

# When “All The Smoke” Leads to Fire: What Canadian Employers Can Take Away about Employee Off-Duty Conduct from Matt Barnes’ Recent Departure from NBC

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By Daniel Wong, Seth Holland

The recent departure of sports analyst and former NBA player, Matt Barnes, who also co-hosts the *All The Smoke* podcast, from his position as Sacramento Kings media analyst at NBC Sports serves as a high-profile example of where an employee’s off-duty conduct can lead to termination of employment. Barnes was reportedly dropped from NBC Sports due to an incident at his sons’ high school basketball game during which he allegedly yelled expletives at referees and a student broadcaster. Barnes was reacting to a foul called on one of his sons during the game. A video of Barnes angrily confronting the student broadcaster, with his hand on his shoulder, went viral on social media. Shortly after the video gained attention, NBC Sports confirmed that Barnes would be removed from his Kings analyst role.

While this situation occurred in the United States, it is a reminder to Canadian employers that an employee’s off-duty conduct can be relevant to the employment relationship, and in some cases can justify termination with cause. Off-duty conduct can give rise to cause for termination of the employment relationship where there is a real and demonstrable connection between the conduct and the employer or the nature of employment. The law in Canada has developed a number of factors that the courts will assess in determining whether off-duty conduct justifies cause to terminate without notice or pay in lieu:

1. whether the conduct of the employee harms the employer’s reputation or product;
2. whether the employee’s behaviour renders them unable to perform their duties satisfactorily;
3. whether the employee’s behaviour leads to refusal, reluctance or inability of the other employees to work with them;
4. whether the employee has been guilty of a serious breach of the *Criminal Code*, which renders their conduct injurious to the general reputation of the employer and its employees; and
5. whether continuing to employ the employee will cause difficulty in the way the employer properly carries out the function of efficiently managing its work and efficiently directing its work force.<sup>[1]</sup>

It is not necessary for an employer to satisfy all of the above elements to justify cause for termination, but any one or combination of these factors must have a sufficient degree of impact on the employment relationship to render the employee’s continued employment untenable.

A decision where an Ontario court upheld termination for cause based on off-duty conduct is *Kelly v Linamar Corp.*<sup>[2]</sup> In this case, a former well-respected materials manager was dismissed after he was arrested and charged with possession of child pornography. The court found that the termination for cause was appropriate in large part because the employee’s job was public-facing and involved significant interaction with the community. The court held that the employer had built up a strong reputation in the community and

that given the nature of the employee's conduct, termination of employment was a reasonable step to protect its reputation.

In contrast, *Kim v International Triathlon Union*, is an example of a decision in which a B.C. court found that an employee's off-duty conduct did not amount to just cause for termination.<sup>[3]</sup> The employee, a communications manager, was dismissed after her boss discovered she had posted a series of offensive comments about her work on her personal social media. The court found that the employer had never warned the employee that her behaviour was inappropriate and due to a lack of progressive discipline and similar incidents of misconduct, there was no just cause for termination.

Based on the Canadian law, it is less than clear that Barnes' conduct would justify just cause for his dismissal if the case played out in Canada. These decisions highlight the ability for off-duty conduct to be grounds for dismissal, but also the high bar required to prove the termination was justified.

#### Key Takeaways for Employers

1. Have clear written policies that remind employees of the expectations for off-duty conduct and the potential repercussions to their employment.
2. Establish a clear internal reporting system that sets out a designated department or person that employees can report to regarding harmful off-duty conduct.
3. Take the appropriate steps, which may include progressive discipline, based on the nature and severity of the off-duty conduct.
4. Remember that the onus to prove the termination was for just cause rests on the employer. Accordingly, it is important that misconduct be clearly documented to the extent possible, and that the employer is able to demonstrate legitimate and demonstrable harm that the employee's conduct will have on the employer or its workforce.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

<sup>[1]</sup> *Millhaven Fibres Ltd. v Oil, Chemical & Atomic Workers Int'l Union, Local 9-670*, [1967] O.L.A.A. No. 4, at paras 19 and 20.

<sup>[2]</sup> *Kelly v. Linamar Corporation*, 2005 CanLII 42487 (ON SC)

<sup>[3]</sup> *Kim v. International Triathlon Union*, 2014 BCSC 2151

For more information or inquiries:



## Daniel Wong

Toronto  
416.947.5042

Email:  
dwong@weirfoulds.com

Daniel Wong is Chair of the Firm's Employment & Labour Practice Group with a practice that is focused on employment and labour relations.



## Seth Holland

Toronto  
416.947.5004

Email:  
sholland@weirfoulds.com

Seth Holland is an Associate in the Employment and Labour Law Practice Group at WeirFoulds LLP.

**WeirFoulds**<sup>LLP</sup>

[www.weirfoulds.com](http://www.weirfoulds.com)

### **Toronto Office**

4100 – 66 Wellington Street West  
PO Box 35, TD Bank Tower  
Toronto, ON M5K 1B7

Tel: 416.365.1110  
Fax: 416.365.1876

### **Oakville Office**

1320 Cornwall Rd., Suite 201  
Oakville, ON L6J 7W5

Tel: 416.365.1110  
Fax: 905.829.2035