

Taking action over conduct outside work is tricky

Employers should tread very carefully if they are considering sanctioning an employee over an incident that occurred outside the workplace



Derek McKay

In the weeks since the US Capitol breach in Washington DC, stories have begun to emerge of some of the participants in the riot losing their jobs as a result of their actions that day.

And while it may seem like a far-away problem for employers in Ireland, this development does raise an interesting question. If an employee breaks the law or is otherwise caught behaving in a less than savoury way outside work, what rights and responsibilities does their employer have, if any?

Addressing misconduct in the workplace is an issue that many employers will have to face at some point. Most will have clear policies and procedures in place to address

it in line with employment legislation and the codes of practice.

But what happens if the behaviour of an employee outside the workplace is called into question? If their behaviour brings unwelcome attention to their employer, can they be disciplined or dismissed?

Unfortunately, there is no simple yes or no answer here, and employers should tread very carefully if they are considering sanctioning an employee for conduct outside work.

Most organisations will have employment terms and conditions outlining the standards of conduct they deem acceptable among staff in the course of their work. These standards tend to relate to issues such as conflicts of interest, data protection or accepting gifts from third parties, however. Rarely do



Some participants in the US Capitol breach have been fired since by their employers

they cover behaviour.

If an employer is taking disciplinary action against an employee for an incident that has occurred outside the workplace, they will generally need to prove a connection to either the employer relationship or the workplace.

A number of cases that have come before the Workplace Relations Commission (WRC) in Ireland demonstrate how an employer can be liable for

incidents that occur outside the normal place of work – at social events, for example, or on social media.

Last May, the WRC found in favour of a betting shop manager who had been unfairly dismissed after he was involved in a physical altercation on the night of a “leaving do”. The commission awarded €6,000 against the employer.

The employee at the time had been involved in a fight

with a colleague. He was subsequently dismissed for causing an injury to a colleague and bringing the reputation of the company into disrepute.

While finding the manager’s behaviour reckless and dangerous, the WRC adjudication officer referenced the fact that the other party involved in the fight was only issued with a final written warning for his participation. The dismissal of the manager was, therefore, found to be excessive and was determined to be unfair.

By contrast, in an earlier employment claim which came before the Employment Appeals Tribunal, a claimant employed as a postman who had been on long-term sick leave was convicted under the Misuse of Drugs Acts for the sale and supply of drugs and sentenced to a nine-month prison term, suspended for 14 months.

The employee was subsequently dismissed. In this case, the tribunal was satisfied that the claimant’s conduct had destroyed the relationship of trust. It noted that the claimant held a position of great trust and was fully satisfied that there was a

connection or nexus between the claimant’s criminal conviction and his employment.

Such a conviction inevitably led to a breach of trust, caused reputational damage and led to the claimant’s dismissal, which the tribunal held to be fair and reasonable having regard to all the circumstances.

What these cases show is that, when it comes to an employee’s conduct outside work, what can or can’t be considered an employment matter is not always clear.

My advice is that employers should always exercise caution in such matters. Disciplinary action is a serious course of action for both employers and employees and should not be taken without good reason and due consideration.

It is the responsibility of employers in all cases to show that any dismissal is fair, justified and proportionate and that due process has been followed.

Derek McKay is managing director at Adare Human Resources. The Irish-owned HR firm has offices in Dublin and Shannon in Co Clare