Federal Court of Appeal | Cour d'appel fédérale

Date: 20190423

Docket: A-422-17

Citation: 2019 FCA 87

CORAM: **WEBB J.A.**
NEAR J.A.
LASKIN J.A.

BETWEEN:

KIMBERLY Y. FAWCETT

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on February 12, 2019.

Judgment delivered at Ottawa, Ontario, on April 23, 2019.

REASONS FOR JUDGMENT BY: LASKIN J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

[1] The appellant, Captain Kimberly Y. Fawcett, is a member of the Canadian Armed Forces. On a February morning in 2006, Captain Fawcett received permission from her immediate supervisor to be late for work so that she could take her son to daycare. This task ordinarily fell to her husband, also a member of the Forces. However, her husband was called to training early that morning in preparation for imminent deployment. Captain Fawcett advised her supervisor

that she was executing her "family care plan," a plan for attending to family care needs in the event of deployment. Unfortunately, while driving to daycare, Captain Fawcett was involved in a tragic motor vehicle accident. Her son was killed, and she suffered severe injuries that necessitated among other things the amputation of a leg above the knee.

[2] When a member of the Forces suffers a serious injury, other than one received in action, articles 21.46 and 21.47 of the *Queen's Regulations and Orders* (QR&O) require the member's commanding officer to order a summary investigation, or convene a board of inquiry, to determine the cause and contributing factors of the injury, as well as whether the member was on duty at the time of injury, and whether the injury was attributable to military service. At the relevant time, the findings of a summary investigation were made with reference to Canadian Forces Administrative Order 24-6, "Investigation of Injuries or Death" (CFAO 24-6), which gave guidance on the terms "on duty" and "attributable to military service" for the purposes of chapter 21 of the QR&O.

[3] A summary investigation into Captain Fawcett's injuries was ordered, and a report issued. The report concluded among other things that she was on duty at the time of the accident, but that her injuries were not attributable to military service. The report was forwarded to the Director Casualty Support and Administration, who approved its findings, with one exception: he concluded that Captain Fawcett was not on duty at the time of the accident. Shortly afterwards, Captain Fawcett's application for a disability award was denied by Veterans Affairs Canada on the basis that her injury was not "service-related," as defined in the *Veterans Well-being Act*, S.C. 2005, c. 21.

[4] In June 2009, on the understanding that the denial was based on the findings in the summary investigation report as approved, Captain Fawcett submitted a grievance under section 29 of the *National Defence Act*, R.S.C. 1985, c. N-5. She requested findings that she was on duty at the time of the accident, and that her injuries were attributable to military service. Section 29.11 of the *National Defence Act* designates the Chief of the Defence Staff – who, by subsection 18(1) of the Act, is "charged with the control and administration of the Canadian Forces" – as the final authority in the grievance process.

[5] In September 2011, Captain Fawcett's grievance was denied by the Director General, Canadian Forces Grievance Authority, on behalf of the CDS. That decision was set aside on judicial review for reasons of procedural fairness: *Fawcett v. Canada (Attorney General)*, 2012 FC 750. Her grievance was again denied in April 2015, and she again sought judicial review. Her application was granted on consent, based on deficiencies in the record, and the grievance again remitted for redetermination by the CDS.

[6] Before the CDS, Captain Fawcett maintained that she was on duty at the time of the accident – that, because the change to her family's childcare routine was a result of a military requirement, her execution of her family care plan was also a military requirement. However, in a detailed decision, the CDS concluded that Captain Fawcett's family care plan was not a "regulated military duty," but a "contingency plan put in place by a parent to ensure her family's care when she is away for service reasons."

[7] The CDS reached this conclusion after considering a report of the House of Commons Standing Committee on National Defence and Veterans Affairs, which had recommended that "all military personnel with children be required to prepare a plan according to predetermined criteria to ensure that whenever they deploy, their child care requirements will be met." He also considered Defence Administrative Order and Directive 5044-1, "Family Care Plan Declaration" (DAOD 5044-1), the order following on this recommendation and requiring Forces members to complete a family care plan declaration in the prescribed form. (I note that while there is no dispute that Captain Fawcett completed a family care plan declaration prior to the accident, her declaration was not in the record before the Federal Court, as it was at some point misplaced by her unit.)

[8] The CDS found that the purpose of a family care plan declaration, as set out in DAOD 5044-1, is to "assist members with planning for family care needs in the event of an absence for duty reasons," and to "apprise commanding officers […] of potential difficulties regarding family care needs that may be encountered by some members in the event of an absence for duty reasons." He found that Forces members were ordered to complete family care plan declarations to "ensure that their family is cared for during the time the member is away for duty reason[s]," and that members would be asked to execute their family care plans only if they were ordered away from their families to attend to military duties. He noted also that the Forces had no control over or responsibility for the content of a member's family care plan, which was up to the individual member to determine.

[9] The CDS further concluded that, on the morning of the accident, Captain Fawcett was not serving any "military-business purpose." In so doing, he considered Captain Fawcett's argument that she and her husband had a "unit" family care plan as a married service couple. He found that DAOD 5044-1 does not contemplate "unit" family care plans, since each member of a married service couple is required to complete a separate family care plan declaration. Based on his interpretation of DAOD 5044-1, the CDS found that, on the morning of the accident, Captain Fawcett was away from military duty to attend to her family responsibilities, not away from family responsibilities to attend to military duty. He therefore concluded that she was not "executing" her family care plan at the relevant time, and that in the circumstances her supervisor could not have lawfully ordered her to do so.

[10] The CDS relied on his analysis of DAOD 5044-1 in proceeding to conclude that Captain Fawcett's injuries were not attributable to military service. He noted that, under CFAO 24-6, an injury was attributable to military service where it "arose out of" or was "directly connected with" service. But he found that because Captain Fawcett's assumption of childcare responsibility on the morning of the accident did not amount to a "regulated military duty," her injury was caused by personal factors not linked to military service. The CDS therefore denied Captain Fawcett's grievance. In doing so, he noted that he had arrived at the same conclusion as the Military Grievances External Review Committee, an independent tribunal that, as set out in subsection 29.2(1) of the *National Defence Act*, provides its findings and recommendations on military grievances to the CDS and the Forces member who submitted the grievance.

[11] Captain Fawcett, then self-represented, sought judicial review of the CDS's decision in the Federal Court. The parties agreed that the applicable standard of review was reasonableness. The application judge found that the CDS's decision was reasonable and accordingly dismissed the application: *Fawcett v. Canada (Attorney General)*, 2017 FC 1071 (McDonald J.). Captain Fawcett now appeals to this Court.

[12] On appeal from a decision of the Federal Court in an application for judicial review, this Court's task is twofold: to determine first, whether the Federal Court identified the correct standard of review – correctness or reasonableness – and second, whether it properly applied that standard: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559. As a practical matter, this entails "stepping into the shoes" of the Federal Court judge and focusing on the administrative decision – here, the decision of the CDS.

[13] Captain Fawcett recognizes that the CDS is presumptively owed deference in his interpretation of his "home statute," or "statutes closely connected to [his] function, with which [he] will have particular familiarity": *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at para. 27, [2018] 2 S.C.R. 230; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 34, [2011] 3 S.C.R. 654. Both the Federal Court and this Court have applied the deferential standard of reasonableness to grievance decisions of the CDS: see, for example, *François v. Canada (Attorney General)*, 2017 FC 154 at para. 32; *Zimmerman v. Canada (Attorney General)*, 2009 FC 1298 at paras. 23-25, 358 F.T.R. 139, affirmed on this point 2011 FCA 43 at para. 21, 415

N.R. 13. As the Federal Court stated in *Zimmerman* (at para. 23), "[i]n deciding a grievance, the CDS interprets and applies policies and rules that he promulgated or for which he is responsible."

[14] However, Captain Fawcett devotes a very substantial proportion of her submissions to the proposition that the presumption of deference is rebutted in this case, so that the CDS's interpretation of CFAO 24-6 is subject to correctness review. The proper standard of review is a question of law; the parties' agreement in the Federal Court on the reasonableness standard is therefore not determinative: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54 at para. 6, [2004] 3 S.C.R. 152. In this Court, Captain Fawcett makes four main arguments for correctness review. She further submits that, because correctness review is appropriate, this Court must conduct the grievance analysis afresh.

[15] I am not persuaded that even if correctness review of the CDS's interpretation of CFAO 24-6 were appropriate, it would necessarily follow that this Court, should, in effect, re-decide the grievance. That overall exercise is one not of law but of mixed fact and law, reviewable for reasonableness: *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44 at para. 45, [2013] 3 S.C.R. 53. However, it is not necessary to address this issue, because in my view Captain Fawcett's arguments in favour of correctness review must fail.

[16] Her first, and principal, argument is that the jurisprudence has already satisfactorily determined that correctness applies. She relies for this argument on the Supreme Court's statement in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 62, [2008] 1 S.C.R. 190, that a

court need not conduct its own standard of review analysis if "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." The prior determination to which she refers is that of this Court in *Cole v. Canada (Attorney General)*, 2015 FCA 119, [2016] 1 F.C.R. 173, which in turn relied on this Court's decision in *Canada (Attorney General) v. Frye*, 2005 FCA 264, 338 N.R. 382. She submits that *Cole* has satisfactorily determined that the standard of review is correctness for the "category of question" comprising questions of "causal connectivity," such as whether her injuries were attributable to military service.

[17] In *Cole*, the decision under review was that of the Veterans Review and Appeal Board (VRAB) refusing the application of a former member of the Forces for a pension under paragraph 21(2)(*a*) of the *Pension Act*, R.S.C. 1985, c. P-6. That provision grants entitlement to a pension "where a member of the forces suffers disability resulting from," among other things, "an injury […] that arose out of or was directly connected with […] military service." Captain Fawcett points out that this language is very similar to that found in CFAO 24-6, which states (at para. 30) that "[a]s a general rule, 'attributable to military service' is interpreted as meaning 'arose out of or was directly connected with service.'" A majority of the Court in *Cole* held that the level of causal connection required under paragraph 21(2)(*a*) was subject to review on the correctness standard.

[18] In my view, *Cole* does not determine the standard of review applicable here. This is so for several reasons.

[19] First, the standard of review "cannot be seen to be satisfactorily established if 'the relevant precedents appear to be inconsistent with recent developments in the common law principles of judicial review'": *Teva Canada Limited v. Pfizer Canada Inc.*, 2016 FCA 248 at para. 46, [2017] 3 F.C.R. 80, quoting from *Agraira* at para. 48. *Cole* pre-dates the Supreme Court's strong re-affirmation in *Canadian Human Rights Commission* (at para. 27) of the presumption of reasonableness for home statute interpretation.

[20] Second, assuming that *Cole* nonetheless satisfactorily determines the standard of review for interpreting questions of "causal connectivity" as they arise under pension legislation, this does not mean that it does so for such questions arising under CFAO 24-6. The CDS and the VRAB operate within distinct statutory schemes.

[21] CFAO 24-6 lists (at para. 17) four purposes of a military investigation. While the first is to "enable the Canadian Pension Commission [the predecessor to the VRAB in this context] to determine whether there is entitlement to a pension under the Pension Act" – CFAO 24-6 was issued in 1975, before the enactment of the *Veterans Well-being Act*, under which Captain Fawcett applied for a disability award – the other three purposes do not relate to pension entitlement, and are internal to the military. They are determining liability for injury or death, indicating whether disciplinary or administrative action is required, and assisting in determining whether or not there may be a claim by or against the Crown. By contrast, section 2.1 of the *Veterans Well-being Act* expressly states that the purpose of that legislation is to "recognize and fulfil the obligation of the people and Government of Canada to show just and due appreciation to members and veterans for their service to Canada," including by "providing services,

assistance and compensation to members and veterans who have been injured or have died as a result of military service […].”

[22] Further, the VRAB is not bound by the findings of the summary inquiry (or the CDS’s determination in a grievance) on the question of attributability. CFAO 24-6 expressly states (at para. 27) that “the Canadian Pension Commission is not bound to follow the findings of the investigation, and makes its own decision based on [t]he evidence […].” Section 18 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18, now provides that the VRAB has “full and exclusive jurisdiction to hear, determine and deal with all applications for review that may be made to the Board under the *Pension Act* or the *Veterans Well-being Act*, and all matters related to those applications.”

[23] A further distinguishing factor is that CFAO 24-6 contains no requirement that its terms be liberally construed and interpreted. By contrast, section 2 of the *Pension Act* expressly requires a liberal construction and interpretation of the provisions of that statute:

2 The provisions of this Act shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled or have died as a result of military service, and to their dependants, may be fulfilled.	**2** Les dispositions de la présente loi s’interprètent d’une façon libérale afin de donner effet à l’obligation reconnue du peuple canadien et du gouvernement du Canada d’indemniser les membres des forces qui sont devenus invalides ou sont décédés par suite de leur service militaire, ainsi que les personnes à leur charge.

[24] A similar requirement is set out in section 3 of the *Veterans Review and Appeal Board Act*, applicable to any statutes and regulations "conferring or imposing jurisdiction, powers, duties or functions on the Board":

3 The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.	**3** Les dispositions de la présente loi et de toute autre loi fédérale, ainsi que de leurs règlements, qui établissent la compétence du Tribunal ou lui confèrent des pouvoirs et fonctions doivent s'interpréter de façon large, compte tenu des obligations que le peuple et le gouvernement du Canada reconnaissent avoir à l'égard de ceux qui ont si bien servi leur pays et des personnes à leur charge.

[25] The *Veterans Well-being Act*, for its part, has since 2015 contained the following provision concerning its purpose and interpretation:

2.1 The purpose of this Act is to recognize and fulfil the obligation of the people and Government of Canada to show just and due appreciation to members and veterans for their service to Canada. This obligation includes providing services, assistance and compensation to members and veterans who have been injured or have died as a result of military service and extends to their spouses or common-law partners or survivors and orphans. This Act shall be liberally interpreted so that the recognized obligation may be fulfilled.	**2.1** La présente loi a pour objet de reconnaître et d'honorer l'obligation du peuple canadien et du gouvernement du Canada de rendre un hommage grandement mérité aux militaires et vétérans pour leur dévouement envers le Canada, obligation qui vise notamment la fourniture de services, d'assistance et de mesures d'indemnisation à ceux qui ont été blessés par suite de leur service militaire et à leur époux ou conjoint de fait ainsi qu'au survivant et aux orphelins de ceux qui sont décédés par suite de leur service militaire. Elle s'interprète de façon libérale afin de donner effet à cette obligation reconnue.

[26] We have been referred to no comparable requirements in any statutory provisions, regulations, or orders governing the finding of a military investigation on attributability. This means that the question of attributability to be decided by the CDS and the question of causation to be decided under pension legislation are different in a significant respect. In his decision on the grievance (at 6, 12), the CDS noted that the CFAO 24-6 did not include a liberal construction and interpretation provision applicable to attributability determinations, and that the analyses in *Cole* and *Frye*, while helpful, were therefore not determinative of the attributability issue that he had to decide.

[27] Captain Fawcett's counsel argued at the hearing that "arose out of" as it appears in CFAO 24-6 must still be interpreted liberally, relying on *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405 at para. 21, 127 D.L.R. (4th) 618, and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 36, 154 D.L.R. (4th) 193. In my view, *Amos* does not assist – it instructs only that "arose out of" has a broader meaning than "caused by." *Rizzo Shoes* is also not apposite: while it holds that "benefits-conferring legislation" should be interpreted in a "broad and generous manner," in my view CFAO 24-6 is not "benefits-conferring legislation" of the kind to which the case refers. It does not itself confer benefits, and as already noted, the VRAB is not bound by a decision rendered under it, but is free to interpret its home statutes in a way that gives full effect to their benefits-conferring purpose.

[28] Captain Fawcett's second argument for correctness is based on the Supreme Court's statement in *Dunsmuir* (at para. 60) that this standard should apply to questions of law that are "both of central importance to the legal system as a whole and outside the adjudicator's

specialized area of expertise." Captain Fawcett argues that, even if *Cole* has not directly determined the applicable standard of review, the statement in *Cole* that the discernment of "degrees of causal connection" raises a question in this category should apply with equal force to the questions of law of this nature before the CDS.

[29] The Supreme Court recently re-emphasized, in *Canadian Human Rights Commission* (at para. 42), that both prerequisites for inclusion in this category – central importance to the legal system and absence of specialized expertise – must be met for the correctness standard to apply. It noted that it has "repeatedly rejected a liberal application of this category." It also stated (at para. 43) that the mere fact that other tribunals may decide similar questions does not detract from a decision-maker's own expertise in its home statute.

[30] In my view, legal questions decided by the CDS in interpreting CFAO 24-6 do not come within this category. Even if the meaning of "on duty" and "attributable to military service" as they appear in CFAO 24-6 involves questions of central importance to the legal system as a whole, the CDS undoubtedly has expertise in interpreting these terms. This expertise arises both from his role in the control and administration of the Forces, including his authority to issue CFAOs and DAODs, and his designation as final authority in the grievance process. His ability to refer a grievance to the Military Grievances External Review Committee and to obtain its findings and recommendations adds to his institutional expertise. As the analysis in *Canadian Human Rights Commission* indicates, the fact that the VRAB may consider similar issues does not detract from the CDS's own expertise in what must be considered a home statute.

[31] As a third argument for a correctness standard of review, Captain Fawcett's counsel submitted, for the first time in oral argument, that the interpretation of CFAO 24-6 falls into the exception identified in *Dunsmuir* (at para. 61) for questions involving the "jurisdictional lines between two or more competing specialized tribunals." The submission is that in this case the jurisdictional lines between the CDS and the VRAB are "blurred," and that this "blurring" is sufficient to engage the exception. This argument is based on the following chain of reasoning: determinations of attributability under CFAO 24-6 are solely for the purpose of entitlement under the *Pension Act* or *Veterans Well-being Act*; in distinguishing *Cole* and *Frye*, the CDS effectively determined that CFAO 24-6's attributability provisions need not be liberally construed; the CDS thus effectively made a determination under the *Veterans Review and Appeal Board Act* that CFAO 24-6 is not captured by section 3 of that Act; and this determination binds the VRAB.

[32] I find this reasoning very difficult to follow, and do not accept this submission. It mischaracterizes both the nature and the impact of the CDS's determinations.

[33] As already discussed, the determinations to be made under CFAO 24-6 have four discrete purposes; they are not limited to pension entitlement. There is also nothing to support the contention that the CDS's interpretations somehow bind the VRAB. As already noted, CFAO 24-6 expressly leaves it to pension authorities to determine pension entitlement, and the VRAB is by statute required to make its own determinations.

[34] In any event, the "jurisdictional lines" exception applies only when there are "competing specialized tribunals" – when the question is which of two or more tribunals has jurisdiction over an issue, or whether they have concurrent jurisdiction: see *Hebron v. University of Saskatchewan*, 2015 SKCA 91 at para. 47, 465 Sask. R. 161; *Walsh v. Mobile Oil Canada*, 2013 ABCA 238 at para. 83, 553 A.R. 360. There is no "competition" in this case. The CDS had jurisdiction to determine attributability under CFAO 24-6. The VRAB has jurisdiction to determine attributability for purposes of Captain Fawcett's entitlement to a disability award, taking into account the findings made under CFAO 24-6.

[35] Again for the first time in oral argument, Captain Fawcett's counsel submitted as her fourth argument for correctness review that the statements in paragraph 50 of *Dunsmuir* call for application of the correctness standard to the CDS's determinations. There the Supreme Court, having discussed the rationale for and characteristics of the deference that reasonableness review requires, stated that "the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law."

[36] In my view, Captain Fawcett's argument rests on a misunderstanding of this passage in *Dunsmuir*. The passage explains the policies underlying the application of the correctness standard to certain questions of law; it does not create a distinct exception to reasonableness review. The possibility that different decision-makers will arrive at different conclusions on the same or similar issues does not by itself require correctness review. Indeed, reasonableness review is "'based on the idea that there might be multiple valid interpretations of a statutory

provision or answers to a legal dispute' such that 'courts ought not to interfere where the tribunal's decision is rationally supported'": *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 at para. 39, [2011] 1 S.C.R. 160, quoting from *Dunsmuir* at para. 41.

[37] This argument too fails to rebut the presumption of reasonableness. The Federal Court correctly determined the standard of review.

[38] The remaining question, then, is whether the CDS's conclusions were reasonable. In my view, the Federal Court made no error in determining that they were.

[39] Captain Fawcett submits that the decision of the Federal Court in her first application for judicial review – of the grievance decision of the Director General, Canadian Forces Grievance Authority, on behalf of the CDS – must be taken as establishing that the CDS's decision was unreasonable. In that case the Federal Court, having determined that the grievance decision should be set aside for procedural unfairness, went on (at paras. 29-31) to express the view that the analysis of attributability in the grievance decision was unreasonable.

[40] I would not give effect to this submission. The Federal Court's comments were expressly stated to be unnecessary for the decision of the case. The result of the application was that the matter was referred back for reconsideration, without conditions or directions. The Court's comments could not bind a subsequent decision-maker in the grievance process, let alone the Federal Court and this Court in reviewing a subsequent decision.

[41] As the Federal Court pointed out in the decision now under appeal (at paras. 39 and following of its reasons), here the CDS specifically referred, in coming to his finding that Captain Fawcett was not on duty at the time of the accident, to the guidance on "duty" in CFAO 24-6. In his consideration of the "duty" issue he then took into account the text, context, and purpose of DAOD 5044-1 and the nature of a family care plan. Similarly, as the Federal Court observed (at paras. 45 and following), the CDS came to his conclusion on attributability having regard to the explanation of the term in CFAO 24-6, the decisions in *Cole* and *Frye*, and his finding as to the relationship between family responsibilities and military duty.

[42] The CDS's detailed reasons exhibit justification, transparency and intelligibility. His decision, in my view, falls within the legally and factually defensible range of possible, acceptable outcomes. The standard of reasonableness is therefore met: see *Dunsmuir* at para. 47.

[43] Captain Fawcett's counsel expressed concern during the hearing that a finding of reasonableness on judicial review of the CDS's decision would effectively preclude a determination in her favour by the VRAB. Having regard to the differences between the regimes in which the CDS and the VRAB operate as I have outlined them, I disagree with this submission. If the VRAB improperly fetters its discretion by treating the CDS's findings as dispositive, that can be addressed on judicial review of the VRAB's decision.

[44] I would accordingly dismiss this appeal. The respondent does not seek costs, and I would not award them.

"J.B. Laskin"

J.A.

“I agree.
Wyman W. Webb J.A.”

“I agree.
D. G. Near J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

(APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE McDONALD DATED NOVEMBER 27, 2017, DOCKET NUMBER: T-2187-16)

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DATED:	APRIL 23, 2019

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