



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102653/19

Held at Inverness on 8 & 9 August and 11 October 2019

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Employment Judge: J M Hendry  
Members: I.C MacFarlane and M Williams Edgar

Mr. D MacPherson

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Claimant  
Represented by:  
Ms. L Bishop Neil,  
Solicitor

Loch Ness Coffee Company Limited

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Respondent  
Represented by:  
Ms. E Grant  
In-House Solicitor

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is as follows:

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1. That the claimant was a disabled person in terms of s.6 of the Equality Act 2010 in October and November 2018.

### REASONS

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1. The claimant in his ET1 contended that he had been discriminated against on the grounds of his disability. The respondent company did not accept: a) that they knew or ought to have known about the disability and b) that the condition or conditions that the claimant suffered from amounted to a qualifying disability in terms of the Equality Act.

**E.T. Z4 (WR)**

2. A preliminary hearing was assigned to examine these two issues.

### **Evidence**

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3. The claimant's solicitor lodged an Index of Documents on behalf of the claimant (C1-11). The respondent's solicitor lodged documents on behalf of the respondents (R1-9). The claimant gave evidence first. He also called his partner, Gillian McKay to give evidence which she did.

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4. The respondent called no witnesses.

### **Application for Postponement**

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5. The respondent's solicitors sought a postponement at the outset of the hearing. The reasons for this were not particularly clear but Ms Grant suggested that a postponement would allow time for possible settlement discussions to take place. The claimant's solicitor indicated that there had been no contact with the respondent's solicitors until the day before the hearing. She opposed the adjournment and suggested that the respondent's solicitor's behaviour was 'appalling' Nevertheless the Tribunal adjourned for a period to allow parties representatives to see if there was any prospect of settlement. A short time later the Tribunal was informed that there was none and the postponement was refused.

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6. The respondent's solicitor indicated at the start of the second day of the hearing that she had hoped to call as a witness a Manager, Mr Kent, who worked with the claimant. The respondent's solicitor Ms Grant advised the Tribunal that she had been in contact with Mr Kent prior to the hearing and that evening before when he was due to give evidence. He had given her no indication that he would not attend. He was not present nor was he answering his telephone. There were, she said, concerns as to his welfare. Ms Grant sought a postponement of the hearing.

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7. The Tribunal asked Ms Grant what evidence she hoped Mr Kent would give. She argued that Mr Kent could give relevant evidence namely that the claimant showed no difficulties in undertaking his work activities as a baker.
- 5 8. The application for postponement was opposed by the claimant's solicitor arguing that the evidence was not relevant and that in addition it was not proportionate to grant the postponement. The granting of the postponement would, she said, incur the claimant in significant additional cost and delay.
- 10 9. The Tribunal adjourned to consider the application. While sympathetic to the respondent's position it came to the view that the postponement should be refused. It was not convinced that the witness could give sufficiently relevant evidence to assist the Tribunal. It considered that the focus for the Tribunal was on the claimant's ability to carry out day-to-day activities not work-related activities although it appreciated that there could be an overlap between the two. The Tribunal noted that the claimant had not been cross-examined as to his inability to carry out particular work activities. The proposed evidence was accordingly likely to have little value to the Tribunal and if allowed would necessitate the claimant returning to give further evidence and the delay and cost that this would incur over and above the significant cost of any adjournment. It concluded that it was not minded to grant the postponement in these circumstances.
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### **Application to Lodge Productions**

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10. In addition, the respondent's solicitor sought to lodge photocopies of entries made in the claimant's Facebook account. She explained that she had received these on Thursday night from Mr Kent. It was not clear what the relevance of the entries were other than to cast doubt on the claimant being unwell during the relevant periods but none of the possible matters depicted in the Facebook pages had been put to the claimant in cross-examination. In the circumstances, the Tribunal concluded that the entries should not be allowed to be lodged in evidence at this late stage. Doing so would require the claimant to return and give evidence and effectively to start afresh. We
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were also concerned that the claimant's solicitor had no notice of their production nor was it clear in what circumstances these documents had been obtained and whether the Facebook pages that had been copied were publicly available.

5 **Facts**

The Tribunal made the following findings in fact:

- 10 11. The claimant lives in Inverness with his partner, Gillian McKay. They have two children.
- 15 12. The claimant began work with the respondents in March 2013 in their bakery business. He was promoted from Cleaner to Baker and thereafter to a supervisory capacity. The work was repetitive and involved much manual work.
13. The work was seasonal. The claimant and the Bakery were very busy during the summer tourist season. Work reduced markedly over the winter period.
- 20 14. The claimant's Manager latterly was a Mr Peter Kent.
15. The claimant enjoyed his work and seems to have been well regarded as competent and hardworking.
- 25 16. The claimant was a keen fisherman and generally outgoing. However, for some years the claimant had periodic mental health issues. He would become withdrawn and depressed. He would feel isolated and detached both from his family and in the work place.
- 30 17. The claimant's mental health deteriorated markedly towards the end of April 2017. He became depressed. He lacked motivation. He was lethargic. His partner, Gillian McKay recognised changes in his character but despite her misgivings the claimant was resistant to seeking help.

18. An appointment with his G.P. at the Riverside Medical Practice in Inverness was eventually arranged at her prompting as an emergency appointment for the 1 May but he did not attend. The claimant's partner spoke to someone at the medical practice on 1 May and the claimant's medical notes record:

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*"DNA - today – feeling down and very stressed. Asked him to see DR never done this before. Gill – sorry using late appointment but is having to travel back from his work."*

- 10 19. The claimant was given a further emergency appointment for 2 May and persuaded to attend. He saw his G.P. Dr. McMullen. The G.P. recorded:

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*"Seen in G.P. Surgery, low mood for the past few months he feels. Lacks motivation, concentration poor and sleep disturbed. Keen fisherman and this is not like him – not fishing yet this year. Usually pretty outgoing. Some stresses – expecting baby – unplanned but not unwelcome news. Turbulent relationship and worse now mood is affected. Loves work – Baker. No thoughts of harm/suicide O/E. Appears anxious/upset. EC reasonable. Hygiene plus dress good. No perceptual abnormalities."*

- 20 20. The General Practitioner prescribed the claimant Fluoxetine for a month. It is an anti-depressant medication.

21. The claimant's mental health did not improve. He was reluctant to engage with medical services. He felt at points he was getting better and would stop taking the prescribed medication. This would lead to a relapse in his mood. Despite prompting from Ms McKay, the claimant on occasions would not get out of his bed in the morning. He would not wash. He would not brush his teeth. He lacked motivation. He was lethargic. He lacked concentration or interest in life. He would not attend work regularly. He was in further contact with his G.P. on 18 December. He had become more depressed than before and had a low mood. The G.P. noted:

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*"Low mood. Worthless, hopeless. No anhedonia with son but anhedonia the rest of the time. Off work last week with throat infection. Needing MED3. Low mood, not worrying about anything in particular. Over*

*sleeping. Appetite passable. Feels worse than he did in May. Fishing season ended. No suicidal thoughts.”*

22. The claimant was put on a course of Sertraline medication by his G.P. (1  
5 tablet daily) for an extended period. Sertraline is an antidepressant medication.

23. The claimant would stop taking the medication when he felt better. This would  
lead to a relapse. He had no insight into the effects of his condition. His mood  
10 fluctuated, and he would regularly become depressed. When he was  
depressed, he lacked motivation and would not participate in his usual  
activities such as fishing. Despite urging by his partner, he would often not  
leave his bed or attend work. Further contact with his G.P. on 18 December  
was made when the claimant was persuaded to attend an appointment with  
15 his mother. She had long standing concerns about his mental health going  
back some years and had asked to attend the consultation. He explained to  
the G.P. that he had low mood and felt worthless.

24. The claimant was in telephone contact with his G.P. on 26 June 2018. He  
20 was depressed and had low mood. It was noted that he was feeling stressed  
and anxious. He was off work and had issues with his boss at work. He felt  
unable to work. He was restarted on Sertraline. The doctor noted:

25 “.....Had been on Sertraline but stopped as didn’t find it helpful. Sleeping  
more. Reduced motivation. Has been dismissed from work apparently  
due to anxiety. Worked as a Baker. Supportive partner. Looking for  
something in addition to Sertraline, discussed guided self-help which he  
seemed to respond to. Will refer. Review again in months’ time.  
Explained needs to use Sertraline for 6 months.”

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25. As a consequence of this appointment the claimant was referred for cognitive  
behaviour therapy and he awaits the start of that programme.

26. The claimant had various absences totalling approximately 50 days  
35 throughout 2017 and 2018 some of which were covered by Fit Notes

(R6,7,8,9). The claimant was embarrassed to have depression put on the Notes and his GP agreed to use the words 'stress at home' on the Notes except the Fit Note issued on the 2 July 2018 (R6) which read 'Depressed Mood'.

## 5 Witnesses

27. We found the claimant an erratic and at times confusing witness who was nevertheless at points credible but seldom reliable as a historian. We found the claimant's partner, Ms McKay, a much more credible and reliable witness on whom the Tribunal could rely. She gave her evidence in a robust and straightforward manner although she was somewhat combative at times she struck us as being an honest witness.

## Submissions

### 15 Claimant's Submissions

28. Ms Neil started her submissions by pointing to the definition of a disabled person in terms of s.6 of the Equality Act and the four key questions that the Tribunal had to answer. She observed that there was no need for a formal diagnosis but the claimant had such a diagnosis in the medical notes which had been produced namely depression following the claimant's attendance at his G.P. on the 2 May 2017. The respondents she said had relied on the Fit Notes. These were not in any way determinative. The claimant had discussed with his G.P. what should go on the Notes. Properly viewed the depression 'sat behind' the other symptoms and anxiety and difficulties that the claimant had. Ms Neil made reference to the case of **Raynor v. Turning Point & Others** UKEAT/0397/10/ZT. The Tribunal should have regard to the advice contained in this case and in the case of **J v. DLA Piper UK LLP** UKEAT/0260/09/RN. In the latter case President HHJ Underhill at paragraphs 34 onwards set out the correct approach to adopt. The Tribunal did not require to proceed by rigid consecutive stages. Ms Neil pointed to paragraph 44 of the case. The discussion as to whether or not terms such

as anxiety and stress would assist the Tribunal was helpful in relation to recurrence. Ms Neil also made reference to the case of **Aderemi v. London & South Eastern Railway Ltd** UKEAT/0316/12/KN.

5 29. The guidance that the Tribunal should concentrate on she submitted was which activities the claimant could not do rather on what he could do. In Ms Neil's submission evidence that he could/would not attend work was good evidence that he could not participate in the day-to-day activity that attending work constituted. The condition the claimant developed had a significant  
10 impact on him. The evidence was that he struggled to concentrate. He struggled to follow TV programmes and so forth. The fit notes are evidence of continuing difficulties. The claimant's condition clearly recurred. The effect when he was unwell was clearly substantial. It was more than minor. She also referred the Tribunal to the case of **Vickers v. BT** 1991 IRLR 680.  
15 Looked at objectively the claimant had good and bad days. His condition had lasted at least until 8 August 2019.

### **Respondent's Submissions**

20 30. Ms Grant began her submissions by also referring to section 61 of the Equality Act 2010 and to the leading case of **Goodwin v. Patent Office** [1999]. We first of all considered whether or not there was a mental impairment. It was disputed that the claimant had been able to demonstrate that he had suffered from depression for an extended period. She made reference to the fit notes and to the reasons given there that the claimant's  
25 absence was due to "stress at home". With reference to the notes there was no clear diagnosis in her view of clinical depression simply low mood.

30 31. The solicitor then referred to the case of **Herry v. Dudley Metropolitan Council** UKEAT/0100/16/LA which was a case in which a claim was rejected where a claimant was found to have periods of absence which were because of "stress" or "work related stress". The Tribunal held that this did not amount to a disability. The respondent believed that this was a similar situation where



the situation fluctuated. The claimant was clearly not depressed throughout the whole period. He regularly attended work although he had a large number of absences. There were various apparent triggers (the birth of a baby and so forth) that could be identified and he was signed off when that stress was triggered. The overall circumstances were much more akin to someone who had periodic stress absences. The medical reports identified the reasons for stress which gave the low mood. In her submission the claimant had not demonstrated that he had a mental impairment or that it had lasted 12 months.

32. She then turned to the question of day-to-day activities referring to the case of ***JB v. DLA Piper UK*** (2010) ICR 1052 and pointed to the fact that the claimant worked throughout most of the period in which he claimed depression. She considered that there was no evidence that the condition was long-term or recurrent. The claimant's evidence was vague and not credible. The Tribunal should be wary of putting too much weight on the medical notes. However, the medical notes themselves indicated that he did not have signs of a psychosis. Ms Grant also made reference to the case of ***Aderemi***. All the different parts of the test were demonstrated. The claimant only required to visit his G.P. periodically for low mood. Looked at in the round this was not sufficient. Examples were given of his inability to carry out day-to-day activities. The claimant in his evidence had accepted that he was physically able to carry out his work duties.

### Discussion and Decision

33. The Equality Act 2010, at Section 6 (1), contains the statutory definition of disability.

***“A person (P) has a disability if –  
(a) P has a physical or mental impairment, and  
(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.”***

Section 6 (5) empowers a Minister of the Crown to issue statutory guidance about matters to be taken into account in deciding any question for the 5 purposes of Section 6 (1), and Schedule 1 to the Equality Act 2010 sets out a various supplementary provision including, at paragraph 2 (1) that:

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***“the effect of an impairment is long term if:  
(a) it has lasted for at least twelve months,  
(b) it is likely to last at least 12 months, or  
(c) it is likely to last for the rest of the life of the person affected.”***

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*Paragraph 2(2)*

***“If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur”.***

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Paragraph (5) of that Schedule 1 provides that:

***“an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if – (a) measures are being taken to treat or correct it, and (b) but for that, it would be likely to have that effect.”***

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Paragraph 5 (2) provides that “measures” includes, in the particular medical treatment.

34. The burden of proof is on a claimant to demonstrate that he or she satisfies the statutory definition of disability, and the standard of proof being on the balance of probabilities.

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35. Whether or not someone is disabled in terms of the Act will depend upon the full circumstances of the case, i.e. whether the adverse effect of a person's impairment on the carrying out of normal day to day activities is substantial and long term. The time at which to assess the disability is the date of the alleged discriminatory act. That period was agreed.

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36. Both parties made reference to the case of ***Goodwin v Patent Office*** [1999] ICR 302, a Judgment of the Court of Appeal in England as authority for the proposition that the words used to define disability require a Tribunal to look

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at the evidence by reference to four different questions, or “conditions” as the EAT expressed them:

- (1) Did the claimant have a mental and / or physical impairment? (the “impairment condition”);
- 5 (2) Did the impairment affect the claimant’s ability to carry out normal day to day activities? (the “adverse effect”);
- (3) Was the adverse condition substantial? (the “substantial condition”) and;
- (4) Was the adverse condition long term? (“the long-term condition”).

10 37. We also had reference to the case of **Paterson v Commissioner of Police of the Metropolis** [2007] ICR 152, where the Employment Appeal Tribunal held that in order to be substantial, the effect must fall out with the normal range of effects that one might expect from a cross-section of the population, but when assessing the effect, the comparison is not with the population at  
15 large, but what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out if not impaired (at paragraph 27, per Mr Justice Elias, President).

20 38. In approaching the evidence we also bore in mind the guidance in **Aderemi** that we should concentrate on the activities that the claimant could not do rather than what he could. A feature of this case was that the claimant attended work throughout much of the period during which he was unwell. He also had numerous unvoiced absences. We did not find that this was unusual  
25 in the particular circumstance of this case as it was clear that he enjoyed his work as Baker and with some pressure/encouragement from his partner he tried to keep up his attendance at work where he found that he could cope with the mostly physical nature of the work. At other times he could not be persuaded to carry out even this activity which he otherwise enjoyed. The GP  
30 seems to have diagnosed depression and given the claimant appropriate anti depressive medication. We noted that in the case of **Rayner** the following

observations were made at paragraphs 22 and 23 which seems to apply in the present case:

5 ***“22. It seems to me, if a condition of anxiety and depression is diagnosed by a GP which causes the GP to advise the patient to refrain from work, that that is in itself evidence of a substantial effect on day-to-day activities. The Claimant would have been at work and his day-to-day activities include going to work. If he is medically advised to abstain and is certified as such so as to draw benefits and sick pay from his employer, that is capable of being a substantial effect on day-to-day activities. It is of course a matter of fact for the Employment Tribunal to determine.***

10 ***23. The Claimant himself gave evidence of the effect on his day-to-day activities, which were difficulties in concentrating and sleeping. Given that he was not challenged on those, it seems to me unfair for it to be said that they had no substantial effect upon him. He gave that evidence in order to demonstrate the effect on his day-to-day life of his condition....”***

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20 39. Ms Grant sought to draw a distinction between clinical depression and bouts of stress which the claimant seemed to have as a reaction to adverse events. We can understand why the respondent takes this position given the terms of most of the Fit Notes and their reference to stress. However, we accepted the evidence of the claimant that he was reluctant to disclose his mental condition to his employers asking his Doctor to use the description ‘stress’.

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30 40. Ms Grant also sought to rely on the case of **DLA Piper** and the distinction drawn there between someone who suffered periodic bouts of depression as a consequence of adverse events and clinical depression. As in the case of **DLA Piper** we were not overburden by medical evidence or opinion and had to rely on the notes that were provided and the evidence of the claimant and his partner. We had as Mr Justice Underhill observes to be cautious about the labels used when considering these matters.

35 41. Nevertheless, the reasons why someone is suffering from depression or on other occasions low mood at particular points can be difficult areas especially without specialist medical evidence but require examination when

considering both the duration of the impairment and the likelihood of recurrence. Put simply if someone becomes depressed at particular circumstances (life events) that they encounter and then recover when those circumstances dissipate that is likely to be regarded as being a discrete or one-off incident of depression.

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42. We concluded, although with some hesitation, that there was sufficient evidence before us to conclude that the claimant suffered from depression and that this appears to have been an underlying condition or at the least a recurrent one. We came to this view by carefully considering the medical notes and putting these in the context of the other evidence that we accept about the claimant's actual mental state which we took principally from his partner. The entry on the 2 May refers to low mood and does not refer to depression at that stage but the claimant is prescribed an anti-depressant medication and there is no point where his mental health fully recovers although on some day's he felt better than on others. The evidence of his partner was that he had little insight into his mental health and his behaviour over an extended period. In December of that year there is reference to a 'depression management programme'.

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43. It is noteworthy that the evidence before us was that there had been no full recovery from the initial difficulties and this was reflected in the evidence. In June 2018 the claimant was noted as being 'depressed'. During this extended period, he was prescribed anti-depressant medication. It appears to us that the depressive condition, although fluctuating in severity continued for a period of more than 12 months from the initial emergency appointment in May 2017.

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44. The evidence which we accepted was that the claimant's ability to carry out every day activities was impacted throughout although at points more severely when for example he would not get out of bed. Generally, although physically able to work in the job he enjoyed he was at points signed off from that work. In addition, he did not attend work on many occasions and these absences, which were nor covered by Fit Notes, seem in whole or in part to

have been connected to his lethargy and lack of motivation. The low mood suffered by him affected his hobbies and also his relationship with his partner and new baby. During this period, he would be lethargic and lack motivation to take part in family or social activities find it difficult to go to work. The condition, namely a depressive condition, had an adverse effect on his ability to carry out normal day to day activities? That effect was from the evidence we had before us was substantial and as we have held long term in that it lasted for more than 12 months.

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- 10 45. We did not determine the issue of when the employer knew or should have reasonably become aware of the claimant's condition. This was a matter that was not fully explored at the hearing and the evidence of the claimant as to when he discussed his condition with Mr Kent and what he actually told him was by no means clear. However, the employers accepted that the claimant submitted Fit Notes and one of these referred to low mood. The submissions at the close of the case focussed on the issue of whether or not the claimant had a qualifying disability and not on the issue of knowledge. Indeed, this matter was not touched on in the claimant's written submissions. In retrospect we might have been more sympathetic to a postponement had we known that the claimant's evidence was going to be that he told Mr Kent about his 'pills'.
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46. We were still left in some doubt as to what exactly was said and the context in which it was said. It is unfortunate that Ms Grant did not impress on us the importance that Mr Kent's evidence might have in relation to this particular issue although to be fair she may not have known what exactly the claimant's evidence was to be on this matter. We did note that there was reference in the ET1 to the claimant alleging that Mr Kent was aware of his depressive condition but no other specification of his position (and none seems to have been sought by the respondent's solicitor).
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47. In these circumstances the situation that we are left in is unsatisfactory for both the parties and the Tribunal. Accordingly, the issue will remain undetermined meantime but will be determined at the final merits hearing

when the Tribunal will have the benefit of hearing the full evidence and placing this issue in the context of the disciplinary proceedings.

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<b>Employment Judge:</b>	<b>James Hendry</b>
<b>Date of Judgment:</b>	<b>14 October 2019</b>
<b>Date Sent to Parties:</b>	<b>15 October 2019</b>

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