

Covid 19: employees' individual and collective rights on health & safety issues for in-person working in HE (Scotland)

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UCU Scotland's position on Covid 19 is:

- **Given the prevalence of virus cases in the community we must have a very cautious approach to any on-campus working**
- **The health and safety of all students and staff should be paramount**
- **Education settings should not become centres of community Covid transmission.**

The collective approach to ensuring healthy and safe workplaces

The most effective way to protect individuals – staff and students – ensuring a healthy and safe working and learning environment is through the collective strength of union representation and through direct engagement with employers.

Branches are taking this approach, and working hard to keep everyone safe. This means:

- Being involved in risk assessment processes.
- Regular negotiation and consultation with management about on-campus working and the working environment.
- Making demands of the employer on ventilation, PPE, face coverings, physical distancing, or hygiene issues, and working with them to agree and implement plans.

Working collectively tends to deliver the best and most sustainable outcomes that benefit all members.

The individual rights of employees and workers

Where the collective approach has not delivered a safe working and learning environment, or where an unexpected situation arises, it is worth being aware that employees do have individual rights in law too, 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 section 44 applies to both employees and workers, however section 100 (protection from dismissal) is confined to employees. This came about as a result of The Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021, which amended the Employment Rights Act and came into force on 31 May 2021.

Sub-section (d) is deliberately framed in wide terms. Where an employee or worker reasonably believes that there are circumstances of danger which are '*serious and imminent*' they may be protected from detriment 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 with whom they come into contact.

At the time of writing there has been 139,031 deaths in the UK within 28 days of a positive Covid 19 test (UK Govt data 20 October 21), and over 162,000 deaths where Covid 19 was mentioned on a death certificate. In Scotland, daily case rates remain high, with 2,786 new cases reported on 20 October 2021. 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 Delta variant of the virus which is more transmissible. Whether they did have this belief will be a question of fact for the Tribunal to determine on hearing their evidence.

Sub-section (e) is an important provision which may protect individual employees and workers from detriment 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 or student support is reasonably believed to be seriously and imminently dangerous, an appropriate step might be to teach online or provide the support remotely, or to wear masks in the classroom/office. 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.

Joint trade union – employer guidance on raising a concern

In summer 2021 UCU along with all campus unions worked with employers' body UCEA to produce [joint trade union - employer guidance on raising a concern](#), outlining the steps to take when a health and safety concern is identified. UCU has been encouraging all branches to make use of this campus unions – UCEA guidance to ensure that escalation routes for health and safety concerns are agreed, shared with all staff, and understood widely, as soon as possible. The existence of agreed escalation routes should help to ensure that workers are not faced with a serious and imminent danger in the workplace, but if it does occur then the safety of individuals comes first.

Employers' duties to protect health and safety

UCU's advice to HE members in Scotland on employers' responsibilities is 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;
- 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;
- Evidence on the impact of Covid-19 is continually developing, and 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 people from Black and Minority Ethnic backgrounds).
- 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 in facilitating employers to comply with their duties is very important:

- Employers are legally required to consult with union health and safety representatives where a union is recognised. Health and safety reps 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.

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 Delta variant, or any new variant with vaccine escape.

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 Delta variant of coronavirus. 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."

Individual members may wish to be reassured on key risk management controls, on the following issues:

- Has the employer checked and enhanced the ventilation in the areas where you will work?
- Will ventilation be regularly monitored by CO2 monitors or via other appropriate means, to take account of occupancy levels, room volume etc?
- Is everyone that is able required to wear a face covering in indoor spaces including teaching spaces, libraries, corridors, lecture rooms?
- Will there be physical distancing on campus – which includes signage and markings to support people to ensure physical distancing?
- What provisions is your employer making for individuals who breach the rules on wearing face coverings or physical distancing?
- Are all staff and students who require to self-isolate because they are a close contact or have a positive Covid test, actively supported by the institution to do so?
- Is large group teaching/lectures being delivered online?

Where members are worried about particular circumstances which heighten their individual risk, they can write to their employer/manager using the updated template letter.

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 remove themselves from 'serious and imminent danger' at their workplace and avail themselves of the protection of s.44. 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 did in January 2021 in the case of school re-openings, 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.

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