University and College Union

COVID-19: Returning to work and health & safety

A note for UCU branches on the legal position

Employers' duties

The starting point for any consideration of the legal position on return to work proposals, following the Covid-19 'lockdown', should be the obligations on employers to ensure the health and safety of their employees.

The union has recently provided advice on this to FE branches in England following the prime minister's announcements on return to work in his television address of 17 May. The advice, which applies to all UCU member workplaces, summarises employers' responsibilities as follows.

Employers must:

- prevent the spread and transmission of COVID-19 within their workplaces and fulfil their legal duties under the **Health and Safety at Work Act 1974**
- conduct **'suitable and sufficient'** risk assessments in consultation with trade unions and employees which seek to first prevent or eliminate workplace hazards or control risks at their source
- identify all potential hazards and risks within the workplace in consultation with trade unions and employees. Risk assessments should consider all those who could be harmed by the hazards identified including employees, students, contractors, visitors, members of the public and so on. Risk assessments should capture what actually happens in practice and include any non-routine tasks
- all those identified as being at a greater risk need to also be specifically identified in any risk assessment as required under Reg 3 of **The Management of Health and Safety at Work Regs 1999** - including new and temporary workers, young people, migrant workers, new or expectant mothers
- as new evidence emerges in relation to COVID-19, the risk assessments should include those who are at greater potential risk of infection or poorer outcomes from COVID-19 (including long-term health conditions, older age, pregnancy, and Black and Minority Ethnic people)
- appoint **competent persons** with appropriate levels of knowledge and expertise to undertake risk assessments (union health and safety reps must be consulted about the appointment of competent persons). Once completed the risk assessments should be signed off by the employer and regularly reviewed to ensure the effectiveness of control measures

- provide sufficient information, instruction and training to ensure employees and others understand the hazards to which they are exposed and the preventative and protective control measures that should be in place
- ensure they communicate their risk management systems and procedures to all staff and regularly review the effectiveness of these in consultation with trade unions and employees.

The role of trade union health and safety representatives is very important:

- employers are already legally required to consult with union health and safety representatives where a union is recognised. Health and safety reps are play an important role in preventing illness, injury and death at work. Their role is recognised and protected under the Health and Safety at Work Act 1974, and they have special legal rights under the Safety Representatives and Safety Committees Regulations 1977 (the **'Brown Book'**) to investigate workplace hazards, represent their colleagues and be consulted on changes to working practices. Employers must consult with union appointed or elected health and safety representatives in good time on all health and safety matters at work that could have a substantial impact on the health, safety or welfare of employees.

The union calls for:

- all risk assessments in workplaces to be produced in consultation with union representatives and actions to guarantee safe working agreed with unions
- all risk assessments to be published and made available to all employees
- changes to working conditions and arrangements affecting the workforce to be preceded by an **Equality Impact Assessment (EIA)**. This is particularly important in the current crisis in which the disproportionate direct and indirect impact of Covid-19 are well known (e.g. on black and minority ethnic staff; on medically vulnerable staff; on staff, mainly women, with caring responsibilities; and so on). EIAs should be published to all employee
- assessment of data about the local incidence of COVID-19 should be factored into workplace risk assessments.

Rights of employees

The most effective way to protect the rights of individual union members to work in a healthy and safe environment is through the collective strength of union representation and through direct engagement with employers. Members do have individual rights in law but relying on them is not recommended as a strategy for securing the health and safety of all members.

The individual right most commonly cited is Section 44 (and the associated Section 100) of the **Employment Rights Act 1996** (in NI, Section 68 of the Employment Rights Order 1996) – the so-called 'serious and imminent danger' provision.

This is a difficult area of law, particularly in the highly problematic way in which it relates to the law governing industrial action. The following note is extracted by permission of its author, Stuart Brittenden of Old Square Chambers, and the UK Labour Law Blog, where it was first published under the title 'Coronavirus: Rights to Leave the Workplace and Strikes' (**https://uklabourlawblog.com/2020/03/27/the-coronavirus-rights-to-leave-the-workplace-and-strikes-by-stuart-brittenden/**).

As the article points out, although S44 is an individual right, it goes together with, and should always be approached by unions in the light of, the corresponding legal duty of employers under the Management of Health and Safety at Work Regulations 1999 to put in place procedures to be followed in the event of serious and imminent danger in the workplace. While S44 is often quoted, this duty on employers is often overlooked.

Serious and imminent danger

The individual rights to protection from detriment and dismissal in s44 ERA are not confined to trade union representatives but cover six situations. Of particular topical relevance are (d) and (e) which protect employees from detriment or dismissal on the grounds that:

d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which they could not reasonably have been expected to avert, they left (or proposed to leave) or (while the danger persisted) refused to return to their place of work or any dangerous part of their place of work, or
e) in circumstances of danger which the employee reasonably believed to be serious and imminent, they took (or proposed to take) appropriate steps to protect themselves or other persons from the danger.

Category (d) is deliberately framed in wide terms. Where an employee reasonably believes that there are circumstances of danger which are *'serious and imminent'* they can tell the employer that they plan to leave the workplace, actually leave (this presupposes that they do not have permission to do so), or even refuse to attend for work. Without doubt, exposure to Coronavirus is serious – both for the individual and those they come into contact with. In a pandemic, it is difficult to regard it as something which is not imminent.

Category (e) is an important right, which may permit individual workers or union representatives to refuse to work until the workplace is made safe. This provision is less precise, and *'appropriate steps'* is not defined. However, where part of a factory is suspected of being dangerous, an appropriate step would be to refrain from entering that particular area, whilst still being physically present at the workplace.

Union advice

It is unlawful for trade unions to seek to induce their members to breach their contracts (including by refusing to attend for work or downing tools and leaving the workplace) unless the unions have the protections accrued by having gone through the necessary legal steps to take lawful industrial action. Disputes over health and safety matters can form the basis for lawful industrial action, although, of course, the timescale involved in balloting and other procedural requirements in preparation for industrial action is likely to be too long to respond to any urgent health and safety issue.

This legal framework of individual versus collective rights prevents unions from proactively advising or encouraging their members to exercise their S44 right to remove themselves from 'serious and imminent danger' at their workplace. The question is whether the union's communications with its members cross the line from advice to unlawful industrial action.

Stuart Brittenden examines this difficult area of law comprehensively in his blog article, dealing with the nuances and potential attitudes of the courts to this question. He concludes that unions would be advised to take care to distinguish between merely providing members with information about their rights under S44, which he argues must be permissible, and being seen to ask or encourage members to act on their right to remove themselves from danger where they have a 'reasonable belief'. He advises:

While there is a tension between the system of individualised rights under ss. 44 and 100 and the provisions in Part V of TULRCA [Industrial Action], the better view is that a Court should not decide that the provision of advice by a trade union as to its members' legal rights in these circumstances should amount to an inducement. From the union's perspective, of course, it would be sensible to make it absolutely clear in any communication that the union is not asking or encouraging the member to do or to refrain from doing anything at all. It is merely providing information as to their individual rights under ss. 44 and 100. That is something that any trade union must be permitted to do, in order to protect its members' health and safety.

To this extent, the use of S44 is limited and from the trade union perspective does carry some serious potential exposure to legal retaliation from employers.

This reinforces the importance of not giving members the impression that S44 is a viable or practical solution to the challenge of ensuring health and safety for all members as and when the return to work process begins. That challenge is a collective one for unions through the deployment of their consultative and negotiating rights under existing agreements and legislation, aimed at forcing all employers to abide by their legal responsibilities to guarantee the health and safety of all their employees, as well as fulfilling their broader duties of care and equality.

While providing members with information about rights, members should always be encouraged to raise any health and safety concerns with the union so that they can be taken up with the employer on their behalf. Members should be aware that despite the protections under S44, an effective response to any detriment suffered as a result of exercising S44 rights would be dependent on the employment tribunals. Even if successful in an unfair dismissal claim, there would be no guarantee of reinstatement; indeed, that outcome would be unlikely. For this reason, union representatives should not advise or encourage members to depend on S44 or give the impression that union support for members who decide to utilise S44 would be automatic – it would depend on the circumstances in each case.

If members are placed in a position in which they are being pressurised by their employer to respond to an instruction to return to work, a suitable holding reply while seeking union advice would be:

'I am very concerned about the suggestion that I return to on-site work activities without knowing all suitable and sufficient risk management controls are in place making it safe to return. My union, UCU, will be advising me of the outcome of collective consultations over any proposed risk management strategy the [college/university etc] may have. I therefore request that this consultation takes place with UCU prior to any consultation with me individually.'