

# Is Sexual Immorality Just Cause for Termination?



*“Information came to our attention recently that in CBC’s judgment precludes us from continuing our relationship with Jian Ghomeshi.”*

–CBC spokesman , Oct. 26

*“My tastes in the bedroom may not be palatable to some folks. . . . But that is my private life. And no one, and certainly no employer, should have dominion over what people do consensually in their private life. . . . I have been fired from the CBC because of what I do in my private life.”*

–Jian Ghomeshi, Facebook posting, Oct. 26

We don’t and will probably never know the real reason the CBC fired Jian Ghomeshi. But what we do know is how to answer the larger legal question Ghomeshi controversy raises: Is immoral sexual behaviour by employees in the privacy of their own bedroom just cause for termination?

## **THE 3 RULES OF DISCIPLINING EMPLOYEES FOR SEXUAL MISCONDUCT**

Conventional wisdom has it that employers are allowed to regulate how employees behave at work but not *away from work*. But it’s not as simple as that. Private behaviour can, in fact, be grounds for discipline in certain situations. It’s important for HR directors to understand where the legal lines are drawn. There are 3 rules.

### **RULE 1: EMPLOYEE’S SEXUAL MISCONDUCT MUST HARM EMPLOYER’S BUSINESS**

In a 1967 case called *Re Millhaven Fibres Ltd. & Oil, Chemical and Atomic Workers I.U. Loc. 9-670*, [[1967] O.L.A.A. No. 4], an Ontario court ruled that off-duty conduct can be grounds for discipline as long as the employer can prove that it harms an important interest of the business. Employers can meet this burden, the court continued, by showing that the conduct:

Harms the company’s reputation;

- Renders the employee unable to do his job effectively;
- Makes co-workers unwilling, unable or reluctant to work with the employee;
- Is a serious breach of the *Criminal Code*; or

- Makes it hard for the company to properly carry out “its function of efficiently managing its works and efficiently directing its working forces.”

If you ever have to decide about firing an employee for sexual immorality, your first challenge is to ensure that the conduct meets at least one of these criteria.

**Harm to reputation:** Kinky sex between consenting adults behind closed doors is one thing; but once it becomes public knowledge, an employee’s objectionable sexual conduct can become a wrecking ball for the company’s reputation and image. This is especially true of religious institutions, schools, police departments and other organizations expected to live up to high standards of morality. Exhibit A: The CBC fired Mr. Ghomeshi to protect its reputation from the anticipated fallout caused by revelation of his nonpalatable “tastes in the bedroom.”

**Impairment of Effectiveness:** Immoral sexual conduct can be just cause for termination if it makes it impossible for an employee to do the job. Exhibit B: The CBC feared that Mr. Ghomeshi couldn’t be a trusted broadcaster once his fondness for sado-masochistic sex became public.

**Complications with Co-Workers:** The acceptance of colleagues is also essential to an employee’s viability. So, evidence that an employee’s sexual practices have undermined the esteem or trust of co-workers can be important to prove just cause.

**Serious Breach of Criminal Code:** BDSM (bondage, domination, sadism and masochism) isn’t a crime as long as both parties consent. But forcing a partner to engage in such conduct against his/her will is a serious crime akin to rape. Convictions and even accusations of such crimes are likely to constitute just cause for termination.

**Interference with Company’s Ability to Manage Its Business and Workforce:** The fifth, and vaguest of the *Millhaven* factors, is conduct that does general harm to a business and workplace. It’s hard to imagine how sexual deviance would have such an effect.

## **RULE 2: TERMINATION FOR SEXUAL MISCONDUCT CAN’T BE DISCRIMINATORY**

We know from Rule 1, that “immoral” sexual conduct between consenting adults in the privacy of their own bedroom can be just cause to terminate an employee. But what exactly does “immoral” mean? For some, gay sex is “immoral.” But as far as the law is concerned, there’s a big difference between gay sex and BDSM: the former is protected by discrimination laws and the latter isn’t.

Explanation: Human rights laws ban employers from discriminating against employees on the basis of sexual orientation. So if the CBC had fired Jian Ghomeshi for having sex with men, it would be guilty of employment discrimination. Consensual sex between adult partners in private isn’t Kinky sex isn’t illegal if it’s consensual. But kinky sex and BDSM, the behaviours for which the CBC allegedly fired Jian Ghomeshi, are **not** protected grounds.

## **RULE 3: THERE MUST BE DUE PROCESS**

Last but not least, as with any other form of discipline, termination for sexual misconduct must be carried out fairly. Providing due process would typically involve:

Establishing a clear and specific workplace policy—like a morality policy;

- Conducting a full and fair investigation;
- Providing the employee adequate warning and a chance to correct the problem—unless the conduct is so egregious that it calls for immediate termination without warning; and

- Documenting each stage of the disciplinary process.