



HR Broadcast – Long-term sickness absence and dismissal

I have recently read about a case that went to Employment Tribunal, then to Employment Appeal Tribunal before concluding at the Court of Appeal. The case involved the dismissal of an employee who was dismissed following over a year's sickness absence. The Court of Appeal ruled that this was unfair dismissal.

The Court of Appeal handed down its judgment in the case of *O'Brien v Bolton St Catherine's Academy*, Case number A2/2015/3377 (2017). This ruling is important as it gives employers guidance on dealing with long-term sickness absence and resulting dismissal.

Briefly, O'Brien (O) commenced work as a teacher for an Academy in 2005. In March 2011 she was assaulted by a pupil. O had a short period off work afterwards, but was terribly shaken by the incident. Following some further incidents in December 2011, O went off sick again with severe stress, anxiety and depression.

After more than a year's long-term sickness absence, the Academy sought clarification from her as to when she might be able to return to work and what adjustments (if any) it could make to facilitate a return. O was asked to attend a meeting to discuss these issues but refused because she felt it might upset her.

Considering her refusal, the Academy asked O to "provide the information in writing" and this resulted in a letter from her GP in which the GP stated that he was "not confident" about when she might be able to return to work.

As a result the Academy decided to hold a medical incapacity hearing, under its formal absence management procedures, and subsequently dismissed O. She then lodged an internal appeal.

At that appeal hearing, O presented a fit note from her GP which stated that her return to work was "imminent" but did not give a likely or possible date. The Academy took the view that the GP's report was suspicious and inconsistent because it only appeared after the dismissal had taken place.

O made a complaint for unfair dismissal and discrimination on the grounds of disability and won her claim at the tribunal. The Academy appealed to the Employment Appeal Tribunal which overturned that ruling. O then went to the Court of Appeal which restored the tribunal's finding of unfair dismissal.

In addition, the Court of Appeal gave some useful guidance:-

1. Where an employee has been absent for a period of twelve months or more and there is no certainty about their return, a dismissal is not necessarily unfair. This is reasonable as these matters cannot remain open ended for such a long time period.
2. With all matters, each case must be treated on its own merits and therefore the timing of the dismissal and its justification can vary from person to person and organisation to organisation.



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From a general point of view, if the situation is manageable then dismissal may well be unjustified even if it is causing significant problems, and conversely, if a situation is causing disruption and is unmanageable then a dismissal may well be justified.

However, the benchmark is high in terms of the evidence required. It also follows that smaller employers will always find it easier to dismiss for long term sickness absence than larger ones because they have far fewer resources at their disposal and the disruption caused by the absence is consequently much greater.