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Assessment concerning 'Strategic Employment Relations & Rights' Issues arising from the draft CAR determination on the Maximum Level of Airport Charges at Dublin Airport 2020-2024.

1.0 Introduction

The Commission for Airport Regulation (CAR) has recently issued its draft determination on the Maximum Level of Airport Charges at Dublin Airport 2020-2024 which it will finalise and publish in Autumn 2019 to take effect on the 1 January 2020 for 5 years.

The CAR targets for operating costs increase from €273m in 2020 to €291m in 2024 (compared to the outturn costs of €268m in 2018). CAR commissioned a bottom up assessment of Dublin Airport's operating costs to establish what it says is "an achievable level of efficient costs for the period". This takes account of *"structural inefficiencies which Dublin Airport cannot easily address in the period"*. An example of a structural inefficiency is cited regarding legacy staff contracts with higher than market rates of salary which CAR acknowledges it does not address. In addition, it does not suggest any structural change to the way Dublin Airport organises its business, for example, the level of insourcing and outsourcing.

2.0 'Strategic Employment Relations & Rights' Issues

The purpose of this paper is to provide a high-level overview of the key strategic employment relations and employment rights' issues that would have to be considered in delivering on the *opex* allowance in any proposal, were it to be confirmed. Principally, it is important for both the daa and CAR to fully appreciate the significant issues, risks and challenges that such a proposal would give rise to in light of the established legal contractual arrangements and employment rights applicable to staff, the implications for collective bargaining agreements and any efforts to resize/restructure staffing levels without the agreement of staff and their representatives. In this paper we outline the key challenges which will need to be fully and properly recognised in framing any final determination.

The ten key messages are as follows:

1. It is well-established that a party to an employment contract cannot unilaterally change its terms and conditions. Significant legal issues arise when effecting such changes. It is important that employees voluntarily agree to any changes to contracts of employment. Otherwise, there are important protections and statutory rights which employees can invoke.
2. Where benefits are considered to be part of the employee's terms and conditions, any attempt to unilaterally alter the manner in which they are paid, or whether they are paid at all, may give rise to a claim for breach of contract or even constructive dismissal. This is apart from the employment relations issues arising.
3. In employment relations terms, the Labour Court will generally uphold an agreement where it was freely entered into by both parties. Where the Court regards an agreement as immutable, it would normally be the case that the employer would have to show the existence of a burning platform to justify change and the possibility of agreement with staff. The Court has tended to protect worker entitlements and ensure that any measures are reasonable and even that a proposal be adopted temporarily (rather than permanently) to be reviewed once trading conditions improve.
4. In the case of the daa, this approach was followed, leading in 2016 to Cost Recovery Pay Restoration involving restoration of basic pay levels from 1st July 2016, bringing an end to the pay cuts applied under the Cost Recovery Agreement from 2009 for affected staff who had accepted Labour Court Recommendation (LCR 20997) providing for an additional 4.04%.
5. The Employment Equality Act 1998 sets out a range of grounds for what shall constitute discrimination. An employer, must be particularly careful to ensure that measures are not indirectly discriminatory. In the case of the daa, this could lead to serious employment relations consequences,

if the nature of a proposal was to be manifestly discriminatory. It would be strenuously resisted by the trade unions to the point of provoking an industrial dispute.

6. The employment relationship for the majority of daa staff is influenced by the existence of collective agreements with its recognized trade unions. The collective bargaining process wherein it gives rise to the incorporation of collectively agreed provisions into the contract allows therefore for the enforceability of those terms. These issues are given further weight by the provisions of the State Airports Act, 2004. Collective agreements will generally bind employees where they are entered with the approval of persons concerned or acquiesced to by them. Normally for those staff in categories with terms and conditions governed by collective agreements, daa generally provides for all employees in those categories that they are bound by those collective agreements whether or not the employee joins or remains a member of the Union.
7. Should outsourcing be contemplated, it must be noted that collective agreements which are legally binding are automatically transferred to the transferee on the transfer of an undertaking.
8. In what is a challenging employment relations environment, the pay agreements entered into by daa with its unions in recent years have led to relatively modest increases. This is in the face of union led campaigns for upward equalisation of terms and conditions for established grades, which have been resisted. In arriving at its pay agreements, daa has done so on the back of significant growth, capital expenditure, reported profitability and the payment of dividends to the state as shareholder. It has struck a delicate balance by tailoring some adjustments towards those perceived to be on 'lower' terms and recognised the contribution of longer serving staff by early restoration of pay reductions under its previous 'Cost Recovery Plan' from 2009.
9. In its most recent negotiations with trade unions, pay deals have been agreed with Forsa and Mandate, in return for significant measures in terms of flexibility, agreement on a new reward model and dispute resolution and has established principles of market-based pay and on building a performance culture. A wide range of changes to the employee management operating model have been agreed and discussions with SIPTU has led to agreed proposals in May 2019 which address specific productivity required by the company, as well as issues raised by the Union.
10. An employer such as daa should always be cognisant that any change that is dealt with incorrectly can not only result in claims under employment rights legislation, could potentially result in substantial employment relations difficulties and serious risks to business continuity in the unionised environments of our major Airports or even to significant breach of contract claims in the civil courts.

2.1 Legalities around changing terms and conditions of employment

The employer/employee relationship is governed by many pieces of employment legislation. In addition, the relationship is also significantly regulated by the terms and conditions of the contract of employment. These terms can be express or implied and usually arise out of agreement between the parties prior to the commencement of employment.

In times of change, sometimes arising out of financial or other business difficulty, an employer may wish to make changes to the employment contract in order to deal with its competitiveness challenges. It is of significant importance that employees first agree to any changes before being implemented, subject always to the relevant consultation being carried out.

During the last recession, employers had to make substantial and necessary changes to maintain their businesses. Hard decisions were necessary in many cases to secure competitive advantage, or even just to stay in business. Some employers were creative in considering aspects of the employment relationship which resulted in savings for the employer, but also benefited the employee, e.g. introduction of career breaks, additional unpaid leave, subsidised study breaks and flexible working arrangements which previously may not have been possible when business demands were greater. These changes were usually brought about with voluntary agreement without the employer seeking to effect changes on a compulsory basis.

Unfortunately, sometimes those types of solutions (as outlined above) may not be enough. Employers can find themselves forced to make deeper cuts yet are still keen to avoid job losses. Among the cost saving mechanisms which can arise for consideration are the reduction or elimination of certain payments which may be seen as discretionary, the revision of employee benefits and reductions in basic pay. Depending on the circumstances, the changes may benefit both parties: employees keep their jobs, albeit on lesser terms and conditions, and employers retain key skills and experience. Critically, these changes, in the main, are secured by agreement.

However, significant legal issues arise when effecting changes to terms and conditions. In fact, the unilateral revision of the terms of any contract is fraught at the best of times, but when changes to contracts of employment are at issue, there are additional protections and statutory rights which employees can invoke when changes are presented as a fait accompli. These include claims for breach of contract at common law, claims pursuant to the Payment of Wages Act 1991, and, provided the other necessary elements are present, may even give rise to claims for constructive dismissal under the Unfair Dismissals Acts 1977 to 2015.

Some of the more significant legal challenges in dealing with the broad categories of changes to terms and conditions which may be the subject of revision are set out below.

2.2 Revision of employee benefits

Consideration may be given by an employer to the withholding or the restriction of certain employee benefits, over and above those provided by statute. However, if these benefits are considered to be part of the employee's terms and conditions, any attempt to unilaterally alter the manner in which they are paid, or whether they are paid at all, may well give rise to a claim for breach of contract. Depending on the benefit selected for revision, there may be equality implications, and an employer should exercise caution to ensure that any revision of benefits does not disproportionately impact upon any category of employees who may come within the protection of the Employment Equality Acts 1998 to 2008.

The fact that employee benefits may not be expressly mentioned in a letter of offer or in a contract of employment does not necessarily mean that they do not form part of the contract. There may be other sources of contractual terms, such as a company handbook outlining a very specific sick pay entitlement by which an employer may be bound, or custom and practice which has resulted in a term being implied into a contract of employment. An employer should be aware that for a custom and practice argument to succeed, the party asserting the implied term would need to be able to show that the term was a certain and unambiguous one, and that it was notorious to those affected.

Where changes are agreed these should be confirmed in writing. This can take the form of a contract addendum or a letter outlining the changes and seeking the express consent of the employee. Section 5 of the Terms of Employment (Information) Acts 1994 to 2014 states that *"the employer shall notify the employee in writing of the nature and date of the change as soon as may be thereafter, but not later than 1 month after the change takes effect"*.

It may be the case that an employer may already have a standard flexibility clause provided in its employment contracts. Whilst such clauses are a basic foundation for agreeing to change, they cannot be relied on alone and agreement should still be sought when amending an employee's terms and conditions.

An employer should be aware that even though an employee may not be availing of a particular employee benefit at the material time, and may indeed never avail of it (e.g. long term sick pay or maternity pay) it still has a value, but its value will not be as clear cut as a reduction in pay, for example.

This makes the outcome of legal proceedings brought by an employee slightly unclear – they may be successful, giving rise to an award by way of damages. The outcome on any particular issue will depend on the individual circumstances; a person who relied on the benefit and expected to avail of it in the near future is likely to recover more than an employee who is claiming for the notional benefit he or she would have received had the circumstances it was intended to cover ever applied to them.

2.3 Reductions in core pay / basic pay

What is well-established in Irish law, is that a party to a contract cannot unilaterally change its terms and conditions. However, an employee facing a pay reduction which is in breach of his/her contractual terms will have a remedy, whether under the Payment of Wages Act 1991 or in breach of contract at common law. The only question then to be determined is what level of damages will be awarded. Where an employer proposes reductions to basic salary, an employee who is unwilling to accept the new terms has a clear avenue of redress, that of a claim under the Payment of Wages Act 1991. This is in addition to a possible claim for breach of contract or even constructive dismissal as mentioned above.

In the UK case of Rigby v Ferodo (1987 IRLR 516) the House of Lords held that the reduction of an employee's pay by £30 per week was a repudiatory breach of the contract of employment which needed the employee's agreement. It further confirmed that it was not necessary for the employee to resign in order to vindicate his rights; he could remain in employment and claim on an ongoing basis for the unpaid amount.

Caselaw in this area continues to evolve, especially following the 2011 case of *McKenzie v Minister for Finance* [1] given distinctions as may be drawn between a '*deduction*' and a '*reduction*' in pay. Employers have increasingly sought to ensure that their newer contracts of employment contain specific wording allowing such a deduction/reduction to be made, as per section 5(1)(b) of the Payment of Wages Act 1991, otherwise they are likely to find themselves unsuccessful in attempting to defend a Payment of Wages Act claim.

As stated, there is still the issue of breach of contract. The general position at common law where a claim is pursued in relation to a breach of contract concerning the non-payment of agreed terms, in the absence of any agreement to do otherwise, the only questions which a Civil Court might be expected to address are whether there is a contractual obligation (whether oral or in writing) to pay the agreed terms to relevant employees and what, if any, conditions are attached to such payment.

If payment is not discretionary, then the Courts equally have no discretion to interfere with the terms of the contract which was agreed between the parties. Breach of contract is not a discretionary remedy which varies with the particular view of an individual judge, or because of e.g. the public mood of the time. In circumstances where it could be proven that payment of the relevant terms was obligatory pursuant to the terms of the contract of employment (whether oral or in writing), a judge would be bound to award damages for breach of contract in the amount of any monies owed.

There are many examples where the Labour Court will consider claims for compensation for loss of earnings in circumstances where a benefit is no longer appropriate or warranted e.g. compensation for loss of overtime or shift premium or some other benefit / entitlement. However, where proposals are tabled for reducing core pay and /or benefits to reduce costs in the private sector and where such measures are proposed for negotiation, the Labour Court will usually take a pragmatic view, backing a company's plea to reduce costs where this is demonstrably in order to stay in operation and to maintain jobs and viability. A precondition for such an approach will be clear evidence of a burning platform which the employer can demonstrate and some acceptance by the Union of the need for change. Even where this is the case however, the Court has also tended to protect worker entitlements and ensure that any measures are reasonable. This may well be in the form of a *temporary* (rather than a permanent) proposal which must be reviewed once trading conditions improve and provide a path for pay restoration.

In the case of the daa, this approach was followed leading in 2016 to Cost Recovery Pay Restoration involving permanent and early restoration of basic pay levels from 1st July 2016, bringing an end to the pay cuts applied under the Cost Recovery Agreement from 2009 for affected staff who had accepted Labour Court Recommendation (LCR 20997) providing for an additional 4.04% under the Recommendation.

The trade unions would also be concerned about creating a precedent that other employers might seek to follow so achieving agreement on such proposals will prove extremely difficult if not impossible in the absence of a credible burning platform. These difficulties are likely to be '*multiplied*' in the case of daa, in a

[1] [2011] E.L.R. 109

challenging employment relations environment, in a '*politically charged*' context of a commercial state body, where the business is growing, profitable and returning dividends to the state as its shareholder.

In line with its long-held policy, the Labour Court will generally uphold an agreement where it could be shown that this was freely entered into by both parties. However, also in line with policy, particularly during the recession, the Court did not always regard an agreement as immutable. Where the employer is looking for a permanent reduction and in the absence of a burning platform which would give the employer leverage to reach a reasonable agreement with staff and their representatives on an acceptable compensation formula, it is likely that any terms if they are to be freely entered into by both parties so that they are sufficiently attractive to staff would become financially prohibitive to the employer. This would also set a significant and unhelpful precedent and a '*benchmark*' should future changes be required in other areas.

It can also be reasonably stated that to approach the matter of a '*buyout*' of terms in an organisation like daa, without there being a broader package or measures of change, restructuring and a deeper engagement with staff and a socialisation of the need for change, given agreed salary and earnings levels, there would hardly seem to be an appropriate incentive for staff to agree to such a '*buy out*' within reasonable parameters.

2.4 Acquiescence to change.

It is highly likely that unilateral changes may give rise to a successful claim for breach of contract. However, it can occur that change is imposed, and the employee does not confirm or reject the change. It may be the case that an employee will depending on the circumstances have accepted the change by acquiescence if they have not made a timely decision to challenge the issue and therefore could be treated as having affirmed the change by acquiescence. Where an employee accepts the upside of a proposed change and has taken e.g. financial incentives where these are part of a set of proposals, then cooperation with the other requirements of those terms follows. Having been notified of changes in terms, and where the person has accepted the financial rewards as a consideration in return for the cooperation sought by an employer, it will with the passage of time become more difficult for the person to challenge any particular term or changes terms where they have acquiesced. Such cases are however always "fact sensitive" and likely to be determined on the individual facts.

2.5 Custom and practice and implied terms

Many employment relationships involve some degree of terms and conditions established through custom and practice. In practical terms, rights established through custom and practice may be rights to e.g. sick pay or ex-gratia redundancy payments. These are terms that are not expressly agreed however are notoriously well known within the organisation or sector. The 'custom and practice' test was adopted by Maguire P in O'Reilly v Irish Press [1937] 71 I.L.T.R 194. In this case it was established that the practice must be "so notorious, well-known and acquiesced in that in the absence of agreement in writing it is to be taken as one of the terms of the contract between the parties…it is necessary in order to establish a custom of the kind claimed that it be shown that it was so generally known that anyone concerned should have known of it or easily become aware of it."

This test was adopted by Hedigan J in McCarthy v HSE[2010] 21 ELR 165 in a case in which a public servant sought to challenge a decision of the HSE requiring her to retire at age 65. The High Court held that the existence of a retirement age of 65 in the public service is so well known that it would have to be regarded as an implied term in every public servant's contract of employment.

It is critical therefore, as the case law reaffirms, that employers not only view the written contract of employment when considering changes but have a deep understanding of any implied terms that may exist.

2.6 Imposition of required changes to a contract.

The question of whether, in critical circumstances, changes to terms and conditions could be imposed on pain of termination of the contract is sometimes an issue. Under section 6(6) of the Unfair Dismissals Acts 1977 to 2007, it is *"for the employer to show that the dismissal resulted wholly or mainly from one or more of the matters specified in section 6(4)… (including redundancy, conduct, capability or competence, etc)…or that there were other substantial grounds justifying the dismissal."*

This would require that an employer meet what is a substantial evidential test and to claim e.g. that the financial state of the business constitutes a substantial ground justifying dismissal. Essentially, this would involve the termination of the contract of employment with notice, and the offer of the same position on lesser terms and conditions. Even where the motivation for this exercise is cost saving, it could not be described as a redundancy situation because the position still existed.

The quality of the evidence which the WRC/Labour Court might require before they would be willing to indulge such an argument would be significant. No doubt, an extremely high standard of evidence would be needed, akin to that provided when a company argues *"inability to pay"* before the Labour Court, in other words management would have to be extremely open about the state of financial affairs within the company and be willing to declare it.

2.7 Equal Treatment Issues

The Employment Equality Act 1998 at Section 34(7) provides that it shall not constitute discrimination on the age ground for an employer to provide for different rates of pay or conditions of employment based on relative seniority or length of service.

In the case of *Coillte Teoranta v. O'Dwyer* [2006] 17 E.L.R. 291 it was held by the Labour Court that the disparity in severance gratuity was based exclusively on the ages of the employees and not service. The scheme did not come within the scope of s.34(7)(b) of the Employment Equality Act 1998.

Section 34(7) has also been used by employers in a number of cases e.g. to justify incremental arrangements and length of service qualification periods. An employer, when considering a restructuring of its workforce, including any weighting of proposals towards certain staff which may e.g. be earnings based or service based, must be particularly careful to ensure that the measures are not indirectly discriminatory. In that regard Section 19(4)(b) of the Employment Equality Act, 1998 as amended, provides that such measures will fall foul of the legislation unless the employer can show that "…*the provision is objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary".*

In the case of *Bilka Kaufhaus v Weber von Hartz* (Case C-170/84 [1986] ECR 1067) a three-stage test was set out. In essence, the objective justification test requires, in relation to difference of treatment by an employer, that any difference in treatment must correspond to a real need of the undertaking, be appropriate to that need, and be necessary for achieving that need.

Whilst this briefly points to the legal position which any employer must contend with, it is worth stating that in the particular case of the daa, they could lead to the most serious employment relations consequences as a result of seeking to comply with a CAR determination, if the nature of a proposal was to be manifestly discriminatory. It would be strenuously and publicly resisted by the trade unions to the point of provoking an industrial dispute.

3.0 Status of Collective Agreements

The terms of collective agreements, which are a significant and extensive feature of daa as a substantially unionised place of employment, are also generally considered to form part of the individual employee's terms and conditions of employment. A collective agreement is one made between an employer (or an association of employers) and a trade union or trade union(s). A collective agreement is assumed to be voluntary (i.e. not legally binding) unless it is in writing and contains a statement that the parties intend it to be of legal effect. Collective agreements may be implied or expressly incorporated into individual employment contracts. Those that are expressly incorporated will normally take place by way of a reference to the collective agreement in the employment contract.

The generally accepted contractual position under law is that when an employer wished to make changes in conditions the employer is required to notify an employee of any changes to the particulars contained in the written statement of terms and conditions not later than one month after the change comes into effect. This requirement does not apply if the change results from a change in statutory law, other laws, and/or

administrative provisions or collective agreements. It is however, good practice to do so, as an employee's ignorance of change arising from these sources could give rise to unnecessary problems.

As far as the legal status of collective agreements (CA's) is concerned and whilst sparing the reader the detail of the case law, the position is briefly as follows:

- Over the years CA's were generally considered to give rise to rights and duties but more in a social sense rather than in strict legal terms;
- There have been real difficulties caused by them not being generally legally enforceable given that they can often be too vague or imprecise;
- However, the approach by the Courts has changed when the issue at question which gives rise to a dispute or on which enforcement is sought is a term which has been incorporated into the employee's contract of employment;
- It is also material if the agreement concerned, has a provision which expresses an intention that the CA should or should not be binding in law;
- This can also have relevance where e.g. a productivity agreement which might not be legally enforceable in all its terms can still amend stated provisions in a person's contract of employment such as a rate of pay, overtime working etc.;
- In all other respects there is nothing to stop employers and unions from giving agreements legal effect either by means of an explicit provision to that effect or by means of the facility of registration under the provisions of the Industrial Relations Acts.
- Collective agreements which are legally binding are automatically transferred to the transferee on the transfer of an undertaking.

Given therefore that the individual contract of employment is the main point of contact between the legal process and the collective bargaining process the incorporation of collectively agreed provisions into the contract allows therefore for the enforceability of those terms at the individual rather than collective level. It is for this reason that to enable this incorporation, it will generally be provided expressly in the contract that the terms and other conditions will depend on the terms of agreements made from time to time between the employer and the relevant trade union. This is known as the *"normative effect"* of a collective agreement. Individual contracts of employment can be varied or added to through negotiations and collective bargaining unless individuals have made it clear that they did not intend or wish to be bound by the change/addition. (Goulding Chemicals Ltd v Bolger, Supreme Court [1977]).

The test to be applied as to whether a collective agreement between trade union and employer is legally enforceable or not is the *objective* test of whether the parties intended to create legal relations. (See O'Rourke v Talbot (Ireland) Ltd [1984]. The alternative is that the parties did not intend to create legal relations but came to an agreement based on optimistic aspirations to regulate their interaction on an orderly day to day basis. Each case would be judged on its own circumstances to ascertain what the intention of the parties was.

In applying the terms of a CA, such as in the case of the daa, it is usual to specify the categories of staff covered by the remit of the terms as may be agreed with individual unions. This would occur, even where union membership is not a condition of employment such that all staff in those categories are bound by collective agreement, including for the application of pay increases and associated terms of an agreement concluded with the relevant trade union.

Normally for those staff in categories with terms and conditions governed by collective agreements, it is understood that daa provides for all employees in those categories that they are bound by collective agreements entered into by the Company and the Union representing that category of employee whether or not the employee in question joins or remains a member of the Union for their category of employment.

Finally, it is also worth drawing attention to the provisions of the State Airport Act, 2004 which stipulates under S.12(9) that *"save in accordance with a collective agreement negotiated with any recognised trade union or staff association concerned, a person transferred to a company in accordance with subsection (4), (5) or (6),* ***shall not, while in the service of the company, be brought to less beneficial conditions of service or of remuneration than the***

conditions of service or of remuneration to which he or she was subject immediately before the relevant appointed day".

4.0 Distinctions between graded employees and personal contract employees.

It is usual in unionised employments, such as the daa, for graded employees to be employed on terms that provide for collective bargaining with a recognised trade union. These arrangements usually provide in respect of the grade that revisions agreed with the trade union through collective bargaining impact directly on contracts of employments of the relevant persons. As an example issues such increases in pay, variations in hours of work/annual leave, variations in respect of policies such grievance and disciplinary procedures, may be agreed collectively and will apply automatically to the contracts of employment of those in the grade, whether or not they are members of the relevant and recognised union and whether or not they assent/acquiesce to the changes. This would be generally applicable across the public service.

In contrast, it is not normal in the public service for collective agreements to apply to staff on personal contracts. For those on personal contracts of employment it would be more usual that such contracts include a flexibility provision such that the employer can vary the duties, amend or replace policies etc. without the individual agreement of the employees. In the case of daa, whilst personal contracts are in use for certain grades of staff including those in senior management positions, the significant majority are in fact employed in categories on contract terms which specify that their terms and conditions are governed by collective agreements.

Collective agreements will generally bind employees where they are entered with the approval of persons concerned or acquiesced to by them. Accordingly, a collective agreement that adversely impacts on a personal contract employee is likely to be binding on an employee if he or she does not make his or her objection known in a timely manner.

5.0 Implications of Outsourcing

Outsourcing is of course often used by businesses as a potential source of cost saving. Depending on those services or functions that may be deemed suitable for outsourcing, it may be the case in daa that '*outsourcing*' may be another route to reduce costs of '*legacy*' staff. It is assumed for the purposes of this paper that the outsourcing of cleaning, facilities and security staff, as well as some elements of airside operations could be placed *'in scope'*. Worker categories in these areas are amongst the most heavily unionised in daa. However, apart from the significant employment relations challenges arising from any such proposal, consideration of the issue needs to take full account of the practical implications for any categories who may be 'in scope' due to the TUPE regulations.

The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (the "Regulations") safeguard the rights of employees when there is a change in the legal owner of the business or part of the business in which they are employed. This area of law is commonly referred to as "TUPE". The purpose of TUPE is to protect employees from dismissal or other adverse consequences where the business in which they are employed changes hands. In essence, TUPE requires that the employees transfer to the employment of the new owner. The employees are entitled to the same terms and conditions of employment as applied before the transfer, their continuity of service is preserved and existing collective agreements which are legally binding are automatically transferred to the transferee on the transfer of an undertaking. The new owner becomes liable for obligations that accrued to employees before the transfer but were not discharged. Occupational pension arrangements do not have to be continued by the new owner.

For the regulations to apply, the business or part of the business being transferred must constitute an economic entity i.e. an identifiable, organised grouping of resources or people that performs a particular function. There must be a legal transfer of the business to another party, which includes a direct sale and the assignment or forfeiture of a lease, and the business must retain its identity after the transfer. The question as to whether the transfer of a contract triggers the application of the Regulations is determined on a case-by-case basis.

All employees, whether full-time, part-time, temporary or permanent, who are employed in the business at the time of the transfer and who are wholly or mainly assigned to the part of the business being transferred are protected by the Regulations.

The Regulations provide that the new owner of the business must honour an employee's existing terms and conditions of employment. They specify that where an agreement provides for a less favourable term or condition, it will automatically be deemed to be modified so as not to be less favourable. This is so even where an employee consent to the less favourable term. A provision which is more favourable to an employee, however, is permissible.

It is not possible for parties to a transaction to contract out of the Regulations. Any provision in an agreement which purports to exclude or limit the application of the Regulations is deemed to be void.

If an employee terminates his employment because a transfer has involved a substantial change in working conditions to the detriment of that employee, the employer concerned is regarded as having been responsible for the termination – it is treated as a dismissal. A dismissal of an employee, the reason for which is the transfer of an undertaking, is deemed to be automatically unfair, unless it can be justified by economic, technical or organisational reasons which entail changes in the workforce. It is often difficult to establish these grounds until after the sale of the business has been completed.

It is also important to recognize that there is a generally held policy position held by trade unions who have long held concerns about privatisation of services. It is also the case that under the public service agreements (first agreed in the Lansdowne Road Agreement) that for service delivery, evaluating between in house or outsourcing options cost comparisons *"shall exclude the totality of labour costs."*. This represented a change to the provisions of the earlier Croke Park Agreement which provided that the evaluation of an outsourcing proposal included a number of factors, namely *"overall costs, quality of service, effectiveness, and the public interest. All relevant costs will be included in the evaluation but it will not be determined by unit hourly rates of pay."*

Under the Lansdowne Road Agreement, it was agreed that in the evaluation process *"any cost comparisons shall exclude the totality of labour costs."* Subject of course to the primacy of any internal daa collective agreements with trade unions about the recourse to '*outsourcing*, these restrictive provisions, whilst not immediately of relevance or application to daa, are indicative of the position as may be taken by trade unions in response to any '*outsourcing'* proposal.

6.0 The Employment Relations Environment is Challenging

The daa is a unionised employer with about seven (7) out of ten (10) staff being members of trade unions. There are five Unions which are recognised in the Airports being SIPTU, MANDATE, UNITE, FORSA and CONNECT. On the broader Dublin Airport campus there are a number of other unionised employments such as Aer Lingus, Ryanair, IAA and Servisair, various retailers and other service companies.

Since 2015 the Irish economy has powered ahead and many companies have paid base pay increases and in terms of collectively bargained base pay increases, settlements in 2018 depending on the sector ranged from 2.0% to 2.75% with a small number of agreements recording settlements of 3.0%. This pattern is repeating in 2019, with a slightly higher range of 2.5-3.0% per annum save for sectors most exposed to Brexit. Premium adjustments are evident in some sectors such as in Finance and ICT driven by skill supply issues. All too often this has occurred without significant productivity or 'cost offsetting' measures having been agreed outside of more standard commitments to 'normal ongoing change', although there are some exceptions.

In an economy with a current unemployment rate of only 4.4% pay increases have continued to outstrip inflation (annual rate of 1.1% at March 2019) as the labour market continues to tighten with skills shortages in some sectors but with an urban / regional divide. Projected average pay increases are likely to remain at the least at the current levels for same time albeit that that for those sectors most exposed to 'Brexit' there may be a dampening effect, depending on the outcome.

Against this background, the pay agreements entered into by daa with its unions in recent years have led to relatively modest increases in the face of union led campaigns for upward equalisation of terms and conditions for established grades, which have been resisted by daa. Issues of '*grievance*' have been most vociferous amongst those who have experienced a differentiation on pay and benefits relative to their colleagues on older terms and conditions which has led to vocal campaigns from those unions representing those in lower paid categories. These issues remain current within daa and have not gone away. Any efforts as a result of any final CAR determination to unwind such '*legacy*' terms is likely to be met with equal and opposite measures and reignite those campaigns by those on lower terms for '*equalisation*' and would almost certainly generate an industrial '*flashpoint*' at the airports.

In arriving at its pay agreements with its principle unionised groupings, daa has done so on the back of significant growth, capital expenditure, reported profitability and the payment of dividends to the state as shareholder. It has successfully struck a delicate balance by tailoring some adjustments towards those perceived to be on '*lesser*' terms whilst also recognising the contribution of staff who endured cuts during recessionary times by early restoration of pay reductions under its previous '*Cost Recovery Plan*'.

As an example, the pay deal agreed with SIPTU in 2018 under the auspices of the Workplace Relations Commission was for 8.5% over 40 months and applied to c. 1900 workers at Dublin and Cork airports. The deal, allowed for 3% backdated to April 1, 2017; 2.75% backdated to April 1, 2018 and 2.75% from June 1, 2019 (the deal expires July 31, 2020).

Across the economy, unions have been focused on seeking pay improvements for members through local bargaining in light of cost pressures associated with housing, childcare and transport costs. Apart from base pay, unions they have sought improvements in other benefits including leave arrangements, bonuses and are defending and seeking improved pension provisions. Private sector unions in 2019 have targeted baseline pay deals, taking into account inflation and productivity, of 3.4% plus additional benefits. The daa agreed terms were similar to the 8.5% over 39 months recommended by the Labour Court in Aer Lingus in 2017, which was the first in a two-part deal to involve productivity discussions.

Under the current agreement between Government and Public Sector unions pay rises worth up to 7.4% are provided for under the Public Service Stability Agreement (PSSA), 2018-2020 (this is comparable to annualised increases of between 2% and 2.5%. For those hired after 2013 with CARE pensions, the PSSA gains are more like c. 7-10%.

Over recent years, at national level, there have been substantial union campaigns for improvement in terms and conditions. Across the public sector, Gardai, teachers and other public servants including health professionals have actively sought mechanisms to equalise pay for those who joined on lower rates of pay during the recession with those who joined prior to the enactment of the FEMPI legislation. In 2018, agreement was reached on 'pay restoration' for up to 60,000 teachers, nurses, Gardaí and public sector workers hired since 2011. The deal costing €200m+, applied from March 2019 and sees new-entrants into the public service jumping two points on the relevant salary scale. Those new commitments are hard wired into Government spending *without* any new cost offsetting measures, reform or service improvements, other than what is provided under existing agreements.

Other unions at daa, Forsa and Mandate – agreed deals which provided for increases of 3-4% per annum over three years, in return for significant measures in terms of flexibility, agreement on a new reward model and dispute resolution. The company had also established principles of market-based pay in T2, and for categories represented by Mandate and Forsa, allowing for sustainable progression and taking important steps to encouraging a performance culture. These positive agreements, also provided for a wide range of agreed changes to the employee management operating model and to enable delivery of the company's revised strategic plan. The second phase of discussions with SIPTU has led to agreed proposals in May 2019 which

address specific productivity required by the company, as well as issues raised by the Union. These have been developed through a new enhanced way of working together (between the company, unions and staff). The proposals set out include measures to reduce absenteeism, introduce a pathway to full time working for those on variable hours, agreed rostering principles, an acceptance that cross terminal working is desirable, the use of technology as an enabler, changes to performance management and pay progression.

7.0 Conclusion

The implementation of change is always best addressed in a manner suited to the culture and operating environment of the particular business, in this case the daa. The legal and employment relations issues arising when changing terms and conditions in a contract of employment remain very complex. An employer such as daa should always be cognisant that any change that is dealt with incorrectly can not only result in claims under employment rights legislation, but could also lead to allegations of breaches of collectively agreed arrangements with recognised trade unions. Such agreements are further acknowledged under the provisions of the State Airport Act, 2004 and any moves to bring about lesser terms and conditions of service, of arbitrary reductions in remuneration or efforts to enforce compulsory redundancies are likely to be fiercely resisted. This could potentially result in substantial employment relations difficulties and serious risks to business continuity in the substantially unionised environments of our major Airports or even to significant breach of contract claims in the civil courts.

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About Stratis Consulting and Brendan McGinty.

Brendan McGinty is Managing Partner of Stratis Consulting and is a leading expert in people strategy, employee relations, employment policy, change management and dispute resolution with 30 years of experience backed judgement. At Stratis, Brendan and his colleagues support organisations who want to lead improvements in critical areas of Employee Relations, People Strategy and Workplace Policy. He brings career experience, knowledge and insight to the full advantage of clients in leading people strategies and supporting senior leaders on any sensitive employment and people strategy issues.

Brendan worked with the business organisation Ibec until 2013, where as a member of the leadership team he had a successful career as Director of Industrial Relations and Human Resource Services. He engages with trade unions, government, state agencies, with other stakeholders and has an excellent appreciation of employment policy.

He is Chairman of the Board of Skillnet Ireland, the national agency responsible for the promotion of workforce learning in Ireland. He is also Deputy Chairman of the Governing Body of the National College of Ireland and previously served as a board member of the Labour Relations Commission (now the Workplace Relations Commission).