Supreme Court of Canada rules that dismissal of incarcerated employee is not a human rights violation

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Does the prohibition of discrimination based on one's criminal record mean that an employer cannot dismiss an employee who is unavailable for work because he or she is in jail? In *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.* (November 14, 2003), the Supreme Court of Canada has said "no".

The case involved Yvon Roy who, in 1985, was convicted of offences involving fraud and breach of trust. In 1989, Maksteel hired him as a maintenance mechanic. On June 26, 1991, he began serving a six-month prison term for the offences committed in 1985. The beginning of the sentence coincided with the beginning of his vacation, which was to end on July 10, 1991. By letter dated July 15, 1991, Maksteel dismissed Roy because he did not appear at work on July 11. On July 22, Maksteel hired a new mechanic to replace Roy.

Roy was released on parole on July 26, 1991. Three days later, he tried to get his job back, but was refused. On August 12, he filed a complaint with the Commission des droits de la personne et des droits de la jeunesse, alleging that he had been dismissed merely because he had been convicted of an offence, contrary to section 18.2 of the Quebec *Charter of Human Rights and Freedoms*. That section reads as follows:

> 18.2. No one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence.

Roy secured a favourable ruling from the Human Rights Tribunal, which held that, because imprisonment is the direct result of a conviction, the actual cause of the dismissal is the conviction itself. It awarded Roy over $50,000 in damages. This decision was overturned by the Quebec Court of Appeal, which held that section 18.2 does not protect an employee from dismissal if the real reason for the dismissal is the fact that the employee is not available for work because he or she happens to be incarcerated at the time. In the Court's view, section 18.2 protects only those who are penalized in their employment owing to the mere fact of a conviction. The Commission appealed to the Supreme Court of Canada.

NO PROTECTION FROM CONSEQUENCES OF A LAWFULLY IMPOSED SENTENCE

In dismissing the appeal, the Supreme Court held that the purpose of section 18.2 is to protect employees from the unjustified social stigma associated with prior convictions. The provision does

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not protect individuals from the civil consequences of a sentence lawfully imposed on an offender:

> "Every incarcerated offender must suffer the consequences that result from being imprisoned, namely loss of employment for unavailability. ... [T]he fact that an incarcerated employee is unavailable is not a consequence of his or her status as a "convicted person", that is, of the fact that he or she has a criminal record. It is a civil consequence of the sentence that was lawfully imposed. Section 18.2 does not protect a convicted person against that consequence."

UNAVAILABILITY THE ACTUAL CAUSE OF DISMISSAL

Having held that the purpose of section 18.2 is limited to protecting against unjustified stigmatization due to convictions, the Court stated that, under the provision, the complainant bears the burden of proving that the actual cause of the reprisal taken by the employer was the complainant's criminal record, as opposed to his or her unavailability due to incarceration. In this connection, the Court observed that, while the Tribunal had found, as a fact, that the employer knew that Roy was in prison when it terminated him, it had made no finding that Roy's conviction was the reason for his termination.

The Court of Appeal, noting that the Tribunal had made no finding on the issue of causation, had assessed the facts itself and concluded that it could not be assumed that, merely because Maksteel had known that Roy was incarcerated, Roy's conviction was the reason for his dismissal.

After reviewing the record, the Supreme Court of Canada concluded that there was no reason to interfere with the Court of Appeal's finding that Roy's unavailability, and not his conviction, was the actual cause of his dismissal.

In Our View

Under section 5 of Ontario's *Human Rights Code*, there can be no discrimination in employment because of one's "record of offences", which is defined in section 10 of the *Code* as "a conviction for, (a) an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or (b) an offence in respect of any provincial enactment". In *Maksteel*, the Court stated the that this wording indicated that, as is the case under section 18.2 of the Quebec *Charter*, there is no protection from the employment consequences of being lawfully sentenced to incarceration.

One difference between the Quebec *Charter* and the Ontario *Code* is that, under section 18.2, there is no defence of a *bona fide* occupational requirement in conjunction with the obligation to accommodate to the point of undue hardship. Rather, under the Quebec provision, if an employee has discharged the burden of proving that the employment reprisal was caused by the mere fact of the conviction, the employer has a defence if it can prove that the offence for which the employee

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was convicted is in some way "connected with the employment".

By contrast, an Ontario employer must justify the discrimination by reference to s. 24 of the *Code*, which provides:

> 24. (1) The right under section 5 to equal treatment with respect to employment is not infringed where,
>
> ...
>
> (b) the discrimination in employment is for reasons of ... record of offences, ... if the ... record of offences ... of the applicant is a reasonable and bona fide qualification because of the nature of the employment;
>
> (2) The Commission, the Tribunal or a court shall not find that a qualification under clause (1)(b) is reasonable and bona fide unless it is satisfied that the circumstances of the person cannot be accommodated without undue hardship on the person responsible for accommodating those circumstances considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Therefore, Ontario employers must show that having no record of an offence is a *bona fide* occupational requirement of the position and that the employee cannot be accommodated short of undue hardship. Because they do not bear the burden of proving that the employee cannot be accommodated, but only that the offence is connected to the employment, Quebec employers may have an easier task than their Ontario counterparts in justifying the discrimination.

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