Federal Court  Cour fédérale

Date: 20151029

Docket: T-2627-14

Citation: 2015 FC 1196

Ottawa, Ontario, October 29, 2015

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

TANIA ZULKOSKEY

Applicant

and

CANADA (MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT)

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review by Ms. Tania Zulkoskey [the Applicant] of a decision of the Canadian Human Rights Commission [CHRC or Commission] dated November 12, 2014, deciding not to deal with her human rights complaint on the basis that it was "vexatious" within the meaning of paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA* or the *Act*]. Her complaint argues that providing a single set of Employment Insurance [EI] parental benefits to parents of twins is discriminatory under the *CHRA*.

I. Background

[2] The Applicant and her spouse paid EI premiums for many years. In 2008, the Applicant became pregnant through artificial insemination. She applied and was approved for EI sickness and maternity benefits in June 2009. On July 10, 2009, she gave birth to twins.

[3] In a letter dated July 22, 2009, the Applicant requested that she be permitted to collect 15 weeks of maternity benefits and have the remaining 35 weeks of parental benefits transferred to her spouse. The request was approved.

[4] On September 29, 2009, the Applicant and her spouse requested by letter that they both receive 35 weeks of EI parental benefits. The EI Commission denied her claim on the basis that her spouse had already been awarded the maximum EI parental benefits under the *Employment Insurance Act*, SC 1996, c 23 [*EI Act*], which provides one set of benefits per pregnancy.

[5] The Applicant appealed this decision to the Board of Referees [the Board], which was denied on June 15, 2010, and then further to the Office of the Umpire [the Umpire]. The question at these appeals was interpretive: whether the Applicant was entitled to parental benefits under the *EI Act* or not.

[6] Upon consent of all parties, the Applicant's appeal to the Umpire, along with a number of similar appeals, was stayed pending the final outcome of *Martin v Canada (Attorney General)*, 2013 FCA 15 [*Martin*], as they all shared a common question of law; whether parents of

multiple-child pregnancies or adoptions were only entitled to 35 weeks of benefits per pregnancy or adoption, rather than 35 weeks per child.

[7] Mr. Martin, a parent to twins born in 2009, requested and was denied EI parental benefits beyond those granted to his spouse. Mr. Martin had gone through the same appeals process as the Applicant, and was unsuccessful on his two grounds of appeal on judicial review at the Federal Court of Appeal [FCA]. The FCA determined that the impugned *EI Act* provisions award 35 weeks per single pregnancy or multiple-adoption and do not provide for an additional set of benefits in the case of twins or multiples. They further found that these provisions are not discriminatory under subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11) [the *Charter*]. The Supreme Court denied leave to appeal on June 27, 2013.

[8] Initially, the Applicant had proposed that the result and reasons in *Martin* be binding on her case, as her appeal "arises from virtually the same set of facts" as *Martin* and seeks the same relief. The Umpire did not adopt this proposition, but simply granted the stay without further conditions, stating that "[o]nce the Martin case has been finally determined, [the Applicant] will have the opportunity to take the appropriate legal steps".

[9] All appeals before the Umpire were transferred to the new Social Security Tribunal, Appeal Division [SST-AD]. On September 25, 2014, the SST-AD dismissed all outstanding appeals stayed pending the outcome in *Martin*, stating that the issue of parental benefits and multiple-child pregnancies or adoptions under the *EI Act* was now settled law.

[10] The Applicant did not seek judicial review of the SST-AD's decision.

[11] On October 10, 2013, the Applicant filed a human rights complaint with the CHRC, alleging that the one-benefit-per-birth cap under the *EI Act* was discriminatory on the basis of family status under the *CHRA*.

[12] The CHRC requested that the Applicant provide submissions regarding whether paragraph 41(1)(d) of the *CHRA* applied [the Position Letter]. This provision directs that the Commission is not to deal with a complaint that is "trivial, frivolous, vexatious or made in bad faith". A vexatious claim arises where the complaint has been dealt with through another process. The letter detailed that a Section 40/41 Report [the Report] would be prepared by an Early Resolution Advisor [the investigator], which the CHRC would use "as well as the complaint form and any of the parties' submissions to the report, to decide whether to deal with the complaint". The letter provided instructions on how to prepare a position letter and what it should address.

[13] The Applicant's Position Letter emphasized that her prior *EI Act* complaint and appeals solely concerned interpretation of the impugned provisions, but did not deal with her human rights issues. She thus did not have her day in court. The Respondent's position was that the substance of the Applicant's discrimination claim was conclusively decided in *Martin*; the Applicant and Mr. Martin's claims were nearly identical and consequently, she should not be given an opportunity to relitigate an issue found unsuccessful in another forum.

[14] The Section 40/41 Report issued August 22, 2014, summarized the complaint, the parties' position letters and the *Martin* decision. It also outlined the applicable case law and legal tests and recommended that the complaint be dismissed as vexatious. The parties were provided an opportunity to respond, within a 10-page limit [response submissions].

[15] The Applicant responded to the Report on September 22, 2014. Her response submissions refer to her Position Letter in an aim to demonstrate that the Report's findings were inaccurate regarding the scope of the *EI Act* appeals.

[16] On October 3, 2014, the CHRC provided the parties with copies of each other's response submissions, to which they were given an opportunity to respond to the other party's submissions [cross-disclosure submissions]. Both parties did so.

[17] On November 12, 2014, the Commission decided not to deal with the complaint, pursuant to paragraph 41(1)(d) of the *CHRA* [the Decision]. Within its reasons, the Commission indicated that it relied the following documents in arriving at its Decision:

a) the Complaint Form, dated October 10, 2013;
b) the Section 40/41 Report, dated August 22, 2014;
c) response submissions from the Applicant (received September 30, 2014) and the Respondent (dated September 19, 2014); and
d) cross-disclosure submissions from the Applicant (dated October 8, 2014) and the Respondent (dated October 23, 2014).

[18] The Commission adopted the recommendations from the Section 40/41 Report, and provided reasons for their Decision, issued November 12, 2014, as follows:

a) the Applicant had exhausted other redress procedures available to her: a final decision was issued on September 25, 2014, by the SST-AD, which has the authority to decide on human rights issues;
b) essentially the same allegations of discrimination as the current complaint had been decided by the FCA decision in *Martin*, which determined that the parental benefits sections of the *EI Act* did not infringe section 15 *Charter* rights;
c) using the result of *Martin* to preclude this complaint would not result in unfairness or injustice (*Penner v Niagara Regional Police Services Board*, 2013 SCC 19 [*Penner*]): although tests under the *Charter* and *CHRA* are different, a human rights analysis of the claim under the *CHRA* would, similar to the *Charter* analysis in *Martin*, examine whether the complainant suffered adversity based on a ground of discrimination and consider the purpose of the *EI Act* parental benefit; and
d) based on guidance from the Supreme Court, the Commission determined it should not deal with the present complaint (*British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 [*Figliola*]; *Penner*, above).

II. Issues

[19] The issues are:

A. Did the CHRC provide adequate procedural fairness to the Applicant in the circumstances?

B. Was the CHRC's decision reasonable?

III. Standard of Review

[20] The standard of review for determining procedural fairness is correctness and is reasonableness in reviewing the Commission's decision under subsection 41(1) of the *CHRA* not to deal with the Applicant's complaint (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Ayangma v Canada (Attorney General)*, 2012 FCA 213 at para 56).

[21] The parties disagree on the level of deference owed to the Commission on applying the standard of reasonableness under subsection 41(1) of the *CHRA*.

[22] The range of acceptable outcomes varies with the context. The Applicant argues that there is a narrower margin of appreciation where the possible outcomes are constrained (*Abraham v Canada (Attorney General),* 2012 FCA 266 at paras 42, 44, leave to appeal denied, 2013 CarswellNat 729 (SCC) [*Abraham*]). In the present case, the CHRC decided between one of two opposing outcomes – to deal with the complaint or not – thus, the Court should engage in a more exacting review of the decision (*Canada (Human Rights Commission) v Canada (Attorney General),* 2013 FCA 75 at paras 13-15 [*CHRC, 2013*]).

[23] A reasonableness review is concerned with whether the Commission's decision falls within a range of possible, acceptable outcomes, and whether the decision is justified, transparent and intelligible. The Court must assess both the reasons given by the decision-maker and the result reached (*Love v Canada (Privacy Commissioner),* 2015 FCA 198 at 22 [*Love, FCA*]; *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47 [*Dunsmuir*]). This range of acceptable options or "margin of appreciation," widens or narrows depending on the circumstances (*British Columbia (Securities Commission) v McLean,* 2013 SCC 67 at paras 37-41).

[24] The language of the statute, which confers discretion on the Commission to decline to deal with a complaint, along with the nature of the Commission's role as a screening rather than adjudicative body, suggest the Commission is entitled to a higher level of deference under

subsection 41(1) (*Love v Canada (Privacy Commissioner)*, 2014 FC 643 at paras 19 – 23; aff'd *Love, FCA*, above).

[25] In *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at para 46 [*Bergeron*], Justice David Stratas found that decisions made under paragraph 41(1)(d) are deferential wherein the Commission considers several fact-based or "factually-suffused questions of mixed fact and law," in coming to its determination, which warrants greater deference from the Court.

[26] Further, under subsection 41(1) the Commission is performing a factual and policy-based screening relating to the allocation of resources at the CHRC - not an adjudicative role. The Decision is based on the principles of fairness and consistency in decision-making, which aims to prevent the re-adjudication of matters adequately determined in another forum. The Commission should thus be afforded "great latitude" upon review (*Bergeron*, above, at para 45).

[27] The wording of paragraph 41(1)(d) provides the Commission with discretion to decline to deal with a complaint, stating that "the Commission shall deal with any complaint filed with it unless in respect of that complaint *it appears to the Commission that*...(d) the complaint is trivial, frivolous, vexatious or made in bad faith" [emphasis added]. This suggests Parliament intended the Commission be seized with this task and higher deference is to be afforded (*O'Grady v Bell Canada*, 2012 FC 1448, at para 34; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 38 [*Sketchley*]).

[28] As stated by Justice Kane in *Khapar v Air Canada*, 2014 FC 138 at para 47 [*Khapar*] (aff'd, 2015 FCA 99):

> 47…section 41 of the Act confers on the Commission ample discretion to decide when not to deal with a complaint at this preliminary stage (*Maracle*, supra at para 47). Decisions made pursuant to section 41 of the Act are, therefore, accorded significant deference by a reviewing court and accordingly, the scope of judicial review is narrow.

IV. Analysis

A. *Did the CHRC Provide Adequate Procedural Fairness to the Applicant?*

[29] The Applicant argues she was not afforded procedural fairness when the CHRC chose not to review her Position Letter, despite stating it would. As well, she claims the reply limit of 10 pages to the Section 40/41 Report was procedurally unfair.

[30] In applying the *Baker* factors to determine the amount of procedural fairness owed in the circumstances, the Applicant argues that the Decision is important, as it engages her legal responsibility to provide for her children and effectively precludes her from having her day in court. She had a legitimate expectation that the CHRC would review her Position Letter. The Decision was a quasi-judicial administrative one, and should encompass basic elements of procedural fairness, including an opportunity to canvass her position and evidence fully, and have it considered by the decision-maker (*Baker v Canada (Citizenship and Immigration)*, [1992] 2 SCR 817 at paras 23-27).

[31] The Applicant also claims she was prejudiced by the CHRC changing the "rules of the game". In *Air Canada v Marley Greenglass and Canadian Transportation Agency*, 2014 FCA 288 at para 27 [*Air Canada*], the FCA found a breach of procedural fairness partly by the way in which the "game-plan" for adjudication, namely who would carry the burden of proof, had been communicated.

[32] The Applicant analogises *Air Canada* to the present facts: letters from the CHRC to the Applicant stated that the Commission would make a decision based on the Section 40/41 Report, the complaint form and any of the parties' submissions to the Report. She claims to have had a legitimate expectation that the CHRC would review her Position Letter, and referenced them in subsequent replies to the Report.

[33] In assessing the *Baker* factors, I agree that the Applicant was owed a duty of fairness in the circumstances: the CHRC's decision affected the Applicant's rights, privileges and interests.

[34] The first two *Baker* factors point towards a lesser degree of procedural fairness. The nature of the decision at the screening stage falls on the administrative end of the spectrum, as the determination is not made in an adversarial context. Additionally, the statutory scheme does not include a privative clause and judicial review is available for the Commission's screening decision.

[35] The Commission's Decision at the screening phase is of considerable importance to the Applicant. The decision to dismiss her complaint will effectively preclude the Applicant from

having her day in court and obtaining relief under the *Act*: it is therefore determinative of her rights. This *Baker* factor suggests an increased level of procedural fairness.

[36] The fourth *Baker* factor considers the legitimate expectations of the Applicant, where the Commission undertook to follow a certain procedure. A review of the correspondence suggests that the Commission did not make a clear and unequivocal promise to review the Applicant's Position Letter. In the first letter to Ms. Zulkoskey, dated November 22, 2013, regarding the applicability of paragraph 41(1)(d), the Commission states:

> The Commission will use the report, as well as the complaint form and any of the parties' submissions *to the report*, to decide whether to deal with the complaint [emphasis added] (Letter from CHRC to the Applicant, dated November 22, 2013; AR, Vol 1, Tab 3(A), p 17).

[37] The subsequent follow-up letter from the CHRC to the Applicant on August 25, 2014, provides her with the Section 40/41 Report and indicates that:

> The Commission will make a decision based on the enclosed report, the complaint form, and any submissions (comments) it has received from the parties. For this reason, if you disagree with information in the report, it is important that you take this opportunity to make a submission (Letter from CHRC to the Applicant, dated August 25, 2014; AR, Vol 1, Tab 3(C), p 120).

[38] The October 3, 2014 letter from CHRC to the Applicant, providing the Respondent's submissions and presenting the Applicant with an opportunity to comment in response states "[t]he Commission will read [the comments] when it is reviewing the report" (Letter from CHRC to the Applicant, dated October 3, 2014; AR, Vol 1, Tab 3(D), p 122).

[39] These letters illustrate that the Commission considered the Applicant's submissions. Although the August 25, 2014 letter does not specify that the submissions reviewed would be those responding to the Report, the very first letter sent to the Applicant clearly stipulates that submissions to the Report would be considered, along with the Report to decide whether to deal with a complaint. The CHRC ultimately considered the documents it stated it would in that first letter, and therefore I do not find that the Commission made a clear promise to the Applicant that they would consider her Position Letter.

[40] Moreover, procedural fairness in the CHRA context does not require the Commission to re-consider everything submitted by the parties prior to making its decision (*Khapar*, at para 63).

[41] The fifth *Baker* factor, the choices made by the Commission supports a lesser degree of procedural protection. The *CHRA* provides no legislative guidance concerning the procedures to be followed in subsection 41(1) investigations. Further, the Governor in Council has not passed any regulations pursuant to subsection 43(4) regarding the procedure to be followed at the screening stage. As a practical necessity, the Commission must screen complaints before referring them for further inquiry. Their procedural choices at this stage should therefore be afforded deference, so long as they comply with the duty of fairness.

[42] In summary, when the *Baker* factors are considered as a whole, the procedural fairness to be afforded in the circumstances of applying paragraph 41(1)(d) is on the lower end of the spectrum.

[43] The investigator's Report must be neutral and thorough, which requires that the parties' arguments be accurately summarized (*Lusina v Bell Canada*, 2005 FC 134 at para 31). The Applicant claims it was neither, as it incorrectly summarized her evidence. A comparison of the Applicant's Position Letter and the Report illustrates that the investigator accurately summarized the Applicant's Position Letter in the Report.

[44] I disagree with the Applicant's assertion that the present circumstances are analogous to the "game change" in *Air Canada*: this is not a situation involving reversal of the burden of proof whereby the Applicant was prevented from submitting key evidence. The Applicant was informed in various letters what would be considered by the Commission. The Applicant was further given not one, but two, opportunities to respond. The Commission's reliance on the Report in making a final determination is appropriate, considering that reviewing all the same documents considered at the Section 40/41 Report stage would defeat the purposes of the preliminary examination (*Khapar*, at para 63).

[45] The Commission carried out its statutory mandate and has complied with its duty of fairness. The Report was neutral and sufficiently thorough. The Applicant had ample opportunity to make submissions and convey her disagreement with the information in the Report. She was provided an opportunity to present her case, and the 10 page limit was not procedurally unfair (*Boshra v Canada (Attorney General)*, 2011 FC 1128, at paras 50-52). The Report, upon which the Commission's Decision is based, identified the issues, comprehensively canvassed the parties' positions, the factors to be applied in determining if a claim is vexatious, and subsequent information gathered from the parties.

B. *Was the CHRC's Decision Reasonable?*

[46] Under the *CHRA*, the Commission should only decline to deal with a complaint at the screening stage if it is "plain and obvious" that the Applicant's complaint falls within one of the subsection 41(1) grounds (*Canada Post Corp v Canada (Human Rights Commission)*, [1997] FCJ No 578 at para 3, aff'd [1999] FCJ No 705 (FCA) [*Canada Post*]. Thus, it must be plain and obvious that the Applicant had already received a final decision regarding her human rights complaint.

[47] The Court's role in this judicial review is to determine whether the Commission's determination that the complaint plainly and obviously fell within paragraph 41(1)(d) is reasonable.

[48] I find that the Decision was reasonable.

(1) Applicant's Position

[49] The Applicant alleges that the CHRC's decision not to deal with her complaint was unreasonable because (a) she did not receive a final decision, as she was not bound by *Martin*, and (b) her human rights issues have not already been dealt with through another process.

(a) *The Applicant Did Not Receive a Final Decision*

[50] The Applicant argues that the CHRC erred in finding that she received a final decision regarding discrimination and in relying on this in its application of paragraph 41(1)(d) of the *CHRA*. Mr. Martin's case is separate and distinct and should have no bearing; she was not a party to his case, nor did she have the opportunity to present evidence or arguments.

[51] The CHRC found that the Applicant had her day in court because essentially the same allegations of discrimination had been decided in *Martin* and because the Applicant stayed her appeal at the SST-AD and had it dismissed based on the outcome in *Martin*. She claims this position is contrary to the actions of the Umpire, who in grating her stay indicated that once *Martin* was determined, the Applicant could take the appropriate legal steps to resolve her case.

(b) *The Applicant's Human Rights Issues Have Never Been Addressed*

[52] The Applicant also argues that this is not a situation where her claim has already been adjudicated on and dismissed by a tribunal with jurisdiction to hear the claim. Rather, the Applicant's complaint filed with the CHRC on October 10, 2013, was the first time she alleged the impugned *EI Act* provisions violate the *CHRA*. The prior EI proceedings only considered interpretation of the *EI Act* with the only issue before the SST-AD being whether the Board was correct in their interpretation – that 35 weeks was awarded per pregnancy or adoption, not per child. Human rights issues were not raised.

(2) Analysis

[53] Paragraph 41(1)(d) of the *Act* grants the Commission discretion not to deal with a complaint where the issues raised in that complaint have been otherwise dealt with through another process. In the Section 40/41 Report, the Commission was required to determine that the Applicant's situation plainly and obviously fell within paragraph 41(1)(d), and if it did, whether justice required that the complaint be heard regardless (*Canada Post*, above, at para 3).

[54] It is appropriate to consider the Section 40/41 Report as part of the Commission's reasons: their reasons are brief and they adopt the Report's analysis (*Sketchley*, above, at para 37). Since the Commission's final decision was based on not just the Report, the parties' further submissions are also relevant.

[55] The Report reveals that the investigator thoroughly canvassed the facts, the legal principles stemming from relevant case law and the positions of the parties. The Report accurately summarizes the Applicant's position letter. It then analyzes the relevant factors for determining whether a complaint is vexatious, including; whether a decision was made in another process, whether the issues raised during that process were essentially the same as the present issues, whether the complainant raised human rights issues, and whether the complainant finished available reviews or appeals of the decision.

[56] Although the Report accurately summarized the Applicant's position, the analysis contains some errors, specifically regarding the content of the previous proceedings. Paragraph

75 of the Report inaccurately states that "the allegations of discrimination raised in the complainant's human rights complaint are essentially the same as the issues raised by the complainant under the EI Act Process and decided upon by the SST-AD". This is incorrect. The *EI Act* Process and SST-AD dismissal only dealt with the issue of interpretation of the impugned provisions. It is therefore inaccurate to claim that the Applicant had her day in court regarding the human rights issue at any of the prior proceedings.

[57] However, the Applicant was given the opportunity to address these errors in her response submissions to the Report, which were considered by the Commission.

[58] I agree that the Applicant did not receive a final determination regarding discrimination at the SST-AD, however, I disagree that her human rights issues have not been addressed.

[59] The Applicant's complaint arose from virtually the same set of facts as *Martin*: both involved parents of twins who requested and were denied parental benefits on the basis that their spouses had received the maximum parental benefits payable.

[60] The FCA in *Martin* interpreted the same provisions of the *EI Act* and determined that these provisions were not discriminatory under section 15 of the *Charter*. The Report canvasses the difference between the legal equality tests under section 15 of the *Charter* and under the *CHRA* and compares the findings in *Martin* with what would be considered under the *CHRA* process, despite the different tests. It ultimately concludes that the Applicant's allegations of

discrimination were analyzed through the lens of the section 15 *Charter* analysis by the FCA in *Martin*.

[61] As noted by the Respondent, paragraph 41(1)(d) allows for some divergence with respect to the exact issues raised, remedies available and procedures used. The purpose of the provision would be undermined if an exact parity were required (*Bergeron v Canada (Attorney General)*, 2013 FC 301 at para 38).

[62] Further, as the Respondent points out, *Brown*, has set a precedent that it is not unreasonable to dismiss a human rights complaint if the human rights issues raised in the complaint have been dealt with under section 15 of the *Charter* (*Canada (Attorney General) v Brown*, 2001 FCA 385 at para 6 [*Brown*]; *To-Thanh-Hien*, above, at para 41).

[63] After determining the claim was vexatious within the meaning of the *Act*, the investigator noted that the Commission retained discretion to deal with a complaint if justice required. The Report shows the investigator was alive to the relevant jurisprudence, namely the decisions in *Boudreault v Canada (Attorney General)*, [1995] 99 FTR 293; *Canada Post Corp v Barrette*, [2000] 4 FC 145 (FCA); *Figliola*, above; and *Penner*, above.

[64] In *Figliola* the Supreme Court set out that the principles of finality, fairness and the preservation of the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay, are to guide a decision whether to hear an already-decided claim. The Commission is given the task to determine "whether it makes sense to expend public and private

resources on the relitigation of what is essentially the same dispute" (paras 36, 37). It is clear the Commission turned its mind to these principles.

[65] The Commission's decision that the Applicant's claim plainly and obviously fell within paragraph 41(1)(d) is two pronged. Firstly, they determined that the Applicant had exhausted other redress procedures available to her and that a final decision was reached under the SST-AD. For the reasons stated above, I disagree, as it is clear the human rights issues were not raised by the Applicant prior to her complaint at the CHRC. However, the Commission's reasons were also based on the fact that the FCA in *Martin* decided on essentially the same allegations of discrimination under the *Charter*. The fact that *Martin* involved a different individual than the Applicant does not change the inevitable result that the Applicant's underlying facts and arguments have been decided in a manner that negates any prospect for success in her case.

[66] The Commission is afforded a margin of deference within the range of acceptable and defensible outcomes on the facts and the law, which is broad in these circumstances. *Dunsmuir* requires that the Commission's Decision fall within this range and that the Decision is justified, transparent and intelligible. Despite the errors in the Report regarding finality and other redress procedures, the decision in *Martin* in and of itself provides reasonable justification for the Commission's Decision not to deal with the Applicant's complaint.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed;

2. Costs to the Respondent: the parties agreed that those costs should be fixed in the amount of $2750.00.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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