Layoff prohibition during the covid period and the balance between freedom of enterprise and the fundamental right to work

A proibição de demissões durante o período da covidência e o equilíbrio entre a liberdade de empreendimento e o direito fundamental ao trabalho

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ABSTRACT
This paper seeks to analyze the rules related to safeguarding and maintaining employment issued by Brazil and Italy during the SARS-COV-2 pandemic. Both countries adopted legislation to strengthen social safety and introduced measures restricting layoffs. The results show that, on different levels, both countries have restricted the freedom of enterprise in favor of the protection of workers.

Keywords: Labor Law, Layoff, Dismissal, SARS-COV-2, freedom of enterprise.

RESUMO
Este documento procura analisar as regras relacionadas à salvaguarda e manutenção do emprego emitidas pelo Brasil e pela Itália durante a pandemia da SARS-COV-2. Ambos os países adotaram legislação para reforçar a segurança social e introduziram medidas que restringem as demissões. Os resultados mostram que, em diferentes níveis, ambos os países restringiram a liberdade de empreendimento em favor da proteção dos trabalhadores.

Palavras-chave: Direito do Trabalho, Demissão, Demissão, SARS-COV-2, liberdade de empreendimento.

1 INTRODUCTION

The global pandemic caused by the coronavirus is responsible for crises and vulnerabilities, not only in the health scenario. All social relations were, in some part, affected by the pandemic, and labor law was not immune to the effects of the pandemic.

The crisis caused by SARS-COV-2 has been challenging the administration capacity of national states in dealing with the trade-off between economic recovery and combating the pandemic. Thus, this study describes the rules related to employment protection issued by Brazil and Italy, analyzing the balance adopted between freedom to enterprise and the fundamental right to work.

Since this situation is replicated in several countries, the comparative analysis of two different legal systems aims to establish common points and highlight the differences on the topic, considering the historical evolution and the economic and social position of each one, to identify possible exchanges and legislative improvements.

As for the methodological aspects, the present study will be elaborated through legislative and bibliographic review of Brazil and Italy, using qualitative criteria.

Ordinary Brazilian legislation on dismissals (termination) without just cause

The art. 7, I, of the Constitution of the Federative Republic of Brazil (CF/1988) disciplines the general regime of protection of the employment relationship, protecting it against arbitrary or without just cause, under the terms of the complementary law, which will provide compensatory reparations or indemnities, among other rights.

Even though it is a matter of enormous relevance, for more than 30 years since the promulgation of CF/1988, the complementary law mentioned in item I of art. 7 of the Constitution has not yet been implemented, therefore, it is possible to dismiss without just cause that is, without any reason, neither objective nor subjective, however being prohibited any sort of discriminatory dismissal[1].

The art. 10, I, of the Transitional Constitutional Provisions Act, establishes that, until the complementary law announced by art. 7, I, of the CF/1988 is not carried out, the compensation of worker's will be regulated by Law 8.036/1990, in its art. 18, §1, and by the Consolidation of Labor Laws (CLT), both repositories of laws relating to individual dismissals.

[1] According to Law 9.029/1995, it is prohibited to adopt any discriminatory and restrictive practice for the purpose of accessing the employment relationship, or maintaining it, due to sex, origin, race, color, marital status, family situation, disability, professional rehabilitation, age, among others.

The legal precepts provide a compensation due to employees, in the event of dismissal without just cause. The Law 8.036/1990 establishes that during employment, the employer must deposit monthly, in a fund managed by the government (called the Unemployment Guarantee Investment Fund – "FGTS"), a portion corresponding to 8% of the employee's salary. In case of dismissal without just cause, the employer must deposit a fine corresponding to 40% of the total installments deposited. These amounts (both the monthly deposits and the fine) are transferred to the worker, at the end of the employment, to protect him from the effects resulting from termination of employment.

The Consolidation of Labor Laws (CLT) also provides the right to a prior notice[2], which corresponds to an indemnity based on the employee's remuneration. It is calculated in proportion to the length of employment, corresponding to the remuneration of a minimum of 30 days and a maximum of 90 days.

On the subject, it is important to note that Convention 158 of the International Labor Organization (ILO), which establishes that the employer can only dismiss the employee upon proof of just reason has been ratified by Brazil[3]. The Convention came to be fully in force in Brazil, however, there was later the denunciation of the said precept, through Decree 2.100/1996.

Part of the legal doctrine[4] defends that the denunciation is unconstitutional. This is because Article 17 of Convention 158 provides that the denunciation could only occur ten years after its entry into force in the national law, becoming effective only one year after the date of its registration. In addition, the Government failed to observe the provisions of ILO Convention 144 (in force in Brazil), which determines the need for tripartite consultation for ratifications and denunciation of international labor conventions and recommendations.

Due to the aforementioned irregularities, a Direct Action of Unconstitutionality (ADI) 1.625-3 was started. This lawsuit discusses the (in)constitutionality of the denunciation (Decree 2.100/1996). The first rapporteur judge in this case, Minister

[2] According to law 12.506/2011, the prior notice has a minimum duration of 30 days. For each year of work in the same company, the worker is entitled to an increase of 3 days up to a maximum of 90 days. In this way an employee who has worked for a year and a half will receive 33 days' notice, while another who has worked for 2 years will receive 36 days, and so on.

[3] Approved by Legislative Decree n. 68, of September 16, 1992. Ratified on January 5, 1995 and promulgated by Decree n. 1.855, of April 10, 1996.

[4] "(...) just as the President of the Republic needs the approval of the National Congress, giving him "carte blanche" to ratify the international treaty, more in line with the rules of the 1988 Constitution in force would be that the same procedure be applied with respect to the denunciation, whence one could not speak, for this reason, a denunciation of a treaty act by the President". MAZZUOLI, Valerio de Oliveira. Direito dos Tratados. São Paulo: Revista dos Tribunais, 2011, p. 309-310.

Joaquim Barbosa, fully upheld the lawsuit, understanding that the denunciation could not be unilateral, pending the final judgment.

In view of the foregoing, upon payment of the indemnities mentioned before, it is possible to terminate employment without just cause in Brazil.

Dismissals without just cause has harmful effects for the Brazilian reality, resulting in a higher labor turnover rates, which increases unemployment and also weakens labor relations in the face of precarious bonds.

Special rules adopted due to the SARS-COV-2 pandemic

In Brazil, statistical data indicate that the virus called "COVID-19" made its first infection on 02/26/2020, in the City of São Paulo, and the first death occurred on 03/17/2020[5].

The increase in the spread of the disease led to the need for social isolation, consequently generating impacts on employment relations, due to the temporary lockdown, mandated by states and cities, of most commercial and service activities. It is noteworthy that in Brazil the legislative determinations in this regard have not been unified throughout the national territory, due to the refusal of the President of the Republic to adopt a national level lockdown policy.

The crisis generated by the pandemic resulted in an increase in unemployment rates, and in the third quarter of 2020, the percentage of the economically active Brazilian population without a job was 14.6% according to data from the Brazilian Institute of Geography and Statistics (IBGE).

To face this situation, the Executive Branch issued Provisional Measure 936/2020 (later converted into law 14.020/2020). The rule has the scope of creating measures to preserve employment levels, allowing the proportional reduction of working hours and salary, as well as the temporary suspension of the employment contract.

To reduce the economic impacts for companies and employees due to these measures, a welfare program in the form of a salary supplement paid by the Federal Government called "Emergency Benefit for the Preservation of Employment and Income" (B. Emergencial) was created.

This benefit, although with the purpose of keeping the employment levels, ended up reducing the wages of part of the workers, since it has as a basis of calculation in a

[5] Data from the Ministry of Health of Brazil: https://www.sanarmed.com/linha-do-tempo-do-coronavirus-no-brasil.

social assistance program called "unemployment insurance" [6] and not the actual remuneration of the employee.

This norm also provided for a "temporary job guarantee" for the employee who receives the "B. Emergencial" with a prohibition of layoffs. The art. 10° established that in the period of the reduction of working hours or in the period of the suspension of the employment contract, and after the re-establishment of the working hours and the closure of the suspension, for a period equivalent to that agreed for the reduction or suspension, layoffs and termination without just cause would be prohibited.

Thus, if the employee that had the employment contract suspended for 120 days[7], for example, during this period and in the 120 days following his return to work, he could not be laid off without just cause.

It happens that, despite establishing this prohibition of unfair dismissals, in the following first paragraph (article 10, §1), it is determined that dismissal without just cause is possible, establishing supplementary indemnity to the previous ones already provided for by law (mentioned in item precedent) and proportional to the period of contract reduction or suspension.

This indemnity is variable[8] according to the amount of time in which the workload reduction or suspension of the employment contract was determined, being at least 50% and at most 100% of the salary to which the employee would be entitled during the period of employment. stability.

The largest indemnity foreseen is for the situation of suspension of the employment contract or for the reduction of working hours equal to or greater than 70% of the total number of hours worked. In this case, if the employee had the contract

[6] According to art. 5 of Law 7.988/1990 unemployment insurance is paid in the following proportion: I - For salaries up to R$ 1.599,61, the average salary will be multiplied by the factor 0.8; II - From R$ 1.599,62 to R$ 2.666,29, the rule contained previously on "I" will apply, up to the limit of the previous item and, about the surplus value, the factor 0.5; III - Salaries above R$ 2.666,29, the benefit amount will be equal to R$ 1.813,03.

[7] According to the Law nº 10.422/2020 (articles 1 and 2) the proportional reduction of working hours and wages and the temporary suspension of the contract, can reach a maximum of 120 days.

[8] According to Art. 10, Paragraph 1 of Law 14020/2020, the indemnification will be: I - 50% (fifty percent) of the salary to which the employee would be entitled in the period of provisional guarantee in employment, in the hypothesis of reduction of working hours equal to or greater than 25% (twenty-five percent) and less than 50% (fifty percent);
II - 75% (seventy-five percent) of the salary to which the employee would be entitled during the period of provisional guarantee in employment, in the event of a reduction in the working houres and a salary equal to or greater than 50% (fifty percent) and less than 70% (seventy percent); or
III - 100% (one hundred percent) of the salary to which the employee would be entitled in the period of provisional guarantee in employment, in the hypotheses of reducing the working hours and salary in a percentage equal to or greater than 70% (seventy percent) or temporary suspension of the employment contract.

suspended for 120 days, for example, and was laid off without just cause on the first day after his return, he would be entitled to receive 100% of the salary due in the period of the "provisional guarantee on employment", which is, for the next 119 days.

Turns out that, as previously mentioned, the indemnity is calculated based on a social assistance program and not on the employee's real remuneration, which is why, in certain circumstances, it is not enough to support the worker.

It is understood that the legislator's option to create the possibility of indemnity for the dismissal without just cause, observes the constitutional principle of free enterprise. It happens that, the article 170, the CF/1988 determines that the economic order, founded on the valorization of human work and free enterprise, aims to ensure a dignified existence for all, according to the dictates of social justice.

In this way, the employer's potestative right to dismiss without just cause must be weighed, with the principles of human dignity (CF/1988, art. 1, III), of the social value of work (CF/1988, 1, IV) and non-discrimination (CF/1988, art. 3, IV).

Considering that work serves as a means of subsistence for citizens, as well as for their social and economic insertion in society, despite indemnity, the job termination in the midst of the greatest health crisis in the history of Brazil and at the moment that the worker was already weakened, precisely because he suffered a reduction in working hours or a suspension of the employment contract, affronts the dignity of the employee, protecting only the pecuniary effects of the dismissal, and not the constitutional right *to work* itself.

Furthermore, while guarantee the right to private property, the CF/ 988 (art. 5, XXIII) also provides for the observance of its "social function". The principle of the social function of property imposes on the owner, or whoever controls the company, the duty to exercise it for the benefit of others, and to not exercise it to the detriment of others[9]. This principle of the social function of the company imposes positive behavior, a performance of *doing* and not merely of *not doing*, of the owner of the property.

Thus, considering that the company is inserted in a social environment, as it depends on society to justify its existence, the business must constantly contribute with the community, contributing to the observance of the minimum precepts related to the dignity of the human person, which is why its freedom self-regulation should be limited to collaborate with the development of the entire community and not just its interests.

[9] GRAU, Eros Roberto. A ordem econômica na constituição de 1988: interpretação e crítica. 4. ed. São Paulo: Malheiros, 2000, p. 252.

By establishing the “job guarantee”, and subsequently allowing the dismissal through indemnity, the Federal Government failed to observe one of the basic principles of the employment relationship, which is the preference for “continuity of work”, or as said Alice Monteiro de Barros[10] "the preservation of employment, with the objective of providing economic security to workers”.

It is observed that the unemployment rate in Brazil has been growing, even before SARS-COV-2. From October to December 2019 quarter was 11%, raising in the January to March 2020 to the percentage 12.2%, according to official IBGE data. Thus, it is understood that it would be imperative to apply measures to maintain employment levels, and not to fixing indemnities, in view of the already existing difficulty to access the labor market, which will be expanded because of the pandemic.

From the above, it is understood that although the Brazilian legal system has created measures to discourage unfair dismissals, favoring to a certain extent the maintenance of employment over the free enterprise initiative, has been lost the opportunity to take more strict measures, in order to safeguard jobs.

The result of this choice, in addition to directly impacting the labor market, ends up having a ripple effect, directly damaging the livelihood of Brazilians, according to data from the research carried out by Action Aid Brazil, Friedrich Ebert Stiftung Brazil (FES Brazil) and Oxfam Brazil who point out that 19 million Brazilians went hungry in the months of October, November and December 2020, in the face of the new coronavirus pandemic.

Considering the continuance and aggravation of the SARS-VOC-2 health crisis in Brazil in 2021, it is expected that the legislative and executive powers will adopt more effective measures to safeguard employment relations, thus respecting the fundamental right to work enshrined in the Brazilian Constitution.

The redundancy regime in Italy

Among the measures implemented by the Italian legislator to deal with the economic and social effects of the pandemic due to the spread of the SARS-COV2 virus, which has hit the country hard since February 2020, there is a ban on collective redundancies and dismissals for justified objective reasons.

[10] BARROS, Alice Monteiro de. Curso de Direito do Trabalho. São Paulo: LTR, 2006. p. 174;

In the ordinary regime, collective layoffs can be adopted by the employer in the presence of two conditions, provided for by law 223/1991:

– the first occurs when the employer, who has already suspended the work with recourse to the extraordinary redundancy fund[11], deems he cannot restore or restructure the company;
– the second occurs when the employer, with more than 15 employees, dismisses at least 5 workers in a period of 120 days, due to a red
– uction or transformation of work, or when he intends to cease the activity.
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In both cases, the employer must follow a specific procedure that provides for prior information to the company union representatives and the most representative trade unions. The information must cover the reasons that prevent the adoption of alternative tools to layoffs and any measures planned to reduce the social impact. At the request of the union, a joint examination must follow, with the possibility of reaching an agreement, which identifies - among other things - the criteria for choosing the workers to be terminated in a manner other than those indicated by the law[12].

When the termination is ordered «for reasons relating to the production activity, the organization of work and the regular functioning of it», pursuant to art. 3 of the l. 604/1966, is considered a dismissal for justified objective reason.

In particular, the crisis of the company, the cessation of the activity or the loss of the duties to which the worker is assigned, without being possible to relocate him to other duties compatible with his level of employment, constitute a justified objective reason.

The 2012 reform[13] also included among the objective reasons the dismissal for exceeding the period of sick leave[14] and the dismissal for physical or psychological unfitness of the worker.

11 The extraordinary wage supplement (CIGS) allows the suspension or reduction of working activity - and of the related remuneration obligation for the company - in the presence of events directly attributable to the employer, even if, for the purposes of granting the treatment, the need remains for the situation legitimizing recourse to the institute to present the characteristics of transience and temporariness.
12 Articles 2, 3 and 41 of the Italian Constitution, which provide special protection for socially weaker workers, already intervened to limit the absolute freedom of the employer to select the employees to be terminated, while the law, l.223/1991, in art. 5 c. 1 establishes that the choice must be made in relation to the technical-productive and organizational needs of the company complex, in compliance with the criteria agreed in the collective bargain agreement and, failing that, in compliance with the criteria relating to family responsibilities, seniority and technical needs productive and organizational, in competition with each other.
13 L. 92/2012.
14 The sick-leave is the period of time during which the employment relationship is suspended due to the employee's illness. During the period of sick leave, governed by the civil code and collective agreements, the employer cannot dismiss his sick employee.

The reasons that integrate the justified objective reason are particularly relevant. In fact, in the absence of a justified objective reason, the employment termination is illegal, and the worker has the right to obtain the protections provided by law.

However, this system of guarantees has changed profoundly in recent years.

Until 2012, the illegality of dismissal for objective reasons was always sanctioned - for employment relationships falling within the scope of art. 18 of the Workers' Statute[15] - with mandatory reinstatement of the worker by the employer.

The 2012 labor market reform made a first, substantial modification to this sanctioning regime, introducing a discipline that modulates employer sanctions according to the severity of the defect that invalidates the dismissal, limiting reinstatement to a limited number of hypothesis[16].

This tendency to weaken the protection of workers reached its peak with the approval of Legislative Decree lgs. 23/2015, which introduced new rules to be applied to all workers hired from March 7, 2015 (date the decree went into effect).

The new regulation which continues to refer to workers employed in companies that exceed the numerical thresholds set by art. 18 of the l.300/1970, reduces even more the cases in which the judge can order reinstatement which can only take place if the lack of justification is ascertained for a reason consisting in the physical or mental disability of the worker.

Special discipline in response to the SARS-COV-2 pandemic

The Italian Constitution states that the Republic is founded on work (art. 1); recognizes the right to work for all citizens, and promotes the conditions that make this right effective (Article 4); protects work in all its forms and applications, (art. 35). At the same time, it sanctions the freedom of private economic initiative, which has the only constraint of not taking place in conflict with social utility or in a way that could damage

[15] The c. 8 of art. 18 of the l. 300/1970 defines the scope of application of the discipline (c.4-7) to the employer who employs more than 15 workers in the production unit, or more than 5 in the case of agricultural enterprises, or more than 60 employees in total. Below these thresholds, the milder protection regime provided for by art. 8 of the l. 604/1966, as replaced by art. 2 of Law 108/1990, which recognizes the unlawfully dismissed worker the only right to receive economic compensation.

[16] This hypothesis recurs, in the new art. 18 of law 300/1970, as amended by l. 92/2012:

– when it is ascertained «the manifest non-existence of the fact underlying the dismissal for justified objective reason»;
– in the event of unlawful dismissal motivated by the physical or mental unfitness of the worker;
– in the event of unlawful dismissal imposed during the period of conduct.

In all other cases, however, the unlawfully dismissed worker is entitled to exclusively economic protection.

security, freedom and human dignity (Article 41). The ongoing health and economic crisis has also prompted the Italian legislator to intervene with emergency legislation to stem the social risk due to job loss. Alongside a legislation to strengthen the social safety nets to compensate for the reductions in working hours caused by periods of closure and the drop in production[17], a much more restrictive measure has been used, the prohibition of layoffs. This rigid provision, introduced by art. 46 of the d.l. 18/2020, supplemented and amended by art. 80 of the d.l. 34/2020, precluded withdrawals for justified objective reasons and blocked collective dismissal procedures from March 17 to August 17, 2020. The legislator then returned to the matter several times and, although with art. 14 of the d.l. 104/2020 mitigated some effects, substantially confirmed the prohibition which, with the 2021 budgetary law, was extended to March 31, 2021 and most recently with the Legislative Decree. 41/2021 was extended until June 30, 2021 (in generalized form) and until October 31, 2021 for some sectors.

The first measure intervened in a clear manner in suspending the pending collective layoffs procedures initiated after February 23, 2020 (first day of the state of emergency declared by the Government) and in precluding them for 60 days from the date the decree went into effect. In addition, employers, regardless of the number of employees, were prohibited from terminating employees for justified objective reasons within the same 60-day period.

With the second intervention of May 2020 (d.l. 34/2020) the ban was extended for additional five months, and the ongoing layoff procedures for justified objective reason were also blocked. A further derogation regarding the deadlines was granted with respect to the possibility of revoking the dismissals for justified objective reasons which occurred from February 23, 2020 to March 17, 2020 provided that the employer simultaneously requested the wage supplement starting from the effective date of the dismissal. The consequent effect was the restoration of the employment relationship without interruption and without charges or penalties for the employer.

With the d.l. of August 2020 (104/2020) some greater freedom has been granted to companies. In fact, the suspensions of the layoffs have been made without prejudice to the dismissals motivated by the definitive cessation of the activity, provided that the transfer of the company or a branch of it does not occur, and the cases in which they were stipulated collective agreements, by the comparatively more representative trade unions

[17] Since March 2020, the Government and Parliament have issued numerous provisions that have allowed, in derogation, expanded and simplified, the use of social safety nets in the hypothesis of suspension or reduction of work activity due to events attributable to the epidemiological emergency from COVID-19. The INPS Circular 28/2021 provides a summary of the main provisions on social safety nets and income support measures provided for by the 2021 Budget Law (Law 178/2020).

in national level, to incentivize the termination of the employment relationship, with voluntary resignation by the workers, who are in any case granted with the unemployment benefits provided for by law[18].

Lastly, on March 22, 2021, the legislative decree was promulgated. 41/2021, which the term of validity of the prohibition of layoffs and suspensions has been moved to next June 30, 2021, while, starting from July 1st, 2021, the halt will remain in place for the sectors receiving the ordinary allowance and the special redundancy fund[19].

There was a strong and sometimes hard confrontation between the social partners, directly interested in the issues in question, and certainly the dispute could only start from the confines of the constitutional legitimacy of the measures adopted. There is no doubt that the intervention that the legislator has operated up to now has expanded some rights, sacrificing others, this was possible, in the silence of the Constitution, by reason of the proclamation of the emergency state provided by law 225/1992, as an assumption of fact was followed by a formal act containing a time limit. In this framework, a balance has developed between constitutionally guaranteed rights oriented towards the protection of a prevailing interest, that of the unity and indivisibility of the Republic, the protection of public health and the safety and security of workers[20]. On the other hand, the institution of the terms of these provisions is the guarantee that the recognition of the underlying rights has remained unaltered[21]. It now remains to understand what is the scenario to be faced and what further measures may be taken in the near future, when the state's intervention, on the threshold of the deadline, withdraws from the social relations of the country.

2 CONCLUSION

The impacts suffered by the business world with the sudden arrival of the coronavirus make countries feel compelled to create rules related to labor situations in an unimaginable pandemic context.

[18] Art. 1 of Legislative Decree 22/2015.
[19] The companies that from July 1, 2021 will be able to proceed with collective redundancies and for justified objective reasons are those companies that fall within the protections of the ordinary redundancy fund and which are indicated in art. 10 of the d. lgs. 148/2015.
[20] As per the sentence of the Constitutional Court 58/2018 which expressed the meaning of the private economic initiative of art. 41 of the Constitution can be limited when the safety of the worker is in danger.
[21] COSIO, Roberto. Il blocco dei licenziamenti al tempo del Covid -19. Tra Carte e Corti from Conversazioni sul Lavoro dal Convento di San Cerbone, p. 5.

This study demonstrated that although there is in Brazil a constitutional protection against layoffs without just cause, in view of the absence of rules that regulate this right, dismissal without motive is possible, upon payment of an indemnity.

In the face of the SARS-COV-2 pandemic and the exponential increase in unemployment, the Brazilian government opted to restrict the freedom of enterprise, determining the prohibition of layoffs without just cause for those who had suffered working hours reduction or suspension of the employment contract, due to the pandemic. However, a loophole was created in the law, to allow the dismissal, if there is additional compensation, which is criticized, for observing only the pecuniary effects of the redundancy, but not the fundamental right to work itself.

In Italy, a more protective legislation was observed, compared to Brazil, with respect to employment terminations, requiring the observance of objective motives, although there was an increase in the possibilities of dismissal after the labor reform that occurred in 2012.

Regarding the COVID pandemic, Italy has taken more severe measures. Alongside a legislation to strengthen the social safety nets to compensate for the reduction in working hours caused by periods of closure and the drop in production, a much more restrictive measure has been used, the prohibition of dismissals.

There was a strong and sometimes hard confrontation between the stakeholders involved and directly interested in the issues in question. A balance was reached between constitutionally guaranteed rights oriented towards the protection of a prevailing interest, that of the unity and indivisibility of the Republic, the protection of public health and the safety and security of workers.

With the evolution of the vaccination rollout plan (much more advanced in Italy than in Brazil) the scenario of “reopening” seems to be closer when the restrictive measures adopted in both countries regarding layoffs and terminations will be suspended. It is expected that the suspension of protective measures should be gradual and consistent with consolidated economic data, to provide more legal protection and certainty.

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