The Ghomeshi Verdict—A Cautionary Tale for Handling Workplace Sexual Misconduct Complaints



Jian Ghomeshi wasn't acquitted because he was innocent. Nor was he acquitted because the witnesses were lying. Jian Ghomeshi was acquitted because his accusers botched the case. And while the Ghomeshi ruling isn't an employment case, its significance should not be lost on employers. The moral of the case: Accusations of sexual misconduct must be handled with delicacy and fairness to both accuser and accused. This applies not only in the courtroom but the workplace. Just as the public perception of injustice in the *Ghomeshi* case (whether right or wrong) has shaken Canadian society, if you allow stereotypes and emotions aroused by employee allegations of sexual misconduct against co-workers to colour your judgment, you're bound to make mistakes that compromise justice and poison morale in your workplace.

THE CASE

What Happened: The Crown charged the celebrated former CBC host of 5 counts of sexual assault based on the accounts of 3 different women, each of whom told a similar story. They found Ghomeshi charming and began dating him. Kissing ensued but ended abruptly when Ghomeshi violently pulled their hair and/or grasped their throat. Although the incidents took place over a decade ago, each accuser said she was emboldened to come forward when the Ghomeshi CBC "scandal" broke in 2014.

What the Court Decided: After hearing the accusers testify (Ghomeshi didn't take the stand), the Ontario Court of Justice dismissed the case.

How the Court Justified Its Decision: Since this was a criminal case, Ghomeshi was presumed innocent and the Crown had to prove the charges beyond a reasonable doubt. As in many sexual assault cases, there was no corroborating testimony, DNA or other physical evidence. The Crown's case was based entirely on the accusers' uncorroborated accounts. The uncorroborated evidence of a single witness can be enough to convict as long as the witness comes across as "sincere, honest and accurate." But the judge found that Ghomeshi's accusers lacked the credibility and reliability necessary to earn the court's trust. Their accounts weren't just inconsistent but "tainted by outright deception." Key factors cited by the court:

- Each accuser went to the media before talking to the police;
- Each accuser hid important details about her relationship with Ghomeshi;

- Each accuser was confronted with a volume of evidence contradicting her sworn statements;
- Each accuser engaged in social conduct with Ghomeshi after the fact that seemed "out of harmony with the assaultive behaviour ascribed to him"; and
- "Most troubling," each accuser demonstrated a repeated willingness to ignore her oath to tell the truth.

All of this was enough to create a reasonable doubt, the court concluded.

[*R. v. Ghomeshi*, 2016 ONCJ 155 (CanLII), March 24, 2016]

WHAT IT MEANS

Is Jian Ghomeshi a predatory sex offender or an innocent man wrongly accused of a crime he didn't commit? Based on public reaction to the trial, it's pretty clear that many have made up their mind on that question months ago. The trial that concluded last week did little to reveal which side was right.

Nor was it supposed to. Criminal trials aren't designed to recreate historical events; they're about determining whether there's enough evidence to convict the defendant of the particular charge. And the starting point in is the presumption of innocence. Ghomeshi didn't have to prove he was innocent; the Crown had to prove he *wasn't*—beyond a reasonable doubt. The problems with the witnesses' accounts and behaviour both before and during trial made them impossible to trust. And since their testimony was the only evidence, Judge Horkins had to acquit Ghomeshi as a matter of law.

Employers have to make similar judgments when one employee charges another with sexual misconduct. And while a workplace isn't a criminal court, employers are well advised to approach accusations of workplace sexual misconduct as a quasi-trial requiring proof and fairness to both accuser and accused. Rules to apply:

Rule 1: Take accusations of sexual misconduct by one employee against another very seriously;

Rule 2: Support employees who come forward with accusations with sympathy and respect;

Rule 3: Don't confuse support and sympathy as requiring you to automatically believe the accuser's account;

Rule 4: Don't take disciplinary action against the accused unless and until you determine that there's reliable evidence to support the accusation;

Rule 5: If possible, gather evidence that corroborates the accuser's story, like DNA or the testimony of another eyewitness.

Unfortunately, in many cases of sexual misconduct, the accuser's story just can't be corroborated. In this situation, you face a difficult and crucial judgment: Is the accuser and his/her uncorroborated account credible and reliable enough to serve as legal justification for disciplining the accused?

Essentially, you'll be sitting in the same place as Judge Horkins in the *Ghomeshi* case. And while nobody will end up in jail, the soundness of your judgment will determine the fates of both the accuser and accused, not to mention the liability risks of your organization if your decision is challenged in court or arbitration.