Jian Ghomeshi Firing Raises Interesting Legal Issues

Jian Ghomeshi is a well-known broadcaster, employed by the CBC for fifteen years. He has been very successful on a program called Q which is broadcast every weekday on CBC and throughout much of the United States on Public Radio International. Mr. Ghomeshi has become a well-known radio personality with a significant following.

On Sunday October 26, the CBC announced that information had come to its attention recently that in its judgment precluded it from continuing its employment relationship with Mr.Ghomeshi. That statement was reprinted by the Globe and Mail confirming that the basis of the termination was as a result of confidential information that had been disclosed 'voluntarily and in good faith' to the CBC by Mr. Ghomeshi.

Mr. Ghomeshi himself admits that he has been involved in his private life with bondage-discipline, dominant-submissive and sadism-masochism sexual practices (BDSM). Mr. Ghomeshi maintains that these practices were consensual, and that these actions are part of his private life and no one else's business. As a result of these facts, Mr. Ghomeshi has commenced a lawsuit against the CBC, claiming more than fifty million dollars in damages for breach of confidence and defamation, as well as five million dollars in punitive, aggravated and exemplary damages. The Toronto Star has reported alleged victims who claim abuse and non-consensual assault.

Can Mr. Ghomeshi Sue The CBC?

Mr. Ghomeshi is an employee of the CBC and is covered by a Collective Agreement between the Media Guild and the CBC. *Weber v. Ontario Hydro*, a decision of the Supreme Court of Canada, dealt with similar issues. That case determined that an individual covered by a Collective Agreement cannot sue his employer or anyone else, if the fundamental basis of the lawsuit involves matters which fall within the jurisdiction of the Collective Agreement. There are a number of cases since*Weber* where the courts have wrestled with the circumstances under which an individual covered by a Collective Agreement has the ability to bring a lawsuit claiming defamation or other tort related damages. In one of the cases, *Giorno v. Pappas*, a Plaintiff who was a civil servant and a Union member, was seconded to the Rent Review Hearings Board as an Appeal Analyst. The Defendant in the case was a senior member of the Rent Review Hearings Board, but not an actual employee of the Government. The Plaintiff and the Defendant were on the same team dealing with appeals. After the Plaintiff in that case refused to do work which she had confirmed with her superior

was beyond the scope of an Appeal Analyst, the individual Defendant, Mr. Pappas, sent a memorandum to numerous people stating that he was taking steps to remove her from his team. The Plaintiff filed a grievance and that matter was settled.

However, the Plaintiff then commenced an action for defamation in respect of the memorandum which had been written by Mr. Pappas. This was a case in which this firm acted for the Government. We were successful in having the court dismiss the action on the basis that the essential character of the dispute involved activity which arose as an incident of employment, and in such circumstance, the Plaintiff's **sole recourse** was to file a grievance. The court found this, despite the fact that the Defendant in the case was neither a party to the Collective Agreement, nor did that Agreement assert any jurisdiction over him. The court reasoned that, in a case where the individual has a grievance against the employer, the Union member would be required to initiate both a grievance and a parallel and concurrent court proceeding arising out of the identical incident. Mr. Ghomeshi has already announced that he intends to file a grievance with respect to his dismissal. Following the reasoning in *Giorno v. Pappas*, this would involve parallel and concurrent proceedings before an Arbitrator or other grievance related proceedings, as well as the court proceeding which has now been initiated.

What Will Happen Next?

We anticipate that lawyers for the CBC will bring a motion to have this Action dismissed on the basis that the courts lack jurisdiction to deal with it because Mr. Ghomeshi is an employee covered by a Collective Agreement with the CBC. The interesting issue in this case may involve whether the timing of this announcement – having been made after he had been terminated – is of any relevance.

Leaving aside entirely whether the statement was in fact defamatory, the argument would go as follows:

At the time the statement was made, Mr. Ghomeshi was no longer an employee of the CBC. Accordingly, his lawyer might argue, even though he was covered by a Collective Agreement **up to his termination**, once he had been terminated, the Collective Agreement could no longer serve to protect the CBC from a defamation action before a court relating to statements that CBC made **after his termination**.

Clearly, in this case the announcement was made almost simultaneously with the discharge. But what if defamatory comments were made many months or even years after a termination, but based on facts which arose while the individual was an employee covered by a Collective Agreement? It would seem unfair that an individual would lose the right to bring a defamation action in such circumstances. If that unfairness is to be prevented, then the question for courts will be: How soon after a termination must any such statement be made in order to be protected by the *Weber* principle?

Without doubt, this matter will be the subject of considerable debate and interest over the next several weeks and months.

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