

**VIRTUAL EMPLOYEES AND THEIR RIGHTS:
THE ENFORCEMENT OF JUDGEMENTS THROUGH RECIPROCAL AGREEMENTS**

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Abstract

In this paper the definition of who is a virtual employee is analyzed. The applicability of the labor law to virtual employment is examined. In the field of labor law there are 2 types of contracts, namely the contract of service and the contract for services. Labor law applies mainly to a contract of service, where an employer employee relationship exists and does not apply when there is a contract for services which deals with the concept of independent contractor. In virtual employment an employee could work for an employer who is located in the same country as himself or he could work for an employer who lives in another country on the other side of the world. The importance of this distinction is that while an employer who is in the same country as his employee comes within the jurisdiction of the same laws and regulations as the other and if the virtual employee wants to take the employer to court it is a straightforward matter. However complications arise when the parties are living in different countries. This paper looks at reciprocal agreements and their application to the enforceability of judgments obtained by virtual employees against their overseas employers. Therefore it argues that if the employee's country has entered into a reciprocal agreement with the employer's country of origin, then there is a strong possibility that his judgment could be effectively enforced against his employer and he could obtain redress. The theoretical concept of reciprocal jurisdiction along with case law is discussed indicating in what instances this type of jurisdiction applies.

Key words

Virtual employment, reciprocal jurisdiction, virtual employee, labor laws

Hartman et al. (1992) states that there are number of issues faced in the workplace, due to increasing diversity in the work force, differing social forces (p. 35), and other changes to one's life style, that require managers to think again with regard to traditionally arranged work which includes telecommuting which has been created to handle ever complex issues pertaining to human resources. All over the world a new kind of employee is appearing in increasing numbers - the virtual employee. The advent of virtual employment has resulted in the creation of number of unique and interesting legal issues such as wage-and-hour compliance, holidays, leave, maternity leave, workers' compensation, and safety and health protection. Strategies & Giaoutzi virtual employment or telecommuting have been defined as "organizational work performed outside the normal organizational limits of space and time, supported by computer and communication technologies" (Stratigea & Giaoutzi, 2000, p. 332). Further according to Maher,

"Remote Employment has often been used interchangeably with the term telecommuting, telework, or work from home which are all terms that indicate making use of technological advances to work away from the employer's office or customer's location in a flexible work environment" (Maher, 2014, p. 160).

According to *McLennan* (2007) definition of a 'virtual' employee or worker requires one to understand that the word 'virtual' is based on the word virtue. The origin of this word can be traced to the Latin word 'vertus' and the French word 'vertu.' Vertus means trust or worth and

virtu means goodness or power. Virtue is a good work for us to use as the basis for how we want to describe the workers in the virtual world of work (McLennan, 2007, p. 13).

In brief, virtual or remote employment “is any working arrangement in which a worker performs some significant portion of his/her work at a fixed location other than an employer’s central office or plant – typically at the worker’s home” (Gregg, 2012 p17).

It must be noted however, that workplace flexibility does not mean simply giving an employee a laptop and a smart phone and sending them off to do their job. Careful thought and planning is required to determine the best approach to working in a regionally- or globally-distributed environment (Hampton, 2011, p. n.d.). While millions of employees still go to their offices and work 8 hours a day under the supervision of their employer and return home in the evening as their forefathers had done before them, during the last 10 to 15 years this traditional concept of the 9 to 5 employee has undergone a fundamental change. Now increasingly a new kind of employee is on the payroll of many companies. He does not come to work with the other employees nor does the employer ever meet him. He works for his employer from home, without ever visiting the office. He has set up his own office at home and uses a computer and communicates with his employer by email and also through the telephone as well as by Skype. The employer may have meetings with him through teleconferencing. This new kind of employee may be located a few kilometers or even a thousand kilometers away from his employer in a different part of the country. Apart from the above there may be such employees who are located in one country while their employer may be located in another country on the other side of the world.

These virtual employees and their name tag may tell us a great deal about who they are. Such employees may have once worked in an office but now they have decided to work for their employer from home for a variety of reasons. Many such employees like the flexibility that working from home gives them, along with the freedom to work when they want and how they want. They also like the fact that they do not have to work 8 hours in an office and are thus not under the eye of their employer and the fact that they do not have to travel to and fro to their employers office daily. Also, it gives an opportunity to have a satisfactory work life balance, for they are at home.

From the employers point of view, having virtual employees on one's payroll gives some distinct advantages. Many large companies having branches all over the world find this concept of virtual employment particularly attractive. They do not have to set up and maintain desks, chairs, office space, parking, restrooms or washrooms, office staff and office equipment, restaurants or canteens, and other necessities required for an office, vehicles and a supervisor or manager to manage an office if their employees are working on virtual mode. This may be considerably more economical for an organization in the long run for they are also saving on such additional expenses as salaries for a staff needed to run an office, rent, electricity, water, rates and taxes to the local council and other similar expenses. At the same time, virtual employees must see to it that they are treated the same way as non-virtual employees. When they join the organization, they must ensure that the terms and conditions of employment in the letter of appointment signed by them contains provisions pertaining to all important areas such as recruitment, wages and remuneration, times of work, leave, sick leave, maternity leave, overtime, terminal benefits, health and safety, holidays probation , termination and similar areas. This is because some employers tend to treat their virtual employees differently to their non-virtual

counterparts and sometimes attempt to deprive them of many of the rights and obligations due to them in an arbitrary manner.

There have been instances of virtual employees being fired or disciplined without a proper inquiry or not paid their due wages or remuneration or deprived of their leave, overtime, holidays and terminal benefits without justification (Wanasinghe, 2017). It is pertinent to consider the concept of wage theft in the USA which is the illegal refusal by an employer to pay their workers for all of the wages & benefits that is legally due to them. Though most employers play by the rules, others do not, probably motivated by fierce competition and higher profits. *Reich vs. Dept. of Conservation Natural Resources (1994)* and *Brennan vs. General Motors Corp. (1999)* is relevant here as it was held that even if an employee does not work on his employers premises but works from home , even then he has to be paid the minimum wage and his overtime just like for a normal employee. However most of these cases involve virtual employees working at call centers or contact centers.

A good example is the unreported case filed by *Brandon Felczer and others Vs. Apple Inc* (Apple case) where, in 2011, an *employment* class action case was filed against Apple Computers alleging that Apple had been classifying at-home call center employees as independent contractors illegally to avoid paying them their share of certain taxes and other business related expenses. In this case, Apple employed workers to answer calls from its customers with regard to questions regarding billing and technical support but had classified the employees as independent contractors in order to avoid paying them their dues pertaining to regular and overtime hours worked by them as well as making certain payments to the government with regard to the cost of the employer's share of tax payments for income for various taxes and insurance. It was alleged that in order to avoid the payment of these legally due costs, these centre

employees working from home had to each form what is called a separate Virtual Services Corporation in order to protect it from liability for its business related expenses. In this case these agreements were referred to as yellow dog contracts. (Poeter , 2014)

The number of class action lawsuits being filed by such employees for allegedly not paying them their due wages by their employers is going up and increasingly these cases are paying off. These employees argue that they should be paid their wages and overtime for time spent doing mandatory preparation before & after work. They state that some employers require their employees to be at their computers prior to their shift start, that is, before their “official work day” actually begins and they are allowed to log out of their computer systems only a certain period has lapsed after the “official” end of their shifts. These cases are significant as they clearly indicate that virtual employees are fighting back with regard to what they feel are attempts to exploit and cheat them out of their lawful dues. However, it must be noted that all these cases were filed by virtual employees who were working for employers in the same country. It would be different if these employers were overseas. Then there would have to be a reciprocal agreement between the countries concerned if such cases are to have any kind of success.

Apart from the above, there have been instances of virtual employees being treated as independent contractors by their employers in order to deprive them of their legal rights. At this juncture it is important to understand the difference between a contract of service and contract for service because the labor law, within which virtual employment falls, apply only to those contracts which are deemed to be contracts of service. The labor law does not apply to those employees who are in a contract for service. In labor law any person who is coming within a contract for service is often referred to as an independent contractor. Thus it must be found out

at the very outset what kind of contract exists between the parties in order to determine whether the above laws apply to them or not.

Type of Contracts Virtual Employees Enter Into

To determine what type of contract exists between the parties concerned, the criteria laid down in the landmark case of *Ready Mixed Concrete Vs Minister of Pensions* (1963) in the UK becomes relevant. This case laid down the requirements for determining whether a relationship existing between two parties was that of a master and servant. This case gives the key indicators as to whether or not a contract is 'for services' i.e. provided by an independent contractor or 'of services' i.e. an employment contract. They are mutuality of obligation, personal service, control and whether other provisions are consistent with a contract of employment, which means, the right to select another for work, the right to give instructions and orders to another who is expected to follow them and the right to control or command another as to the manner in which the work should be done. It could be said that the above control test is the most important of all the criteria to decide whether a master-servant relationship exists. The next criterion is the right of dismissal and payment of remuneration to the servant by his master. It could be argued that the employer employee relationship could be compared to the above master servant relationship to some extent as hereto all the above criteria could be deemed applicable accept possibly the control test. It could be said that in employment of this nature the employee may be possessing higher levels of competence, experience, qualifications and ability as compared to a servant.

Cherry (2009) states that whether a worker is deemed to be an employee or an independent contractor is determined according to a multifactor test which looks into the fact of the relationship

existing between the parties. This test applies agency law and case law and sees whether the worker has independent judgment and control over his work, the manner in which he performs his work and whether it is customary to use workers for that kind of work. This position is also stated by Leberstein and Ruckelshaus (2006).

Cherry goes onto to say that the control test is well known for establishing the status of the worker, namely whether he is an employee or an independent contractor and that the courts will look into the economic reality of the relationship in order to decide the extent of the dependency of the worker on his employee in order to finally decide whether the relationship is that of an employer employee or that of an independent contractor (Cherry 2009). The concept of disguised employment relationships applies here. De Stefano (2016) states that this is a significant component of the virtual workforce. Adams and Deakin (2014) along with Berg and De Stefano (2015) state that unless such workers establish that they are employees they run the risk of being categorized as independent contractors. De Stefano (2015) states that some part time workers and marginal part timers particularly run the risk of being classified as independent contractors as they cannot be distinguished from casual and on demand workers. Bergvall-Kareborn and Howcroft (2013), inform that another feature of these disguised employment relationships is that sometimes it might be difficult to ascertain exactly who their real employer is as there may be a number of middlemen and intermediaries involved in such transactions which can increase the number of actors involved in the process along with a breaking of the work into segments given out to various workers which are later collected together to form a whole. This kind of complex, multilayered transactions can create issues in deciding the allocation of rights, responsibilities and duties with the result that the workers who are disguised and not easily identifiable, may not be able to fall within the protection of the law applicable to employees. Lord Denning in *Beloff vs. Pressdram* (1973) held that the

greater the skill the servant possesses the less control the master has over him. As detailed below, it could be argued that this ruling applies equally well to the employer-employee relationship.

Legal Remedies available to Virtual Employees

Perritt (1998) states that jurisdiction is usually divided into three types: "Prescriptive jurisdiction acts as a limit on legislative power. A sovereign State, legitimately may apply its legal norms to conduct as it has jurisdiction to prescribe. Adjudicative jurisdiction acts as a limit judicial power. When a State has jurisdiction to adjudicate, its courts structure can resolve disputes. Enforcement jurisdiction acts as a limit to executive power. When a state has jurisdiction to enforce, its police and customs authorities may take steps to restrict the flow of trade, detain individuals, and affect property interests.

Historically, the biggest limiter of jurisdiction was created by the difficulty of enforcing a judgment against someone or something over which the court has no control (Perritt, 1998) However, a sovereign can extend its prescriptive jurisdiction beyond its enforcement jurisdiction in two ways. That is, it can make representations to other sovereigns to enforce its judgments and, where it does not possess adjudicative jurisdiction, it can ask other sovereigns to apply its laws to various controversial issues. However, both courts and sovereigns, have by now accepted the fact that there are limits on applying law to controversies which have no connection to the sovereign, to get over this, a choice of law rules and regulations has been developed to decide which sovereign's laws to apply. Norms of international law and international treaties are governed by choice of law and the enforcement of judgments, a result of the development of international law is the concept of respecting the sovereignty of other nations. This has become an important governing principle

in limiting prescriptive jurisdiction and preventing overreaching in this area (Perritt, 1998)

For maximum effectiveness, jurisdiction over foreign individuals and entities must rely on international treaties or reciprocal enforcement agreements these agreements often look at the level of commitment the foreign entity has within the sovereign country or area in order to decide if the sovereign has a legitimate interest (Perritt, 1998)

A landmark international case involving the website Yahoo and the selling of Nazi memorabilia auctions on its site is of relevance here. A French court ruled that the sales of such items, violated French law as it could be accessed by French Internet users. The court gave Yahoo time of 90 days to block French users or face a fine of \$13,000 per day after discovering that it was technically possible to block 70 to 90 percent of French users from using the website (*Yahoo! Inc. v. La Ligue Contre La Racisme et L'Antisemitisme (LICRA) and L'Union Des Etudiants Juifs de France (UEJF)* (2006). However, from a practical point of view, legal experts warned the French court could not enforce the ruling, since Yahoo has no assets in France although it does have an interest in Yahoo-France. Yahoo is already contesting the ruling in the U.S. A in the Federal District Court in San Jose, California., stating that the French order cannot be enforced for various reasons, including coming into conflict with the First Amendment of the U S Constitution. However it has taken a positive step in the right direction as it voluntarily banned the sale of all hate group related merchandise.

There are however methods of enforcing foreign judgments which are complicated, time consuming and expensive. These methods vary substantially depending on whether you choose between "civil law ' and "common law " jurisdictions. The United Kingdom (UK), and commonwealth countries

follow the English common law, while most European and some Asian countries follow the civil law. Foreign judgments usually cannot be enforced in countries following the civil law but in England they have allowed this for the last 350 years or more. The above laws apply to such commonwealth countries such as Australia, New Zealand, India, Pakistan, Malaysia, Singapore, Hong Kong and Sri Lanka. Hong Kong has allowed foreign judgments from EU countries such as Belgium, France, Germany, Italy, Austria, the Netherlands and even Israel to be enforced within its jurisdiction (McDermott, 1989). The applicability of Hong Kong law in this sphere was discussed in *Caffal Bros Forest Products Inc. vs. Chie Ku-Yin t/a Sin Lie International Enterprises* (1987). In Singapore only judgments from countries which provides for the reciprocal enforcement of judgments can be registered and enforced there. These are usually commonwealth countries (Country Report (2015), Ministry of Law Singapore www.mlaw.gov.sg). In New Zealand foreign judgments can be enforced if they are from a list of commonwealth countries and are done under the auspices of the Judicature Act 1908 (Law Commission Report, New Zealand, 1996). Apart from the above, foreign judgments are allowed if there is a reciprocal agreement under the Reciprocal Enforcement of Judgments Act 1934 in New Zealand and enforceable under the Judicature Act 1908 provided the judgment is for a sum of money. If the judgment is from any other country or it is from outside the Commonwealth country such as USA it can be enforced under common law in New Zealand.

The ease of enforcing foreign judgments in England depends mainly where the judgment was delivered. The English Administration of Justice Act 1920 allowed for the enforcement of judgments issuing from all commonwealth countries by all other commonwealth courts by registering the judgment with the relevant enforcing court. However, even where reciprocity exists,

it must be kept in mind that English courts will refuse to enforce a foreign judgment in the following instances (1) Where the foreign court lacked personal jurisdiction over the party under English jurisdiction law (2) the party was denied due process (3) the judgment was obtained by fraud or (4) enforcement would be contrary to public policy (s.4 of the Foreign Judgments (Reciprocal Enforcement) Act 193)

All this indicates that it is possible in certain circumstances for even a virtual employee to take his foreign based employer to court by filing a case against him in the virtual employees own country and getting the judgment enforced through the courts in the employers own country though as can be seen, it is a complex process. This indicates that if a virtual employee who has an issue with his employer who is based in the EU, he might be able, in certain circumstances to obtain redress in court, provided there is a reciprocal agreement between his own country and the EU. Further, if his employer is based in the U K or a commonwealth country then he might be able again to file action in his own country and get the judgment enforced in that foreign court provided there is a treaty or reciprocal agreement in existence between the 2 countries. It is in the English legal system that the most promising development of the law pertaining to virtual employees has taken place, as can be seen below.

There are number of English cases which apply to issue of jurisdiction as regards unfair dismissal of virtual employees. In Lodge Vs Dignity & Choice in Dying and others (2014) an Australian had come to the UK to work in a company there. Her contract was governed by the law of England and Wales. She subsequently moved back to Australia with the consent of the company and continued to work for it for a period of over 10 years as a virtual employee. She later resigned and brought a claim of constructive unfair dismissal and whistle blowing in London against her employer. While the

original Tribunal held against her, in appeal it held that her status was similar to that of an expatriate employee working abroad for her parent company and that she had returned to Australia with the consent of her employer. She therefore came within the law of England and Wales even though she was in Australia at the relevant period of time and her claim was upheld. In arriving at this judgment, the court considered *Serco Limited Vs Lawson* (2006) where the House of Lords stated that there were 4 categories of employees who could claim protection from unfair dismissal under the English Law. They are standard employees, peripatetic employees, expatriate employees and other employees who do not come within the other three categories but who have an equally strong connection with the United Kingdom. Another English case the court relied on was *Financial Times Ltd Vs Bishop* (2003) (EAT) where an employee had been posted from London to San Francisco USA, and the court held that even though the employee had been working in San Francisco for over three years, where unfair dismissal was concerned, he was deemed to be still coming within English Law rather than American Law. A third English case deemed relevant was *Raval Vs. Halliburton Manufacturing and Services Limited* (2012) where the Supreme Court held that it could be found out under which category an employee came within as stated in the Serco case above even where an employee's place of work is not within the U K, by asking themselves, is the connection with the U K sufficiently strong enough for Parliament to refer such an employee's claim to the relevant Tribunal.

These cases indicate that in the United Kingdom they appear to be a marked shift in the way jurisdiction is applied to virtual employees working overseas for a British Company. These cases clearly show that the English Courts see nothing wrong in applying their own local laws to a virtual employee working for them on the other side of the world. This trend is very encouraging as the same approach could be theoretically applied to any virtual employee

working for a company located overseas. The only issue here is many countries, especially developing countries where many foreign local employees are drawn from, don't have local labor laws nor any decided local cases as authority for such a radical step to be taken. In view of the above, as a practical remedy, the courts in the country where the virtual employee is living could apply laws pertaining to jurisdiction in the same manner as the UK courts have done in such instances or they could pass the necessary labor legislation to give redress to virtual employees. At this juncture this jurisdictional issue is looked at from the view point of USA law as it is the country where the largest number of virtual employees reside and where e-commerce transactions are the highest. In the U.S., each of the 50 states has its own substantive commercial laws and court systems. Each state has a law called a "long-arm statute" which defines the persons and the entities over which the local courts have jurisdiction. Thus, judgments in one State are enforceable in all the others. While this makes jurisdiction over residents of another state practical, states are limited in their jurisdictional reach. In *International Shoe Company v. Washington*, (1945) the Supreme Court interpreted the due process clause in the constitution to mean that each State court can only exercise personal jurisdiction over a non-resident defendant if the defendant has had sufficient "minimum contacts" with the state to justify jurisdiction. Thus, a corporation from another state that sells products directly within another state is "purposefully availing" itself of the laws of the other state, which is sufficient contact to justify jurisdiction. However, in *World-Wide Volkswagen Corp. v. Woodson* (1980), it was held that a state cannot exercise jurisdiction over an out-of-state corporation that sells goods that unforeseeably end up in the state. A website operator will not usually limit its viewers or customers to those in a certain state. A significant amount of cases have addressed this issue, with all of them following the judgment in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* (1997). In practice, courts have examined a variety of factors, including

the number of hits a website gets from users within the state or the presence of an e-mail link or toll-free number on the site. The judicial trend here is that the courts will not assume jurisdiction even when some sales have occurred. This was followed in *Winfield Collection Ltd. v. McCauley* (2000) which held that two sales to state residents via eBay's online auction was not sufficient to establish jurisdiction since sales resulted from the random bids of parties beyond the defendant's control and not from him purposely targeting state residents. The court also held that the act of merely maintaining a website with interactive features does not by itself subject the site's sponsor to jurisdiction anywhere in the United States. A useful case here is *Mink v. AAAA Dev. LLC* (1999) which held that there was no jurisdiction where defendant's website allowed viewers to send email but did not allow them to enter into contracts with defendant online. Customers were asked to print order forms and mail or fax them to the defendant. Companies that do not wish to be subject to jurisdiction in foreign states and countries should consider limiting their websites to passive activity. Exposure to foreign jurisdiction can be limited by including forum selection and choice of law clauses, but their enforceability is highly questionable. At this juncture the position taken up by the U S Supreme Court in the *Vimar Seguros case* (1995) is very significant. In this case Justice Kennedy was of the view that in this day and age, the court could not insist that all disputes must be resolved only by our laws and our courts as businesses once local now operate globally and the expansion of business and industry will not be encouraged if the old fashioned concepts are adhered to. The Court appeared to be attempting to open the door to the concept of local businesses coming within the jurisdiction of other countries, however, from a practical point of view, there is little evidence to indicate that positive steps have been taken legally in this area.

It appears that jurisdiction issues as regards the laws of the 50 States in USA appear to be more or less settled. However it appears that the law has not progressed far enough to accommodate a claim made by a virtual employee living overseas against his employer, a company located in the USA, unless there is a reciprocal jurisdiction agreement between the U S A and the virtual employees own country.

It is seen that international labor law at the moment has no remedy to offer this kind of situation as the ILO has not entered into any treaty to deal with situations where a virtual employee intends to sue his employer located in another country to obtain legal redress. Further there are no treaties or conventions dealing with the terms and conditions of virtual employment entered into by parties living in different countries.

Conclusion and recommendations

This paper analyzed discussed who is considered a virtual employee and the advantages and disadvantages of being a virtual employee are looked into. The applicability of the labor law to virtual employment was examined. In the field of labor law there are 2 kinds of contracts, namely a contract of service and a contract for services. The labor law applies mainly to a contract of service, where an employer employee relationship exists and does not apply to a contract for services which deals with the concept of independent contractor. Finally, the paper looked at the legal benefits available for virtual employees. It is observed that where both the employer and the virtual employee are from the same country, an employee can sue his employer on any issue pertaining to his employment. This is made easier by the fact that the employee would have been issued a letter of appointment by his employer. However if the 2 parties are from 2 different countries then unless there is a reciprocal agreement in force between the 2 countries, it will be very difficult for the employee to get his judgment enforced in the employers country. It all

depends on the 2 countries in question. If for example, the employer is living in the UK and the employee hails from a commonwealth country, then as there may be a reciprocal agreement in force, it might be possible for the employee to get his judgment enforced in the UK against his employer. In the event the employer is living in the U S A, if such an agreement exists between the employee's country and the USA, then there is a way out for the employee. In view of the above, as more and more virtual employees are entering the workplace, the time has come to make sweeping changes in the prevailing law to accommodate their requirements and solve such problems as the above.

In order to do this, all countries concerned must with the assistance and guidance of the International Labor Organization (ILO) enter into treaties or reciprocal agreements so that the enforcing of foreign judgments is made a routine legal procedure available to all. Further, it is recommended that since the labor laws in many countries are old fashioned and many years out of date and not attuned to the requirements of the modern labor scenario, especially in many Asian countries, that the necessary legislation be enacted so that such ' new' employees as virtual employees are recognized and given the necessary protection by the law.

Specifically, the authors argue that:

1. There should be international agreements that protect the rights and ensure the obligations of virtual employees by international bodies.
2. An international Organization like International Labour Organization (ILO) should come forward to facilitate the introduction of treaties in this regard. The ILO could create an authority having international jurisdiction to look into and offer solutions to such labour issues as the above and it should lay down laws that would be followed by all countries employing virtual employees.

3. Individual countries can become signatories to bi-lateral and multi-lateral agreements/memorandum of understandings (MOU) entered into with other countries where virtual employees are rendering their services, to safeguard their interests.
4. These agreements should specify what remedies are available for employees if they are unlawfully terminated to protect job security. In this regard the government can study in depth the reciprocal agreements that exist in some countries, such as the United Kingdom (U K), the U S A , the European Union (EU) and certain commonwealth counties such as Australia, New Zealand, Singapore, Hong Kong and some African countries, so that we should also enter into such agreements with various countries which would then allow an aggrieved virtual employee to file action against his foreign employer in our local courts and then get judgement enforced in the employers country in his favour.

In the end whole the laws have always lagged behind the changing nature of employment, laws are often the response to changes, whether it is proactive or reactive.

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