

Equality and mental health: what advocates need to know



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THE EQUALITY AUTHORITY



The National Mental Health
Stigma Reduction Partnership

**Equality and
mental health:
what advocates
need to know**

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Equality and mental health: what advocates need to know

This booklet is for mental health advocates – people who support those who experience mental health difficulties.

People who experience mental health difficulties all too often also experience discrimination. Ireland's equality legislation offers protection against certain kinds of discrimination in employment and in the provision of goods and services for particular categories of people. People who experience mental health difficulties are protected under equality law through the disability ground. If people who experience mental health difficulties are discriminated against because of their mental health difficulty, they can seek redress by taking a case to the Equality Tribunal under the disability ground.

This booklet aims to explain how mental health advocates can use equality law to help people who have mental health difficulties to avoid discrimination, to achieve their rights and to seek redress if they experience discrimination.

This booklet is for information only. It is not a legal document. It explains the legal requirements under equality law:

- for **employers** to provide **reasonable accommodation** for people with disabilities, and what that might mean for employees with mental health difficulties
- for **mainstream and specialised service providers** to provide **reasonable accommodation** for people with disabilities, and what that might mean for customers and service users with mental health difficulties.

The booklet also explains:

- what reasonable accommodation means, both in employment and in the provision of goods and services
- how mental health advocates can use equality law, and the right to seek redress, to assist a person experiencing mental health difficulties who feels that they have been discriminated against, either in employment or in the provision of goods or services
- where mental health advocates can find out more.

This booklet aims to explain how mental health advocates can use equality law to help people who have mental health difficulties.

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Why should mental health advocates know about equality law?

Mental health advocates know well that people who experience mental health difficulties often experience prejudice and discrimination in the workplace, and when trying to access goods and services. This is well documented. For example, in a recent survey:

- only two out of three people agreed that people with mental health problems should enjoy the same rights as others
- 78 per cent of people felt comfortable working with someone with a diagnosis of an eating disorder, while 41 per cent of people felt comfortable working with someone with a diagnosis of schizophrenia
- less than 50 per cent of respondents thought that people with mental health difficulties should have children.

(Source: "Public Attitudes Towards Mental Health Problems", Millward Brown Lansdowne, 2010, available to download from www.seechange.ie).

It is encouraging that a more recent survey of public attitudes showed increased awareness and understanding of mental health, mental health problems, stigma and support services. However, it also found:

- a greater reluctance to be open and disclose information about a mental health problem in personal and professional relationships
- more negative perceptions of peers' reactions to a person's mental health disclosure.

(Source: "Irish Attitudes Towards Mental Health Problems", Millward Brown Lansdowne, 2012, available to download from www.seechange.ie).

In research conducted in 2010 by Amnesty International, people experiencing mental health difficulties reported:

- being avoided or shunned by people who knew they had a mental health problem (63 per cent)
- unfair treatment in relation to finding a job (36 per cent)
- unfair treatment in relation to keeping a job (43 per cent)
- unfair treatment by mental health staff (58 per cent).

(Source: "Hear My Voice: the experience of discrimination of people with mental health problems in Ireland", Amnesty International, 2010, available to download from www.amnesty.ie)

Ireland's equality law is there to protect particular people from certain kinds of discrimination. People who experience mental health difficulties are included in the disability ground, one of the nine categories named in equality law. Mental health advocates can use equality law to help people who experience mental health difficulties to achieve their rights and to seek redress if they are the victims of discrimination. This booklet contains the basic information you need.

People with experience of mental health difficulties are covered by the disability ground.

About equality law

Equality law covers people who experience mental health difficulties

There are two main equality laws. Both aim to protect particular people against certain kinds of discrimination that can happen in employment, and also when they are buying goods and using everyday services.

The two main equality laws

The Employment Equality Acts, 1998-2011 protect people against certain kinds of discrimination in relation to employment. Examples include times when people are in employment, applying for a job, on work experience or doing vocational training.

The Equal Status Acts, 2000-2011 protect people against certain kinds of discrimination that can happen when people are buying goods or accessing services. Examples include when people are shopping, using services such as health services, going to school or college, socialising or looking for accommodation.

The nine categories named in equality law are known as the “nine grounds”. A person who is covered by one or more of these grounds is protected against certain kinds of discrimination in employment or when they are buying goods or accessing services.

Disability is one of the nine grounds. The definition of disability under the Employment Equality Acts and the Equal Status Acts is broad. It includes physical, intellectual, learning, cognitive and emotional disabilities and a range of medical conditions.

People with experience of mental health difficulties are covered by the disability ground. The application of equality law to people with mental health difficulties is broad. For example, in a case which was brought to the Equality Tribunal, the Equality Officer found that depression, stress and anxiety fall within the meaning of disability

defined in the equality legislation. You can find out more about this case on the Equality Tribunal website www.equalitytribunal.ie. The case reference number is DEC-E2007-025.

Equality law applies if people are currently experiencing mental health difficulties or if their experience of mental health difficulties was in the past. For example, under the Employment Equality Acts, if an employee applies for promotion the employer cannot discriminate against them because of current or past experience of mental health difficulties. Similarly, under the Equal Status Acts, a person cannot be refused access to an educational course because of current or past experience of mental health difficulties.

Equality law applies if people are currently experiencing mental health difficulties or if their experience of mental health difficulties was in the past.

About discrimination

What is discrimination?

Discrimination has a specific meaning in the Employment Equality Acts and the Equal Status Acts. Mental health advocates need to understand how discrimination is defined in order to work out if a specific experience of discrimination can be considered under the equality legislation on any of the nine grounds.

Equality law covers three different types of discrimination. All focus on the question of whether the person who feels that they have been discriminated against, for example, because of their experience of mental health difficulties, has received **less favourable treatment** than someone else would have been treated in a similar situation.

Direct discrimination	The treatment of a person in a less favourable way than another person is, has been or would be treated, in a comparable situation on any of the nine grounds.
Indirect discrimination	Less favourable treatment by impact or effect. An example of this is when someone is refused a service, not explicitly on account of a discriminatory reason, but because of a provision, practice or requirement which they find hard to satisfy.
Discrimination by association	Less favourable treatment because of association with a person from one of the nine grounds (for example, a person with experience of mental health difficulties).

Examples of discrimination cases

Discrimination under the Employment Equality Acts

Case reference number – DEC-E2008-26

www.equalitytribunal.ie

In this case an employer dismissed an employee who was on sick leave. The dismissal letter was issued after the employer became aware that the employee was experiencing depression.

The Equality Officer found that the employer discriminated against the employee on the disability ground.

The Equality Officer also found that the employer failed to carry out an assessment of the employee's disability to see if there were appropriate measures which could have been investigated in order to support the employee to carry out his work.

The employee was awarded €17,500 in compensation for the distress suffered due to the discriminatory dismissal.

Discrimination under the Equal Status Acts

Case reference number – DEC-S2009-012

www.equalitytribunal.ie

This case was taken by a person who experiences mental health difficulties arising from schizophrenia, agoraphobia and depression. Because of this he is unable to use public transport. He relies on two taxi drivers, who he is familiar with, to get him to out-patient services. His application to the HSE for mobility allowance was refused.

The mobility allowance is a means-tested monthly payment for people who have a disability and are unable to walk or use public transport and who would benefit from a change of surroundings.

The Equality Officer found that there was no evidence of discrimination by the HSE in relation to the way in which the assessment for the mobility allowance was processed. However, the Equality Officer found that definition of disability used to decide if the person was eligible for mobility allowance was too narrow, because it focused only on physical disabilities.

The Equality Officer recommended the HSE to examine various allowance schemes designed for people with disabilities to ensure that the policy and assessment procedures comply with the Equal Status Acts.

The Equality Officer ordered the HSE to reassess the person's application for mobility allowance, taking into consideration the broad definition of disability included in the Equal Status Acts. The HSE was also ordered to pay the person €1,500 for the inconvenience caused.

Does different treatment always mean discrimination?

Different treatment of one person compared to another person does not always mean discrimination from a legal point of view. Two important questions to think about are:

- Is the person covered by any of the nine grounds?
- Is the different treatment allowed under the law?

In order to avoid raising unrealistic expectations about redress, it is important for mental health advocates to know that not all forms of discrimination are covered by the law. Equality legislation prevents discrimination on nine grounds, including disability. But if different treatment of one person compared to another person does not fall into the category of any of the nine grounds, then the equality legislation cannot be used. Importantly, though, the broad definition of disability used in the equality legislation has been interpreted to include mental health difficulties (see pages 8-9).

It is also important to know that Ireland's equality legislation allows people to be treated differently in certain circumstances on any of the nine grounds. These circumstances are called **exemptions** (see pages 13-14).

In addition, in certain circumstances different treatment of people on any of the nine grounds is allowed to meet individual needs. Equality law also allows for **positive action** (see page 14).

Not all forms of discrimination are covered by the law.

About exemptions

In general, a person from any of the nine grounds can be treated differently than another person from the nine grounds if the treatment is based on another Irish law or European law, or any international treaty which imposes an obligation on the State. In other words, different treatment is not discrimination under the equality legislation if it is allowed for in another law being used in the State.

The equality legislation also names some specific exemptions.

Examples of some specific exemptions in the Employment Equality Acts

- an employer can require educational, technical or professional qualifications for a specific post
- an employer is not required to employ someone who does not have the capacity or the competence to do the job. However, the employer does have an obligation to take appropriate measures to support a person with a disability in employment or to access employment (see page 15)
- an employer can apply a different rate of pay where, due to disability, the amount of work done during a particular period of time is less than the amount of work done (or could reasonably be expected to be done during that time) by an employee who does not have a disability. However, the employer does have an obligation to take appropriate measures to support a person with a disability to do the job (see page 15)

Different treatment of people on any of the nine grounds is allowed in certain circumstances.

Examples of some specific exemptions in the Employment Equality Acts

- Educational establishments are allowed to treat student with disabilities differently if:
 - the nature of the disability makes it impossible to provide educational services to other students
 - if the disability is having a serious effect on the provision of educational services to other students.

However, reasonable accommodation must be provided to support the student with the disability (see page 15).

About positive action

Equality law allows for positive action on any of the nine grounds.' The aim of positive action is to promote or ensure equality through preferential treatment or positive measures which promote equality of opportunity for people who may be disadvantaged because of their circumstances, or to cater for their special needs. For example, public sector employers are obliged to reach an employment target of 3 per cent for people with disabilities. This positive action measure recognises the difficulties that people with disabilities have in accessing employment.

Positive action

Under the Employment Equality Acts employers can take steps to ensure full equality in practice between employees or potential employees on all of the nine grounds, including disability.

Under the Equal Status Acts different treatment is allowed if it is intended to:

- promote equality of opportunity for disadvantaged persons
- cater for the special needs of persons on any of the nine grounds, including disability.

About reasonable accommodation

Equality law in Ireland requires employers and service providers to put supports in place so that people with disabilities, including people who experience mental health difficulties, can access and participate in employment, and access and use services. These supports are known as **reasonable accommodation**. This is an important concept, and applies only to people with disabilities, including people who experience mental health difficulties. Reasonable accommodation is handled slightly differently in the two main equality laws, and is called **appropriate measures** in the Employment Equality Acts.

Reasonable accommodation in the Equal Status Acts

Under equality law, when goods and services are being provided, everything reasonable must be done to accommodate the needs of a person with a disability. Examples of reasonable accommodation might include private consultation areas and the provision of extra information or reassurance. However, special facilities or treatment do not need to be put in place if the cost is more than what is called a “nominal cost”. This is not a fixed amount, and varies in different circumstances. For example, a big service provider with a lot of resources would be expected to spend more on special facilities or treatment than a small service provider.

Appropriate measures in the Employment Equality Acts

The Employment Equality Acts take a similar approach to reasonable accommodation. “Appropriate measures” must be put in place in order to meet the needs of people with disabilities in relation to employment and training. Appropriate measures can include things like adapting the premises or equipment, making arrangements for flexible patterns of working time or distribution of tasks, mentoring or peer support, agreeing an action plan to support a person’s return to work after a period of ill-health, and providing training. Appropriate measures have to be put in place unless to do so would impose a “disproportionate burden” on the employer. This is not a fixed amount, and varies in different circumstances. For example, a big employer with a lot of resources would be expected to do more than a small employer.

There are some exemptions to the obligation to make reasonable accommodation or put in place appropriate measures to meet the needs of people with disabilities. There are situations in which employers and service providers can treat people differently on any of the nine grounds, including disability. For example, an employer is allowed to state that certain qualifications are necessary for a particular job when a position is being advertised (see page 13).

Reasonable accommodation measures put in place for people with disabilities can often have a positive impact on everyone else, too. For example, a focus on reducing stress in the workplace is good for everyone's mental health. Similarly, all customers gain when staff undergo training which helps them to deliver services calmly and explain issues clearly.

Examples of cases involving reasonable accommodation and appropriate measures

Reasonable accommodation under the Equal Status Acts

Case reference number – DEC-S2007-057

www.equalitytribunal.ie

In this case, because of her disability, a person with a phobic disorder, agoraphobia and claustrophobia applied to a local authority for an apartment larger than the standard allocation provided for single applicants. The local authority said that it uses family size as the sole criterion to decide what size accommodation to allocate. The local authority also said it was willing to adapt the accommodation within its allocated size limit to meet the applicant's disability-related needs. This provision usually applies to adaptations aimed at accommodating people with physical impairments.

The Equality Officer found that the local authority failed to make reasonable accommodation in this case due to the limited nature of its medical assessment of Ms D.

The local authority was ordered to make a full medical assessment in person of a housing applicant who has a disability in cases where the housing applicant has medical references supporting their request for special facilities.

The Equality Officer also ordered the local authority to broaden its allocation criteria for housing units to take into account the broader definition of disability in the equality legislation.

Appropriate measures under the Employment Equality Acts

Case reference number – DEC-E2003-052

www.equalitytribunal.ie

In this case the Equality Officer found that an employee experiencing anxiety and depression was discriminated against when he was refused permission to return to work on a phased basis following a period of sick leave. Although the company said it was not feasible to allow the employee to return to work on a phased basis because of the nature of the work and the size of the organisation, there was evidence that the company had allowed a former employee time off on a daily basis to attend treatment for his condition. The Equality Officer therefore found that the employee had been treated differently than someone with a different disability in a similar situation.

Returning to work on a phased basis could have been considered as part of putting in place appropriate measures to support the employee who had a mental health difficulty, on the disability ground.

The Equality Officer was satisfied that the company tried to establish the full facts in relation to the employee's condition by seeking independent medical advice. However, she found that the company failed to provide the employee with reasonable accommodation. The employee should have had the opportunity to express his own wishes in terms of workload on his return to work, as part of an effort to find common ground which could have been acceptable to both the employee and the company.

How does disclosure relate to reasonable accommodation?

People experiencing mental health difficulties often ask mental health advocates about whether they should disclose information about their condition or the state of their mental health. Equality legislation does not require a person to disclose that they have a disability. On the other hand, it may be difficult for a service provider to make reasonable accommodation to meet the needs of a person

who is experiencing mental health difficulties, or for an employer to put in place appropriate measures, if they are not aware that such supports are necessary.

Employers have to understand the needs of a person who is experiencing mental health difficulties if they are to put appropriate measures in place to facilitate their access, participation and advancement in the workplace. In this context, employers have a duty to assess such needs, but this does not allow them to discriminate.

It is important to remember that people have a choice about disclosing a disability, including mental health difficulties. Before disclosing, a person experiencing mental health difficulties needs to think about:

- why they need to disclose
- what they need to disclose
- when they need to disclose
- who they need to disclose to
- how best to disclose.

A person who discloses that they are experiencing mental health difficulties may be asked by their employer to have a medical assessment. People who agree to have a medical assessment related to their employment have the right to:

- see the outcome of the assessment
- seek a second opinion if they are not happy with the outcome of the assessment.



People have a choice about disclosing a disability, including mental health difficulties.

There is a balance to be struck between the obligation on the employer to provide reasonable accommodation and the right of a person to decide whether they wish to disclose that they have a disability. Lack of disclosure does not necessarily provide an employer with a defence in relation to discrimination or in relation to failure to provide reasonable accommodation.

It is important to create trust between employers and employees. Mental health advocates can help to broker this. They can also help to convince employers to develop clear policies and practices which can reassure employees that they will not be discriminated against if they disclose that they have a disability, including mental health difficulties.

Examples of cases involving disclosure issues in employment

Case reference number – DEC-E2010-062

www.equalitytribunal.ie

In this case an employee suffering from depression and anxiety who was dismissed from his job after refusing to provide a medical opinion took a case against his employer. He was not successful. The Equality Officer found that it was reasonable for the employer to seek a medical opinion and that it was not done to oust the employee from the company. The Equality Officer said,

“I am satisfied that this was not a situation where, due to sometime ignorance and stereotypical attitudes in our society concerning mental health issues, the respondent (employer) presumed that because the complainant (employee) suffers from mental health problems there would be a problem with the complainant”.

Case reference number – DEC-E2006-043

www.equalitytribunal.ie

In this case an employee who was moving from a temporary to a permanent position was required to have a pre-employment medical examination. The employee was dismissed on the basis that she had failed to disclose certain issues in the medical declaration.

The Equality Officer found that the dismissal was discriminatory because the imputed disability was a significant factor in the company's decision to dismiss the employee and the company did not make adequate enquiries regarding her actual fitness for the post.

As the Equality Officer accepted that it was an imputed, rather than an actual, disability he did not address whether failure to disclose the disability in the medical declaration could justify a dismissal or would be discriminatory. However, the Equality Officer did state that the operation of the pre-employment medical examination questionnaires are not unlawful as such, but that employers should exercise caution when using the information obtained so as not to fall foul of the equality legislation.

Case reference number – EDA-08-22 December 2008

The Labour Court found that the employer was unaware of the worker's depression when they dismissed him and therefore had not discriminated against him.

The worker was successful before the Equality Tribunal (DEC-E2008-026) where the Equality Officer found that once the employer was aware of the disability it was incumbent on them to ascertain the nature of the worker's illness in order to assess his disability.

The Labour Court relied on the fact that there were no indications or sign to alert the employer to enquire about the worker's needs for reasonable accommodation.

AHEAD (Association for Higher Education Access and Disability) has produced a booklet on disclosure that includes some useful tips. Called "Disclosure", it is available to download from www.ahead.ie

What else does equality law include?

Other aspects of Ireland's equality legislation are also relevant to mental health advocates. Two particularly important aspects are the provisions relating to harassment and victimisation.

Harassment and sexual harassment are not allowed in employment, vocational training, the provision of goods and services, accommodation or education.

Under the Employment Equality Acts and the Equal Status Acts:

- harassment is any form of unwanted conduct related to any of the nine grounds
- sexual harassment is any form of unwanted verbal, nonverbal or physical conduct of a sexual nature.

Unwanted conduct can include acts, requests, spoken words and gestures. It can also include the production, display or circulation of written words, emails, text messages, pictures or other material.

Victimisation is not allowed under the Employment Equality Acts and the Equal Status Acts. For example, if a person makes a complaint of discrimination, or is a witness in a case which is taken under the equality legislation, they cannot be treated adversely.

How to make a complaint of discrimination to the Equality Tribunal

The Equality Tribunal is a separate entity to the Equality Authority. The Equality Authority promotes equality and seeks to eliminate discrimination, for example, by producing information such as this booklet. It is the Equality Tribunal which investigates, hears and decides claims of discrimination under equality law.

Mental health advocates can find information about making a complaint of discrimination to the Equality Tribunal from two sources:

- the Equality Tribunal's website, www.equalitytribunal.ie
- the Equality Authority's website, www.equality.ie

If mental health advocates are thinking of supporting someone to make a complaint of discrimination to the Equality Tribunal, there are a few important things to keep in mind. These include:

- Under the Employment Equality Acts a complaint of discrimination must be made within six months of the date of the discrimination. The first step in making a claim of discrimination under the Equal Status Acts must be taken within two months of the date of the most recent occurrence of the discrimination. If claims are not lodged in time they will not be considered. In certain circumstances a time extension is allowed, but it is not safe to rely on this.
- Individuals can represent themselves or they can be represented by a mental health advocate, a lawyer, a trade union official or another representative.
- In certain circumstances the Equality Authority can provide legal assistance to people who wish to make a claim of discrimination. This usually happens only when:

- the case raises an important point of principle
- it appears that the person may not present the case adequately without assistance.
- A parent or guardian can make a complaint of discrimination on behalf of a person who is unable to make a complaint effectively due to an intellectual or a psychological disability.
- If a person can establish facts which appear to show that discrimination has taken place, the employer or service provider has the burden of proving that it has not.
- In general the maximum compensation awarded under the Employment Equality Acts is two years' pay, or €12,700 if the person is not an employee. The maximum compensation awarded under the Equal Status Acts is €6,350.
- The Equality Tribunal can appoint a mediator with the consent of both parties.

The majority of complaints of discrimination must first be referred to the Equality Tribunal. Gender discrimination claims have the option of going to the Circuit Court. In addition complaints of discrimination in relation to clubs are heard in the District Court.

Decisions made by the Equality Tribunal can be appealed. Appeals under the Employment Equality Acts are made to the Labour Court and the Circuit Court. Appeals under the Equal Status Acts are made to the District Court and the Circuit Court.

The right to seek redress for discrimination under the Equal Status Acts and the Employment Equality Acts is a very important right, and many cases have been successful. However, it is important to remember that taking a case can be stressful, and that not all cases are successful.

How to help people to see if they have a case under equality law

This is a short list of the most important things to ask about and consider. It is not exhaustive. The Equality Authority can provide mental health advocates with more detailed information, as required.

Timing: Count the time from when the discrimination took place, not from when the person found out about it.

If there is more than one discriminatory act: List everything, with the dates highlighted. Remember, a discriminatory act could be the omission of something or the refusal to do something, as well as something which was done.

Questions: Ask prompt questions (for example, “why do you think you were treated like that?”, “does everyone get treated like that?”, “why do you think it is unfair?”), as well as direct questions (for example, “do you think someone who didn’t experience mental health difficulties would be treated like that?”). These questions can relate to discrimination under any of the nine grounds. It is possible that the person with mental health difficulties has experienced discrimination under more than one ground (for example, under the gender or sexual orientation ground, as well as the disability ground).

What to ask: “Equality How? An ICTU guide to taking cases under the Employment Equality Acts, 1998-2011”, available to download from www.ictu.ie/publications/fulllist/congress-equality-how-taking-an-equality-case, contains very useful and detailed information about what to ask a person who wants to make a claim of discrimination under the Employment Equality Acts. It is easy to adapt this guidance to claims of discrimination under the Equal Status Acts.

Keeping a file: If you are going to support the person to make a claim of discrimination, you should open a file on the case and keep in it:

- comprehensive written notes of all your meetings with the person on this issue
- copies of all relevant correspondence
- detailed notes of any relevant telephone conversations
- copies of all e-mails, forms and other documentation
- explanations of what you have done (or not done) with regard to the case.

Keep the file in a secure place.

Where to get more information

Information on the equality legislation is available on the Equality Authority website www.equality.ie. In addition, the Equality Authority's **Public Information Centre** provides information on the Employment Equality Acts and the Equal Status Acts.¹

Public Information Centre contact details

- Telephone access to a Communications Officer on Locall 1890 245 545 or (01) 417 3333 during office hours (Monday – Friday, 9.15am to 5.30pm)
- Telephone access to a pre-recorded telephone message service outlining the basic features of the equality legislation
- E-mail: info@equality.ie
- Letter: Public Information Centre, The Equality Authority, Birchgrove House, Roscrea, Co. Tipperary.

Mental health advocates should be aware that the Public Information Centre is not in a position to offer legal advice. In certain circumstances the Equality Authority can provide legal assistance to people who wish to make a claim of discrimination (see pages 22-23).

More detailed information on individuals' rights under the equality law is available in the following information guides:

- "Your Employment Rights Explained: Guide to the Employment Equality Acts 1998-2008"
- "Your Equal Status Rights Explained: Guide to the Equal Status Acts 2000-2008"

Both of the guides are available to download from www.equality.ie. Guides to the legislation in different languages are also available on the website.

¹ The Public Information Centre also provides information on the Maternity Protection Acts 1994 and 2004, the Adoptive Leave Acts 1995 and 2005, and the Parental Leave Acts 1998 and 2006.

Detailed information about how to take cases of discrimination under the Employment Equality Acts is contained in:

- “Equality How? An ICTU guide to taking cases under the Employment Equality Acts, 1998-2011”

It is available to download from www.ictu.ie/publications/fulllist/congress-equality-how-taking-an-equality-case

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