managed to sort of flip around and work out for me. And I guess that's maybe not the case for everyone, but for those people who are struggling at the most and, you know, if your life does take a different rout, don't give up. There are other opportunities and other things out there. Just need to have a little guiding hand, it's the best way to manoeuvre that.

DAVID: Hopefully the condition is not such that someone is going to be incapable of performing any work at all. It may just be that there are other types of employment that are available. You just have to think about, what am I able to do? What aggravates my condition? And the more you're aware of your condition, the more you might be able to inform yourself what sorts of work you can do.

Just because you have done one particular type of work for your whole career, doesn't necessarily mean you can't retrain and do other things. It's obviously different for every individual, but you know, we can see improvements in people's conditions.

So, we had a few cases that have come through where we've been able to say: we still know so little about prognosis that it is unreasonable for you to assume that this is going to last for another year or another 18 months. So just hold on, don't make any drastic decisions and keep this person into employment.

PAULA: Is there any support out there for people who are self-employed, or something quite similar?

DAVID: Yeah. Someone who's genuine self-employed, it is harder, because you're not employed by anyone, you are your own business, effectively. Somebody who is, for example, in Amy's situation - a partner - discrimination law would apply to her and anyone else who is in a partnership relationship.

The big question really comes for people who are in this grey area, which is described as Limb B workers. Somebody who, they have to do the job, so they can't sort of delegate the job out to anyone else. And they can't sort of say: "Oh, by the way, I'm not coming in, but one of my employees is coming in." It's them personally who have to perform the work, but they're not guaranteed hours or pay. They're not guaranteed that they've got 30 hours a week. It's sort of ad hoc, zero-hour work.

Now, those sorts of workers, it's harder. Things like discrimination law would apply to them, but they wouldn't have rights such as unfair dismissal. So, if they just stopped getting work because they were unable to accept the number of shifts that they used to accept - so, you're thinking of a Deliveroo driver or an Uber driver, for example, who had a minimum amount of work they had to accept each week - it would be difficult for those individuals to enforce their rights under the Employment Rights Act, because they have that status that employees really have.

And I have to say that, in terms of unfair dismissal law, this is incredibly unfair. It's probably the most unfair thing about unfair dismissal law is, if you have less than two years' service, then the right not to be unfairly dismissed does not exist for you. So, if somebody dismisses you prior to you reaching that length of service, then they may treat you incredibly unfairly, but there's nothing you can do about it, because you don't have the right not to be unfairly dismissed. Whereas, two weeks later, once you've got two years' service, they could do exactly the same things and you would have an absolute stick-on case. It's a very arbitrary cut-off, that two year qualifying service aspect.

PAULA: Can we just then go over: where do we go for advice and support? You're in this situation, you're living with Long Covid, you're thinking: I'm struggling with working, struggling with money. It affects my mental health, my wellbeing, and I just really don't know what to do.

What's the first thing a person would do?

DAVID: I think the agencies I was talking about previously - in terms of debt and financial advice, it's not really my area. In terms of your employment rights, I would be speaking to ACAS; speaking to the Citizens Advice Bureau; if you're in a trade union, speak to a trade union. Even if you're not in a trade union, but you've got a trade union representative in the

workplace, speak to them because they might have some experience and background that they are happy to give to you.

If you've got a legal case, there are some *pro bono* legal services out there that you might want to look at. I mean, I have to say: resolution of these sorts of issues through discussion and persuasion will generally be a lot more effective and less stressful than going down a formal legal route. Sometimes you're forced into that. You know, if you've lost your job and you feel it's been unfair, you're sort of bounced into legal writ and there's nothing you can do about it. But generally trying to put your concerns to the employer and have them deal with it is the best way to do things and have it recorded.

Every employer has to comply with the ACAS code on disciplinary grievance. And the grievance process is another process that's really designed to clarify for people what the nature of the issue is. For example, if you've got an issue where you feel that reasonable adjustments are not being made, you've asked for those adjustments, and your employer is simply not giving you any good reason why they are not complying with it adjustment, then by all means, raise a grievance, ask them for a copy of their grievance policy, which they should have. And you write a grievance setting out what the issues that you have are and asking for specific things to change as a result. And they will be obliged to respond to that. And you've also got a right to appeal that grievance to a higher authority within the organisation.

One thing I would say about raising these concerns: it can be daunting to raise the concerns, particularly if you're still in employment. One of the things the law does, which is quite helpful - and it's helpful to remind people and to remind employers of this - is if you raise these sorts of concerns and say that you think you are being discriminated against, or say that you think you are a disabled person as a result of this condition, and that they have an obligation to make reasonable adjustments and they are not doing that, that's what's called a protected act in law. And protected acts in law are designed to say: where we give people these rights, they're going to be pretty useless if every time somebody raises one of these concerns or tries to enforce that right, then they can be subject to detriments or punished by an employer for having raised those concerns.

So, the law does actually protect people: Even if you didn't have a good claim for reasonable adjustments, if you're then subsequently subject to some form of unfavourable treatment as a result of that, or detriment, that is a stand-alone claim in and of itself, even if the original thing you were complaining about was not something that had any legs as a legal issue. So that are protections in place to allow people to make some noise about this.

You know, I think the sort of work that's been done by your organisation in trying to raise the profile of these issues and have forums for these things can be discussed and presumably advocate on behalf of people as well, provide information and guidance - I think these are important resources because it lets people know that these issues are going on, or these fights are being had, by other people that you don't know in other workplaces. That's what we're quite fortunate. We maybe get 15 employment lawyers who are all dealing with 20, 30 cases each and we've got multiple cases that are dealing with COVID and Long Covid

issues. We've still got health and safety issues that are running from people who have been asserting health and safety issues in the workplace relating to COVID and have had issues at work related to that. So we've seen that all the time, because it's something we've been talking about a lot over the last couple of years.

But it's just letting people know that there are lots of people going through these issues all across Scotland and the UK, and that they're not alone in having those problems. That's not to diminish their problems. It's just that they're not as, maybe, alone as they think they are.

PAULA: I just want to say, David, thank you so much for your time today. Honestly, you've been so helpful, incredibly interesting. Lots of advice, lots of support given there. So thank you so much for joining us, it's been so lovely to meet you!

AMY: Yes, thank you!

DAVID: No, absolute pleasure, and best of luck with all the good work that you're doing, and lovely to speak to you all.

[OUTRO MUSIC]

VOICEOVER: Thank you for listening to Long Covid and Me, a podcast from Chest Heart & Stroke Scotland. If you enjoyed this episode, please like us on your podcast app and consider sharing the podcast with your friends, family, and anyone else who may be interested.

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If you have questions or feedback about the podcast itself, or if you would like to be involved in future Chest Heart and Stroke Scotland podcasts, you can contact the podcast team direct at: podcast@chss.org.uk. Please note that we cannot provide individual medical advice through this email.

If you would like to read a transcript of this episode, or if you would like to view links and further information, these can be found in the show notes. Thank you for listening, and we hope to see you again next time.

ADDITIONAL CREDITS

This podcast was made possible by the support and skills of:

- Jay Wilkinson (Primary editor and voiceover)
- Serena Battistoni (Transcription and online support)
- The CHSS Graphics and Communications team (Artwork, advertising, and circulation)
- Robyn Donoghue (Communications lead)
- CHSS Long Covid Support Group (Consultants)

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