

Covid 19: employees' individual and collective rights on health & safety issues on return to work in FE (Wales)

January 2021

Our campaigning position on Covid 19 is:

- teaching this term should be online wherever possible;
- all our sectors need emergency funding now

The individual rights of employees

In normal times 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, and trade unions can lawfully give their members information about these.

The individual right most commonly cited is **Section 44** (and the associated **Section 100**) of the [Employment Rights Act 1996](#) the so-called 'serious and imminent danger' provision.

Serious and imminent danger

S.44 ERA provides, as far as is relevant:

44 Health and safety cases.

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

.....

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

S.100 ERA provides similar protection in relation to dismissal.

These individual rights to protection from detriment and dismissal are not confined to trade union members, but they are confined to employees. Those who do not work under an individual contract of employment do not have these protections.

Sub-section (d) is deliberately framed in wide terms. Where an employee reasonably believes that there are circumstances of danger which are '*serious and imminent*' they may be protected from detriment or dismissal when they tell the employer that they plan to leave the workplace, actually leave (this presupposes that they do not have permission to do so), or refuse to attend for work. Without doubt, exposure to Coronavirus can be serious – both for the individual and those they come into contact with. At the time of writing there have been 74,570 deaths in the UK within 28 days of a positive Covid 19 test (ONS data 03.01.21). An individual may reasonably believe the danger in their own individual circumstances to be imminent, given the rising infection rate in some parts of the country driven by the new variant of the virus which is believed to be more transmissible.

Sub-section (e) is an important provision which may protect individual employees from detriment or dismissal where they refuse to work until the workplace is made safe. This provision is less precise, and '*appropriate steps*' is not defined. It is possible that where face to face teaching is reasonably believed to be seriously and imminently dangerous, an appropriate step might be to teach online, or to wear masks in the classroom. Although s.44 provides an individual protection, 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 s.44 is often quoted, the duty on employers is often overlooked. The law is structured so that the weight of responsibility for protecting health and safety at work falls on employers, and health and safety representatives have a protected role to play in facilitating employers to comply with this responsibility.

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 Minister for education issued guidance for recommencing face-to-face Further Education and work Based Learning.

The advice, which applies to all UCU member workplaces in Wales during the Rescue Phase, expects providers to:

- undertake a full risk assessment
- consult with staff, unions and stakeholders
- develop communication plans for staff, learners, parents/carers and employers, including clear ways for them to ask questions and raise concerns
- for centre-based learning, consider how the learning environments and communal areas are prepared to meet social distancing requirements

- assess which staff and learners will be able to recommence face-to-face learning at this stage, including identifying and communicating with those who cannot attend due to shielding requirements, and those who have concerns or anxieties about attending
- clearly communicate expected behaviours to learners including social distancing requirements; hygiene requirements; what to do if they feel unwell; what to do if they have concerns or anxiety; and what would happen if they do not comply with requirements
- for employed learners including apprentices, confirm with employers that appropriate hygiene and social distancing arrangements are in place
- consider how social distancing and hygiene requirements should be reflected in disciplinary policies and that learners are made aware of any consequences of noncompliance with social distancing requirements
- consider travel to and from learning centres
- determine cleaning requirements prior to and after re-opening
- consider timetabling, including staggered opening hours and break times
- continue online learning for those unable to physically attend at this stage, and blended learning for those who are attending their college or training centre for part of the time; and
- secure alternative arrangements for assessment and progression for those unable to physically attend.

In addition to these expectations on providers the employers and the joint trade unions have agreed a set of specific protocols dealing with employers' health and safety obligations: https://www.ucu.org.uk/media/10934/Agreed-FE-Wales-workplace-return-protocols/pdf/covid-19_walesfe_protocols.pdf

Colleges are able to stay open at Level 4. However, colleges in Wales have made an agreement that they will move to online-only provision for the week **4-8 January**. Students scheduled to take exams or assessments during this week can attend college to do so. Work-based learning, including apprenticeships can continue as normal at alert level 4.

UCU continuously 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 employees;
- Assessment of data about the local incidence of COVID-19 should be factored into workplace risk assessments;
- Risk assessments must be updated in line with new information about risks, eg the transmissibility of the new variant of coronavirus.

Union advice to members

Members are 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 s.44 and s.100, an effective response to any detriment or dismissal suffered would be dependent on winning a claim in the Employment Tribunal.

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. In particular I note that existing risk assessments will need to be reviewed and updated in the light of the increased transmissibility of the new variant of coronavirus B.1.1.7. 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."

Where members are worried about particular circumstances which heighten their individual risk, they can write to their employer/manager using the appropriate template provided by UCU here:

<https://www.ucu.org.uk/covid19letters>

UCU notes the actions taken by sister unions in the education sector and applauds their stance given the requirements on their members to return to work on 4 January 2021, and their members' reasonable belief that the risks in schools have increased with the advent of the new variant of Coronavirus.

By law, trade unions must not induce their members to breach their contracts of employment (including by refusing to attend for work or leaving the workplace) – unless the unions have the protections accrued by having gone through the necessary legal steps to take lawful industrial action by holding a ballot which complies with the statutory requirements of the Trade Union and Labour Relations (Consolidation) Act 1992. 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 often too long to respond to any very urgent health and safety issue.

The legal framework of individual versus collective rights prevents unions from proactively advising or encouraging their members to avail themselves of the protection of s.44 if they 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 and information to unlawful industrial action.

Unions need to take care to distinguish between merely providing members with information about s.44 and s.100, which we are clear is permissible, and being seen to ask or encourage members to remove themselves from danger where they have a 'reasonable belief' in serious and imminent danger.

There is a tension between the individualised rights under ss. 44 and 100 and the provisions in TULRCA which legitimise industrial action. We would argue that the provision of advice by a trade union as to its members' legal rights in these circumstances does not amount to an inducement. A union does

however need to make it absolutely clear in any communication that the union is merely providing information as to members' 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 utility of s.44 to trade unions is limited, and from the trade union perspective does carry some serious potential exposure to legal retaliation from employers.

Employees may invoke their individual rights at any time, whether they are union members or not, and whether their union has advised them to do so or not. If they are a union member and they are disciplined by their employer for doing this, they will have the same right to representation and support as they always do.

If a union proactively advises its members to invoke their individual rights, as some education unions have done in the case of school reopenings, it exposes itself to a risk of legal action from each of the employers affected by its advice.

Any union's decision to do this will only be taken with great care and extensive discussion, and as an absolute last resort. It will depend on a range of political, scientific and other factors: for instance, whether line managers and employers are likely to discipline members who invoke those rights; whether employers are likely to take legal action against the union; the urgency of the situation; the availability of other options for protecting members; current scientific advice about the relevant hazards; different situations in different workplaces and sectors where the union has members; and the scale of the benefits to health and safety of members and the general public that can be won by forcing any change.

UCU's position is constantly being kept under review and we will notify members as soon as possible if there is any change.

