

IN THE CIVIL AND ADMINISTRATIVE TRIBUNAL
Appeal Panel

File Number: 15/55753

Tom Lonsdale

Applicant

AND

The University of Sydney

Respondent

RESPONDENT'S SUBMISSIONS

Issues to be determined

1. The following issues arise for determination pursuant to the Applicant's application for leave to appeal:
 - a) whether leave should be granted in respect of the decision of a Registrar of the Tribunal to refuse leave to the Applicant to issue five summonses for production addressed to certain University staff, Hill's Pet Nutrition Pty Ltd ('**Hill's Pet Nutrition**') and Royal Canin Australia ('**Royal Canin**'), applications for which were made on 10 August 2015;
 - b) whether leave should be granted in respect of the decision of a Registrar of the Tribunal to refuse leave to the Applicant to issue a summons for production addressed to the Information Commissioner, an application for which was made on 14 August 2015;
 - c) whether leave should be granted in respect of the decision of McAteer SM on 14 September 2015 to refuse leave to the Applicant to issue five summonses for attendance addressed to certain University staff, Hill's Pet Nutrition and the Information Commissioner, applications for which were made on 3 September 2015; and

- d) if leave is granted in respect of any of the above decisions, whether there was any error in that or those decisions.
2. In relation to the applications for summonses for production filed on 10 August 2015, the summonses would be addressed to the following people:
 - a) the University of Sydney, with particular parts of the summons to be directed to Dr Michael Spence, Vice Chancellor of the University, Professor Roseanne Taylor, Dean of the University's Faculty of Veterinary Sciences and Dr Hugh White, Director of the Centre for Veterinary Education;
 - b) Hill's Pet Nutrition; and
 - c) Royal Canin.
3. In the application for the summons directed to the University of Sydney, the Applicant sought a wide variety of correspondence and other documents, as well as:
 - a) purporting to require the University to permit the Applicant to attend its premises in order to take photographs and videos;
 - b) purporting to require annotation of financial accounts; and
 - c) purporting to require Dr White to provide reasons for certain decisions he had made.
4. In the applications for the summons directed to Hill's Pet Nutrition and Royal Canin, the Applicant:
 - a) purported to require answers to various questions, including but not limited to the "responses" of each entity to an article published in the *Wall Street Journal* in 1997, reasons why each entity wishes to keep its commercial information private and claims made about each entity in relation to pet food;
 - b) requested production of financial accounts, and purported to require each entity to annotate those accounts.
5. In relation to the application for a summons for production filed on 14 August 2015, the summons would be addressed to the Information and Privacy Commission. By that summons, the Applicant:
 - a) purported to require the Information and Privacy Commission to answer a series of questions; and
 - b) requested production of "ALL internal emails, memoranda and documents related to" a letter sent by the Applicant dated 2 August 2015.

6. In relation to the applications for summonses for attendance filed on 3 September 2015, the summonses would be addressed to the following people:
- a) the Information Commissioner, on the basis that the Applicant wished to ask for information about the Information Commissioner's review of the University's decision which is the subject of the primary proceedings in the Tribunal;
 - b) Professor Roseanne Taylor, Dean of the University's Faculty of Veterinary Sciences, on the basis that the Applicant wished to ask her for her reasons for declining to provide documents;
 - c) Dr Hugh White, Director of the Centre for Veterinary Education, on the basis that the Applicant wished to ask him for his reasons for declining to provide documents;
 - d) Ms Belinda Hutchinson, Chancellor of the University, on the basis that the Applicant wished to ask her about the reasons the University had declined to provide documents; and
 - e) Hill's Pet Nutrition, on the basis that the Applicant wished to ask about its reasons for declining to provide documents.
7. In his written submissions, the Applicant also states that he requests that "all decisions of the Tribunal up to this date" be quashed: Applicant's written submissions: para 35. With respect, if the Applicant seeks such an order, it is necessary for him to file a separate application for leave to appeal identifying with clarity the decisions from which he seeks leave to appeal and the grounds on which any such appeal would be based.

Background to application before Tribunal

8. On 29 September 2014, the Applicant filed an application for access to documents under the *Government Information (Public Access) Act 2009* ('**the GIPA Act**').
9. The Applicant's request was expressed as follows:

'Please supply details of research funds, scholarships, agreements and contracts between pet food companies and the University of Sydney, its staff and students.

Where possible, please group the contributions into categories:

- a) *Capital contributions for buildings, laboratories, library endowments, etc;*
- b) *Current account funding for research projects, lecturer salaries, textbooks etc;*
- c) *Contributions in kind including student excursions, guest lectures, product supply, teaching materials, teaching aids, etc.*

Such agreements will for the most part be with the Veterinary Faculty and Centre for Veterinary Education. Other departments of the University may have ties with pet-food companies.

Please supply copies of correspondence, email messages and memoranda that relate to the arrangements entered into by individuals and the University.'

10. On 11 November 2014, the University gave the Applicant notice of its decision under the GIPA Act ('**GIPA Decision**'). The University decided that some of the information was already available to the Applicant, because sponsorship by pet-food companies of events held by the Faculty of Veterinary Science is acknowledged in the public material relating to that event.
11. After consulting with Royal Canin and Hill's Pet Nutrition, the University decided to refuse to provide access to the other information requested by the Applicant, due to an overriding public interest against its disclosure.
12. Both internal review and review by the NSW Information Commissioner resulted in affirmation of the GIPA Decision.
13. In the primary application before the Tribunal, the Applicant seeks review of the University's internal review of the GIPA Decision. Accordingly, the issues before the Tribunal in the primary application concern whether or not the University was correct in determining that there was an overriding public interest against disclosure of the information sought by the Applicant.
14. The University supports the GIPA Decision on the basis of the following provisions of the GIPA Act:
 - a) in respect of some information: Sch 1, cl 5 of the GIPA Act, on the basis that the University claims legal professional privilege in relation to certain information; and
 - b) in respect of other information: GIPA Act, s 14, Table, items 1(f) (concerning the impact of disclosure on the effective exercise by the University of its functions), 1(g) (concerning breach of confidence and related issues), 3(a) (concerning whether disclosure would reveal personal information), 4(b) (concerning commercial-in-confidence provisions of a government contract), 4(d) (concerning the impact of disclosure on the legitimate business, commercial, professional or financial interests of any person).
15. The University accepts that the following factors are public interest factors in favour of disclosure:
 - a) the general public interest, pursuant to s 12(1) of the GIPA Act; and

- b) the public interest in disclosing information that facilitates public scrutiny of and promotes transparency in University decision-making, including in respect of sponsorship arrangements with private companies.
16. These matters set the boundaries of what evidence is relevant to the primary application before the Tribunal. The question of relevance is central to the question of whether or not a summons ought to be issued.

Procedural history in Tribunal

17. The Applicant filed the primary application with the Tribunal on 8 May 2015.
18. On 23 June 2015, the parties attended a planning meeting. On that date, the following timetable was set:
- a) University to file and serve written submissions and evidence by 15 July 2015;
 - b) Applicant to file and serve written submissions and evidence by 14 August 2015;
 - c) Information Commissioner to file and serve written submissions and evidence, if any, by 28 August 2015;
 - d) University to file and serve any written submissions and evidence in reply by 11 September 2015; and
 - e) application listed for hearing on 17 September 2015.
19. There has been general compliance with this timetable. The Information Commissioner has not filed or served written submissions or evidence and did not appear at the hearing.
20. During the planning meeting on 23 June 2015, the question of summonses was raised.
21. On 26 and 27 July 2015, the Applicant sent a number of emails seeking responses to various questions. Those emails were as follows:
- a) 26 July 2015: email to the Vice Chancellor of the University (Annexure L14 to the Applicant's affidavit sworn 13 August 2015);
 - b) 26 July 2015: email to Professor Roseanne Taylor, Dean of the University's Faculty of Veterinary Sciences (Annexure L15 to the Applicant's affidavit sworn 13 August 2015);
 - c) 26 July 2015: email to Dr Hugh White, Director of the Centre for Veterinary Education (Annexure L16 to the Applicant's affidavit sworn 13 August 2015);
 - d) 27 July 2015: email to representatives of Royal Canin (Annexure L17 to the Applicant's affidavit sworn 13 August 2015); and

- e) 27 July 2015: email to Hill's Pet Nutrition (Annexure L18 to the Applicant's affidavit sworn 13 August 2015).
22. On 29 July 2015, the University's solicitor sent the Applicant a letter stating that, in the University's view, the information requested by the Applicant in his emails to the Vice Chancellor, Professor Taylor and Dr White was not relevant and accordingly, the University declined to provide that information on a voluntary basis. The letter also stated that the University would object to any summons seeking production of the same material on the basis of relevance.
23. On 31 July 2015, Ms Tricia Andres, Legal Counsel – Hill's Pet Nutrition Australasia & Far East, sent the Applicant a letter stating that, in the view of Hill's Pet Nutrition, the information sought by the Applicant "would be inappropriate to produce ... prior to NCAT's determination" and so declined to provide the material on a voluntary basis. Ms Andres also stated that Hill's Pet Nutrition would object to any summons seeking that information on the basis it would be an "abuse of process and a fishing expedition".
24. On 2 August 2015, the Applicant wrote to the Information Commissioner asking a number of questions and requesting a voluntary response within five working days.
25. On 7 August 2015, the Information Commissioner wrote to the Applicant outlining the legislation governing the Information Commissioner and stating it could take no further action in relation to the Applicant's GIPA application to the University.
26. On 10 and 14 August 2015, the Applicant made the applications for summonses to produce referred to above. Those applications were refused.
27. On around 14 August 2015, the Applicant filed and served his written submissions and evidence.
28. On 2 September 2015, an interim hearing was held in relation to another issue raised by the University. Due to the nature of the Applicant's evidence, the University also sought orders from the Tribunal in relation to its objections to some of the Applicant's evidence on the basis that much of the evidence the Applicant sought to tender was irrelevant and would result in the requirement for the University and Tribunal to spend a significant amount of time dealing with that irrelevant evidence.
29. During that hearing, the question of summonses was again raised. The Applicant filed further applications for summonses for attendance on the following day.
30. The Registrar of the Tribunal refused the applications for summonses. The Applicant sought review of that decision by McAteer SM, in accordance with NCAT Procedural Direction 2 at [11].

31. On 14 September 2015, McAteer SM held a hearing to determine the Applicant's applications for the issue of the summonses. If leave to appeal is granted, the University reserves its right to seek to rely on the transcript of that hearing so that the reasons given by McAteer SM at its conclusion can be understood in context.
32. Senior Member McAteer refused the Applicant's application to issue the summonses.
33. The hearing commenced on 17 September 2015. It did not conclude on that date, and was adjourned to 13 November 2015. Accordingly, the matter is presently part-heard.

Principles in relation to grant of leave

34. The decision whether or not to issue a summons is an interlocutory decision of the Tribunal. Accordingly, leave is required for an internal appeal: *Civil and Administrative Tribunal Act 2013 ('NCAT Act')*, s 80(2)(a).
35. The principles governing a grant of leave to appeal from an interlocutory decision are set out in *Collins v Urban* [2014] NSWCATAP 17. There, the Appeal Panel held:¹

- (1) *In order to be granted leave to appeal, the Applicant must demonstrate something more than that the primary decision maker was arguably wrong in the conclusion arrived at or that there was a bona fide challenge to an issue of fact ...*
- (2) *Ordinarily it is appropriate to grant leave to appeal only in matters that involve:*
 - a) *issues of principle;*
 - b) *questions of public importance or matters of administration or policy which might have general application; or*
 - c) *an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;*
 - d) *a factual error that was unreasonably arrived at and clearly mistaken; or*
 - e) *the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed ...*
- (3) *In relation to an application for leave to appeal relating to a question of practice and procedure, the application is to be approached with the restraint applied by an appellate court when reviewing such decisions, especially if the application is made during the course of a hearing ...'*

¹ *Collins v Urban* [2014] NSWCATAP 17 at [84] (references omitted).

Matters of evidence

36. The Applicant seeks to rely upon all of the evidence before the Tribunal in the primary application.
37. At the hearing on 17 September 2015, the University formally objected to Annexure L4 to the Applicant's affidavit sworn 13 August 2015, which is 389 page book by the Applicant entitled *Raw Meaty Bones*, as well as to Annexures L20-L22, which consist of a total of five videos. As the Applicant has noted in his written submissions, he does not rely on Annexure L5 (a second book) or Annexure L8 (a video of over 40 minutes).
38. In respect of this application for leave to appeal, the University makes the same objections in relation to Annexures L4 and L20-L22 as it did at the hearing on 17 September 2015. Those annexures not only have no relevance to the matters before the Tribunal, they would occupy considerable time and resources if the Tribunal were to admit them into evidence.
39. The University observes that parties are not generally permitted to adduce any fresh evidence on an appeal. However, the University does not object to leave being granted to the Applicant to adduce the additional documents he has annexed to his written submissions in relation to the application for leave to appeal.

Application of principles to present case

40. The brevity of the reasons given by McAteer SM does not do justice to the breadth of the issues canvassed at the interim hearing on 14 September 2015 and there are no reasons provided in relation to the Registrar's decision to refuse the applications for summonses to produce which were filed on 10 and 14 August 2015.
41. However, the issues to which the summonses relate are plainly outside the bounds of the issues before the Tribunal in the primary application before it. For that reason, as well as on the overall application of the principles set out in *Collins v Urban*, leave to appeal should not be granted.
42. First, the application for leave to appeal concerns a matter of practice and procedure and has effectively been made during the course of the hearing. As held by the Appeal Panel in *Collins v Urban*, this is a time at which the Appeal Panel ought to exercise particular appellate restraint.
43. Secondly, and leaving aside the question of the reasons for decision themselves, there is no error in any of the decisions to refuse the applications to issue summonses.

44. In *White v Carlton Tow Bars Pty Ltd* [2014] NSWCATAP 36, the Appeal Panel set out the requirements for valid summonses which are, relevantly, as follows:
- a) there must be a legitimate forensic purpose (or apparent relevance);²
 - b) the person who is to be ordered to comply with the summons must be identified correctly, “with clarity and precision”;³ and
 - c) if the summons is a summons for production, it is necessary to identify the documents which are to be produced, rather than to set out a series of questions.⁴
45. To these should be added the following:
- a) if the summons is a summons to attend to give evidence, the person who is addressed must be both competent and compellable as a witness; and
 - b) if a summons is overbroad and/or oppressive, that would be a ground to refuse leave.
46. Finally, timing is relevant in the present matter in two respects:
- a) pursuant to s 36 of the NCAT Act, the Tribunal has the power to refuse leave to issue a summons if the timing is such that it would cause prejudice to a party if the summons was issued; and
 - b) pursuant to cl 25(4)(c) of the *Civil and Administrative Tribunal Rules 2014* (**‘NCAT Rules’**), the Applicant is out of time in respect of his application for leave to appeal from the decisions of a Registrar to refuse to issue the summons for production in August 2015.
47. For the reasons set out below, the decisions to refuse to issue the summonses were correct and leave to appeal should be refused.

Application for summons to produce – University

48. In the application for the summons to produce addressed to the University, the issues to which the Applicant refers are as follows:
- a) the question of whether packages delivered by the Applicant to the University in July 2010, with a request they be provided to the Senate, were in fact delivered as requested;
 - b) “all correspondence with Senate members and the Dean of Vet Faculty confirming discussions and responses, **at any time**, in respect to complaints of University involvement with pet-food companies” (emphasis added);

² *White v Carlton Tow Bars Pty Ltd* [2014] NSWCATAP 36 at [18].

³ *White v Carlton Tow Bars Pty Ltd* [2014] NSWCATAP 36 at [19]-[20].

⁴ *White v Carlton Tow Bars Pty Ltd* [2014] NSWCATAP 36 at [22]-[23].

- c) whether commercial pet food is “suitable and safe to be fed, as per label claims, every day of a dog or cat’s life”;
 - d) any “claims that processed food improves the health and life expectancy of pet dogs and cats”;
 - e) “product information sheets for processed pet food and dental aids on display and sold at [the University’s] veterinary clinic”;
 - f) “the most recent full year Vet Faculty accounts in respect to all aspects of teaching, research, clinic and Centre for Vet Education”, annotated;
 - g) evidence in relation to the refusal, in 2008, to publish an article written by the Applicant; and
 - h) reasons for the Centre for Veterinary Education to refuse to provide information about alleged “deals with pet-food makers and pet-food maker influenced academics”.
49. None of these matters are relevant to the issues in the primary application before the Tribunal, as they are not relevant to the question of whether the information the Applicant has sought by way of his GIPA application should be released to him.
50. Further, the following parts of the summons are not requests for production of documents:
- a) the part of the summons purporting to require the University to permit the Applicant to attend the University’s premises in order to take photographs and videos;
 - b) the part of the summons purporting to require annotation of financial accounts; and
 - c) the part of the summons purporting to require Dr White to provide reasons for certain decisions he had made.
51. Those are not requests for production. Accordingly, the Tribunal could not grant leave in relation to these parts of the application for issue of a summons in any event.
52. Finally, even if relevant, the summons would be overbroad and/or oppressive in the following respects:
- a) the requirement for “all correspondence with Senate members and the Dean of Vet Faculty confirming discussions and responses, **at any time**, in respect to complaints of University involvement with pet-food companies” (emphasis added) – the University does not argue that the number of documents responsive to such a search would in itself be oppressive but the requirement to conduct such a broad search would potentially be oppressive; and

- b) “the most recent full year Vet Faculty accounts in respect to all aspects of teaching, research, clinic and Centre for Vet Education” is overbroad.

Application for summons to produce – Hill’s Pet Nutrition and Royal Canin

- 53. In the applications for the summonses to produce addressed to each of Hill’s Pet Nutrition and Royal Canin, the issues to which the Applicant refers are as follows:
 - a) the response of each company to an article published by the *Wall Street Journal* in 1997;
 - b) the reasons of each of Hill’s Pet Nutrition and Royal Canin for seeking to protect their commercial information, including the “scientific or educational basis” for those reasons;
 - c) evidence about whether commercial pet food “is suitable and safe for purposes of every day feeding for life of a pet”;
 - d) evidence about whether commercial pet food “increase[s] the health and life expectancy of pet dogs and cats”;
 - e) whether documents released by Murdoch University relevant to each company were “broadly similar to the documented arrangements” each company had with the University; and
 - f) the last full year accounts for each company and its parent in Australia, annotated.
- 54. The only matter which comes close to having any vague relevance to the primary application is the question about each company’s desire to keep its commercial information private, in the sense that the University does rely on the commercial-in-confidence nature of some information in relation to some factors it has raised as public interest considerations against disclosure. However, the question for the Tribunal is the *nature* of the information itself. The Tribunal is capable of making an assessment of the nature of the information by inspecting the information the subject of the primary application.
- 55. No other matters in the applications for summonses addressed to Hill’s Pet Nutrition or Royal Canin are relevant in any way to the issues in the primary application.
- 56. Further, each summons is expressed as a series of questions or interrogatories. That is so even in relation to the request for “evidence” in relation to whether commercial pet food is “suitable and safe” and in relation to any claims in relation to the relevant company’s own food. By making a request for “any evidence”, the summons goes beyond any request for production of documents.

Application for summonses to produce and attend – Information and Privacy Commission / Information Commissioner

57. In relation to both summonses to the Information and Privacy Commissioner and Information Commission, neither the Commissioner or the staff of the Information and Privacy Commission are competent or compellable to give evidence or produce any documents because the proceedings before the Tribunal are “legal proceedings in respect of ... information obtained by the Commissioner or a member of staff in the course of the exercise of functions under” legislation: *Government Information (Information Commissioner) Act 2009* (NSW), s 41(1).

58. Accordingly, the Tribunal has no power to issue either of these summonses.

Application for summonses to give evidence – University staff

59. In his applications for summonses for Professor Taylor, Dr White and Ms Hutchinson to attend to give evidence, the Applicant states that he wishes to ask each of them for either their or the University’s reasons to decline to provide documents.

60. It is not clear whether the Applicant wishes to ask about the University’s decision under the GIPA Act or the refusal to provide documents in response to the Applicant’s emails of 26 July 2015, or both.

61. If the former, the summonses have no relevance because the issue before the Tribunal concerns the merits of the decision pursuant to the GIPA Act whether or not to disclose documents, not the subjective reasons of any individual in that regard. That is particularly so in circumstances where both the initial decision pursuant to the GIPA Act and the internal review decision were made by individuals other than Professor Taylor, Dr White and Ms Hutchinson.

62. If the latter, the summonses simply have no relevance.

63. Further, the fact that the Applicant’s application to issue these summonses was not made until 3 September 2015, two weeks before the hearing, is relevant, pursuant to s 36 of the NCAT Act.

64. The procedural history of the matter is outlined from paragraphs 17 ff above. In particular, the first planning conference was held on 23 June 2015 and the Applicant was ordered to file and serve his evidence, including statements by any witnesses he intended to call, by 14 August 2015. His applications for summonses to produce were refused in mid-August.

65. The University was not aware of the Applicant’s applications for summonses until 10 September 2015. Had any summonses to attend and give evidence been issued,

leaving aside the question of the requirement for service on the individuals concerned, the University would have had less than one week in which to prepare for the relevant examination of those witnesses. There is a real possibility that, had any of the summonses been issued, the University would have suffered prejudice unless the hearing date was vacated.

Application for summonses to give evidence – Hill's Pet Nutrition

66. This summons does not identify "with clarity and precision" the person who is to be ordered to comply. For the reasons given by the Tribunal in *White v Carlton Tow Bars*, the Tribunal has no power to issue such a summons.
67. Further, the Applicant seeks the reasons of Hill's Pet Nutrition for its desire to keep its commercial information private. For the reasons outlined in paragraph 54, that has, at best, tangential relevance to the issues in the primary application.
68. Finally, the University also relies on the question of timing outlined in paragraphs 63 to 65 above in relation to this summons.

Conclusion on all summonses

69. For all of these reasons, the decisions of the Registrar and of McAteer SM to refuse to issue the summonses are correct.
70. There is, accordingly, no error. This is a significant reason militating against any grant of leave to appeal.
71. Further, none of the other matters set out at [84(2)] in *Collins v Urban* apply in the present case. In particular, there is no question of principle or public importance, no matter of administration or policy and no injustice in circumstances where the summonses are plainly not appropriate to be issued.
72. For those reasons, leave to appeal should be refused.
73. Further, with respect to the summonses to produce, applications for which were made on 10 and 14 August 2015, the Applicant is out of time in relation to his application for leave to appeal from the Registrar's decisions to refuse to issue those summonses: NCAT Rules, cl 25(4)(c).
74. The Applicant has not acknowledged that he requires an extension of time in relation to those decisions. He has provided no evidence or reasons as to why he did not seek leave to appeal within time.

Other issues raised by Applicant

75. The submissions filed by the Applicant in relation to his application for leave to appeal reveal that he continues, in this application for leave to appeal, to seek to air issues which go beyond those before the Tribunal in the primary application. For example, at paragraph 5, the Applicant states:

'There is no doubt that the University of Sydney has commercial arrangements with the junk pet-food makers Hill's, a division of Colgate-Palmolive, and Royal Canin a division of Mars Inc. These arrangements should be tested by reference to documents and to cross-examination of the witnesses to assess the truth of the University's submissions before the Tribunal.'

76. The primary proceedings before the Tribunal do not concern the substance of University's commercial arrangements with Hill's Pet Nutrition or Royal Canin. The Applicant would not be permitted to cross-examine any witnesses in relation to the substance of the commercial arrangements, in the sense of their desirability or otherwise or the nature of them.
77. It is plain that the Applicant's central concern is what he alleges is some kind of impropriety in relation to the University's arrangements with Hill's Pet Nutrition and Royal Canin. He has made his GIPA application to seek information in relation to that issue. However, it is not the Tribunal's role to consider whether the arrangements are improper in the manner the Applicant alleges, and the University denies any such impropriety.
78. Similarly, contra paragraph 10 of the Applicant's written submissions, the University's claim for legal professional privilege cannot "be tested by cross examination of the University employees responsible for striking the deals and by cross examination of the junk pet-food company representatives." Claims for legal professional privilege are assessed with reference to ss 118 and 119 of the *Evidence Act 1995*. In particular, the representatives of Hill's Pet Nutrition and Royal Canin could, by definition, have no knowledge of documents in respect of which the University claims privilege.
79. Finally, the Applicant makes a number of assertions which are irrelevant to the matters before the Tribunal, unsupported by evidence and with which the University disagrees.

Brenda Tronson
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Sarah Heesom
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Date: 19 October 2015