

Age Discrimination: the Issues for Employers

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1. Introduction

The government has made a commitment to introducing age discrimination legislation before the end of 2006. This will outlaw age discrimination in employment and vocational training and will apply to people of all ages - the young as well as the old.

This action on age discrimination is required by the European Employment Directive (Council Directive 2000/78/EC), which sets the framework for equal treatment in employment and is binding on all European Union Member States.

Prior to this the government had taken steps to address the issue of age discrimination in the workplace through encouraging employers to follow a voluntary Code of Practice (www.agepositive.gov.uk) covering age diversity in employment. This Code was introduced in 1999 and updated in 2002.

In anticipation of the legislation, the government then set out its proposals to outlaw age discrimination in 2003 in a consultation document, *Equality and Diversity: Age Matters*¹. Following the response to this consultation, it was expected that the draft regulations on age would be issued by mid 2004. This timetable slipped and the draft regulations will now be published by Summer 2005 at latest. This will be followed by a further consultation period.

In view of the deadline of October 2006 for the legislation to come into force, employers will have less time to prepare than the two years originally planned. That is why it is vital that employers start - if they have not done so already - reviewing their policies and procedures to prepare for the forthcoming legislation.

This briefing provides an outline of the scope of the forthcoming legislation and sets out some of the key issues that employers should consider.

¹ Department of Trade and Industry (2003), Available at www.dti.gov.uk/er/equality/age.htm

1.1 What will the legislation cover?

As set out in its consultation document, the law will apply to all employees, as well as to job applicants. It will cover both training in and for work. It will prohibit direct and indirect discrimination. Those covered by the new legislation will include: employers; providers of vocational training; and trade unions, professional associations, and employers' organisations.

The main areas that will be covered are:

- recruitment, selection and promotion
- retirement age
- pay and non-pay benefits
- training and development
- statutory redundancy payments.

There will be provision for exceptions, where treating people differently on the grounds of age will be possible. But an employer must be able to do so with reference to specific aims and be able to show that it appropriate and necessary in the particular circumstances. It will not be enough to assert this. An employer will have to produce supporting evidence.

Age discrimination claims will be brought to an Employment Tribunal, and there will be no limit on the level of financial compensation that may be awarded to an applicant.

The experience in Ireland, where age discrimination legislation is already in place, indicates that age is a major area for discrimination claims. Nearly one in five of Ireland's formal discrimination claims are age-related.

1.2 Preparing for the legislation

In view of the wide scope of the legislation, employers will need to review their current policies in all the key areas identified above, and determine what action they need to take to ensure that their policies are not open to challenge on grounds of age discrimination. Below we consider some of the key issues, and set out some steps employers can take to ensure that they do not discriminate on the basis of age in any of these areas.

1.3 Recruitment, selection and promotion

There are many sources of guidance available on avoiding age discrimination at all stages of the recruitment and promotion process. The government's Code of Practice, updated in 2002, warned that: 'By using age as a recruitment condition, you are showing potential employees that you are an employer who discriminates unfairly. Be an employer of choice. Make it clear that you recruit people on the basis of their skills and ability and not their age'¹.

A recent survey carried out by Eversheds law firm questioned over 2,000 people including senior managers and HR professionals about discrimination legislation. One in five said that they were 'aware of a recruitment decision that has been influenced by age'. One in three claimed that they had been discriminated against on the grounds of age, with almost 60 per cent of the 16-24 year olds feeling unfairly treated because of their age or perceived lack of experience².

1.3.1 The recruitment process: avoiding age discrimination

The recruitment, selection and promotion processes include: advertising, application forms, shortlisting and interview panels. These are some recommended actions for employers to consider drawn from the various sources of guidance available:

- Job adverts should avoid language that implies that only a certain age group is being sought, such as 'young graduates'. The legislation may allow employers to apply an age limit to recruitment, but only in exceptional circumstances where they can justify doing so.
- Asking applicants their date of birth could be seen as discriminatory. Many companies no longer do this as it has been shown to disadvantage older workers. The Employers' Forum on Age commissioned the recruitment specialists Bartlett Scott Edgar to design an age neutral application form with all age elements removed. This means that all chronological information is removed. (For a sample of the application form, go to www.efa.org.uk)
- Make sure that any experience requirements can be justified and do not indirectly discriminate on the basis of age

¹ Department for Work and Pensions (2003), *Age diversity at work, a practical guide for business*.

² cited in IDS Diversity at Work, no.5, Nov 2004

- Make sure that interviewers involved in the selection process know that age should not affect who they select, and only ask job-related questions
- Make sure that promotion opportunities are made available to all staff regardless of age, and that people are promoted because of their ability, rather than their age

1.3.2 Monitoring the recruitment and promotion

Ideally, having put such steps in place, it is important to check hidden barriers to recruitment by monitoring the number of candidates from different age groups who are:

- job applicants
- shortlisted
- interviewed
- appointed
- promoted.

One survey of employers, carried out for the journal *Equal Opportunities Review*, found that less than a third of respondents were monitoring the recruitment process in terms of age, and only nine per cent were monitoring promotion decisions¹. However, these proportions were set to significantly increase by October 2006.

1.3.3 Positive steps to recruit an age diverse workforce

Employers wanting to **attract a more diverse workforce** can actively encourage this in several ways:

- Employer branding could help employers recruit the employees they need regardless of age, and thus widen the potential recruitment market. Some employers who are keen to recruit an age diverse workforce, are seeking to brand themselves as employers of choice. This can include actively seeking a wide age range of employees and offering flexible working arrangements, flexible retirement options *etc.*
- The Employers' Forum on Age suggests age awareness training for all employees. It would certainly be advisable to offer this type of training to managers responsible for recruitment, to make them aware of any potential (often

¹ Godwin K (2004), 'Age diversity: the story so far', *Equal Opportunities Review*, No 131, July

unintentional) bias that can influence the recruitment process.

- HBOS has been working with recruitment suppliers to promote age diversity. Tyrone Jones, diversity and organisational development manager at HBOS, says 'There is sometimes an assumption ... that recruitment agencies understand your diversity needs and will automatically send you a diverse range of candidates, but this may not always be the case. As a recruiter you need to be explicit and clearly communicate the organisation's values and requirements' (cited in IRS Employment Review, 808, p45). HBOS has also worked with Encore Recruitment, a consultancy specialising in finding work for the over 45's. From April 2003 to September 2004, 60 staff found employment at HBOS through this initiative.

1.4 Retirement age

The issue of the retirement age is currently proving to be the most controversial aspect in the debate about age discrimination.

When the government conducted its consultation in 2003, it found that many respondents were confused about retirement ages. The consultation asked for views on whether employers should be able, exceptionally, to justify mandatory retirement ages, by reference to specific aims, and whether there should be a default retirement age of 70 at or after which employers could require employees to retire.

The majority of employers who responded to the consultation believed that the legislation should abolish the right for individual employers to impose a compulsory retirement age, on the grounds that it was a form of age discrimination. But they also expected that the government would introduce a default retirement age.

The term 'mandatory retirement age' was defined in the consultation report as the age that an employer sets for the retirement of its employees. The term 'default retirement age' refers to the age at which employees would be able to retire their employees compulsorily without having to justify their decision by reference to legitimate aims. A strong employers' lobby led by the CBI argued that without a default retirement age every retirement would become an area of potential dispute over competence and would raise practical problems in areas such as performance management and workforce planning. These views were contested by organisations representing older people and by the trade unions which saw the introduction of a default retirement age as endorsing age discrimination.

At the end of 2004, the government finally announced that that it *will* set a default retirement age, and that this it to be 65. Employees will have the right to request to continue working past 65, but employers will be entitled to reject the request for business reasons. An employer who wishes to retain a retirement age below 65 will have to objectively justify this. A formal review of this default retirement age will be carried out five years after the legislation comes into force in October 2006.

1.4.1 Need for a systematic approach to retirement planning

So where does this debate over retirement age leave an employer wanting to promote good practice? Recent research on the retirement processes in three organisations, involving interviews with HR and Pensions managers and 160 employees and retirees, confirms that most organisations do not take a proactive approach to the management of older workers, and this includes retirement planning¹. The HR professionals did not consider themselves pensions specialists and tended to regard the whole issue of retirement as not a core part of human resource management. Instead an ad hoc approach prevailed which meant that decisions about individual employees – for example, whether they could carry on working after normal retirement age or could take early retirement – appeared to be arbitrary rather than transparent.

The implications of the age discrimination legislation is that employers will need to be able to justify any decisions they make in relation to retirement, for example where an individual requests to continue working beyond 65. Otherwise the organisation may be open to a challenge that age, rather than justifiable business reasons, or issues of competence, lay behind a decision to refuse a request.

1.4.2 Flexible retirement options

A survey carried out by CROW² found that 78 per cent of older workers would be willing to consider work after they formally retire. Of these over half would consider part-time work, a third would consider voluntary work, but fewer than one in ten would consider full-time work. A growing number of organisations are addressing the question of retirement age

¹ Vickerstaff S (2005), 'Managing the older workforce', *Equal Opportunities Review*, January

² Centre for Research into the Older Workforce (2004) 'Are older workers different?', Briefing Paper1, University of Surrey

by choosing to offer a package of flexible retirement options. These include the following organisations:

- Aberdeen City Council's age-neutral policy has led to a formal introduction of a flexible retirement age¹. Approximately one year before the usual retirement date, an employee will meet with an officer to discuss the various options available. The decision to extend an employee's contract is subject to the employer's discretion, but is *not* subject to a medical unless there are particular health concerns.
- BT now offers five flexible working options by which people can retire gradually². These are:
 - wind down, which offers employees an opportunity to work part time or job share
 - step down, which enables employees to reduce their work commitments by taking a lower-grade job with less responsibility
 - time out, which allows employees to take phased sabbaticals
 - helping hands, which encourages employees to take up full-or part-time secondments
 - easing down, which allows employees to gradually reduce working hours and/or responsibilities.

The company has retained a fixed retirement age of 60 but plans to abolish the company retirement age before the legislation comes into place. In the meantime it provides opportunities to continue working beyond 60 in business areas where there are skills shortages.

1.4.3 Redundancy

When the statutory redundancy payments scheme was introduced in the UK in 1965, it contained a number of age-related provisions. These include:

- no payment to those below the age of 18
- age is used as a factor to calculate payment (half a week's pay for each year of service between ages of 18-21; one week's pay for each year of service between ages 22 and

¹ Suff R (2004) 'Using age-diversity policies to attract and retain older workers', *IRS Employment Review*, 808)

² Foster C (2005), 'BT - positive about age', *Equal Opportunities Review No. 138, February*

40; and one and a half weeks' pay for each year of service between ages 21 and 65)

- an upper age limit of the normal retirement age (if lower than 65) or a default of 65
- a cap of 20 years on the length of service than can be taken into account.

To bring these payments into line with the principle of equal treatment regardless of age, the government put forward a number of proposed changes in its consultation document in 2003. These include:

- Service below 18 will become eligible for statutory redundancy payments.
- Payments will not be differentiated according to age, but be based on one-week's pay for each year of service, irrespective of age.
- The upper age limit for entitlement depends on the decision made about the retirement age. As we have seen above, a default retirement age of 65 is to be set. Therefore eligibility for statutory redundancy payments would continue up to the age of 65. If any employer had set a lower normal retirement age, this would have to be justified as discussed in the section on retirement.

However, the government did propose in that consultation to retain the cap of 20 years reckonable service. As discussed in the DTI's Summary of responses to the consultation, these proposals attracted some different opinions. Some considered the cap of 20 years to be inconsistent with age discrimination principles, while others criticised the perceived levelling down of payments for older workers – *ie.* those aged over 40.

There is some debate about whether the length of service calculator for redundancy would be lawful. As the draft regulations will not be issued till the summer, employers need at this stage to be aware that current system of payments is likely to be changed.

Selection for redundancy

However, in addition to the financial aspects, there is also the issue how an organisation selects employees for redundancy, and this is an area that HR professionals need to be reviewing in anticipation of the legislation.

The government's Code of Practice, clearly advise employers not to use age as a basis for selecting people for redundancy: 'Employers should make unbiased job-related decisions, based

on important factors such as performance and skills, when choosing people for redundancy'. Other advice includes:

- involving employee representatives early on in the redundancy process, and making employees aware that decisions will not be based purely on age
- avoiding redundancies by considering other possibilities, such as:
 - asking for volunteers
 - part-time working
 - secondments
 - natural wastage
 - career breaks
 - job sharing
 - retraining
 - moving people to other departments.

Drawing on lessons from the Irish and American experiences of age discrimination legislation, a legal commentator in a recent article in the Employer's Forum on Age magazine, wrote: 'Employers should be much more careful [under the new UK regime] about singling out older workers for redundancy and will be obliged to communicate much more detail about the reasons for redundancy than is currently the case for older workers'¹.

As in other policy areas, the key to good practice for employers will be to not only to 'ensure that they have transparent and fair procedures, but that they retain records relating to those procedures'.

1.4.4 Training

Analysis by IES of 2004 Labour Force Survey data showed that older workers are less likely to be offered work-related education and training opportunities than younger workers. While 63 per cent of those aged between 16-19 years old had been offered education or training in the previous three months, this proportion rose to 75 per cent of those aged between 25-49. This figure then declined to 70 per cent of 50-55 year olds and 65 per cent of those aged 55 to 59. Older workers in low-skilled occupations were the least likely to receive any training.

¹ McEwan N (2004), 'Transparency is vital in defending against age discrimination claims', *Working Age*, Issue 2, November

This pattern is reflected in research which has examined attitudes towards training workers of different ages.

- Taylor and Walker's study of employer attitudes towards older workers revealed that a significant number of employers provide no training at all for the over 50's.¹
- McNair discusses some of the myths surrounding the training of older workers, such as a lack of 'pay back time', and the assertion that 'you can't teach an old dog new tricks'². McNair found 'little evidence that most people's capacity to learn or work (in most occupations) diminishes significantly with age during the 50's and 60's, provided the individual is sufficiently motivated and trained'. Casey *et al* found no evidence for the assertion that older workers are not willing to take up new training opportunities³.

What does emerge from reviews of the evidence is that older workers face a range of barriers to obtaining training⁴. Some of these barriers come from myths about older workers and their capacity to learn. Older workers may also erect their own barriers to training due to low expectations or lack of confidence.

A first step for employers is to monitor the provision and take-up of different types of training by different age groups in their workforce. Without that data, it becomes difficult for an employer to know whether or not age is a factor in who is offered, and who receives, training in their organisation.

1.4.5 Conducting a policy audit

In the previous sections, we have set out some of the issues that employers need to consider to be ready for the legislation. But if this is a new area for policy in an organisation, where should it start?

¹ cited in Alferoff C (1999)

² McNair S., (2004), *The age of choice: a new agenda for learning and work?*, Working Paper 13: Centre for Research into the Older Worker, University of Surrey

³ Casey B, Metcalf H and Lakey J (1993), *Human Resource strategies and the third age: policies and practices in the UK*, Institute of Personnel Management, cited in Stoney & Roberts

⁴ Meadows P (2003), *Retirement Ages in the UK: a Review of the Literature*, DTI Employment Relations Series 18 and Newton B, Hurstfield J, Miller L, Bates P (forthcoming), *Practical Tips and Guidance on Training a Mixed-Age Workforce*, Extending Working Lives, DWP

- A first step is to carry out a review – or audit – of all the organisation’s policies to identify whether age is used as criteria in any of them. This might be direct, *eg.* if any company benefits are linked to age; or indirect through use of criteria such as ‘experience’ in job adverts.
- Does the organisation have an equal opportunities policy that includes age? Consider developing a specific policy on age diversity? Be aware of the possible interrelationship between age and other equality issues. For instance, a House of Lords Economic Affairs committee report highlighted the ‘double disadvantage’ of age and ethnicity, encountered by members of ethnic minorities over 50¹.
- What does the existing data show about the age profile of the workforce? Is there a good spread of ages across the organisation? If not, what are the reasons for this?
- Once the legislation is in place, and ideally, before this, employers will need to monitor for age, to ensure that older workers are not being discriminated against. This process of monitoring will need to cover not just recruitment, but other areas discussed in this paper, such as training, promotion and redundancy schemes.

1.5 The business case for employing a mixed age workforce

This paper has focused on the need for employers to have policies and procedures in place so that they can comply with the forthcoming age discrimination legislations. But tackling any forms of ageism in the workforce, is not just about complying with the law or calculating the potential financial costs to employers of discrimination claims against them.

Equally important is an awareness of the business benefits to employers of recruiting and retaining a mixed-age workforce on the basis of skill and ability, and not excluding workers on grounds of age. What are these benefits?

1.5.1 Tackling skills shortages

The age profile of the UK workforce is changing. The average age of people in the workforce has been steadily increasing over the past decade. Although the employment rate is considerably lower for people aged between 50 and the state pension age, than those aged 25 to 49, the gap is closing as the

¹ see ‘The economics of an ageing population’, *Equal Opportunities Review*, no.127, March 2004

employment rate of older workers is steadily increasing¹. Population projections indicate that 45-59 year olds will form the largest groups in the labour force by 2006².

Employers who are reluctant to employ people from particular age groups – such as workers over the age of 45 – will be missing out on potential employees with valuable skills³. In contrast, businesses who promote age diversity in their workforce, report improved rates for keeping staff, higher staff morale, fewer short term absences and higher productivity⁴.

A review of the age profile of the workforce may help to address skills shortages and to find suitable employees for ‘hard to recruit for’ jobs. For instance, North Ayrside Council removed the cut-off retirement age of 65 to recruit school patrol officers, a role which had been difficult to recruit for.

Although demographic data about the ageing population (Withnall *et al.*) indicates that businesses should be seeking to attract older workers, the situation varies according to the sector and profile of the workforce. For instance, local authorities are struggling to recruit younger employees. Recent research from the Employers’ Organisation shows that a quarter of the local authority workforce will retire in the next decade, but only eight per cent of local authority staff are under 25⁵.

1.5.2 Sickness absence

The view that older workers are absent more often than younger ones is not borne out by the experience of many employers. The pattern is more complex than this and types of absence vary by age⁶. For example, older employees tend to have higher percentages of no recorded absence than younger employees who have more frequent, shorter periods of sickness absence. Sick leave from industrial accidents is higher amongst new or inexperienced workers. However, if older employees become sick, they are more likely than younger employees to have a serious medical condition leading to more lengthy

¹ DWP (2004), *Older workers: statistical information*, Spring

² The Employers’ Forum on Age(2005), ‘Age: the facts’, www.efa.org.uk/age/facts

³ Godwin K (2004), ‘Age Diversity: the story so far’, *Equal Opportunities Review*, no.131, July

⁴ Age Diversity at Work, www.agepositive.org.uk

⁵ Employers’ Organisation (September, 2004), *Recruitment and Retention Survey*,

⁶ ACAS (2004) *Absence and labour turnover*, Advisory booklet, June

absences. The pattern of absence also varies in different sectors, and is higher amongst manual workers than office workers.

The fact that absence rates vary in these ways, rather than simply increasing with age, point to the need for employers to avoid stereotyping older workers and instead look carefully at what steps can be taken to support employees of all ages through spells of absence.

1.5.3 Reduced turnover

Many organisations find that younger staff have a higher turnover than older employees (*People Management*, 23/12/04). For example, the retail company Tesco found that targeting older workers was a useful strategy in the retail sector, and reported lower turnover rates for the over 50's than for younger age groups. In fact, turnover within the 16-19 age band was five times higher than for the 50-59 age band¹

1.5.4 Balancing the workforce

The National Maritime Museum's age diversity policy has helped to ensure a more balanced age structure². The particular aim of the policy (introduced during the 1990's) was to address an imbalance of predominantly older workers. The museum acknowledges the business benefits that this brings. For instance, visitors to the museum come from 'all walks of life', so it helps to have a diverse range of staff to help with customer care. Andy Bodle, HR Director points out that age diversity 'brings different attitudes and skills and diverse knowledge to the workplace'. (See the case study at the end of this paper for more details.)

For similar reasons, some employers in the finance sector have specifically targeted older workers, as have other service sector employers such as Asda and B & Q. These measures are seen as vital to reflecting the diversity of the business's customer base.

1.6 Where to find out about good practice

There are a number of sources of further guidance which are set out at the end of this paper.

¹ Stoney and Roberts (2003)

² C. Wolff (2004), 'National Maritime Museum turns the tide on ageism', *IRS Employment Review*, 811, November

Examples of organisations that have successfully put age diversity policies into practice are widely available. There are more than 70 named case studies on the government's Age Positive campaign website, which seeks to promote the business benefits of an age diverse workforce. These case studies provide examples of how individual organisations have addressed issues such as recruitment, redundancy and retirement. The organisations come from a wide range of sectors, and include small organisations as well as large one, as the selection below from the list on the website shows:

- Asda (retail)
- B & Q (retail)
- BarclaysBank (finance)
- Better Prospects (recruitment and training company)
- Domestic and General (provider of protection plans for domestic appliances)
- Ealing Family Group (Social Housing provider)
- Eden Brown (recruitment consultancy)
- HBOS (finance)
- J Sainsbury (retail)
- Kappa Packaging (packaging manufacturer)
- Nationwide (finance)
- Natural Gas Services Ltd (Gas installation and service)
- Nordam Group (engineering)
- Shaw Homes (Housing association)
- Tesco (retail).

1.7 Useful sources of guidance

Age Positive Campaign (based at the Department for Work and Pensions). For the Code of Practice on tackling age discrimination in the workplace, see *Age Diversity at Work: a Practical Guide for Business*, 2003. Available on the Age Positive website: www.agepositive.org.uk

Chartered Institute of Personnel and Development
www.cipd.co.uk

The Employers Forum on Age
www.efa.org.uk

Third Age Employment Network
www.taen.org.uk

1.8 Conclusion

The government's delay in issuing the draft regulations on age discrimination has perhaps reduced the sense of urgency about preparing for the legislation. It appears that many employers have not yet taken any steps and are waiting to see the detail of the legislation. However, all the organisations offering guidance in this area stress that employers should be gearing themselves up and reviewing their current policies. Taking action over the next few months to ensure that these policies are free from age bias, will mean a smooth transition when the legislation finally comes into force.

2. Case studies

2.1 Nationwide Building Society

The policy in the finance sector during the early 1990s' recession of shedding older workers was later seen as damaging to the industry in that the expertise of these older workers was lost.

Retaining older managers who have more expertise, understand the whole business cycle and make more informed lending decisions makes good business sense. Several banks, including Nationwide, responded to this and took the opportunity to actively target and retain older workers.

Nationwide is a keen champion for age diversity and monitors its HR policies regularly to try to reduce age bias. The company believes that there is a link between employee commitment and age, and customer commitment and business results

In the early 1990s, just two per cent of Nationwide's employees were over 50. By 2004, the over 50's made up 11.7 per cent of the workforce.

In 2001, Nationwide introduced an innovative **flexible retirement policy**. Whereas the usual retirement age is 60, the scheme allows employees to stay on until they are 70, subject to certain considerations such as performance.

However, if an employee over 60 feels that he or she is slowing down or is declining in competence, the line manager will seek to address this by suggesting job redesign, a different role, or part-time work.

Flexible retirement: It is fairly common for older employees to phase their retirement by moving to a four day week, then a three day week, and so on.

Customer response: Nationwide believes that if the make-up of staff in local branches reflects the community they serve, customers will respond to this with increased customer loyalty.

This not only applies to age diversity but also to gender and ethnicity.

Recruitment: Nationwide has explicitly removed age restrictions from job advertisements, to encourage a wide range of ages to apply for jobs.

Wolff (2004a)

2.2 Asda Supermarket

Since Asda introduced its policy of targeting the over 50s in 1999, absenteeism has dropped to one-third lower than the national average and turnover has decreased to two per cent

The company feels that it can offer improved customer service if the profile of their employees reflects the diversity of their customer base in terms of age, ethnicity, gender and disability.

The new store in Broadstairs which employs a particularly high proportion of the over 50s reports higher customer satisfaction and greater employee retention (even though initial training took slightly longer than usual).

Asda offers a wide range of flexible working initiatives, some aimed at the over 50s and some aimed at the whole of the workforce. Examples of those for the over 50s are:

- 'Benidorm leave': up to three months unpaid leave can be taken between Jan to March.
- Carer's leave: unpaid leave to look after or nurse a relative.
- Grandparent's leave: up to one week's unpaid leave on the birth of a grandchild.
- Seasonal squad: a contract for as little as 10 weeks of the year.

2.2.1 Business benefits

- Older workers are a steadying influence on younger employees. A 'buddy scheme' has been set up where older workers help new younger employees to settle in.
- Older workers are well liked by customers.
- Retaining older workers saves an average of £3,000 per person in recruitment and training costs.
- Stores employing predominantly older workers report reduced short-term absence.

Foster (2004)

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