

FOCUS ON

LABOUR & EMPLOYMENT LAW

Lessons from the Ghomeshi case

Situation may have broader impact on workplace harassment claims

BY SHANNON KARI
Law Times

The criminal charges against Jian Ghomeshi are unlikely to go to trial until some time in 2016 at the earliest unless there's an unexpected resolution of the matter. But beyond the individual court proceeding and the impact on the reputation of the Canadian Broadcasting Corp., the publicity over the case may have a broader effect on the way employers deal with harassment claims in the workplace.

The allegations against the former CBC radio host resulted in a wave of discussion, including about the way the public broadcaster reacted to them and the reporting of sexual assault and workplace harassment.

According to lawyers who practise in the area, the increased spotlight and the fallout from how senior management at the CBC initially dealt with allegations against one of its best-known personalities have provided a number of lessons. Among the most important is the fact that the existence of a harassment policy and ensuring that employees know about

If the target of the complaint is a more senior employee, a company should consider hiring an outside investigator, says Inga Andriessen.



it isn't sufficient.

"One of the take-aways from this is that wilful blindness is not going to pay off in the long run," says Erin Kuzz, a partner at Sherrard Kuzz LLP in Toronto.

The fallout from the alleged actions of the former CBC host has reverberated in a number of other workplaces, says Inga Andriessen, a Toronto lawyer whose practice includes

employment litigation on the employer side.

"There definitely has been an uptick in sexual harassment complaints since Ghomeshi," she says. Hoping the problem will go away isn't the answer. "Short of it being really minor, you need to take it seriously," says Andriessen.

The allegations reported against Ghomeshi, outside of

the criminal charges he's facing, include a claim by at least one former female employee at the CBC who has stated he acted in a sexually inappropriate manner towards her in the workplace on more than one occasion. In a column in the British newspaper *The Guardian*, the woman alleged her union was of little assistance and the executive producer of the show Ghomeshi hosted suggested she needed to cope with it since that was the way he was. The woman ended up resigning.

The CBC says it fired Ghomeshi last fall after a meeting with two senior employees in which he showed video of what he said was consensual sexual activity that the public broadcaster has stated was graphic and violent.

Soon after the allegations became public and before police laid any criminal charges against Ghomeshi, the head of English programming at the CBC said in interviews with the public broadcaster that there were no records of past complaints. Heather Conway added the CBC had previously done a "deep dive" into his human resources file that didn't turn up evidence of workplace harassment.

At the same time, Conway retained Janice Rubin, a Toronto employment lawyer, to investigate. The CBC has said Rubin will produce two reports for senior management. One is specifically about the Ghomeshi allegations. The other is a broader review of the CBC's policies and practices related to harassment and respect in the workplace.

Without commenting specifically on how the CBC had initially handled the Ghomeshi

situation, Kuzz says not taking action unless there's a formal complaint isn't acceptable.

"An employer's legal obligation kicks in the moment they know [about alleged harassment]," she says.

"It doesn't mean there will always be something to find," she adds, suggesting employers must always take the allegations seriously.

Amendments to the Occupational Health and Safety Act that took effect in 2010 require employers to have a policy in place about workplace harassment.

But drafting the policy is only the first step, says Andriessen. "It needs to be followed once you get the complaint. You can't punish a person for complaining," she adds.

Andriessen suggests separating the complainant and the person who's the subject of the complaint at the workplace in order to reduce the possibility of more problems while an investigation is underway.

In addition to the duty to investigate fairly, there's also the reputation at stake of the employee who's facing the allegations. "You are walking a fine line. You have two employees who could sue you" if the employer doesn't address the complaint fairly, says Andriessen.

If the target of the complaint is a more senior employee, a company should consider hiring an outside investigator, she says. Kuzz echoes that view. "You don't want an internal investigation being open to any allegation of a conflict of interest," she says.

Even for smaller- to mid-sized businesses, the expense of an outside investigator may still be cost-effective for the company in terms of avoiding litigation or a complaint to the Human Rights Tribunal of Ontario, says Andriessen.

Once the allegations against Ghomeshi became public, there were leaks to the media of a number of internal memos issued to employees by senior executives. Meetings with a number of employees at once or memos while an investigation is still underway aren't a good idea, says Kuzz. "This could threaten the integrity of the investigation," she says.

While there may not be a duty on the employer to notify the authorities, if an allegation is serious enough that it could be criminal in nature, Kuzz says it should encourage a complainant to contact the police. **LT**