Brando Paul Raj Pillai v The Grace Academy Sdn Bhd [2025] ILJU 129

Industrial Law Journal Unreported (ILJU)

INDUSTRIAL COURT (KUALA LUMPUR)

VANITHAMANY SIVALINGAM C

AWARD NO 389 OF 2025

17 March 2025

Roeshan Celestine Gomez (Muhillan Ng & Gomez) for the claimant.
Francis Pereira (with Gowri a/p Romanathan) (Francis Pereira & Shan) for the company.

Vanithamany Sivalingam C:

REFERENCE

This is a reference by Honorable Minister of Human Resource, Malaysia to this Industrial Court under Section 20(3) of the *Industrial Relations Act 1967* ("The Act") for an award in respect of the dispute arising out of the alleged termination of **BRANDO PAUL RAJ PILLAI** ("the Claimant") by his employer**, THE GRACE ACADEMY SDN BHD** ("Company").

This Court takes cognizance of the following bundles, statements, submission and cause papers filed;
DOCUMENTS IN COURT FILES

Statement of case dated - 17.9.2021

Statement of reply dated - 15.10.2021.

Rejoinder dated - 12.11.2021.

Claimant's Bundle of Document - (CLB1, CLB2 & CLB3)

Company's Bundle of Document - (COB1, COB2, COB3)

Witness Statement of the Claimant - BRANDO PAUL RAJ PILLAI (CLWS1)

Witness Statement of the Company - DATO' JOHN WILLIAM XAVIER (COWS1)

Witness Statement of the Company - JAMES TAN KONG MING (COWS2)

Witness Statement of the Company - PRAVINA A/P PARAMASIVAM (COWS3)

Witness Statement of the Company - VIKRAM PIO MARTIN (COWS4)

Company's Written Submission dated - 19.8.2024

Claimant's Written Submission dated - 19.8.2024

Company's Written Submission In Reply dated - 18.9.2024

Claimant's Written Submission In Reply dated - 2.9.2024

Company's Bundle of Authorities

Claimant's Bundle of Authorities

THE CLAIMANT'S CASE

[1] The Claimant claimed that he was employed by the by Grave Assembly of God as Associate Principal for Grace Resource Centre – Primary & Secondary, commencing 1.1.2016 till 31.1.2.2016. Subsequently, the Claimant was offered a contract of service from 1.1.2017 till 31.12.2017 as Principal for Grace Assembly of God. Pursuant to the restructuring exercise, the Claimant tendered his resignation as the Principal of Grace Assembly of God on 31.3.2017 with the condition that he is offered the same position with the unchanged terms and condition at the

Company (The Grace Academy Sdn Bhd). Via contract of service dated 1.4.2017, the Company offered an employment to the Claimant as Principal and the Claimant's contract was renewed from 1.1.2018 till 31.12.2018 and the Claimant was promoted as the Principal of Grace Resource Centre("GRC") effective from 1.1.2018 with an increment. Thereafter the Claimant received renewal of the contract and increment till 2019. On 1.1.2020, the Claimant's contract was renewed till 31.12.2020 with an increment. The Claimant avers that his employment was permanent in nature.

[2] Via letter **24.9.2020**, the Claimant was informed that he was terminated from the position of Principal of GRC with immediate effect on the ground of that the Claimant had allegedly;

i) contravened the restraint clause in his contract of employment dated 1.1.2017; and

ii) defied the Board's Directive as per the Company's letter dated 24.7.2020 thereby committing a gross insubordination.

[3] The Claimant claims that he was not guilty of any of the allegations levelled against him and averred that during the Board's meeting on 9.4.2020, the Claimant was questioned on his gym business, and he had explained to the Board that his business only opens at night, and did not clash with his work in the daytime. He also informed the Board that he has his own staffs running and managing the gym for him. The Claimant was not issued any warning letter nor did the Company raise this issue thereafter.

[4] The Claimant avers that he was not issued any show cause letter, nor did the Company afforded him any opportunity to defend himself with regards to the allegations. No Domestic Inquiry ("DI") was held by the Company. The Claimant's last drawn salary was RM10,975.00 and the Claimant also received a monthly travelling allowances of RM200.00.

THE COMPANY'S CASE

[5] The Company on the other hand averred that, the restructuring exercise was carried out due to the implementation of the Goods and Services Tax ("GST") by the Government at the material time and as such a commercial entity like the Company was incorporated independent of the church i.e. Grace Assembly of Sungai Way/ Subang Selangor. The Company also claimed that there was restraint clause in the contract of service of the Claimant, which states the following;

> *Rest raint Cla u se*
>
> *As a condition of your contract, you are required to devote your whole time, attention, energy and skills solely to The Grace Academy Sdn Bhd, and you shall not be concerned or interested directly or indirectly in nay business or work other than that of your assignments.*

[6] The Claimant's employment with the Company commenced on 1.1.2016. Prior to the appointment of the Claimant, this position was carried out by Janet Jasbeer a/p Kaur Pillai ("Janet Pillai") for many years. Janet Pillai is the Claimant's mother and Reverend Dr. Henry K. Pillai, the father of the Claimant ("Pastor Henry Pillai") was the member of the Board. The Board allowed Janet Pillai a great deal of latitude in the operations and governance on GRC and did not interfere in the decision made. 2 years after the Claimant's appointment as Associate Principal, Janet Pillai decided to resign as Principal and proposed the Claimant to replace her.

[7] A Board meeting was held on 9.4.2020 and the Claimant attended as observer. The Board queried the Criminal on the finance and management of GRC particularly on the revenue losses. Pursuant to this, the Board unanimously decided to wind down the GRC by end year of 2020. Thereafter, at the Board meeting on 23.7.2020 which was attended by the Claimant, the Board informed the Claimant that GRC administration would need to start on an exit for closure. The Board advised the Claimant to keep the Board updated on every stage of the exit plan. This information was conveyed to the Claimant via letter dated 24.7.2020. As part of the exit plan, the Claimant was issued a termination letter.

[8] The Company averred that the Claimant had contravene with the restraint clause (*para 4.1 of the Contract of Employment)*. The Claimant was operating a gym under the name of "Gracie Barra" and it was admitted by the Claimant in the Board meeting on 9.4.2020. The Claimant failed to obtain the Company's consent priori operating or setting up the gym. The Company noticed that the Claimant's attendance was grossly affected in year 2018, 2019 and2020. It was also discovered by the Company that the Claimant had been using the services of the Company's employee for his gym.

[9] As the Principal of GRC, the Claimant was responsible for the entire operation at all times and aware that the Company was making losses. Despite of the knowledge that the Company has decided to cease operation in end year 2020. The Claimant in clear defiance had blatantly advertised for new students intake in year 2021 and went further to provide Early Bird offer for the fee. The Claimant's conduct in seeking new student would have subjected the Company into a serious percussions and financial implications in the event the new enrolment into GRC when its operations were pending cessation.

[10] In year 2016, the Claimant and his mother Janet Pillai had incorporated a business entity called the B.P. Study Lounge which operated the similar business as that of GRC. At no time was the Company informed of this new venture nor was any approval obtained. To add to the insult injury, the Claimant was directly and indirectly representing to the employees of GRC that BP Study Lounge was part of the GRC and use the employee's services to operate the BP Study Lounge. This showed a clear intention of the Claimant to defraud the Company.

ISSUES

[11] The issue to be decided here is whether the dismissal was with just cause or excuse. There is no issue of dismissal, as the Company had given the letter of termination to the Claimant.

ROLE AND FUNCTION OF THE COURTS

[12] In the case of *WONG CHEE HONG v. CATHAY ORGANIZATION (M) SDN BHD* [1988] 1 CLJ 45; ; [1988] 1 CLJ (Rep) 298, the Court had stated the followings:

> *"When the Industrial Court is dealing with a reference under* s. 20*, the first thing that the court will have to do is to ask itself a question (of) whether there was a dismissal, and if so, whether it was with or without just cause or excuse ".*

[13] In the case of *WONG YUEN HOCK v. SYARIKAT HONG LEONG ASSURANCE SDN BHD & ANOR APPEAL* [1995] CLJ 344 , the Federal Court had held;

> *"On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under* section 20 *of the Act (unless otherwise lawfully provided by the terms of the reference), is to determine whether the misconduct or irregularities complained of by the Management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal."*

[14] In the case of *GOON KWEE PHOY v. J & P COATS (M) BHS [1981] 2 MLJ 129**, the Federal Court** (vide the judgment of Raja Azlan Shah CJ) held:- "*

> *"Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the 8 court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it".*

[15] The burden of proof in an unfair dismissal claim lies on the employer to prove on a balance of probabilities that the employee is guilty of the allegation or the reason for the dismissal. This principle was expounded by the Industrial Court in the case of *STAMFORD EXECUTIVE CENTRE v. DHARSHINI GANESON* [1986] ILR 101**:**

> *"In a dismissal case the employer must produce convincing evidence that the workman committed the offence or offences the workman is alleged to have committed for which he has been dismissed. The burden of proof lies on the employer. He must prove the workman guilty and it is not the workman who must prove himself not guilty. This is so basic a principle of industrial jurisprudence that no employer is expected to come to this Court in ignorance of it".*

[16] Whenever a Company had cause dismissal of the workman, it is the incumbent on part of the Company to discharge the burden of proof that the dismissal was with just cause or excuse. This was illustrated in the case of *IREKA CONSTRUCTION BERHAD v. CHANTIRAVATHAN A/L SUBRAMANIAM JAMES* (1995) 1 MELR 373, where the Court held that:

> *" It is basic principle of Industrial jurisprudence that in a dismissal case the employer must produce convincing evidence that the workman committed the offence or offences the workman is alleged to have committed for which he has been*

dismissed. The burden lies on the employer to prove that he has just cause and excuse for taking the decision to impose the disciplinary measure of dismissal upon the employee. The just cause must be either a misconduct, negligence or poor performance based on the facts of the case."

[17] See also the case of *PELANGI ENTERPRISE SDN BHD v. OH SWEE CHOO & ANOR* (2004) 6 CLJ 157**.**

[18] Standard of proof that is required to prove a case in the Industrial Court is one that is on the balance of probabilities as held in the case of *TELEKOM MALAYSIA KAWASAN UTARA v. KRISHNAN KUTTY SANGUNI NAIR & ANOR* (2002) 1 MELR 4, 314**,** where the Court of Appeal held that the standard of proof that is required in the Industrial Court is that of balance of probabilities. Even if there is misconduct like theft or any dishonest conduct, the standard of proof is still on balance of probabilities and not of beyond reasonable doubt. What this means is that the Company bears the burden of producing convincing evidence that the Company has good grounds for the dismissal and that the exercise of this decision is made with just cause or excuse.

EVALUATION AND FINDINGS

[19] The burden of proof is on the Company to prove that the dismissal was done with just cause or excuse. The case kicked off with the letter of termination dated 24.9.2020 *(refer to page 3 of the CLB1).* The termination was for the conduct of the Claimant contravened with the restraint clause para 4.1 of the contract of employment. The Company averred that despite of the Company giving a clear instruction to wind down the operation of the GRC, the Claimant went on to place advertisement in the school premises and GRC Facebook to recruit students hence committing insubordination. The Company submitted that the Claimant had failed to establish that his dismissal was without just cause or excuse. The burden of proof is on the Company to prove that the termination was justified on the ground of insubordination and breach of contract as alleged in the letter of termination and it was done with just cause or excuse.

[20] The Company had claimed that the position was offered to the Claimant as a favour to Janet Pillai, the Claimant's mother. Janet Pillai's previous employment with the Company is not the issue in the present case at all. Pastor Henry Pillai's position as being one of the members of the Board has no relevance in the issue of insubordination of the Claimant and furthermore, the Claimant's parents' position is not directly or indirectly related to the issue at hand. The Company averred that Pastor Henry Pillai has used his position in the Church to influence and obtained a great deal of financial benefit for his family. The Claimant had applied to join the Church as the party to the suit however then Company objected and stated that the Church is non profitable organisation and has nothing to do with the issue at hand.

Therefore, this Court opines that it is not fair now for the Company to bring Pastor Henry Pillai's position in the church, as a corroborating factor to the allegation against the Claimant now. This issue of nepotism was never raised by the Company in any of its meetings. This Court will discard the allegation of nepotism raised by the Company. It is irrelevant to the present case of termination.

[21] The Company alleged that the Claimant was employed without experience and qualification in year 2016 with a starting salary of RM7,000.00 including the allowance because of the Claimant's mother Janet Pillai's influence. The Claimant's employment is not the issue in the present case. He has been employed by the Company since 2016 and none of the Board members had disputed his qualification thus far. The Claimant's appointment nor his salary was disputed all these while by the Company in the Board meeting nor did the Company able to produce any document with regards to their dissatisfaction of the Claimant's appointment. Therefore, this Court would perceive the Company's submission with regards to the Claimant's appointment qualification and his salary as an afterthought and irrelevant to the present case.

[22] The Company raised 2 allegations as to the contravention of restraint clause, firstly the Claimant who operated a gym called "Gracie Barra" and the BP Study Lounge operated by Janet Pillai together with the Claimant which was considered as conflict of interest with the Company's business.

[23] The Claimant's performance was disputed by Company. COW2 testified that the number of students in the school has declined since he took the office, which shows that his performance was definitely very poor. COW2 further added that the Claimant's contract was renewed because of his father Pastor Henry Pillai and his mother Janet Pillai's influence. The Company had alleged poor performance on part of the Claimant, however the Company failed to prove how the Claimant's his conduct had made the school suffer financial losses. On the contrary the Claimant adduced *page 4 of CLB1* email dated 27.12.2017 from the Director of the Company as evidence to prove that the Company's claim was baseless, and that the Claimant was performing well in the Company and was entitled for increment.

[24] The first allegation was that the Claimant set up the gym which contributed to his poor performance in the Company and which was against the restraint clause. Refer to the minutes of the Board meeting dated 9.4.2020 at *page 15 of COB 1*. Pursuant to the minutes of the meeting, the Claimant attended the meeting as an observer, and he was asked by COW1 about the rumour that the Claimant is operating a gym. The Claimant answered affirmatively and informed the Board that he has his staff running the operation and management and he only goes to the gym at night. The Company did not warn the Claimant that his actions were against the Company policy or that he had breached the restraint clause. Furthermore, the Company did not issue any warning letter or show cause letter. The Company did not take any disciplinary action against the Claimant with regards to the contravention of the restraint clause either. It appears that the Company had condoned with the Claimant's action of running a business against the restraint clause since 9.4 2020.

[25] The case of *PUBLIC SERVICES COMMISSION MALAYSIA & ANOR v. VICKNESWARY A/P RM SATHIVELU* *(2008) 6 MLJ 1***,** held that condonation in the context of employment contract is an act of employer to excuse or forgive the employee for the wrongful act committed by the employee, or by passive act of not taking any action. Condonation can be in the active form by the act of telling that the has been forgiven for the wrongful act or by passive act of not taking any action. On the present case, the Company had elected to continue with the Claimant's employment despite of knowing that the Claimant had acted in contravene with the restraint clause or more specifically had breached one of the terms of the contract therefore the Company is deemed to have waived its right to take action against the Claimant.

[26] The Company alleged that the Claimant's averment that he had already informed COW1 and Mr. Lim Fong Chuen ("Company's Director") was not true. Be it as it may, the Company had knowledge that the Claimant was running a gym as early as 9.4.2020. Furthermore, the Company claimed that the Claimant's performance was grossly unsatisfying in year 2018, 2019 and 2020. The Company on the other hand, had given salary increment to the Claimant praising his performance despite of the allegation that his performance were poor. Unfortunately, the Company had failed to produce evidence to show that informed and brought to the Claimant's attention that the Company was not satisfied with the Claimant's attendance or performance. The Company did not raise the issue of poor performance of the Claimant thus far until the letter of termination was issued to the Claimant. Again, this shows the Company had condone with the Claimant poor performance all these while until 24.9.2020 if any.

[27] The Claimant was asked in cross examination that the Claimant had been working for the gym and BP Study Lounge and the Claimant answered affirmatively. The question now is whether the Company had knowledge about this before 24.9.2020 or is this the first time the Company came to know about the Claimant running the gym and BP Study Lounge. COW1 testified in Court that he knew that BP Study Lounge was closed down in year 2018. Furthermore, it was not a pleaded issue in the Statement in Reply. It appears that the Company seem to have raised the issue of BP Study Lounge belatedly and not a genuine claim. It has been established by the Claimant that the Company had knowledge about the Claimant operating a gym as early as 9.4.2020 and the Company did dispute or warn the Claimant before. With regards to the BP Study Lounge, the Company did not state when and how the Company came to know about the BP Study Lounge. This Court opines that the Claimant although might have acted in contravene with the restraint clause of para 4.1 of the contract of employment, the Company had clearly condoned with the Claimant action. It is too late for the Company to now raise objection and state that the Claimant had acted in contravention of the restraint clause. Furthermore, the Company failed to adduce evidence that the BP Study Lounge had affected the business of the Company. Besides it was established during the trial that some members of the Company did in fact owned and operated other businesses, and the Claimant was not the only one. Even COW1 had a catering and food business called *"Big Rajah Food Caterers Sdn Bhd* ' which had its business registered under the GRC premise. Even the cctv footage showed that the caterers had removed the licence displayed in the premise of GRC. COW1 was the treasurer of the Church and he was the one of the main witness for the Company.

[28] With regards to the 2nd allegation, the Company alleged that the Claimant had committed insubordination. The Claimant admitted that he was informed about the Company winding down its operation on 23.7.2020 *(refer to page 27 of COB1)* although the exit plan was not discussed. The Claimant testified that the Company informed the employees that they were winding down however the Company did inform the employees to maintain the status quo as there were 2 investors intend to purchase the school. The Company also informed the employee that they will carry on with the business for 2 weeks until the employees are updated. Refer to the email dated 9.9.2020 from the Claimant to the Director of the Company where the Director replied to the Claimant's queries and stated that the Company will update the Claimant. This email does not in any way prove the clear and confirmed plan of the execution of the Company's exit plan. The Claimant was not informed of any execution of the exit plan. There was no specific instruction from the Company to the Claimant not to perform any of his responsibilities in the future.

[29] The Claimant had advertised for the new intake of student for year 2021 in the absence of clear instruction and directive from the Board of the Company. Nevertheless, the Company issued a Directive that GRC was not authorised to take new intake of student for year 2021 and thereafter, the Claimant had directed Ms. Katrina to stop the new intake and remove the advertisement in the Facebook with immediate effect. There is nothing mala fide on part of the Claimant's conduct. He approved placing of the advertisement in the absence of clear and direct instruction from the Company and once he had obtained the same, he had responsibly acted in accordance with the Directive. This is obviously not a case of insubordination. Insubordination clearly means a willful act of disobeying orders or instructions given by the employer of the employee's superior. Cases like *SIN KOK FOONG v. GREY WORLDWIDE SDN BHD (* (2018) 3 ILR 325 and *ADRIANNAABY v. MASS RAPID TRANSIT CORPORATION SDN BHD* (2019) 1 ILR 549 are among others which defined the act of insubordination. The Claimant's action does not in any way shows mala fide or bad intention towards the Company. Even if the Company perceives as insubordination, it is a good practice if a warning or show cause letter was issued and afford an opportunity to the Claimant to explain himself before the Company write to a decision. The Company failed to do so and was very quick in dismissing the Claimant without affording an opportunity for the Claimant to explain. The Company failed to call Mr. Lim Fong Chuen the Director of the Company who issued the directives and instructions about winding down of the Company.

[30] The final issue is with regard to the Claimant's nature of employment. The Claimant claimed that his employment was permanent in nature while the Company claimed that the Claimant was employed on a fixed term contract basis. The Court found that the Company did not submit on the issue of the Claimant's nature of employment. The Claimant on the other hand submitted the case of *AZRELL BIN MOHAMAD v. NATIONAL AEROSPACE & DEFENCE INDUSTRIES SDN BHD & ANOR* *(2024) MLJU 1604*. It was held in the case that that a contract can be a fixed term contract if it contains within it a clause enabling ither side to terminate the contract in giving notice before the term expires and *"a fixed term contract lapses upon expiry of the term stipulated in the contract unless otherwise extended. The contract terminates upon its expiry and needs to be terminated by either party".*

[31] The Claimant's contract was renewed continuously on the present case. The Federal Court in *AHMAD ZAHRI MIRZA ABDULl HAMID v. AIMS CYBERJAYA SDN BHD* [2020] 6 CLJ 557, decided that in determining whether a contract is a genuine fixed term contract there are three issues to be considered;

(i) the intention of the parties;

(ii) employer's subsequent conduct during the course of employment; and

(iii) nature of the employer's business and the nature of the work which an employee is engaged to perform.

[32] Further in the case of *SRI KAVIN A/L SANANADAS v. RAHMAN HYDRAULIC TIN SDN BHD* *(2022) 2 ILJ 104***,** it was held that the entire circumstances will be considered by the Court in determining whether a contract is a genuine fixed term contract or permanent in nature. The Court must undertake an inquiry into the question whether an employee genuinely had a need for the services of an employee for fixed term duration and thereby employed the employee for the said term stipulated in the contract. In the present case, the contract had been renewed continuously for 4 times without a break. It is apparent that there is a need for the Claimant's service and that shows that the position was not temporary as the contract was renewed even before the expiry of the contract. The Claimant was not required to apply for renewal before the expiry of the contract. The renewal was automatic. The position in question was of "Principal". There is no need for the school to employ someone on temporary basis as the position was a permanent and not project based. There was no evidence adduced to show if Janet Pillai who was the former Principal's contract was permanent or fixed term in nature. Furthermore, COW1 had testified that the Claimant's employment was not temporary. The Claimant was asked to resign on 31.3.2017 and the Company offered the job back in the Grace Academy Sdn. Bhd. until 31.12.2017. There is no need for the Company to require the Claimant to resign in order to employ him back in another entity if the Claimant's nature of employment is not permanent in nature. His job was restored back with the unchanged condition, and he was offered increment and allowance every year. In the absence the Company's submission on this issue and by looking at the circumstances of the nature of the employment and the intention of the parties, this Court opines that the nature of the Claimant's contract was permanent in nature. This Court opines that the Company's allegations of insubordination and contravention to the restraint clause are just an afterthought to justify the termination.

DECISION

[33] Being guided by the principles of equity, good conscience and substantial merits of the case without regard to technicalities and legal forms and after having considered the totality of the facts of the case, the evidence adduced

and by reasons of the established principles of industrial relations and disputes as stated above, this Court finds that the Claimant had proved on the balance of probabilities that the dismissal of the Claimant was without just cause or excuse. This Court finds that the Claimant has been dismissed without just cause or excuse, therefore the Claimant's claim is hereby allowed by this Court.

REMEDY

[34] Considering the facts of this case, the Court finds that reinstatement may not be an appropriate remedy. Therefore, the monetary award of compensation in lieu of reinstatement would be more suitable ***(****KOPERASI SERBAGUNA SANYA BHS (SABAH) v. DR. JAMES ALFRED (SABAH) & ANOR* [2000] 3 CLJ 758***.*** The Claimant's last drawn salary was RM10,975.00 and for the purpose of calculation, this Court disregard variable figures such as reimbursement, commission and allowances. The Court is also mindful of the provisions of Section 30(5), Section 30(6A) ***and The Second Schedule of the Industrial Relations Act 1967*** in considering the appropriate relief to be awarded to the Claimant. Having considered all the above items and items *1 and 3 of the Second Schedule of the Act,* the Court hereby orders that the Claimant be allowed the relief of back wages equivalent to 12 months of his last drawn salary. However, the back wages for the Claimant is justified on the grounds that the Claimant has a secured an income from his own business.

Back wages of 24 month:	
RM10,975.00 x 12 months	= RM131,700.00
Compensation in lieu of reinstatement	
RM10,975 x 4	= RM43,900.00
TOTAL	**= RM175,600.00**

[35] It is hereby ordered that the total sum of **RM175,600.00 (Ringgit Malaysia One Hundred Seventy Five Thousand And Six Hundred Only)** after statutory deductions if any, is to be paid by the Company to the Claimant's solicitor MESSRS MUHILLAN CHAN & GOMEZ within 30 days from the date of this Award.

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