

## THE GHOMESHI AFFAIR – WHAT CAN EMPLOYERS LEARN?

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By now everyone has heard or read about the facts and recommendations contained in the investigation report prepared for the CBC concerning the actions of former Q radio host, Jian Ghomeshi (the “Report”).

While it may be tempting to write-off Ghomeshi’s actions as an extreme example of celebrity misconduct, an employer ignores the substance of the investigation’s findings at its peril.

The CBC is not the only workplace at which a high performing, high producing employee has been allowed to treat colleagues in a manner that is ‘deeply disrespectful’, ‘belittling’ and ‘abusive’. The question is, **what can we learn from all of this?**

#### If you have a policy, enforce it

The CBC opted to put into place a policy that exceeded its basic legal requirements. The corporation’s Code of Conduct (much like the *respectful workplace policy* found in many Canadian workplaces) goes well above its obligations under the *Canada Labour Code* and *Canadian Human Rights Act* (the corollary legislation in Ontario being the *Occupational Health and Safety Act* and *Human Rights Code*, respectively). It mandates that employees treat one another in a manner consistent with the law, but also ‘with respect and fairness’ and that they ‘work together in a spirit of openness, honesty and transparency that encourages engagement, collaboration and respectful communication.’

While it is laudable the CBC sought to exceed its basic legal obligations, having set this higher standard, the corporation was obligated to hold employees to it. Its failure to do so not only allowed Ghomeshi’s conduct to fester unchecked, it created a workplace culture in which other employees were either afraid to voice their concerns for fear of reprisal, or if they did, they were effectively ignored.

This lesson is simple: If you have a policy, you must enforce it, consistently and transparently - even more so when the ‘problem’ employee is high profile.

#### If any member of management knows, the company knows

A significant criticism of the CBC involved what the Report called ‘missed opportunities’ to have investigated and addressed Ghomeshi’s conduct. According to the Report, several managers were aware of some kind of misconduct on Ghomeshi’s part (whether from third parties or their own observation), yet chose to do nothing (or nothing meaningful). This *turning a blind eye* attracted the investigator’s harshest criticism, resulting in a finding the CBC *condoned* Ghomeshi’s conduct.

The lessons here are two-fold. First, turning a blind eye is never an acceptable management response to workplace bullying or harassment. It is simply not acceptable for any manager to suggest that because he or she didn’t know the full extent of an employee’s misconduct there arises no obligation to make further inquiries. Second, except in the rarest of circumstances, knowledge, action or inaction on the part of *management* will be deemed in law to be that of the *company*.

#### A complaint does not have to be in writing

One explanation offered by CBC was that while it had a complaint mechanism in place, no *formal* complaint was ever filed. The suggestion being that if a complaint is not in writing, it’s as if the complaint doesn’t exist and the employer has no obligation to inquire or investigate.

Nothing could be further from the truth.

While most workplace harassment and discrimination policies request (or even require) a written complaint to be filed as part of the process, an employer cannot hide behind an employee's failure or refusal to do so as a basis for failing to inquire or investigate. When facts come to light which would cause a reasonable employer to believe there may be the presence of harassment or discrimination (or other violation of a relevant code of conduct), the circumstances must be investigated. This includes where an employee claims only to want to 'vent' to a manager or 'get something off his or her chest'. Bottom line: Liability is created when an employer knows, or ought reasonably to know, there has been a breach.

### Someone needs to be in charge

Perhaps the most surprising finding in the Report was that no one at CBC appeared to be 'in charge' of Ghomeshi and responsible for his workplace conduct or performance. Complicating this unusual absence of supervision was the fact that every member of the Q production staff, including Ghomeshi, was a unionized member of the same bargaining unit. The obligation for CBC employees to comply with its Code of Conduct was therefore virtually impossible to enforce because no one was responsible for doing so.

Lesson learned: *Someone* has to be in charge, and others need to know who this person is.

### A union has obligations too

Although many of the relevant facts were redacted in the version of the Report released to the public, it is clear that at some point a member of the Canadian Media Guild (the union representing the relevant CBC staff) raised with the Guild allegations of sexual harassment against Ghomeshi. Unfortunately, despite having a stated 'zero tolerance policy' regarding sexual harassment, the Guild did nothing to escalate the complaint. Instead, just as the CBC had done, the Guild appears to have been unwilling or unable to investigate one of its golden boys.

### Closing thoughts

While it may be tempting to dismiss the findings in the Report as merely the embarrassing fallout of a high profile personality abusing his perceived authority and power, any employer that fails to see the lessons to be taken from the Ghomeshi affair may be doomed to learn them in its own workplace.

As we noted at the very start - the CBC is not the only workplace at which a high performing, high producing employee has been allowed to treat colleagues in a manner that is 'deeply disrespectful', 'belittling' and 'abusive'.

While the devil is always in the details, and no single approach will apply in every workplace, at the very least employers must be mindful of the following lessons learned:

1. If the organization has a code of conduct (or equivalent), it must be enforced, consistently and transparently.
2. A complaint does not have to be in writing.
3. Liability is created when an employer knows, or ought reasonably to know, there has been a breach.
4. Willful blindness is never a winning strategy.
5. If any member of *management* knows, the *company* is deemed to know.
6. Someone needs to be in charge.
7. The union has obligations too.

To learn more or for assistance drafting, implementing and enforcing anti-harassment and bullying policies tailored to your specific workplace, contact a member of Sherrard Kuzz LLP.

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