

*Top employment lawyer, Rhian Radia, Partner and Head of Employment Law at [Hodge Jones & Allen](#), recently gave HR News her report on the case of a teacher who recently won at appeal having been dismissed for long term sickness absence. The case has implications for both educational employers and the wider HR community.*

*[HR News](#) have given Activ Absence permission to share Rhian's report:*



### **Sacking sick employees – how long should employers wait?**

Sick employees are an expensive problem for employers. But how long do employers need to wait before deciding enough is enough and taking the drastic step of dismissing an employee for being incapable of doing their job?

The recent Court of Appeal decision in O'Brien V Bolton St Catherine's Academy provides some useful guidance.

### **Long-term absence, how long is too long?**

Mrs O'Brien was a teacher at Bolton St Catherine's Academy who was assaulted by a pupil. The assault left her feeling very shaken and unsafe at work, which led to her being diagnosed with anxiety, depression and post-traumatic stress disorder.

After a year of being off work, the Academy dismissed Mrs O'Brien on the basis that there was no evidence that she would return to work in the near future. The employer, in other words, decided it could not wait forever and considered this to be a reasonable and fair step

## Case law: Dismissing staff for sickness absence

pg. 2

to take. Mrs O'Brien then produced a fit note stating that she could return to work imminently, but the decision to dismiss was upheld on appeal.

The Employment Tribunal initially found in Mrs O'Brien's favour but its decision was overturned by the Employment Appeal Tribunal on the basis that the Academy should not have had to wait longer for Mrs O'Brien to return to work. Mrs O'Brien then took her case to the Court of Appeal who concluded that the dismissal was both unfair and amounted to disability discrimination.

This case is a lesson for employers not to rush to dismissal.

### **Dismissal should always be a last resort**

According to the Court of Appeal, the Academy should not have disregarded the fit note and given Mrs O'Brien enough time to gather appropriate evidence. In short, they should have taken the fit note seriously and waited longer before resorting to dismissal.

The Court of Appeal also found that the Academy had not appeared to have considered the impact of Mrs O'Brien's continued absence on the wider business, which should have been the case. More specifically, the Academy should have been able to demonstrate that the impact on the business was significant enough to warrant its decision to dismiss. It is not just about the medical evidence but also the financial and commercial aspects too.

The Court of Appeal was not in agreement about the decision. The fit note was described as "half baked" by one of the judges and the length of absence also fuelled disagreement. The case clearly highlights the difficulties for employers of any dismissal decision of employees on long-term sick leave.

Here are some steps that employers can take to manage the risks.

### Implications for employers

This case clearly demonstrates that employers should not rush to dismiss employees simply because they have been on sick leave for a lengthy period of time. It is therefore vital that employers take the following steps before even considering dismissal:

1. Be proactive and don't forget employees who are absent for a long period of time. Obtain medical documentation regularly and do not let things drift
2. Ask the employee to attend an independent medical examination. It is useful to have the right to do this in the employment contract
3. Give employees time to gather evidence to support their ability to return to work and put forward their case
4. It may sound basic, but follow occupational health recommendations
5. Take on board the advice provided by medical and other related professionals, including occupational health, on an employee's ability to continue to do their job
6. Make reasonable adjustments to facilitate a disciplinary hearing, for example, arrange to visit the employee at home or at a neutral venue
7. Be sure that the impact on the wider business of any continued absence is significant enough to warrant dismissal, and gather supporting evidence
8. Think about whether there are other vacancies for the employee which they could take up in the future before dismissal.

Employers that take the decision to dismiss an employee in the absence of sound medical evidence or whilst ignoring the same, or do not consider the full impact on the business, will do so at their peril.

*About the author: Rhian Radia is Partner and Head of Employment Law at Hodge Jones & Allen. Downloaded article shared by kind permission of HR News.*