

8

EMPLOYEE LIABILITY INFORMATION

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A. Introduction

1. The Directive

Article 3.2 permits Member States, if they wish to do so, to introduce into their domestic legislation implementing the Directive provisions requiring the transferor to notify the transferee of all rights and obligations in relation to the employees whose employment is to transfer to the transferee on a transfer of undertaking insofar as those matters are (or ought to be) known to the transferor at the time of the transfer. This obligation operates independently from the other protections provided by the Directive so failure to comply does not affect the transfer of employees and associated rights otherwise effected by the legislation. **8.01**

Specifically, Article 3.2 provides that: **8.02**

Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee under this Article [3], so far as those rights are or ought to have been known to the transferor at the time of transfer. A failure by the transferor to notify the transferee of any such right or obligation shall not affect the transfer of that right or obligation and the rights of any employees against the transferee and/or transferor in respect of that right or obligation.

2. TUPE 2006

In the 2001 Consultation, the Government confirmed its intention to take advantage of the option provided by Article 3.2. The benefit of an obligation on the transferor to provide what **8.03**

TUPE 2006 defines as 'employee liability information'¹ was considered to be that transferees would be entitled to full and accurate information about the liabilities which they would inherit as a result of a TUPE transfer and therefore would be 'well placed to meet them'.² This obligation would ensure transparency and avoid what was described as 'sharp practice'³ such as where, just before transfer, terms and conditions of employment or the composition of the workforce assigned to the particular undertaking or activities are varied to the disadvantage of the transferee. That said, an obligation to provide information does not of itself prevent the mischiefs in question being committed. If complied with, it simply alerts the transferee to any such development. Changes to the employment situation at a late stage simply trigger the obligation to update the original notification of employee liability information.

- 8.04** The obligation to notify the transferee of employee liability information was also perceived as promoting competitiveness. Smaller businesses with lesser bargaining power were considered to be less able than others to negotiate contractual safeguards with regard to employee information, which disadvantage this new notification obligation would (to an extent) remedy. The obligation to provide employee liability information no doubt makes it more likely that transferees will be given by transferors the information which they need to operate the employment contracts of those employees whom they inherit as a consequence of a relevant transfer. However, it may not necessarily have any material effect on the relative bargaining strengths of the parties in relation to the negotiation of more detailed, specific and protective warranties, indemnities, and contract pricing, not least in light of the fact that the obligation is only in principle required to be complied with fourteen days prior to the transfer itself as opposed to the (potentially earlier) time at which the contract binding the parties into the relevant contract is entered into.
- 8.05** Regulation 11 does not remove the need for transferees to consider seeking detailed due diligence, backed by appropriate warranties and indemnities, in the process of negotiation of a transfer. Its assistance to a transferee who commercially cannot secure such protections is limited by the scope of the information required to be provided. Nonetheless, in the absence of comprehensive contractual protection, disclosure in accordance with regulation 11 will assist not just logistically in ensuring that the transferee knows what terms and conditions it needs to continue in respect of the transferring employees but also evidentially in relation to any dispute with employees concerning their contractual entitlements. It will not, however, necessarily give adequate commercial protection. While considerable substantive detail must be provided, the information required to be disclosed is not comprehensive enough for the commercial purposes of many due diligence exercises. Examples of information which does not fall within the scope of the employee liability information required to be provided pursuant to regulation 11 but which might be of assistance to a transferee in readying itself for the transfer to its employment of the relevant employees are enhanced redundancy and severance entitlements, confidentiality and restrictive covenant obligations, details of any trade union and other recognition arrangements in place in relation to the transferring employees and compliance with the requirements of immigration legislation.
- 8.06** Regulations 11 and 12 set out the requirements and applicable conditions of the obligation to provide employee liability information in detail. It should be appreciated that these are obligations

¹ Regulation 11(2)(a)–(c).

² 2001 Consultation para. 69; 2005 Consultation para. 80.

³ 2005 Consultation para. 80.

triggered by the fact of an impending relevant transfer. No request from the transferee is required for the obligation to provide employee liability information to arise—it is an automatic obligation.

B. Employees

The obligation imposed upon the transferor to provide employee liability information to the transferee relates only to those who are employees for the purposes of TUPE. That said, particularly in view of the potential uncertainty concerning the issue of what constitutes employee status, not least in the context of agency workers, ensuring compliance with regulation 11 may on occasion be far from straightforward in terms of assessing in respect of which individuals information needs to be collated and disclosed to the transferee. **8.07**

Regulation 11(1) provides that the employees about whom the relevant information must be supplied by the transferor to the transferee are those who are ‘assigned to the organised grouping of resources or employees that is the subject of a relevant transfer’. Care therefore needs to be taken to ensure that the proper (i.e. transferring) group of employees is identified for the purposes of complying with the obligation to provide the requisite employee liability information. The wording adopted in regulation 11(1) mirrors the wording used to identify those employees who transfer.⁴ The assessment of which employees are the subject of the obligation to provide employee liability information needs to be conducted on the basis of the guiding principle of assignment (other than on a temporary basis) to the relevant undertaking or organized grouping of employees.⁵ **8.08**

C. Information

1. Prescribed information

Regulation 11(2) prescribes the employee liability information to be disclosed by the transferor to the transferee which is to be disclosed in respect of the relevant employees as: **8.09**

- the identity and age of the employee;⁶
- those particulars of employment that an employer is obliged to give to an employee pursuant to ERA 1996, s. 1;⁷
- information of any:
 - disciplinary procedure taken against the employee to which a relevant Code of Practice applies,⁸
 - grievance procedure taken by the employee to which a relevant Code of Practice applies,⁹
- information of any court or tribunal case, claim, or action:
 - brought by an employee against the transferor, within the previous two years,¹⁰

⁴ Regulation 4(1).

⁵ See Chapter 4, para. 4.36 *et seq.*

⁶ Regulation 11(2)(a).

⁷ Regulation 11(2)(b).

⁸ Regulation 11(2)(c)(i).

⁹ Regulation 11(2)(c)(ii).

¹⁰ Regulation 11(2)(d)(i).

- that the transferor has reasonable grounds to believe that an employee may bring against the transferee, arising out of the employee's employment with the transferor;¹¹
- information of any collective agreement which will have effect after the transfer, in its application in relation to the employee, pursuant to regulation 5(a).¹² Accordingly, only collective agreements which fall to transfer to the transferee in respect of the transferring employees pursuant to regulation 5 need to be disclosed in accordance with the requirements of regulation 11.

8.10 Regulation 11 does not extend to criminal liabilities generally so these need not be disclosed by the transferor in respect of the transferring employees, even if foreseeable, if they do not entail claims against the transferor or transferee by an employee as envisaged by regulation 11(2)(d). The fact that the matters within the scope of the obligation to provide written particulars of employment must be disclosed means that occupational pension entitlements must be notified even though they do not, in principle, transfer to the transferee pursuant to regulation 10. Claims in respect of accrued pension rights presumably need not be disclosed if (as is likely save in cases of claims based on the *Beckmann/Martin* cases) the transferor can reasonably conclude that, by virtue of regulation 10, no claim in that regard can be brought against the transferee.

2. Employment particulars

8.11 Rather than define the contractual entitlements of transferring employees by reference to generic concepts of remuneration, benefits, entitlements, and liabilities, the contractual aspects of the transferor's relationship with the assigned employees must be disclosed to the transferee by reference to those written particulars of employment which an employer is obliged to provide to an employee pursuant to ERA 1996, s. 1. That no such, or incomplete, particulars might have been provided to the relevant employee by the transferor is presumably irrelevant as the reference to the ERA 1996, s. 1 obligation is deployed to identify the types of information to be disclosed in order to comply with regulation 11. If written particulars have been provided (in a contract or formal statement), the transferor will need to ensure that up-to-date and comprehensive details are provided. If no such particulars have been provided to the employees, they will need to be compiled for the purposes of complying with regulation 11.

8.12 The written particulars which are listed in ERA 1996, s. 1 and are therefore the items which fall within the scope of the employee liability information to be disclosed pursuant to regulation 11(2) are:

- the names of the employer and employee;¹³
- the date when the employment began;¹⁴
- the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period);¹⁵
- the scale or rate of remuneration or the method of calculating remuneration;¹⁶

¹¹ Regulation 11(2)(d)(ii).

¹² Regulation 11(2)(e).

¹³ ERA 1996, s. 1(3).

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ ERA 1996, s. 1(4)(a).

- the intervals at which remuneration is paid (that is, weekly, monthly, or other specified intervals);¹⁷
- any terms and conditions relating to hours of work (including any terms and conditions relating to normal working hours);¹⁸
- any terms and conditions relating to any of the following:
 - entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);
 - incapacity for work due to sickness or injury, including any provision for sick pay;
 - pensions and pension schemes;¹⁹
- the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment;²⁰
- the title of the job which the employee is employed to do or a brief description of the work for which he is employed;²¹
- where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;²²
- either the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer;²³
- any collective agreements which directly affect terms and conditions of the employment including, where the employer is not a party, the person by whom they were made;²⁴
- where the employee is required to work outside the United Kingdom for a period of more than one month:
 - the period for which he is to work outside the United Kingdom,
 - the currency in which remuneration is to be paid while he is working outside the United Kingdom,
 - any additional remuneration payable to him, and any benefits to be provided to or in respect of him, by reason of his being required to work outside the United Kingdom,
 - any terms and conditions relating to his return to the United Kingdom.²⁵

The obligation to provide employee liability information under regulation 11 only extends, in relation to employees' contractual terms and conditions of employment, to the specific written particulars of employment required to be provided under ERA 1996, s. 1 and does not require the transferor to provide the transferee with details of further contractual terms and conditions of employment. Whilst full disclosure may well be good practice, the obligation to provide employee liability information is limited to employees' specific written particulars rather than the full contractual position. Full copies of all contractual documentation are not required to be disclosed by regulation 11.

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¹⁷ ERA 1996, s. 1(4)(b).

¹⁸ ERA 1996, s. 1(4)(c).

¹⁹ ERA 1996, s. 1(4)(d).

²⁰ ERA 1996, s. 1(4)(e).

²¹ ERA 1996, s. 1(4)(f).

²² ERA 1996, s. 1(4)(g).

²³ ERA 1996, s. 1(4)(h).

²⁴ ERA 1996, s. 1(4)(j).

²⁵ ERA 1996, s. 1(4)(k), subject to ERA 1996, s. 1(5).

3. Disciplinary and grievance procedures

- 8.14** The requirement to disclose information about disciplinary and grievance procedures conducted in relation to the transferring employees is confined to those matters to which a relevant code of practice applies. For these purposes the relevant code of practice is the ACAS Code of Practice on Disciplinary and Grievance Procedures.²⁶ With regard to disciplinary and grievance procedures, the 2009 Guidance suggests²⁷ that the relevant category of grievances are ‘grievances which could give rise to any subsequent complaint to an employment tribunal about a breach of a statutory entitlement’. It also indicates, perhaps surprisingly, that the disciplinary action which must be notified to the transferee is ‘action taken under the ACAS Code of Practice on disciplinary and grievance procedures [and does] not include oral or written warnings or suspensions on full pay’.²⁸

4. Claims

- 8.15** The transferor is subject to two obligations with regard to actual and potential claims on the part of the transferring employees. The first obligation is to provide information about court or tribunal claims or actions brought against the transferor in the period of two years prior to the relevant transfer in respect of the transferring employees.²⁹ The second obligation—to provide information effectively about potential claims—is less straightforward. The obligation is to provide ‘information of any court or tribunal case, claim or action . . . that the transferor has reasonable grounds to believe that an employee may bring against the transferee, arising out of the employee’s employment with the transferor’.³⁰
- 8.16** What constitutes ‘reasonable grounds’ for belief of the likelihood of a claim being brought is necessarily fact-sensitive. In addition, regulation 11(2)(d)(ii) could have identified the disclosable claims as those which the transferring employees potentially have against the transferor and which the transferee would inherit under TUPE. It did not do so—while to be disclosable a claim or potential claim must arise from the employee’s employment with the transferor, it must also be the case that the transferor reasonably believes that the claim may be brought against the transferee.
- 8.17** The formulation adopted in regulation 11(2)(d)(ii) with regard to potential claims can therefore be interpreted to cover not just claims which the transferee inherits as a result of the acts or omissions by the transferor in respect of the transferring employees’ pre-transfer employment. Regulation 11(2)(d)(ii) potentially requires the transferor to inform the transferee of claims which the transferring employees might make against the transferee arising out of the transferee’s pre-transfer conduct. If an employee is in a position, as a result of the transferee’s actions, where he or she is able to exercise the right to terminate employment in response to changes to working conditions³¹ or to claim constructive dismissal³² and this possibility comes to the (reasonable) attention of the transferor, it arguably falls within the scope of regulation 11(2)(d)(iii), which is not limited to claims created by or lying only against the transferor. So construed, regulation 11 would require the transferor to inform the transferee

²⁶ ACAS Code of Practice 1—Disciplinary and Grievance Procedures (April 2009).

²⁷ At p. 19.

²⁸ At p. 20.

²⁹ Regulation 11(2)(d)(i).

³⁰ Regulation 11(2)(d)(ii).

³¹ Regulation 4(9).

³² Regulation 4(11).

of the claims to which it was potentially exposing itself. It is not clear that this was the intention behind the formulation adopted in regulation 11(2)(d)(iii).

The 2009 Guidance³³ provides some further guidance on the issue of assessing when a potential claim can fall within the scope of regulation 11(2)(d)(ii). In answer to the question of how the transferor can decide whether it is reasonable to believe that a legal action could occur, it is suggested that: **8.18**

[t]his is a matter of judgment and depends on the characteristics of each case. So, where an incident seems trifling—say, where an employee slipped at work but did not take any time off as a result—then there is little reason to suppose that a claim for personal injury damages would result. In contrast, if a fall at work led to hospitalisation over a long period or where a union representative raised the incident as a health and safety concern, then the transferor should inform the transferee accordingly.

5. Data protection

It is expressly provided that the age and identity of every relevant employee must be provided as part of the employee liability information which the transferor is required to deliver to the transferee.³⁴ **8.19**

In order to avoid breach of the provisions of the DPA 1998 with regard to the processing of 'personal data', it is often considered prudent only to supply anonymized information about the transferring employees as part of due diligence processes. DPA 1998 requires, if the processing of personal data such as employees' names is to be lawful, either consent of the data subject (in this context a transferring employee) or a legal obligation to effect the processing. Delivery of employees' names to a third party transferee clearly constitutes 'processing' for the purposes of DPA 1998. Therefore, save as required by regulation 11, such disclosure is only permissible under the DPA with employee consent. **8.20**

Since the requirement to provide the employee liability information is legally required pursuant to regulation 11, there is no breach of the data protection legislation in providing personal details about transferring employees to the transferee in advance of their transfer from the transferor to the transferee provided that the information falls within the scope of regulation 11(2). DPA 1998, Schedule 2, paragraph 3 provides that processing of personal data (which transfer to a third party of employee names constitutes) is permitted where the processing is 'necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract'.³⁵ **8.21**

That regulation 11 imposes a legally binding obligation also ensures that disclosure to the transferee by the transferor of 'sensitive personal data'³⁶ about transferring employees is not **8.22**

³³ At p. 20.

³⁴ Regulation 11(2)(a).

³⁵ In this context the transferor is the data controller and the legal obligation is that imposed by regulation 11(2).

³⁶ DPA 1998, s. 2 defines sensitive personal data as:

personal data consisting of information as to:

- (a) the racial or ethnic origin of the data subject;
- (b) his political opinions;
- (c) his religious beliefs or other beliefs of a similar nature;
- (d) whether he is a member of a trade union (within the meaning of the Trade and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,

in breach of DPA 1998, again provided that it falls within the scope of regulation 11(2). DPA 1998, Schedule 3, paragraph 2(1) provides that one of the conditions permitting the processing of sensitive personal data is that '[t]he processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment'. Information relating, for example, to a potential employment claim the central facts of which related to an employee's sexual orientation would appear to be disclosable pursuant to regulation 11 (and would need to be so disclosed to ensure compliance) without breach of the DPA 1998.

8.23 Nonetheless, careful consideration may still need to be given to whether disclosure of information containing personal data can be given without being anonymized during a pre-contract due diligence process. Only if information falls within the scope of regulation 11(2) will the DPA 1998 condition (for permissible data processing) of compliance with a legal obligation be satisfied. The supply of information wider than that specified in regulation 11(2) will still be covered by the relevant DPA protections.

8.24 The other protections prescribed by DPA 1998 (in terms of the data protection principles set out in its Schedule 1) will still need to be considered when complying with the obligation to provide employee liability information with regard to all 'personal' aspects of the information disclosed and not just employee names. Examples of the applicable data protection principles which may be particularly relevant in this context are that:

- personal data shall be accurate and, where necessary, kept up to date;³⁷
- appropriate technical and organisational measures shall be taken against unauthorized or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data;³⁸
- personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.³⁹

8.25 The Information Commissioner has issued a Good Practice Note on disclosure of employee information under TUPE.⁴⁰ Amongst other things, this guidance reminds employers of the need carefully to assess whether disclosure is permitted under TUPE without regard to the provisions of the DPA 1998. As the guidance indicates, there are various scenarios in which the provisions of regulation 11 do not engage to disapply the usual protections of the DPA 1998 with regard to the processing of personal data and sensitive personal data. These include transfers which are outside the scope of TUPE (such as share takeovers), the proposed transferee requesting information wider in scope than the prescribed employee liability information and there being a number of potential bidders, only one of whom will

-
- (f) his sexual life,
 - (g) the commission or alleged commission by him of any offence, or
 - (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

³⁷ DPA 1998, Sch. 1, principle 4.

³⁸ DPA 1998, Sch. 1, principle 7.

³⁹ DPA 1998, Sch. 1, principle 8.

⁴⁰ Dated 21.05.08. Accessible via www.ico.gov.uk.

become the eventual new employer but all of whom need the information to assess whether to pursue the purchase. As this guidance puts it:

Wherever possible, the employer should release information that is anonymous or, at the very least, should remove obvious identifiers such as name. Employers should only disclose this extra information with the consent of the individuals concerned, or put in place appropriate safeguards to make sure that the information will only be used in connection with the proposed business transfer and will not be kept once it has been used for this purpose.

In terms of the transfer of employment records on completion of a relevant transfer the Information Commissioner's guidance states as follows: **8.26**

It is likely that once the transfer has taken place the new employer will need a large proportion of an individual's employment record to manage the workforce and run the business. The former employer would not need the employees' consent to the transfer of their personal information if it was necessary for the purpose of the transfer and business needs of both parties. The new employer should consider whether all the information in the personnel files is needed and delete or destroy securely any unnecessary information.

It is assumed, although TUPE does not expressly address the point, that the obligation to provide employee liability information only applies when there is a likely or definite transferee. On this analysis (and consistent with the Information Commissioner's Guidance) provision of employee information to bidders in a tender process before a final decision is made on the tender would fall outside the scope of regulation 11 and therefore be subject to the data protection considerations described above. **8.27**

6. Former employees

Regulation 11(4) provides that:

8.28

[t]he duty to provide employee liability information...shall include a duty to provide employee liability information of any person who would have been employed by the transferor and assigned to the organised grouping of resources or employees that is the subject of a relevant transfer immediately before the transfer if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

Accordingly, if an employee is dismissed prior to the transfer in circumstances where there is no ETOR avoiding automatic unfair dismissal,⁴¹ that employee falls within the scope of the obligation imposed upon the transferor to provide the prescribed employee liability information in accordance with regulation 11(2). Careful consideration of the nature of pre-transfer dismissals will be needed to ensure appropriate notification to the transferee in order to comply with regulation 11. **8.29**

D. Delivery and Updating

The transferor is obliged to notify the transferee of the requisite employee liability information either in writing⁴² or 'by making it available to him in a readily accessible form'.⁴³ **8.30**

⁴¹ In which case, pursuant to regulation 4(3), liability for the dismissal does not transfer to the transferee.

⁴² Regulation 11(1)(a).

⁴³ Regulation 11(1)(b).

Presumably, whilst a written report may be required as to matters of which there is no documentary record, provision of copy documentation (such as contracts, handbooks, benefit scheme documentation, ET documentation, etc.) or access to an electronic data room will suffice where appropriate as part of the process of complying with regulation 11.

8.31 As the 2009 Guidance put it:⁴⁴

The information must be provided in writing or in other forms which are accessible to the transferee. So, it may be possible for the transferor to send the information as computer data files as long as the transferee can access that information, or provide access to the transferor's data storage. Likewise, in cases where a very small number of employees are transferring and small amounts of information may be involved, it might be acceptable to provide the information by telephone. However, it would be a good practice for the transferor to consult the transferee first to discuss the methods which he can use.

8.32 If there is 'any change in the employee liability information', then the transferor must notify the transferee in writing of the change.⁴⁵ The transferor therefore needs to ensure that its systems are such that, and that the management of the transfer process is conducted on the basis that, the employee liability information disclosed about employees, salary, and other remuneration, details of claims made and so on, is reviewed and updated on a regular basis in order to ensure at all times that up-to-date information has been provided.

8.33 This aspect of regulation 11 can be particularly important in a detailed tendering process where bidders may have been provided with outline employee information at the outset in order to assist them with formulating their bids. It is not sufficient for the transferor to assume that it has discharged its obligations simply by providing what does constitute full disclosure as at the outset of a negotiation or contracting process but which subsequently becomes incomplete or inaccurate.

E. Instalments

8.34 The employee liability information required to be notified to the transferee may be delivered 'in more than one instalment'.⁴⁶ The transferor will wish to keep a clear record of what information was provided when in order to be able to deal with any subsequent argument about the adequacy of its compliance with regulation 11. That said, it is clear that provision of employee liability information from a variety of sources (for example, through the due diligence process handled by lawyers for the commercial parties in the course of the negotiation of a transaction and the direct provision of information from human resources departments) may cumulatively satisfy the requirements of regulation 11. Careful coordination and management of the information provision process will nonetheless be needed to avoid confusion and dispute.

⁴⁴ At p. 19.

⁴⁵ Regulation 11(5).

⁴⁶ Regulation 11(7)(a).

F. Indirect Provision

The requisite employee liability information can be provided ‘indirectly, through a third party’.⁴⁷ This delivery option was included, *inter alia*, to reflect the fact that, where contracts are reassigned or retendered, the ultimate client may well be responsible for passing employee liability information to bidders and the successful contractor and indeed may be the only party in direct contact with bidders and an incoming contractor during a tender process or contract reassignment. **8.35**

Incumbent contractors will wish to ensure that any client wishing to be responsible for providing information to bidders as part of a retendering process does indeed pass the information on in a timely fashion. On an outsourcing, therefore, whilst a client may wish to include in the relevant contract provisions requiring an initial contractor to provide employee liability information as and when required (and particularly in advance of retendering or termination), the contractor itself will want protection from the client with regard to timely provision of information to new contractors (as well as compliance by the client with the protections of DPA 1998). This is especially relevant if the retendering is, as can often be the case, a process in which the transferor is not involved, over which it has no control, and of whose precise timing (apart from the ultimate end of its contract with the client) it is ignorant. Incumbent contractors will wish to avoid the situation where, because they have no control over the retendering process, they have inadequate information as to when the obligation to provide employee liability information arises (and in respect of what transferee) and consequently inadvertently become exposed to a potentially significant penalty for breach of the requirements of regulation 11. **8.36**

G. Timing

In terms of the date at or by reference to which the information is given, regulation 11(3) requires disclosure of the information ‘as at a specified date not more than 14 days before the date on which the information is notified to the transferee’. If special circumstances render this not reasonably practicable the information should be disclosed as soon as reasonably practicable. There is no obligation to provide the information any earlier, as might be of assistance to the transferee in preparing to take on the transferring employees. **8.37**

A requirement of notification in any event no later than the ‘completion’ of the relevant transfer was contained in the draft regulation but was omitted from the final version of regulation 11. Where special circumstances apply, notification can presumably therefore be provided after the transfer as long as this still constitutes disclosure as soon as reasonably practicable. **8.38**

The 2009 Guidance⁴⁸ addresses the circumstances where it may not be reasonably practicable to provide the information fourteen days in advance of the transfer occurring and indicates that: **8.39**

[t]hese would be various depending on circumstances. But, clearly, it would not be reasonably practicable to provide the information in time, if the transferor did not know the identity

⁴⁷ Regulation 11(7)(b). The 2001 Consultation had considered making it a requirement to provide the information through the client in a retendering situation (i.e. a service provision change involving the reassignment of a service contract) but this was not adopted since it was considered not always to be appropriate—see 2005 Consultation para. 78 and 2001 Consultation para. 72.

⁴⁸ At p. 20.

of the transferee until very late in the process, as might occur when service contracts are re-assigned from one contractor to another by a client, or, more generally, when the transfer takes place at very short notice.

- 8.40** The delivery of the requisite information is not calibrated by reference to the entry by the commercial parties into a binding contract to effect the transaction which constitutes a TUPE transfer. If (as will very often be the case) the relevant contract giving rise to a transfer of an undertaking is agreed some time before the transfer takes place, the obligation to provide employee liability information, which only has to be complied with by fourteen days prior to the actual transfer, will not assist a transferee in terms of ascertaining employment-related liabilities for the purposes of the commercial negotiation of contract terms.

H. Remedy

1. Award

- 8.41** The ET determines complaints of failure to comply with regulation 11. Awards of compensation are based on loss rather than by way of a penalty.⁴⁹ The complaint must be presented:
- before the end of the period of three months beginning with the date of the relevant transfer;⁵⁰ or
 - within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.⁵¹
- 8.42** Where an ET finds a complaint under paragraph (1) well founded, it:
- shall make a declaration to that effect;⁵²
 - may make an award of compensation to be paid by the transferor to the transferee.⁵³
- 8.43** The amount of the compensation to be awarded by the ET where breach of regulation 11 is established is prescribed by regulation 12(4) as:
- such as the tribunal considers just and equitable in all the circumstances, . . . having particular regard to:
- (a) any loss sustained by the transferee which is attributable to the matters complained of; and
 - (b) the terms of any contract between the transferor and the transferee relating to the transfer under which the transferor may be liable to pay any sum to the transferee in respect of a failure to notify the transferee of employee liability information.⁵⁴

2. Principles of award

- 8.44** This very general power to award compensation based on loss has no statutory maximum in contrast to the remedies for breach of the collective information and consultation regimes applying to relevant transfers⁵⁵ and redundancy exercises of the requisite scale.

⁴⁹ Regulation 12(1). Regulation 12(7), combined with Employment Tribunals Act 1996, s. 18, establishes the ET as the forum for such complaints.

⁵⁰ Regulation 12(2)(a).

⁵¹ Regulation 12(2)(b).

⁵² Regulation 12(3)(a).

⁵³ Regulation 12(3)(b).

⁵⁴ Regulation 12(4)(a) and (b).

⁵⁵ Regulations 13–6.

Whilst loss may be straightforward to identify in relation, for example, to an undisclosed discrimination claim which the transferee inherits, the fact that an award for breach of regulation 11 is determined by reference to what is just and equitable in all the circumstances gives ETs considerable flexibility in the awards which they may make. It appears possible that transferees will be able to mount compensation claims analogous to breach of warranty claims. Transferees may well seek to base arguments for compensation on what they would have done, the value of what they would have acquired, and what they would have paid for the relevant business had accurate and comprehensive employee liability information been provided. **8.45**

Regulation 12(4) provides that the terms of a commercial agreement between transferor and transferee will be relevant to the award under regulation 12 where that contract provides for the transferor to pay 'any sum' to the transferee 'in respect of a failure to notify the transferee of employee liability information'. If warranty and indemnity provisions in a transfer agreement provide for compensation for breach of the disclosure obligations imposed by the agreement, they can presumably be taken into account in assessing the loss by reference to which the just and equitable award of compensation for breach of regulation 11 is to be assessed. Presumably, *de minimis* provisions can also be taken into account. **8.46**

The relevance of compensation or damages payable by the transferor to the transferee pursuant to their commercial arrangements is defined by reference to the obligation to provide employee liability information. Construing the position strictly, compensation for breach of warranties as to matters of wider scope than the employee liability information as defined by regulation 11(2) is irrelevant to the ET's consideration of the level of award to be made (unless considered to be just and equitable in the circumstances). **8.47**

3. Minimum award

The assessment of the compensation capable of being awarded by the ET in respect of breach of the regulation 11 obligation is subject to important further provisions. First, regulation 11(5) provides that, regardless of the issues of loss described above, the minimum award shall be £500 per employee in respect of whom the transferor has failed to comply with its obligations. This minimum award need not, however, be made if the ET considers it 'just and equitable in all the circumstances, to award a lesser sum'. **8.48**

The nature of the transferor's breach will be relevant to the number of employees in respect of whom such a minimum award can or should be made by the ET. Unlike regulation 15, which provides for compensation for breach of regulation 13 of up to thirteen weeks' pay per affected employee (as that term is defined in regulation 13(1)), regulation 12(5) limits the application of the minimum award to those employees in respect of whom the transferor has breached its regulation 11 obligations. By way of example, strictly construing this provision, if the transferor complied with all its regulation 11 obligations save for the provision to the transferee of the relevant employment particulars of one employee, the regulation 11 breach would only relate to one employee and presumably the £500 minimum award could only be made in respect of that one employee. By way of contrast, a failure by the transferor to notify the transferee of a collective agreement covering a workforce of thousands would constitute a breach of the regulation 11 obligation in respect of all those employees in relation to all of whom the £500 minimum award should in principle be made unless ET considers that it is not just and equitable to do so. **8.49**

8.50 The 2009 Guidance makes one specific observation in relation to the issue of when the tribunal would not make the minimum award of compensation because to do so would be unjust or inequitable. It indicated that ‘it might be fair to assume that trivial or unwitting breaches of the duty may lead to the ET waiving what would otherwise be a minimum award of compensation’.⁵⁶

4. Mitigation

8.51 Regulation 12(6) provides a further principle for the ET to consider in exercising its jurisdiction to award compensation in respect of breach of regulation 11. The principle of mitigation of loss under common law must also be taken into account in assessing the loss in respect of which (to the extent just and equitable and subject to the parties’ commercial terms) an award can be made under regulation 12.

I. Due Diligence Exercises

8.52 The parties involved in a relevant transfer will therefore need to consider a variety of issues in relation to the provision of information about those employees who will transfer from transferor to transferee under TUPE. Clients awarding contracts will wish to oblige their contractors contractually to provide the requisite information to them as and when requested for onward transmission to potential bidders in order to ensure that subsequent retendering processes can be managed effectively and to reassure transferees that an incumbent contractor is bound contractually to provide the information which is required by statute to be disclosed and which they may often wish to see earlier than the statute actually requires to assist in the formulation of bids. Transferors will wish to ensure that they take proper steps, by way of investigation of the liabilities which have arisen in respect of the transferring employees, to comply with the (albeit limited) obligation imposed by regulation 11. Incumbent contractors will wish to ensure that on a retendering no dispute arises about the timely provision of information and that the client is contractually required to do all that is reasonably necessary to enable them to comply with their obligations.

8.53 Notwithstanding the obligation to notify employee liability information and the availability of compensation in respect of breach, transferees will still wish, where feasible, to ensure that appropriate warranties and indemnities provide more extensive protection when compared with that supplied by regulation 11.

8.54 That said, whether or not commercial indemnity protection can be obtained, transferees may often wish to utilize the obligation imposed by TUPE to provide employee liability information to put pressure on transferors promptly to provide full employee information. Transferees may well wish to make specific and detailed requests and argue that the request simply reflects the transferor’s obligations under regulation 11 in any event.

8.55 In formulating due diligence requests by reference to the obligation on the transferor to provide employee liability information, it needs to be borne in mind that the obligation imposed by regulation 11 is limited to the specific items referred to in regulation 11(2). Basic contractual obligations and responsibilities, claims, and debts can be seen clearly to

⁵⁶ At p. 30.

fall within the scope of the employee liability information which is to be notified by the transferor to the transferee. That said, there may well also be information which a transferee will wish to seek, depending upon the nature of the business in question, as part of a due diligence process but which will fall outside the strict scope of the concept of employee liability information for the purposes of regulation 11. By way of example, information about the industrial relations history of the operation in question, whether any regulatory or governmental body has ever investigated the business, staff turnover, any restrictive covenants to which the transferring employees are subject pursuant to their contracts of employment and other matters may need to be sought for important commercial reasons but would be outside the scope of regulation 11.

Whilst space constraints preclude a detailed treatment of all the due diligence issues which can arise when negotiating and documenting relevant transfers, there are a number of crucial categories of information that a transferee will wish wherever possible to obtain. **8.56**

A list of all potential employees who might transfer employment following the transaction should be sought including those who have not yet commenced employment. Relevant details about those employees would include, in respect of each employee, the employer, the name of the employee, the date on which the employee's continuous employment for statutory purposes began, the job title, the notice period, salary, any overtime entitlements, and any pay increases awarded. **8.57**

Full details should be sought of any share option bonus, profit sharing, or commission arrangements in which the transferring employees participate, including the applicable scheme rules. Not least in order to be able to assess employment costs and the arrangements needing to be replicated post-transfer, details should be sought of all other employment benefits offered or provided to the transferring employees. Examples of the arrangements about which information should be sought include life assurance schemes, private and permanent health insurance arrangements, company car and travel policies, enhanced redundancy arrangements, retirement policies, relocation policies, and long service award schemes. **8.58**

Employment documentation itself is of course crucial and copies should be sought of all standard terms and conditions of employment, of all employment contracts with directors and other transferring employees whose employment is terminable on greater than, say, three months' notice, of any employment handbooks and similar policy documents, all applicable disciplinary and grievance procedures, and details of any pension schemes. Pension details sought should extend to early retirement entitlements, eligibility requirements, and which transferring employees are eligible to participate in the scheme. **8.59**

An appreciation of the collective and industrial relations framework in which the transferring undertaking operates can be invaluable. Accordingly, details should be sought of all agreements with trade unions, of works councils arrangements and other employee representative structures, of trade union membership, and of the industrial relations history of the business. Full details should also be sought of past, outstanding, and anticipated applications to ETs or courts by any existing or past employees as well as historic dismissals, not least given the risk of an employee dismissed prior to transfer alleging that the dismissal was transfer-related and therefore that the transferee inherits any liability for any consequent unfair dismissal claim. **8.60**

J. Contracting Out

8.61 In the first draft of what became the 2006 Regulations, the prohibition on contracting out of the provisions of TUPE referred to a number of provisions of TUPE 2006 other than regulation 11. The omission of regulation 11 from the scope of the anti-avoidance provisions of TUPE would presumably have meant that, as between themselves, the transferor and transferee could have agreed to disapply regulation 11. This position was reversed in the final version of the 2006 Regulations on the basis that it would have disadvantaged the employees. The prohibition of contracting out in regulation 18 applies equally to the obligation imposed upon the transferor to provide employee liability information to the transferee.⁵⁷

<http://www.pbookshop.com>

⁵⁷ See Chapter 12, para. 12.01 *et seq.*