

Ghomeshi's legal HR quagmire

Collective agreement complicates matters

BY SARAH DOBSON

IT'S HARD to say what garnered the most attention — the \$55-million lawsuit, the firing of a popular radio host, admissions of secret sexual activities, allegations of assault or the fact the CBC was involved. But the termination of radio host Jian Ghomeshi is steeped in legal HR issues around terminations and collective agreements.

On Oct. 26, CBC announced its relationship with the host had ended. Then the *Globe and Mail* quoted a CBC spokesperson as saying, "Information came to our attention recently that, in CBC's judgment, precludes us from continuing our relationship."

Ghomeshi gave his version of events on Facebook: "I've been fired from the CBC because of the risk of my private sex life being made public." He said he indulged in "rough sex" but it was always consensual, and he had shared this information with the CBC.

"They said they're not concerned about the legal side. But then they said that this type of sexual behaviour was unbecoming of a prominent host on the CBC. They said that I was being dismissed for 'the risk of the perception that may come from a story that could come out.'"

Ghomeshi later filed a \$55-million lawsuit against the CBC.

"In bad faith and violation of the mutual understanding of a common interest between itself and Mr. Ghomeshi, the CBC violated the confidence that it had been entrusted with over several months respecting Mr. Ghomeshi's personal life, and wrongfully used the confidential information obtained by it under the guise of trusted confidant, as the basis to terminate his employment," it said. "The conduct of the CBC has nega-

tively impacted and will continue to impact Mr. Ghomeshi's public reputation and future employment and other opportunities."

However, it's not certain the lawsuit will stand, as Ghomeshi is a member of a union and, therefore, subject to a collective agreement.

"(His) claims for defamation, breach of confidence and breach of good faith are, in their essential character, disputes that arise out of the termination of his employment. Dressing them up as something different doesn't change that," said Toronto lawyer Allan Rouben in an online post.

"My guess is that the CBC will bring a court application to stay or dismiss the action. Based on legal precedent, they will almost certainly be successful!"

But there's no straightforward answer, according to Jonathan Tweedale, a lawyer at McLean & Armstrong in Vancouver. It's about taking a look at the factual context of the dispute and whether the essential character of the dispute concerns subject matter covered by the collective agreement.

"That's, of course, inherently contestable and arguable."

But if Ghomeshi filed a grievance against the CBC for reinstatement and back pay, he might have trouble, according to Howard Levitt of Levitt & Grosman in Toronto.

"A union can assess all factors in determining whether it will represent a member, including the interests of the other members, ie. accusers, the prospects of success, the cost of the case, the view of the union toward the misconduct and the impact on the union in further negotiations. The prospect of a successful duty of fair representation case is remote as long as the union

put their mind to the matter and acted in good faith accordingly."

And reinstatement is unlikely since the arbitrator would state an employer has the right to terminate someone who is toxic to its brand, he said.

Cause termination

The collective agreement concerning Ghomeshi states there shall be no dismissal "except for just and sufficient cause." So, what grounds might CBC have to turf him?

Cause termination essentially is when a worker does something "outrageous" and one would have to consider the conduct and whether the termination for cause is proportional to it, according to Ron Minken of Minken Employment Lawyers in Unionville, Ont.

"If an employee had been with an employer for decades, did something very serious, it may be that termination for cause is not proportionate to the behaviour or the conduct. But one could be with an employer for a short period of time and do something so dastardly... demonstrating a complete, fundamental breakdown of the relationship. With cause, you'd need to demonstrate that the relationship has been broken down, that the trust is gone completely."

A person can also be disciplined for what she does away from work, such as insulting her manager online, as long as there's a relationship to the employment, said Stuart Rudner, a partner at Rudner MacDonald in Toronto.

"Or it's like this type of situation, where it's indirect — he didn't do anything or say anything about CBC but — and this is all hypothetical — if it was found he was sexually assaulting employees or sexually

assaulting anyone, well he is very much a face of the CBC so anything that impacts his reputation will impact their reputation as well. And, in that case, you can be disciplined or dismissed."

Recent cases show the courts focus on the accused's response when confronted with allegations of misconduct, said Rudner.

"If an employee under investigation was to go on social media and do what (Ghomeshi) did — breaching confidentiality, wholeheartedly denying any wrongdoing, attacking his accusers and embarrassing his employer — that would go a long way toward satisfying a court that the employment relationship could not be resuscitated and dismissal was appropriate."

The more public a figure someone is as a result of employment, the more the employer can regulate conduct inside and outside the workplace, said Minken.

There could also have been a code of conduct or morality clause, said Minken.

After the firing, the CBC sent a memo to staff saying it had seen "graphic evidence that Jian had caused physical injury to a woman," according to *Maclean's*, and it "determined that Jian's conduct was a fundamental breach of CBC's standard of acceptable conduct for any employee."

Any criminal complaints or charges could impact the case. The Supreme Court of Canada, for example, has established that a person cannot consent to assault if an assault happened, said Minken.

However, the information about Ghomeshi's sexual activities and claims of harassment were not made public before his termination, said Tweedale.

“I suppose that the CBC is going to take the position that they thought there was a real risk their reputation would be harmed and that that risk was great enough and that reputational harm was legitimate, that it justified their actions.”

Breaches of confidence, good faith, defamation

As for the lawsuit, it raises the issues of breach of confidence and bad faith related to Ghomeshi's sharing the information about his sexual activities with the CBC.

“There may have been some sort

of agreement as to how they were going to work together, either expressed or implied,” said Rudner.

If the CBC never disclosed Ghomeshi's information publicly, that doesn't mean the broadcaster couldn't be liable for breach of confidence, said Tweedale, if confidential information, communicated in confidence, was misused by the party to whom it was communicated.

“In this case, (his) allegation is it was misused by the CBC by using this information as grounds to terminate his employment. And that could constitute a breach of confidence.”

However, it's also possible Ghomeshi had an obligation to disclose to his employer certain activities he had engaged in that could harm his employer's reputation and “that could undercut the breach of confidence,” he said.

As for defamation, it doesn't appear the CBC had published any information about Ghomeshi at that point, so the damage is questionable, said Minken. However, CBC's additional quote to the *Globe and Mail* could be taken in a negative light.

“You could see the apparent innuendo is that Ghomeshi committed

some form of unacceptable conduct,” said Tweedale.

But Ghomeshi might not be able to proceed with the defamation claim “if the essential character of the dispute concerns the subject matter covered by the collective agreement,” he said. “And there have been numerous cases in which defamation proceedings have been thrown out of court for exactly that reason.”

Editor's note: Because this is a fast-moving story, the facts may have changed after we went to press. Be sure to check www.hrreporter.com for updates.