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Employment Update

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"[T]he collective agreement between the union and the employer not only supplants any individual employment contract that might exist between the employer and the employee, but is required by law to mandate the arbitration of all disputes arising out of the employment relationship."

THREE EMPLOYMENT LAW LESSONS TO BE DRAWN FROM THE JIAN GHOMESHI AFFAIR

Jack B. Siegel

The perfect storm that has ensnared Jian Ghomeshi and the CBC in recent weeks has given new currency to labour and employment lawyers in cocktail party conversation, as many Canadian tongues wag about the latest development in what has quickly become Canada's hottest celebrity scandal of – well, ever.

The facts read like a surreal law school exam. Ghomeshi was a pop culture radio host, and, quite possibly, CBC Radio's biggest star. He apparently became concerned about an ex-girlfriend's desire to exact revenge by disclosing the details of a decidedly atypical sex life, laden with elements of BDSM (bondage, dominance, sadism and masochism). Rather than deny or seek to shut any such disclosures down, Ghomeshi decided upon a rather aggressive response, making disclosure to CBC (typically a desirable step – to an employer, anyhow) and providing a video that was apparently intended to demonstrate that the rough sex in which he engaged was consensual. As best as the facts can presently be discerned, it appears that CBC management found the video, consensual or not, to reflect a level of over-aggression amounting to assault causing bodily harm, and concluded that what had been learned "precluded" the CBC "from continuing [its] relationship with Jian Ghomeshi."

Ghomeshi's lightning-fast response the very next day was to sue the CBC, not for dismissal, but for defamation (apparently, in his analysis, to allude to an unstated concern as something precluding a continuing work relationship constitutes a defamatory remark) and for breach of confidence. The viability of that suit has already been the subject of some discussion on our blog (http://blaneysatwork.com/2014/10/29/jian-ghomeshi-firing-raises-interesting-legal-issues/). Essentially, we anticipate that the CBC will likely be successful in having the action dismissed as arising out of a unionized employment context. This is because the collective agreement between the union and the employer not only supplants any individual employment contract that might exist between the employer and the employee, but is required by law to mandate the arbitration of all disputes arising out of the employment relationship. Effectively, this precludes an employee from pursuing such disputes through a court action, as laid out by the Supreme Court of Canada in the case of *Weber v. Ontario Hydro* (see the blog posting for greater detail).

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"A unionized employee's sole recourse is to seek to pursue a union grievance."

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Which leads us to:

Lesson #1

Unionized employees cannot sue their employers for matters that arise out of the employment relationship. This extends well beyond simple dismissals to include issues of libel and slander, workplace assault (regarding which the *Workplace Safety and Insurance Act* also provides some protections to non-unionized employers and co-workers), and harassment. A unionized employee's sole recourse is to seek to pursue a union grievance. While human rights applications to an administrative tribunal may also remain an option in some cases, court applications are essentially a non-starter, and unionized employers should be aware that this is the first and best defence if a bargaining unit member ever commences an action.

Of course, the CBC found itself in a bit of a spot once Ghomeshi came forward with what some might describe as too much information. While the information that he disclosed does not appear to have involved CBC employees or its workplace, it certainly gave rise to a reasonable concern that this employee had proclivities that might pose not merely a colossal public relations nightmare, but significant employment-related risks of similar conduct taking place on site, with co-workers or with others. It seems also that the video recording that Ghomeshi shared might well have been made, or at least saved, on a smartphone that was CBC property, giving rise not only to a potential defence on the merits of the breach of confidence claim, but also to a greater ability and obligation on CBC management to act.

So what might be the basis for CBC's termination of Ghomeshi? It appears that, at the time, CBC management had no knowledge of any dubious conduct in the workplace, or similar interactions between Ghomeshi and other CBC employees over whom he might conceivably have had considerable power. The suggestion has been made in a number of media reports that there is some sort of a "morals clause" in the collective agreement as it might relate to high profile performers, but even in the absence of any such specific provision, it seems clear that conduct by a high profile employee, inside or outside of the workplace, that could substantially damage the reputation of the employer, may give rise, at minimum, to an arguable case of termination for cause.

On the other hand, at the time of the termination decision, the CBC was not in any position to assess or even allege reputational damage, because, up to that point, the conduct at issue was not publicly known. Although the smartphone in question may have been CBC property, the question still arises as to whether its mere use to facilitate disclosure to the employer constitutes some sort of breach of a duty to the CBC or misuse of company property sufficient to warrant discharge.

In short, it might well be the case that CBC initially lacked cause to terminate Ghomeshi – at least at the time that it chose to do so.

In this respect, Ghomeshi might well have been his own worst enemy. In posting to Facebook a lengthy discourse on his termination and the surrounding circumstances (https://www.facebook.com/jianghomeshi/posts/10152357063881750), he disseminated, on a nationwide scale, a detailed description of his conduct (albeit as he saw it).

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"... 'after-acquired cause' – something the employer learns after the termination that can amount to cause for the dismissal – may be used by the employer to justify a decision that might previously have been taken on more tenuous grounds."

From that point it was public, and capable of damaging the CBC's reputation. But perhaps worse for him, this counterattack, combined with the lawsuit, opened a floodgate of similar stories from eight women to date, at least one of which was attributable to a named member of the performing arts community (creating a potential employment nexus), as well as a number of reports of workplace harassment (or worse) by Ghomeshi, culminating in CBC's retention of a noted workplace investigator to get to the heart of the matter.

While CBC had something that sounds like it may, or may not, have flown before an arbitrator at the time it decided to terminate, the aftermath might well have given it the necessary means to defend its original decision.

So Lesson #2 is about how an employee can take a bad situation and make it worse, even after discharge.

Lesson #2

In both wrongful dismissal law and labour arbitration law, "after-acquired cause" – something the employer learns after the termination that can amount to cause for the dismissal – may be used by the employer to justify a decision that might previously have been taken on more tenuous grounds. In labour arbitrations, there is a need to link the new information to the originally-given grounds for termination, but in this case, that now seems to be a rather lower bar for the employer to hurdle.

But is there enough to get over it? As an employer that is exceptionally conspicuous in the public eye, CBC now has the benefit of a lot of investigatory journalism about this former employee that certainly sounds helpful to its positon, but what it does not have is **evidence**. Newspaper reports of journalism schools refusing to place their students on Ghomeshi's show due to his reputation, and 8 or more women reporting similar conduct to what initially alarmed them, at least one of whom was a CBC employee, are not the sort of thing that one can simply take into a hearing room, lay down on a table and say, "there you go – it's proven!" Hearsay evidence is a problem.

In a typical termination matter, the circumstances giving rise to the decision are usually within the direct personal knowledge of the decision-maker, or at least of a supervisor who can report back and testify, often with detailed records and witness statements from others who can be called upon to testify. But where the conduct at issue is, by its very nature, hidden, episodic, intimidating, or any combination of these, evidence that can be given under oath is much harder to identify. The true facts of the entire situation may be harder for an employer to discern, even with benefit of news coverage that won't be in the hands of the typical employer. How then, is the CBC to prove its case? Even if it seems presently to have won it in the court of public opinion, can it do so within the strictures of a legal hearing?

Just a few days after the story broke, the CBC let it be known that it had retained the services of a well known workplace investigations lawyer, one who has in fact previously been retained by this firm to assist a client in a difficult situation of workplace conduct. Typically, such investigations are undertaken before an employee is disciplined, but in this case, it appears that the CBC did not

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consider itself to have that luxury, nor did it seem to have knowledge at the time of dismissal of any related incidents having occurred in the workplace.

Employers may certainly carry out their own investigations of a situation, and indeed must do so in most cases, directly or through their own legal counsel. But where the neutrality, fairness and approachability of the person asking the questions become sensitive factors, a trained and experienced outside investigator is likely to be better positioned to gather the necessary facts and evidence to permit management to make the decisions that must be made, and to litigate those decisions successfully, should they be called into question.

Lesson #3

It is not enough to "know" something. Admissible evidence is needed, and one potentially helpful means of assembling sufficient high quality information is through the retention of an independent workplace investigator, to collect reliable information in a manner that can be presented in a formal setting.

More Lessons?

If ever there was a tale that needs to end with the tagline, "more to come," this is it. Unquestionably, there will be more media coverage, a likely court motion to have the civil case thrown out, and if not settled, a labour arbitration that would ordinarily become part of the public record. While the story may yet tantalize the reading public, so too, might it provide more insights into the workings of employment and labour relations law. ■

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