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Is a penalty clause valid that requires a sportsperson to return severance pay if he fails to fulfill his obligation not to provide services?

Player's individual training sessions during lockdown do not count as work time if there is no order or monitoring by the club

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Galicia High Court confers validity on a clause, entered into by the parties in relation to the sportsperson's unjustified dismissal, and stating that if the sportsperson were to join the coaching staff of a named coach within a specified time period, all severance pay would have to be returned plus an additional payment received for signing that clause

Is a penalty clause valid that requires a sportsperson to return severance pay if he fails to fulfill his obligation not to provide services?

Galicia high court judgment of March 25, 2021

Ángel Olmedo Jiménez

Issue under debate

Club and sportsperson agreed, in relation to the termination of his contract, which was held to be unjustified, that he would receive the severance pay contained in his contract, unless, within a given period, he were to form part of the coaching staff of a named coach, in which case his severance would be zero euros.

In reply to an appeal, the superior court legally assessed the validity of that clause and the consequences after the athlete ultimately failed to fulfill the obligation set out in the agreement.

The agreement specified the consequences in the event of termination, in particular a golden handshake clause following termination of the employment relationship for any reason, with the exception of justified dismissal

Facts of interest

A fitness coach and a club signed a contract, under Royal Decree 1006/1985, for a term spanning two seasons.

The agreement specified the consequences in the event of termination, in particular a golden handshake clause following termination of the employment relationship for any reason, with the exception of justified dismissal.

Before the end of the first season, both parties agreed to terminate their relationship. In the settlement agreement, the

club recognized the existence of unjustified dismissal and undertook to pay a given sum in three installments, "as long as the fitness coach does not form part of the coaching team of [XXXX] for the 2018/2019 season. If he forms part of that coaching team, his severance pay will be zero euros".

The fitness coach enrolled in July 2018 to work with the Spanish national football team, having as its trainer the person named in the agreement, so the club claimed repayment of the severance pay he had already received.

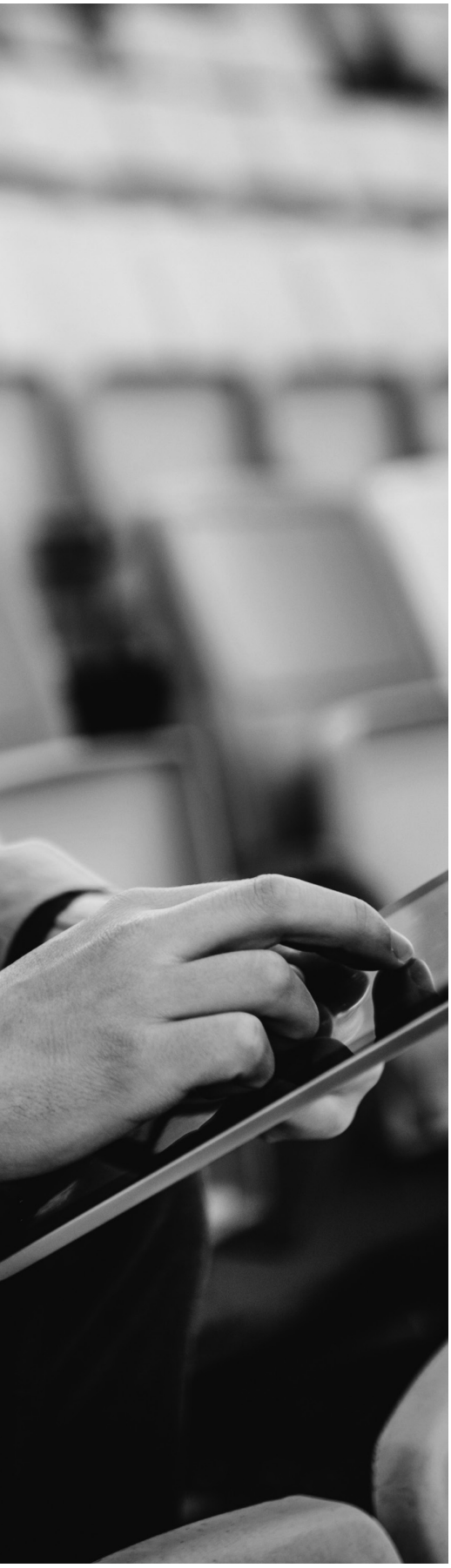
The labor court upheld the club's claim and ordered the fitness coach to return the amount he had already received in respect of severance pay.

Judicial interpretation

The fitness coach filed an appeal to a superior court in the labor jurisdiction in which a number of particularly important issues were examined.

The first question raised was whether the termination agreement was null and void based on three reasons:

- The possible inclusion of a non-compete covenant (by preventing the trainer from forming part of the coaching staff of a named coach).
- The specified sum was lower than the statutory minimum amounting to 2 monthly payments per year of service as determined in article 15 of Royal Decree 1006/1985.
- The fitness coach did not breach the covenant, because he "worked with" and not "for" that coach.



The court held that the clause entered into between the parties cannot be said to amount to a post-contractual non-compete covenant, because in the court's view its intention was for the fitness coach not to form part of the team coach's staff, and therefore it did not prevent the fitness coach from working with another Spanish or foreign team. On this point, the ruling held that the purpose of the covenant is reasonable in that its sought aim is for "the structure of XXXX's coaching team [not] to be dismantled due to the worker's private interests by leaving to join another coaching team".

It was not accepted either that they had agreed to a severance payment below the statutory amount because the fitness coach received the statutory minimum plus an additional payment for the covenant not to form part in the following season of the coaching staff of the trainer concerned.

Additionally, the judgment determines that the "zero severance" clause is not illegal because it is a type of penalty clause for the event that was ultimately seen to take place: the trainer's failure to fulfill the agreed requirement.

Lastly, the ruling found that the purpose of the covenant was not tied to the person receiving the services from the team, instead to the fitness coach's relationship with the named coach, in other words, that it sought to bar the fitness coach from joining the coaching staff that the trainer may put together in the future.

For the reasons explained, the appeal was dismissed and the fitness coach's obligation to return the received amount of severance pay was confirmed.

The court held that the clause entered into between the parties cannot be said to amount to a post-contractual non-compete covenant, because in the court's view its intention was for the fitness coach not to form part of the team coach's staff, and therefore it did not prevent the fitness coach from working with another Spanish or foreign team

Player's individual training sessions during lockdown do not count as work time if there is no order or monitoring by the club

Andalucía High Court holds that athlete's training sessions during COVID-19 lockdown and while on an ERTE temporary layoff due to force majeure events do not count as actual hours worked, due to absence of proof of a direct order by the club to the football player regarding his tasks.

Andalucía high court judgment (Granada Chamber) of March 11, 2021

Ángel Olmedo Jiménez

Issue under debate

At issue was the correct use of the temporary layoff due to force majeure events, and also whether the football player's training sessions during lockdown as described above could be classed as actual hours works.

Facts of interest

The player, a professional footballer, had signed a contract for one season.

In March 2020, due to the COVID outbreak, the government halted all official tournaments and the Spanish football association recommended suspension of all collective training sessions. All training sessions stopped until June 2020.

The club filed an application for an ERTE temporary layoff due to force majeure events, which was granted by the labor authority, in the absence of an express decision.

During the suspension of all collective training sessions, the player engaged in training sessions at his home, without there being any record of a specific order by his team, or any monitoring of those activities.

The labor court dismissed the worker's claim and the player lodged an appeal against that decision, which was examined by the Andalucía High Court.

Judicial interpretation

The ruling tackles two important legal issues: (i) one related to the lawfulness of the ERTE temporary layoff due to force majeure events authorized for the club and the fulfillment of its obligations under that arrangement and (ii) another concerning whether the individual training sessions completed by the player during lockdown could count as working hours.

On the first issue, the judgment supports the labor court's conclusion, by underlining that the ERTE temporary layoff was allowed, in the absence of an express decision, by the labor authority, and due to the evidence on record that the club notified the player and his fellow players of that application.

Secondly, the court confirmed the labor court's decision on the nonexistence of hours worked by the player during lockdown.

The judgment accepted that, because evidence had not been provided that the club ordered those training sessions, or even that it had done a minimum amount of monitoring of them, the sessions have to be regarded as falling outside working hours and as voluntary activities by the athlete.

For all of these reasons, the appeal was dismissed and the lawfulness of the club's actions from the standpoint of the rules on ERTE temporary layoffs due to force majeure events was confirmed.

The judgment accepted that, because evidence had not been provided that the club ordered those training sessions, or even that it had done a minimum amount of monitoring of them, the sessions have to be regarded as falling outside working hours and as voluntary activities by the athlete

NEWS

Sports Business Administration Program kicks off

The official start of the Sports Business Administration Program (SBA) at Centro de Estudios Garrigues took place on November 11 at an event attended by Félix Plaza, chairman of Centro de Estudios Garrigues and director of the program.

Félix Plaza and Ángel Olmedo, singled out in 13th edition of Best Lawyers

Félix Plaza and Ángel Olmedo, co-directors of Sports & Entertainment at Garrigues, were singled out in the 13th edition of Best Lawyers as top lawyers in the industry.

For this edition, Best Lawyers surveyed the nation's legal community to identify the top 2 percent of practicing lawyers in Spain. The guide partnered with Confilegal to prepare the rankings.

Resolutions

1. Financial assistance provided by Spanish Olympic Committee, Spanish Triathlon Association and Spanish Olympic Sports Association (ADO) Program is not subject to VAT, and is eligible for personal income tax relief in certain circumstances

DGT resolution V1384-21 of May 13, 2021

The issue submitted for resolution concerned the VAT and personal income tax arising on financial assistance provided by the Spanish Olympic Committee, the Spanish Triathlon Association and the Spanish Olympic Sports Association (ADO) Program to high level athletes to fund their training for the Tokyo Olympics.

In relation to VAT, the provision of scholarships or assistance by a public entity to achieve its public interest purposes and unrelated to any specific obligation does not qualify, in these circumstances, as a transaction subject to VAT.

The DGT also concluded in relation to personal income tax that, after classifying that assistance as income from professional activities, and considering article 7 of the Personal Income Tax Law and article 4 of the Personal Income Tax Regulations, which determine to be exempt "assistance with a financial component to high level athletes", it may be regarded that the exemption is applicable to financial assistance for "sports training and coaching" delivered to high level athletes and which are included in the ordinary or extraordinary amounts approved by the National Sports Council (CSD), or funded directly or indirectly by the Spanish Olympic Sports Association, by the Spanish Olympic Committee or by the Spanish Paralympic Committee.

2. Whether services provided by professional trainers to a sports club are VAT taxable depends on whether the trainers are regarded as traders or professionals

DGT resolution V1748-21 of June 4, 2021

The DGT examined VAT on services provided by professional trainers to a sports club.

In its view, sport training services are subject to VAT where the individuals providing them to the club have an intention to participate in the production of goods and services, which determines that a business or professional activity is carried on for VAT purposes.

Where the trainers are regarded as traders for VAT purposes they are subject to all the substantive and procedural obligations associated with VAT. Namely, they have to be entered on the taxpayer register for traders, professionals and withholding agents, and issue invoices for every transaction they make, even if they are exempt.

3. Federative license fees paid by members of autonomous community sports associations are not eligible for personal income tax credit for gifts due to not being voluntary or being intended as a gift

DGT resolution V1787-21 of June 9, 2021

The issue submitted for resolution was whether the amounts paid to sports associations by their members in respect of annual federative licenses are eligible for the personal income tax credit for gifts.

Under Law 49/2002, they have to be pure and simple irrevocable gifts or contributions, which do not amount to present or future consideration for a good or service. Additionally, undver an existing principle determined by the DGT, those fees cannot be treated as contributions in the form of gifts because they are not voluntary and they are not intended as a gift. In the described case, in which the requesting entity receives from its members an annual sum which includes the payment of insurance for the athlete and a contribution in respect of an annual membership fee that entitles the member to participate in the association's activities and in competitions: (i) the federative license fee is not voluntary because it needs to be paid for the person to be classed as member, and (ii) nor is it intended as a gift because the license has specific rights associated with it.

The DGT therefore replied that the paid sums do not give entitlement to the personal income tax credit for gifts, and tax has to be withheld from them at the applicable rate in each case, unless the relationship between entity and volunteers is for a shorter period than a year, in which case the 2% minimum withholding rate applies

4. DGT analyzes tax on economic activities classifications in which graduates in physical education and physical activity and sport sciences may be registered

DGT resolution V2104-21 of July 12, 2021

A taxpayer requested clarification of the captions in which to classify the activities carried on by the professionals at an entity, who are graduates in physical education and physical activity and sport sciences (sport and physical education instructors).

The DGT replied that there are three available options:

- -Section two "Professional activities", group 82 for "Education professionals", within which teaching activities carried on by individuals on an individual and personal basis are classified by teaching levels, and these activities include those of sport and physical education professionals.
- Section three "Artistic activities", group 04 for "Sports-related activities" is the category for graduates in physical education and in physical activity and sport sciences who carry on activities more directly related to sport.

Lastly, the DGT concluded that to classify them in the related category or failing that the category closest to the activities that

they actually carry out, the existing circumstances in the activity concerned in each specific case must be taken into account.

5. Expenses incurred to purchase supplies to prevent the spread of COVID-19 among people working on an audiovisual production in Spain cannot be included in the tax credit base for film investments

DGT resolution V2155-21 of July 28, 2021, and resolution V2300-21 of August 16, 2021

The requesting entity, a Spanish production house registered on the register of film production companies held by the Ministry of Education, Culture and Sport, was going to take charge of executive production of a foreign audiovisual work that would be filmed in Spain and would enable the creation of a physical medium before its audiovisual production. The expenses it was going to incur for these purposes included purchasing face masks, hand gel, gloves and protective screens, along with COVID-19 tests. It asked whether those expenses could be included in the tax credit base for investments in film productions, audiovisual series and live shows of performing arts and music.

DGT concluded that the expenses could not be included in the base for that tax credit due to not being directly related to the production, and instead directed at avoiding the risk of the spread of the virus.

6. Analysis of the effects for the tax on economic activities of the activity carried on by a tennis coach who is to hire a number of workers

DGT resolution V2376-21 of August 20, 2021

The requesting person, a tennis coach registered under caption 042 in section three of the tax classifications: "Players, coaches and trainers for tennis and golf", who was going to hire workers to carry out his activity, asked whether he should be registered under a different category of the tax on economic activities classifications.

Based on article 79.1 of the Revised Local Finances Law, the DGT concluded that the coach would have to be registered:

- Under caption 042 in section three of the classifications, if the activity is not carried on in an establishment or premises owned by him and used for the activity.
- Under caption 967.2 in section one of the classifications: "Schools and sport instruction services", if he carries on the activity at a specific establishment or set of premises that he owns.

7. Travel expense payments to volunteers by not-for-profit sports entities may be classified as salary income for personal income tax purposes subject to withholding

DGT resolution V2366-21 of August 20, 2021

The DGT analyzed the personal income tax treatment of payments for travel or other expenses, in a fixed amount per day of services, paid by the not-for-profit sports entity.

Because the DGT had determined in similar cases that an "expense on behalf of a third party" could be seen to exist, it concluded that, if the entity makes available to volunteers the resources they need to get to the place where they have to perform their activities, in other words, provides their means of transport, and accommodation if necessary, there would not be any income for the volunteers, because no private gain would exist for them.

If, however, the entity reimburses volunteers for expenses incurred to travel to the place where they are going to provide their services and the volunteers do not provide proof that the reimbursements strictly pay for those expenses, or the entity pays them a sum which they are free to decide how to allocate, then a taxable amount of monetary income exists for personal income tax purposes which would have to be classified as salary income, a classification which means it is subject to withholding, as provided in article 75.1.a) of the Personal Income Tax Regulations.

Judgments and decisions

1. Valencian High Court concludes that concession for sports center is not unviable due to lower revenues caused by opening second sports center in the same town

Valencia high court judgment of May 18, 2021

The Valencian High Court upheld an appeal lodged by the local council against a judgment upholding the appeal filed by a concession holder against denial of a petition made to that council to rebalance the finances of the public work concession agreement relating to sports facilities between 2012 and 2015.

The concession holder requested compensation equal to the difference between the operating revenues that would have arisen had it achieved 70% of the occupancy charted in the financial viability study and the revenues obtained from actual occupancy, due to the opening of a second sports center in a more central area of town.

At the heart of the debate was whether the necessary adverse effect of the second concession on the concession holder for the first sports center actually caused an upset in the financial balance. The high court's view was that it had not been proven that the reduction to revenues was the triggering element for the concession becoming unviable.

The court concluded that the analysis should cover a longer period that does not coincide with the worst years of the economic crisis and examine the viability of the concession from the standpoint of both the financial and economic study by the local council and the plan filed by the company to obtain the administrative concession, and on that basis it had to uphold the appeal lodged by the council.

2. Penalty cannot be imposed on taxpayer for items the authorities neither notified nor adjusted

National appellate court judgment of September 29, 2021

An appeal was filed against TEAC's decision partly upholding the joined claims filed by a company holding a concession for a number of box seats at the stadium of a well-known football club against several decisions issuing assessments and imposing penalties in respect of VAT, related to the deduction of input VAT on the provision of box seats and VIP tickets.

Supporting its decision on a recent judgment, the National Appellate Court rejected the plaintiff's claim concerning the ability to deduct input VAT. In relation to the decisions imposing penalties, however, the National Appellate court held that the way in which the tax authorities' power to impose penalties is defined for pursuing behavior that shows a greater degree of illegality requires the necessary notification at the time they were examined, and in this case it was made difficult for the taxpayer to learn of this illegal infringement of tax law, because the authorities made no objection when they examined it.

The National Appellate Court concluded accordingly that the appeal needed to be upheld partly by voiding the challenged decisions that related to penalties.

3. Court confirms lawfulness of penalty imposed on football club for infringement of the law against violence, racism, xenophobia and intolerance in sport, due to having given favorable treatment to a violent group of fans

National appellate court judgment of October 6, 2021

An appeal for judicial review was filed against the decision by the Secretary of State for Security, dismissing an appeal in relation to a penalty imposed on a football club for infringement of Law 19/2007, against violence, racism, xenophobia and intolerance in sport, due to allowing entry to the stadium of a group of radical/violent fans.

The appellant alleged that the administrative decisions had not been substantiated, to which the National Appellate Court concluded that all the objectives sought by the requirement for substantiation of decisions, which are even greater if they involve the imposition of penalties, had been fulfilled sufficiently in the case under examination, because the facts and legal grounds on which the decision is based were known with the required level of detail, and therefore the interested party was able to refute them.

The National Appellate Court therefore confirmed that the infringement had been evidenced. Put concisely, it held that, even if it is materially impossible to find in the law with absolute precision the facts declared to be an infringement, the simple absence of any essential element of the definition would be a reason for not recognizing that the act matches that set out in the law, which does not happen in this case, in which the appeal for judicial review has to be dismissed and the penalty held to be lawful.

4. Advertising sponsorships are a supply of services where the foundation has not exercised public powers or prerogatives

Supreme court judgment of October 26, 2021

The Supreme Court held that the core element of the dispute was the need to determine whether or not the activities carried on by athletes and clubs, by displaying at sporting events the names of a foundation and its sponsors, is a VAT taxable supply of services and whether, reciprocally, the amounts paid by that foundation to those athletes and clubs were really an amount of consideration.

It is inferable from CJEU case law that the key element is determining the existence of reciprocal consideration, and accordingly to rule out a taxable supply for VAT purposes, the lack of clarity must concern the supply of the service and the reciprocal consideration. The Supreme Court concluded therefore that the contribution of funds by the foundation may be classed as consideration.

Based on all the comments made above, the court held that the legal transactions concluded between a foundation in the public sector entrusted with the task of encouraging sport and certain sports entities and athletes who agreed to display the foundation's logo in exchange for a sum of money, may amount to a "supply of services for consideration" where the foundation has not exercised public powers or prerogatives, and the lower court judgment had to be set aside and overturned due to not recognizing the chargeable event for VAT purposes in legal transactions relating to "advertising sponsorship".

5. Reduced VAT rate applicable to sales of tickets and passes for members of football club competing in Segunda División B

TEAR of Cataluña Decision of June 28, 2021

A number of provisional assessment decisions were notified in which the tax authorities held to be unjustified the reduced VAT rate charged on sales of tickets and passes to members of a club competing in Segunda División B, by arguing that they did not fulfill the requirements to be classed as an amateur event.

The Catalan TEAR brought to bear the DGT's findings, in resolution V0359-19 of February 20, 2019, to the effect that the category of the competition should be determined by reference to the specific legislation on the sport, and the responsibility for classifying a sport as professional lies with the National Sports Council (CSD).

Based on the arguments submitted, taking the view that, under the applicable legislation, the competition in which appellant participated cannot be classified within the category of professional sport, the 10% reduced rate

is applicable to sales of tickets and passes, under the Spanish VAT Law.

6. If income from rights of publicity licensing cannot be included in taxable income under "85/15" rule the legislation on controlled transactions between the footballer and the licensing entity does not have to be applied

TEAC decision of November 23, 2021

The issue concerned whether, where income from rights of publicity licensing cannot be included in a footballer's taxable income for personal income tax purposes due to exceeding the 85% threshold of salary income plus the aggregate income obtained from licensing the rights by the licensee, the legislation on controlled transactions has to be applied or not to the rights of publicity licensing between the footballer and the licensee.

In the TEAR's judgment, the legislation on controlled transactions did not have to be applied because allowing this would be mocking the spirit of the law and breaching the principles of legal certainty and specificity.

The appellant by contrast did consider that the legislation was applicable by arguing that (i) the principle of specificity does not apply, because we are not dealing with two rules that are incompatible with each other, instead with two separate rules with different purposes, (ii) the legislation on controlled transactions does not contain any exemption where income has to be recognized in respect of rights of publicity, and (iii) the specific article of the Personal Income Tax Law relating to rights of publicity licensing does not define any incompatibility between both sets of rules.

TEAC held, however, that it is a special tax regime that is implicitly going to prevent the legislation on controlled transactions from applying to the rights of publicity licensing, unless it is sought to alter its nature and deprive it of content. The tribunal therefore concluded that, in cases where income does not need to be recognized for rights of publicity licensing due to fulfillment of the requirement set out in the law, the legislation on controlled transactions does not have to be applied.

Legislation

1. Law on doping in sport approved

On December 28, the Spanish parliament approved Organic Law 11/2021 of December 28, 2021, on combating doping in sport.

The coming into force of the new law on December 30, 2021 introduced changes to the rules, which have separated anti-doping powers from health protection powers. For this reason, the Spanish Anti-Doping Agency (Agencia Estatal Comisión Española para la Lucha Antidopaje en el Deporte) has been created.

Among other new provisions, it introduces changes to the procedures for doping tests and the related inspection activities, puts penalty rules in place at three levels and establishes personal data processing rules.

2. Council of Ministers gives green light to Preliminary Bill for Sport Law

The Council of Ministers, on a motion by the Ministry of Culture and Sport, approved the Preliminary Bill for the Sport Law on December 17, 2021.

This is draft legislation produced through the National Sports Council (CSD) and drawn up with the participation of the various ministries linked to sports activities, autonomous community governments, sport associations, labor unions and the various public and private players in the Spanish sport ecosystem.

3. National Sports Council updates list of substances and methods prohibited in sport

In a decision adopted on November 25, 2021 by the Chairperson-in-Office of the National Sports Council, the list of substances and methods prohibited in sport has been adapted to the list adopted in the UNESCO International Convention against Doping in Sport.

4. Contract with National Sports Council's Leisure and Culture Team approved

In a decision adopted on October 4, 2021, the Spanish Agency for Health Protection in Sport approved the contract with the Leisure and Culture Team at the National Sports Council, for increasing sport and joint activities among the agency's employees and their family members.

5. Contract with Club Deporte Global for race in support of science

In a decision dated October 5, 2021, the Chairperson-in-Office at the National Scientific Research Council approved the Contract with Club Deporte Global to join forces for organization of Carrera de la Ciencia (Race for Science).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