



# EMPLOYMENT TRIBUNALS

**Claimant:** XYZ

**Respondent:** Midland Red South Ltd

**Heard at:** Midlands West ET

**On:** 4-8 December 2023

**Before:** Employment Judge Routley  
Mr J Wagstaffe  
Mr D Faulconbridge

## **Representation**

Claimant: Ms L Veale (Counsel)

Respondent: M J Allsop (Counsel)

# JUDGMENT

1. The judgment of the Tribunal is as follows:

- 1.1. The Claimant's claim for failure to make reasonable adjustments is well-founded and succeeds;
- 1.2. The Claimant's claim for harassment is well-founded and succeeds;
- 1.3. The Respondent is ordered to pay the Claimant the sum of £25,000 plus interest in the sum of £3,819.18.

## **2. Anonymisation of judgment**

- 2.1. For the purposes of this claim, the Claimant was required to discuss very personal and sensitive medical information, including the fact that he had soiled himself in the workplace.
- 2.2. It is necessary for the purposes of making findings in this claim to refer to this personal and sensitive information in the Tribunal's judgment. The fact that the Tribunal had to reserve judgment in this matter meant that these details would be published in full on the internet.

- 2.3. The Claimant has a relatively unusual surname, and so it is likely that these details would be revealed in the event that anyone carried out a basic internet search against the Claimant's name.
- 2.4. The Tribunal therefore considered that the Claimant's Article 8 rights were triggered. The Tribunal asked Ms Veale whether she wished to make any applications in this regard on behalf of the Claimant. Ms Veale has subsequently provided an application for an anonymisation order under Rule 50 of the Employment Tribunal Rules.
- 2.5. Mr Allsop confirmed on behalf of the Respondent that there was no objection to such an application, although of course this is not determinative of the question as to whether such an application should be granted.
- 2.6. The Tribunal has to weigh the impact on the Claimant's right to a private life against the principle of open justice. This principle is fundamental to the administration of effective justice, and so should not be set aside easily.
- 2.7. However, it was the Tribunal's view that given the particularly sensitive nature of the medical information discussed, it would be appropriate to make an order in these circumstances. The impact on open justice would be limited, on the basis that the hearing had itself had taken place in public, and all information in respect of the case other than the Claimant's identity would be publicly available.
- 2.8. It is appropriate for this order to remain in place indefinitely, as the impact on the Claimant's private life would not be effectively mitigated without an indefinite order.
- 2.9. The Tribunal therefore makes an order that the Claimant be identified in its public judgment by way of the initials "XYZ". The order will remain in place indefinitely.

### **3. The hearing**

- 3.1. The hearing was a hybrid hearing, with the Tribunal members attending via CVP. There were some difficulties in the members hearing the parties' representatives at the start of the hearing, but these were resolved.
- 3.2. The Tribunal began by clarifying the issues in respect of this case.
- 3.3. Ms Veale confirmed on behalf of the Claimant that his case was limited to events which took place between January and October 2022. The sections of his claim form which covered earlier events were to be treated as background information only.
- 3.4. Ms Veale confirmed that the Claimant alleged that the Respondent had failed to make reasonable adjustments in the following respects:
  - 3.4.1. By requiring the Claimant to work shifts longer than 8 hours, as follows:
    - 3.4.1.1. In January 2022, when the Claimant was required to work duty 216 (as set out in paragraph 15 of the particulars of claim);
    - 3.4.1.2. In January 2022, when the Claimant was asked to work duty 235 rather than duty 211 (paragraphs 15-18);

- 3.4.1.3. In April 2022, when the Claimant was asked to work a lengthier Saturday shift twice in a row (paragraph 22);
- 3.4.1.4. On 4 June 2022, when the Claimant was asked to work duty 213 which was 11 hours long (paragraph 24); and
- 3.4.1.5. On 8 July 2022, being asked to work duty 216 which lasted 10 hours and 53 minutes (paragraph 27).

3.4.2. By requiring the Claimant to work shifts of variable start times, as follows:

- 3.4.2.1. In January 2022 when the Claimant was asked to work duty 235 (paragraph 15-18 of the particulars of claim);
- 3.4.2.2. In April 2022 when the Claimant was asked to work a lengthier Saturday shift twice in a row (paragraph 22); and
- 3.4.2.3. On 4 June 2022, when the Claimant was asked to work duty 213 (paragraph 24).

3.4.3. By requiring the Claimant to work shifts without comfort breaks, as follows:

- 3.4.3.1. In January 2022 when the Claimant was asked to work duty 235 (paragraph 15-18 of the particulars of claim);
- 3.4.3.2. On 4 June 2022, when the Claimant was asked to work duty 213 (paragraph 24); and
- 3.4.3.3. On 8 July 2022, being asked to work duty 216 which lasted 10 hours and 53 minutes (paragraph 27).

**3.5.** In respect of the harassment claim, Ms Veale confirmed that the Claimant relied upon the following acts:

- 3.5.1. On 5 July 2022, being asked to check in with local management (paragraph 25);
- 3.5.2. On 27 July 2022, being told to raise with local management each time he was told to work unsuitable shifts (paragraph 28); and
- 3.5.3. On 23 September 2022, being told to raise the issue with a local rota rep (paragraph 30).

#### **4. Findings of fact**

**4.1.** It was a fact agreed between the parties that where the Claimant was allocated a shift in 2022, he worked that shift, unless demonstrated otherwise by the sickness absence records provided by the Respondent.

**4.2.** The Tribunal makes the following findings of fact:

- 4.2.1. The Claimant is employed by the Respondent as a bus driver and has been for over 30 years. He remained employed by the Respondent as at the date of this hearing. He works at the Nuneaton depot.
- 4.2.2. The Claimant suffers from Crohn's disease. The Respondent accepts that the Claimant's condition amounts to a disability and had done for the entirety of the period January – October 2022.

- 4.2.3. There are 150 staff members at the Nuneaton depot. 10 drivers at the depot require adjustments to their role.
- 4.2.4. The Claimant attended an occupational health appointment on 20 April 2016. A report was issued which stated that the Claimant had a long term and substantial health problem. It stated that Crohn's was quite a serious condition and clearly had been in his case.
- 4.2.5. The report recommended the following adjustments:
- 4.2.5.1. A fairly predictable work pattern with an opportunity to have meals three times a day and an opportunity to take his tablets at the same time;
  - 4.2.5.2. Regular access to a toilet stops; and
  - 4.2.5.3. Shifts of generally no more than eight hours.
- 4.2.6. The report further indicated that the Claimant would need to use the toilet several times a day. If the Claimant got out of a routine, this could result in a flare up of his condition. This could result in an unpredictable and urgent need to go to the toilet.
- 4.2.7. On 26 April 2016, following a flexible working request, the Respondent wrote to the Claimant stating that he would be given a fixed working pattern. The letter stated that every effort would be made not to change the Claimant's working pattern and that if it was changed, the Respondent would ensure that the start/finish and break times would be kept regular.
- 4.2.8. At a grievance hearing on 26 April 2021, the Claimant was informed that the Respondent would "put something in place to stop this happening in future."
- 4.2.9. At a grievance hearing on 22 February 2022, the Claimant was informed that a guideline would be written for his fixed line in order to avoid further problems in future.
- 4.2.10. On 29 August 2018, the Respondent wrote to the Claimant in response to a previous grievance. This letter referred to the Claimant's three criteria for shifts: 1) Regular toilet stops; 2) a regular finish time to ensure an evening meal was eaten at approximately the same time; and 3) a duty in the region of 8 hours. We will refer to these for the purposes of this judgment as the "Three Criteria".
- 4.2.11. The Respondent wrote to the Claimant on 22 March 2019, in respect of another grievance. This outcome letter also referred to the "Three Criteria".
- 4.2.12. The Claimant wrote to the Respondent on 12 April 2021. This letter also set out the Three Criteria.
- 4.2.13. We therefore find that the Claimant was clear about the requirements of a suitable shift, and that the Respondent was aware of these requirements.
- 4.2.14. We find that the Claimant was required to work unsuitable shifts which did not meet the Three Criteria in January-March and June-August 2022.
- 4.2.15. We find that shift 216 was unsuitable because it was too long. The Claimant had agreed to work this shift for as long as he was able. However, he made clear to the Respondent that he was no longer able to work this shift in a letter dated 21 January 2022.

- 4.2.16. We find that the shift 235 which was offered to the Claimant was unsuitable because it did not allow for adequate toilet breaks. Whilst it was a local route and so regularly passed through the bus station, it was the evidence of both the Claimant and Mr Bhullar that this did not necessarily amount to a toilet break. Mr Bhullar stated in his evidence that the time between a bus arriving at the bus station and the time it left was not a break for drivers but was intended to give drivers time to a) unload the bus; b) reload the bus; and c) make up time in the event that the bus entered the station behind schedule. Mr Bhullar further stated that this “break” may not in fact happen at all. It is evident from the duty sheet at page 250 of the bundle that the first break of any substantial length in that duty occurred at 12:45, almost five hours after the start of the shift. Duty 211 on the other hand had a start time of 06:26 and a first break at 08:50.
- 4.2.17. There was some debate during the hearing as to whether or not the breaks for local routes had become shorter over the years. We did not find it necessary to resolve this question, on the basis that the clear evidence of both parties was that shift 235 did not include regular toilet breaks.
- 4.2.18. We find that the Claimant’s request to work shift 211 in January 2022 was declined because the Respondent felt that it had to be “fair to other drivers” in its allocation of shifts. This is demonstrated by the letter at page 247 of the bundle and by the comment made by Mr Bhullar about “positive discrimination” at page 264 of the bundle.
- 4.2.19. A meeting took place on 22 February 2022 at which a suitable shift was agreed for the Claimant. Mr Bhullar gave evidence that this shift change would have been implemented “within a couple of weeks”. We therefore find that the Claimant worked an unsuitable shift up until early March 2022.
- 4.2.20. We find that the Claimant was not required to work unsuitable shifts in April 2022. The Claimant was asked to work a shift which did not meet his requirements. However, when he objected to working this shift he was instead required to take a day’s leave. The Tribunal was not asked to determine whether this amounted to a substantial disadvantage.
- 4.2.21. We find that the Claimant was required to work unsuitable shifts from 9 Jun 2022. The duty which the Claimant was allocated on this date was 11 hours long and so did not meet the first of the Three Criteria. The Claimant raised a grievance on 4 June 2022 but did not receive a response until 5 July 2022.
- 4.2.22. We find that the requirement that the Claimant work unsuitable shifts continued into July 2022. On 8 July 2022, the Claimant was allocated a duty which failed to meet the Three Criteria, in that it was too long and did not provide for sufficient toilet breaks.
- 4.2.23. The Claimant challenged this allocation by way of the grievance process. This grievance was heard by Ian Campbell. Mr Campbell’s finding was that the shift allocation was due to an error on the part of the commercial team, as set out at paragraph 14 of his witness statement and page 304 of the hearing bundle.
- 4.2.24. The grievance outcome was that the Claimant had been allocated unsuitable shifts. The Claimant was instead allocated a duty that met his requirements. The grievance outcome was sent on 2 August 2022. On the basis of the Respondent’s evidence that a shift swap would take a few

weeks to implement, we find that the Claimant worked an unsuitable shift until mid-August 2022.

4.2.25. We find that the Claimant did soil himself as a result of his working unsuitable shifts. The Claimant gave evidence to this effect, stating that he had “shit himself”, and that his attempts to work the unsuitable shifts resulting in him soiling himself. This was not challenged by the Respondent during cross-examination. We note that the Respondent did subsequently seek to deny that the Claimant had ever soiled himself, and accordingly its witnesses gave evidence that no incident of this nature was ever raised with them by the Claimant. However, we prefer the Claimant’s evidence on this point, for the following reasons:

- 4.2.25.1. The Claimant gave unchallenged evidence that he had soiled himself, and that he had to carry clean underwear, toilet paper and wet wipes around with him;
- 4.2.25.2. The Claimant also gave evidence that he found it difficult and embarrassing to discuss his condition. It is therefore unsurprising that chose not to raise these incidents with his supervisor;
- 4.2.25.3. The occupational health report at page 150 of the hearing bundle indicates that the Claimant’s condition could result in a sudden need to move his bowels. The Claimant’s claim is therefore consistent with the medical evidence provided.

## **5. Relevant law and judgment**

### **5.1. Limitation period**

5.1.1. Any act or omission which occurred prior to 2 June 2022 may be out of time. The Claimant’s claim of failure to make reasonable adjustments referred to events which dated back as far as January 2022. We therefore had to consider whether the Tribunal had jurisdiction to hear the aspects of the Claimant’s claim that related to this period.

5.1.2. Under section 123(3)(a) of the Equality Act 2010, where an act or acts of discrimination extend over a period, they are treated as having taken place at the end of that period. The final act complained of by the Claimant took place on 23 September 2022. Therefore, if the acts complained of by the Claimant are found to be a “continuing act” then the Claimant’s entire claim will have been brought within the appropriate limitation period.

5.1.3. The Claimant has argued that the Respondent’s conduct amounted to a continuing act. We asked for submissions from the representatives as to how the question of whether conduct amounted to a continuing act would apply in this case, given the way in which time limits are calculated in respect of claims for failure to make reasonable adjustments.

5.1.4. We are persuaded that the Respondent’s failure to make reasonable adjustments in this case amounted to a continuing act, such as to bring the allegations from January 2022 in time.

- 5.1.5. The Claimant continued to request the same adjustments, namely that he be allocated shifts which met the Three Criteria. We have found that the Respondent continually failed to put in place shifts which met the Three Criteria. This amounted to an ongoing situation in which the Claimant experience discriminatory behaviour. This is not a series of unconnected or isolated events.
- 5.1.6. We find that it would have been just and equitable to extend time in any event. We have taken into account the fact that there is no presumption in favour of extending time, and that the decision to extend time should be the exception rather than the rule. We have also considered the fact that the burden is on the Claimant to persuade the Tribunal that the time limit should be extended.
- 5.1.7. We note that the Claimant had the backing of his union, and had previously brought Tribunal proceedings against his employer. He therefore had some knowledge of the Tribunal process.
- 5.1.8. However, we note that in this particular claim, the Claimant stated that he had been trying to reach an agreement with his employer before resorting to legal action. The Claimant had repeatedly attempted to resolve the matter by way of the Respondent's internal grievance procedure. We also note that the Claimant had received previous assurances that the issues he was raising had been remedied, and resorted to legal action only after further failures on the part of the Respondent. We find that this was a good reason for the delay.
- 5.1.9. The delay was not extensive. The earliest act complained of was in January 2022, and the Claimant commenced the ACAS pre-claim conciliation process on 2 September of that year.
- 5.1.10. The Respondent's witnesses were able to give cogent and detailed evidence in respect of the incidents of which the Claimant complained and so find that this was not impacted by the Claimant's delay in bringing a claim. We find that our ability to hold a fair hearing in respect of this matter was not impacted by the delay.
- 5.1.11. The Respondent has not put forward any evidence or submissions in respect of any prejudice to the Respondent in extending time in this case.
- 5.1.12. In light of this, we find that it would be just and equitable to extend time in this particular case.

## **5.2. Harassment**

- 5.2.1. Section 26 of the Equality Act sets out the criteria which have to be met in order to make out a claim of harassment. The Tribunal has made a finding of fact that the events complained of happened. The Tribunal panel has therefore considered each of the relevant criteria in order to determine whether the definition of harassment is made out:

### **5.2.1.1. Was the conduct unwanted?**

The Claimant indicated in evidence that he found the process of having to continually ask for adjustments "exasperating". His witness statement says that he felt a "huge amount of humiliation" at having to continuously ask the Respondent to make adjustments. The Respondent's continued requests

that he raise issues with shifts with management was therefore clearly unwanted conduct.

**5.2.1.2. Did the conduct relate to the Claimant's disability?**

The conduct related to the Claimant's need for reasonable adjustments. His need for adjustments arose because of his disability. The conduct in question was therefore "related to" his disability. As set out in *Hartley v Foreign and Commonwealth Office Services 2016 ICDR D17*, "related to" should be given a broad meaning and does not have to be "because of" a relevant protected characteristic.

**5.2.1.3. Did this conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him (the "prohibited effect"?)**

5.2.1.3.1. The Tribunal finds that the conduct in question did not have this purpose. We make no finding of any malice on the part of the Respondent. It did however have the prohibited effect.

5.2.1.3.2. In considering whether the conduct did have the prohibited effect, the Tribunal has taken into account: a) the perception of the Claimant; b) the circumstances of the case; and c) whether it was reasonable for the conduct to have that effect.

5.2.1.3.3. As set out above, the Claimant described feeling a "huge amount of humiliation" at continually having to ask for adjustments. He gave evidence that he was "affected" by having to discuss his condition and "check in" with management.

5.2.1.3.4. We have considered the circumstances of the case, in that the unwanted conduct occurred against a backdrop of repeated and ongoing requests by the Claimant to have his reasonable adjustments implemented, dating back a number of years. We have also considered the fact that the Claimant was dealing with a chronic and unpleasant condition which took a considerable amount of effort to manage, and the impact this had on his mental wellbeing.

5.2.1.3.5. We have considered whether it was reasonable in these circumstances for the conduct to have that effect. The Claimant gave evidence that he found his condition very difficult to talk about, as well as the impact that the constant worry about changing shifts had on him. On the particular facts of this case and the context in which these remarks were made, we find that it was reasonable for the remarks to have the prohibited effect.

**5.3. Reasonable adjustments**

5.3.1. Section 20 of the Equality Act 2010 places a duty on employers to make what are commonly referred to as "reasonable adjustments".

5.3.2. This duty is triggered in circumstances where a provision, criterion or practice ("PCP") places an employee at a substantial disadvantage. The PCPs in this case are as follows:



- 5.3.3. A requirement to work shifts longer than 8 hours (PCP 1);
- 5.3.4. A requirement to work shifts of variable start times (PCP 2); and
- 5.3.5. A requirement to work shifts without comfort breaks (PCP 3).
- 5.3.6. This duty is only triggered when an employer has knowledge of a disability. Additionally, an employer has to have knowledge of the substantial disadvantage to which the Claimant is placed by the application of its PCP.
- 5.3.7. As set out in paragraph 4.2.4-4.2.6 above, the Respondent had received a medical report in 2016 (page 150) which explained the nature of the Claimant's condition, the effect it had upon him and the adjustments he required to be able to perform his role effectively. It further explained the impact of his condition of not having these adjustments in place. The Respondent therefore had knowledge of both the Claimant's disability and the substantial disadvantage to which he was placed by the application of its PCP.
- 5.3.8. This report is one of multiple examples in the hearing bundle of the Claimant explaining the nature of his condition and the impact upon him to various employees of the Respondent. However, we have referred to one specific report for the sake of brevity and because we find that this alone was sufficient for the knowledge requirement to have been met.
- 5.3.9. We find that the Respondent applied PCP 1 and PCP 3 to the Claimant from 21 January 2022 until early March 2022. The Claimant again applied PCP 1 and PCP3 to the Claimant in June and July 2022. We can find no evidence that the Respondent applied PCP 2 to the Claimant.
- 5.3.10. We find that the application of these PCPs placed the Claimant at a substantial disadvantage, in that they resulted in him soiling himself in the workplace. The comparator here is with a non-disabled bus driver who would be able to complete the shift without soiling himself.
- 5.3.11. We find that the Claimant should have automatically been provided with shifts that met the Three Criteria, without having to request this each time there was a change to shift patterns.
- 5.3.12. We appreciate that the Claimant's requirements for staff can change, and that it needs to be able to operate its business with some degree of flexibility. However, we find that in the event that the Respondent needed to change the Claimant's shifts, he should have been assigned an alternative shift that met the Three Criteria. This would have alleviated the disadvantage suffered by the Claimant, in that he would not then have soiled himself at work.
- 5.3.13. The Respondent has argued that it did its best to meet the Claimant's requirements, but that it could only do what it reasonably could given the nature of its business, the number of employees, third party requirements and extenuating circumstances. However, we are not persuaded that these factors justify the Respondent's failures to make adjustments for the following reasons:
- 5.3.13.1. The Respondent itself suggested in numerous grievance outcomes and other correspondence that it would ensure that the Claimant was issued with appropriate duties in future, suggesting that this should be commercially possible (as referenced at paragraphs 4.2.7, 4.2.8 and 4.2.9 above).

5.3.13.2. Additionally, we note that following the Claimant's complaints, the Respondent managed to find duties for the Claimant that did meet the Three Criteria. The Respondent therefore had appropriate shifts available and has not provided an explanation as to why these could not have been made allocated to the Claimant without his being required to make a further request.

5.3.13.3. We appreciate that there are numerous staff employed by the Respondent and that allocating rotas and duties to staff is a significant piece of work. However, we also note that only 10 drivers at the Claimant's depot required adjustments. It is the Tribunal's view that management at the depot could have taken responsibility for ensuring that the shifts allocated to these 10 drivers met their requirements.

5.3.14. Further, we note that in respect of the Claimant's request to change shifts in January 2022, the Respondent did not refer to commercial pressure or the need for flexibility. Their explanation given in the contemporaneous documents was the need to be fair to other drivers in the allocation of early finishes. Whilst we understand the Respondent's desire in this regard, this was misguided given the Claimant's condition and his need for reasonable adjustments.

5.3.15. The Respondent's view was that its practice of providing the rota 10 days in advance was sufficient, and that the Claimant could have engaged with this process in order to ensure that the shift with which he was provided was suitable.

5.3.16. We were not persuaded by that argument, for the following reasons:

5.3.16.1. Mr Bhullar stated on the part of the Respondent that the Claimant's requirements had changed over the years, in that he had previously wanted to work local routes and now wanted to worker inter-urban routes. Mr Bhullar therefore appeared to be of the view that it would not be possible to simply allocate the Claimant appropriate shifts. However, it was not the case that the Claimant had fundamentally changed his position. He had been very clear on the Three Criteria, and the routes which formed the basis of the Claimant's complaint to this Tribunal did not meet these criteria.

5.3.16.2. Further, the duty to make reasonable adjustments is one that is placed on the employer. It is not for the employee to have to continually and repeatedly request appropriate adjustments, or to police the Respondent's compliance with such adjustments. It is for the Respondent to "take ownership", not the Claimant. The Respondent had medical evidence which set out the adjustments which the Claimant required. The Claimant had also made his requirements clear. The Respondent should therefore have ensured that the Claimant's clearly-articulated needs were met. The Claimant would not then have found himself in a position where he was working inappropriate shifts, and the disadvantage would have been removed.

5.3.16.3. We note the Claimant's argument that it had a duty of care to other drivers to meet their needs and requirements, and that creating a specific duty could be costly and difficult to accommodate. However, we also note that once the Claimant had raised a complaint, that the matter as dealt with relatively quickly and without

notable difficulty. This indicates that it would have been possible to allocate appropriate duties to the Claimant from the start without the need for him to have to repeatedly re-request his required adjustments.

5.3.17. We therefore find that it would be reasonable and practically achievable for the Respondent to have put this adjustment into place.

#### **5.4. Remedy**

- 5.4.1. The Claimant has not suffered any financial loss as a result of the actions of the Respondent. We have therefore made an award in respect of injury to feelings only.
- 5.4.2. We find that the Claimant should receive an award in the upper part of the middle band of the *Vento* guidelines (as updated by the relevant Presidential Guidance). We have therefore made an award of £25,000.
- 5.4.3. We have considered the fact that the Respondent remedied its failure to make reasonable adjustments within a relatively short timeframe each time that such a failure was brought to its attention.
- 5.4.4. However, we have also taken into account the fact that there were repeated failures to make reasonable adjustments, and three incidents of harassment. This was not a one-off event or isolated occurrence, and we believe it would be appropriate for the award to be in the middle band.
- 5.4.5. We have also considered the fact that the impact of the Respondent's failure to make reasonable adjustments was particularly humiliating for the Claimant, in that it resulted in him soiling himself in a public place.
- 5.4.6. Our final consideration has been the impact that these events has had on the Claimant. His evidence is that the actions of the Respondent has caused him significant anger and frustration, and a "huge amount of humiliation".
- 5.4.7. We consider that these factors mean that the award should be place towards the upper end of the middle band.
- 5.4.8. We do not accept that the Respondent's actions contributed to the Claimant's period of ill-health in the autumn of 2022, as asserted by the Claimant's representative. The Claimant did not give evidence to this effect, and no supporting medical evidence was provided to the Tribunal.
- 5.4.9. We find that the first act of discrimination took place on 25 January 2022 when the Respondent refused the Claimant's request to change shift. The number of days from 25 January 2022 until the date of this judgment is 697.
- 5.4.10. We therefore award interest in the sum of £3819.18.

Employment Judge **Routley**  
22 December 2023

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