Section 44

The secret to getting safe working conditions in the UK

https://Section44.co.uk

Contents

Introduction:

Although you have probably never heard of it, Section 44 Employment Rights Act 1996 could be considered the corner stone of the UK's Health & Safety at Work legislation, and here's why:

- Section 44. provides employees with the means to contest the adequacy and/or suitability of safety arrangements without fear of recriminations (e.g. getting sacked or transferred) or suffering detriment (e.g. loss of wages).

- Section 44. provides employees with the 'right' to withdraw from and to refuse to return to a workplace that is unsafe. Employees are entitled to remain away from the workplace (e.g. stay at home) if – **in their opinion** – the prevailing circumstances represent a real risk of serious and imminent danger which they could not be expected to avert.

- Section 44. entitles employees to claim for 'Constructive Dismissal' and (unlimited) compensation in the event that an employer fails to maintain safe working conditions.

- Section 44. means employees don't have to wait until they (or someone else) suffer injury before they can take action to get suitably safe working conditions.

- Section 44. leaves employees with no excuse whatsoever for tolerating unsafe working conditions and acts as a deterrent against an employer either deliberately or carelessly devoting inadequate resources to the protection of safety in their workplace.

- Section 44. cautions employees against taking risks.

- Section 44. clarifies the circumstances in which an employee should take "appropriate action" to withdraw/remove themselves from danger.

Circumstances in which an employee should take "appropriate action" to withdraw/remove themselves from danger:

According to Section 44.1(d) and Section 44.1(e):

Section 44.1(d)

(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

Section 44.1(e)

(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.

Section 44. clarifies that it is the employee's opinion that counts:

Section 44.2 makes it clear that it's what the individual employee taking the action believes that counts –

"*Section 44.2 For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.*"

The Current Landscape - COVID-19 and Section 44:

As of Wednesday 13th May 2020, the UK government is starting to ease the countries lockdown restrictions. As part of this easing many thousands of workers will be asked by their employers to return to their places of work. However, the narrative attached to the lockdown easing has clearly got many people both employers and employees very confused. Regardless of on which side of the political divide you may normally reside, even if you don't have a political affiliation, the pandemic issue of COVID-19 (Coronavirus) has potential to affect us ALL the same way when returning to the workplace, and the workplace health guidance currently being provided by the Government to employers regarding the return to work and making workplaces safe is woefully lacking in any real actionable detail.

Further, the general confusion surrounding factors such as getting to and from work safely, questions such as, why we can meet work colleagues but not family members, what's being done in my workplace to ensure my safety, how can my employer be sure I'm safe, and many more in a similar vein has created a very confused landscape for many employers and employees. Regrettably, this also has potential to negatively impact relationships between employers and employees, with employers trying to do the right thing in most cases, but honestly not being sure if they are, or are not, looking after their staff.

Therefore, the time has come for EMPLOYEES to protect themselves, look after your own health and protect your loved ones. Until more is known about the health impact, transmission rates, and seriousness of Coronavirus, and until the Government can provide some assurance against Covid-19 contraction in the workplace, you MUST choose for yourself, whether to risk it and return to your place of work, or not!

Thus, this paper does not set out to criticise the Government or set employee against employer! The aim of this paper is simply to raise awareness of the existence of Section 44 Employment Rights Act 1996, so that EMPLOYEES know THE LAW IS ON YOUR SIDE *if* you decide NOT to return to your workplace due to the obvious risks of contracting the Coronavirus infection, and further, the intentions of the legislators can be achieved. We have produced this document to support the website https://section44.co.uk and encourage you to print a copy and hand it to your employer should they ask you to return to work against your wishes.

If everyone knew about Section 44

Knowing about Section 44. would immediately emancipate employees from the misconception that they have to tolerate unsafe working conditions. It (as the law always intended) empowers them with the legal means to insist on – and get – appropriate safety standards.

If, every employee was made aware of Section 44, safety standards would improve dramatically – and quickly!

If employers knew that their employees knew about Section 44, they'd know that unless they provided a suitably safe working environment, their staff could withdraw their labour and remain off work – on full pay – until the shortcomings are remedied.

The threat of this happening would be sufficient to encourage most if not all employers to invest more appropriately.

Hardly anyone has heard about Section 44 (yet)

Despite its significance and the fact that it has been law for more than a decade, hardly anyone is aware of Section 44 Employment Rights Act or how it relates to Health and Safety at Work.

The HSE won't tell you!

The HSE have denied responsibility to inform the public about Section 44!

Below is what Steve Vinton at the HSE's Innovative Engagement Unit wrote in response to a question put to him on the absence of information on Section 44.

"HSE does not have responsibility for the Employment Rights Act 1996. It is therefore not appropriate for HSE to provide guidance on employment rights legislation. However, as part of the range of advice and information that HSE provides on the Workers Web Page of its website, we are looking at the possibility of including something on Section 44 in relation to the Public Interest Disclosure Act 1998 (which stems from the Employment Rights Act 1996) and whistleblowing. We will be taking advice from HSE solicitors on the

legal implications of the above prior to updating the Workers Page early next year."

The statement from the HSE ignores the fact that Section 44 is titled "Health and Safety Cases".

The HSE's reluctance to inform the public about Section 44 conflicts directly with HSE's declaration in March 2003 to – "Seek proactively to identify the information which people need and strive to provide it" and to "Share what we know" and it is also inconsistent with the HSE's statement on openness.

Why aren't they telling?

Is there a Government policy to keep people in the dark?

Yes!

Compelling Evidence

The Government appears to be complicit (if not the guiding hand) in the conduct of a strategy that involves the cooperation of a number of official bodies and others, (including the TUC) which is:

1. Designed to mislead employees about their legal responsibilities and keep them in the dark about their rights and entitlements.

2. Intended to prevent employees performing a vital safety role (i.e. ensuring employers maintain satisfactory standards of workplace safety.)

3. Enabling employers to operate with unsatisfactory safety arrangements that put people (employees and the public) at risk.

4. Having the effect of holding back safety improvements.

Unlikely, but true!

It may seem incredible, but it's the only possible conclusion.

The undisputable proof lies in the fact that, although the law clearly gives employees the upper hand * over employers in disputes about the adequacy of safety measures and leaves no excuse for tolerating unsafe working conditions, millions of people still go to work every day knowing that the safety arrangements at their workplace are inadequate.

* By enabling employees to withdraw from the workplace, without fear of recriminations and remain on full pay while the employer remedies the shortcomings. (S44. Employment Rights Act 1996)

How have people been kept in the dark?

The way people have been kept in the dark has been a subtle and consistent lack of transparency. Those responsible for producing and publishing official guidance and instructions have simply not disclosed all the relevant information in easily comprehensible terms.

The rationale behind the "Policy"

Telling employees about their legal rights/duties would (as the law and the legislators always intended) hand them direct control over expenditure on workplace safety provisions (i.e. by being able to insist on suitable safety arrangements.)

Whereas, by ensuring employees aren't aware of their rights and responsibilities, employers have been able to keep control over expenditure – and avoid the expense of making safety improvements!

Seriously?

Yes!

It began when the UK Government, as a member of the Council of the European Communities was obliged to comply with DIRECTIVE 89/391/EEC, dated 12 June 1989. This required Member States to introduce measures to encourage improvements in the safety and health of workers at work.

S44 Employment Rights Act 1996 was created in order to comply with Article 8 of that Directive. Here is the thing.

A government official* made the decision NOT to include the new 'health and safety at work' provisions (i.e. arising from Article 8) in the Health and Safety legislation and instead chose to hide it way in Employment Rights legislation.

This decision effectively meant that the HSE (whose statutory responsibility is to inform employers and the public on health and safety at work matters) could claim that their remit did not extend to explaining Employment Rights law – and so not mention it.

(*That person is traceable and could be held accountable – but more than likely won't be!)

Added to that, when the Health and Safety at Work Act 1974 came into force, the approach taken by the HSE was effectively 'non enforcement', ostensibly to help prevent organisations collapsing under the expense of having to meet the new statutory obligations incorporated in the Act.

The 'policy' was supposed to be a temporary measure to give employers time to prepare and budget for the necessary improvements.

The problem for the authorities has been that, despite the time that has elapsed since then, a good time to come clean has never materialised.

But, keeping quiet is not in anyone's best interests.

The effect of the lack of transparency:

1. Employers have maintained almost absolute control over decisions about the adequacy of safety arrangements.

2. Safety Standards have not improved as fast as they should have done.

3. Millions of people have been (and continue to be) duped into putting themselves at risk and getting hurt where they might otherwise have remained safe.

4. Millions of incidents which could and should have been avoided have resulted in injury, misery and expense.

Who is to blame for this shambles?

The finger of blame points directly at HSE's Senior Management – because HSE has had the most control and influence over the way Health & Safety responsibilities have been explained and conveyed to the public. However, the fact that HSE's explanations have been so unquestioningly supported by others has undoubtedly compounded the problem.

No one can deny its existence!

Section 44 is sitting there as an Act of Parliament, in black and white.

http://www.legislation.gov.uk/ukpga/1996/18/section/44

So now you know, what now?

How fast people will find out about all this is uncertain. There is no way now of stopping people finding out about Section 44 or controlling how fast they find out. And, when they do, lots of them are going to be very angry at the way they have been kept in the dark and exploited. And, more and more of them are going to claim their right to a safe way of working.

There is the potential for serious and widespread disruption!

In the UK, practically every security officer could justifiably remain OFF WORK, ON FULL PAY for as long as it takes their employer to implement a safe system of working, or until an Employment Tribunal can be convened and a decision reached about the adequacy/inadequacy of the safety measures (min 3 months).

Nurses and midwives could do the same. So too, could most Teachers, Social Workers, Air Line Cabin Crews, Bus Drivers, Railway Service workers, Benefits Agency workers, even the Clergy!

It's an option which many people would find attractive. Isn't it?

So… What are you going to do now when asked to return to your workplace while the country is still battling COVID-19?

Given Boris Johnson's known admiration for the great Winston Churchill, it seems only right to include a Churchill quote: "Man will occasionally stumble over the truth, but most of the time he will pick himself up and continue on."

Please do the right thing and tell others about Section 44 and how it protects them during these Coronavirus times!

Reference Material and Further Reading:

Employment Right Act 1996
Section 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 —

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee —

> (i) in accordance with arrangements established under or by virtue of any enactment, or
>
> (ii) by reason of being acknowledged as such by the employer, the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(c) being an employee at a place where –

> i) there was no such representative or safety committee, or
>
> (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(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.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) An employee is not to be regarded as having been subjected to any detriment on the ground specified in subsection (1)(e) if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have treated him as the employer did.

(4) Except where an employee is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to the dismissal, this section does not apply where the detriment in question amounts to dismissal (within the meaning of that Part).

NOTE: The right not to be subjected to a detriment (including dismissal) for 'asserting a statutory legal right' is also expressed in Section 29 of the Trade Union Reform and Employment Rights Act 1993. Under Section 29, the protection applies where an employee has made a claim to enforce a right or has alleged that the employer has infringed their right in some way. It doesn't matter that no right has actually been infringed. Neither does it matter whether or not the employee actually had any 'right'. The key point is whether the employee, acting in good faith, asserted to have a relevant statutory right.

IOSH Public Discussion

S44 was discussed at length on the IOSH Public Discussion Forum in October 2003. The thread extended to 49 posts and more than a thousand words.

IOSH is the Chartered body for health and safety professionals. With more than 35,000 individual members, it is the biggest professional health and safety organisation in the world.

To view the thread on S44 visit:
http://forum.iosh.co.uk/default.aspx?g=posts&t=64014

Section 44 – Employment Tribunal Cases

In the case of Teasdale versus John Walker (t/a Blaydon Packaging), an Employment Tribunal decided that a breach of the duty to take reasonable care of an employee's Health and Safety was a fundamental breach of contract which entitled the employee to resign and claim he had been constructively dismissed. As the 'dismissal' fell within Sections 44 and 100 of the Employment Rights Act, it was deemed automatically unfair.

In Harvest Press Ltd v McCaffrey (1999) The Employment Appeal Tribunal confirmed that the word `danger' is used in S.44(2)(d) without limitation and that Parliament had intended that word to cover any danger, no matter how it arose.

NOTE: In the Harvest Press Ltd v McCaffrey case, the 'danger' appears to have amounted to a clear threat of physical violence. Whether an employee would be eligible for protection under Section 44 Employment Rights Act, where the claim relates to 'serious and imminent danger' arising from psychological harm (i.e. as a result of harassment/bullying) has yet to be tested. However, that is not to say that if an employee is so overworked or otherwise stressed that they are on the verge of a nervous breakdown and reasonably believe that to continue working in the same conditions will push them over the edge, the situation may well fall within S.44. Another way to look at it would be to consider whether a failure by the employee to withdraw from the workplace in such circumstances would constitute a breach of their statutory duty under Section 7 of the Health and Safety at Work Act 1974 – to take 'reasonable care for their own health and safety!

If, as seems likely, such circumstances do fall within S.44, it would mean employees who have been made ill from stress at work could claim their right to protection, as well as, victims of workplace bullying and harassment!

In the News

GP victory in landmark whistleblowing legal case

14 June 2013

GP Dr Margaret Ferguson has been given the go-ahead to take Abertawe Bro Morgannwg University (ABMU) Health Board to an employment tribunal for failing to protect her from reprisals after she raised concerns about her partner's prescribing…..she is seeking a remedy under the whistleblowing provisions of the Employment Rights Act 1996.

To read the Employment Appeal Tribunal's Judgement visit:
http://www.bailii.org/uk/cases/UKEAT/2013/0044_13_2404.html

Warning!

Just because the law says that employees are fully protected against recriminations by their employer, it doesn't mean that recriminations won't happen! It can be a really rough road. (Be prepared!)

Take professional advice…

monaco SOLICITORS

https://www.monacosolicitors.co.uk/

Tel: 0207 717 5259 - Email: communications@monacosolicitors.co.uk

Thank you and stay safe!

https://section44.co.uk

Note: The Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021, which came into force on 31st May 2021, amended the term 'employee' to be 'worker'. Thus, expanding the range of people covered by section 44 to include, agency and part-time staff, (including zero hours contracts) and volunteers, etc.