



**REPORT OF AN INQUIRY INTO THE
CIRCUMSTANCES SURROUNDING
THE LINDSEY OIL REFINERY
DISPUTE**

16 February 2009

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Introduction

1. Following an unofficial dispute at the Lindsey oil refinery the Secretary of State for Business, Enterprise and Regulatory Reform asked Acas to conduct an inquiry into the various accusations surrounding the IREM sub-contracting arrangements. Acas would conduct the inquiry under the powers granted to it in section 214 of the Trade Union and Labour Relations (Consolidation) Act 1992. The terms of reference for the inquiry, that have been agreed with the parties are:

“To determine the facts surrounding the IREM contracting arrangements at Lindsey Refinery and publish a report including the current legal context of contracting practices”.

2. In addition to this Acas-led inquiry the Government has indicated that it may be initiating a much broader review. We believe that any such review should consider the productivity, skills and employment relations issues bearing on the overall competitiveness of UK companies in tendering for projects on large construction sites.

Events leading up to the award of the contract to IREM

3. The background to the dispute starts with the decision by Total, who own and operate the Lindsey Refinery, to install a new de-sulphurisation facility on the site. The construction of the facility was contracted out to an American company, Jacobs Engineering, who have had a UK base since 1993 and now employ circ 6,000 people in the UK. They in turn sub-contracted the mechanical and piping work to Shaw Group UK. Shaw and Jacobs reached an agreement that in order to complete all aspects of the project in the required timescale it would be beneficial for Jacobs to engage an additional sub-contractor to complete specific aspects of the project. A new tendering process was carried out and in December 2008 IREM, an Italian company, was appointed to carry out the work that had been taken from Shaw Group as part of the recovery plan.

4. IREM were one of seven companies bidding for the work. All of the companies were European and five were based in the UK. IREM

were awarded the contract on the basis of the safety, quality, scheduling and price of their bid. Unlike the workers employed by Shaw Group, who were all UK nationals, IREM made it clear that they planned to follow the European Sub-contracting model and use their own workers, who were all foreign nationals, to deliver the majority of the contract. If locally sourced workers were to be employed IREM indicated that they would only be used on less skilled work or where the work entailed servicing mainstream operations (craneage, riggers, NDT, painting etc). However, where they had gaps in their own workforce they would recruit locally. As per the terms of the tendering documentation, IREM were fully aware and, in submitting a tender, would be implicitly accepting that all of their workers on site would be employed on the terms and conditions set down in the National Agreement for the Engineering Construction Industry (NAECI) including their pay.

5. This agreement, commonly known in the industry as the NAECI 'blue book', determines the pay and conditions for workers at all major engineering construction sites in the UK and requires that all member firms of the Engineering Construction Industry Association (and of other signatories to the agreement) abide by the terms of the agreement where projects are put within its scope. This is not mandatory but Total chose to conduct this project under the terms of the NAECI agreement. The NAECI agreement was originally established jointly by the major employers in the industry and trade unions in order to prevent unofficial disputes and first came into operation in 1981. It enjoyed significant support from government and client (end user) companies. As the following extract from the IDS report¹ on the Lindsey refinery dispute shows the agreement has recently been updated:

"The most recent NAECI agreement is for a 30- month deal, the first stage of which came into effect from 4 June 2007 following prolonged negotiations between the employers' associations and the relevant trade unions, Unite and the GMB. This agreement introduced a number of important alterations to existing arrangements which were intended to provide solutions to short-term labour resourcing issues and to aid recruitment and retention in the light of changes to the structure of the industry.

Importantly, the new NAECI agreement included enabling provisions for contractors looking to source short-term labour. This move was taken in anticipation of major new construction projects and events where large numbers of skilled staff would be required on a temporary basis and where skill shortages might pose a significant threat to work progress. This section of the agreement aimed to

¹ IDS Pay Report 1019: February 2009

regulate the use of agency labour on the basis that employment agencies follow the same rules as contractors.

This means that agencies must be a member of the Engineering Construction Industry Association, workers must be directly employed (to prevent 'bogus' self-employment) and the package received by workers must be exactly the same as for non-agency staff covered by the agreement. In recognition of the likelihood that employers might want to recruit labour from outside of the UK in some circumstances, the agreement also includes a provision for the employment of non-UK posted workers. This allows flexibility in periodic leave, travel and accommodation arrangements and allows employers to vary entitlements and allowances of this kind."

6. The NAECI agreement is then supplemented by local agreements (SPAs) which cover specific terms and conditions relevant to individual organisations or sites.

7. Jacobs Engineering is a member of the Engineering Construction Industry Association and we understand IREM has applied for and obtained provisional membership. This lasts for two years prior to transfer to full membership and is equivalent to full membership during the provisional period.

Union concerns about the contract with IREM

8. In the October of 2008 the GMB and Unite were first alerted to the fact that Jacobs would be re-tendering part of Shaw Group's contract to work on the de-sulphurisation plant. In mid December 2008, the unions were told that the tendering process had been won by IREM. They were also told that the contract with IREM would be commercially different from that relating to Shaw Group and that IREM was not planning to employ UK workers for their core activities because they had an existing workforce. The unions were advised that IREM workers would be paid the rates and allowances determined by the NAECI agreement and applied across the site. The unions had a number of concerns about Jacobs' decision to use IREM.

9. The unions were concerned that IREM planned to employ overseas labour only. The unions believed that UK based workers had the skills and experience to work on the project for IREM and should be given the opportunity of applying for the jobs. Acas was told that as IREM had bid a fixed price based on using a significant proportion of their own 600 permanent employees, they had no flexibility to now replace these with UK workers as this would mean

making many of those Italian workers redundant. It is important to emphasise that the unions were not seeking to have Italian workers made redundant, nor were they seeking exclusive jobs for UK workers.

10. The unions also felt that the shift pattern IREM proposed to use on the work was inconsistent with the NAECI agreement. Specifically, they were concerned that there was no provision in the contract with IREM for its workers to take paid 'tea breaks' which was a condition that had to be met by UK companies applying for the tender. The time of a tea break may seem small but when multiplied by several hundred workers over the period of a contract for several months it can mount up to a considerable saving of time and, therefore, money. The unions also felt it was unfair that IREM workers would be preparing for their shift before travelling to the site, unlike other workers whose time spent putting on protective clothing etc was counted as part of their shift. This would enable IREM to make a bid on the basis of their workers being more productive. Given that the contract was being awarded on a lump sum basis of a fixed number of hours in which to complete the job the above was felt by the unions to give IREM an unfair competitive advantage. The management stated that it had linked the tea break to the midday lunch break to create a longer lunch break. Such arrangements are permissible under the NAECI agreement, Management also clarified that all workers on site are required to be changed and dressed in their protective workwear prior to clocking in for work. The unions believe that IREM workers are not in receipt of a daily travel allowance involving the journey between the barge and the project whilst they are being transported in the company's vehicle, whereas a UK worker would receive a daily travel allowance as per the NAECI agreement.

11. The unions were also extremely concerned about the lack of wage transparency and the employment status of the IREM workers. IREM had said that their workers were permanent employees and would be paid according to the NAECI agreement. Acas has inspected the contract documentation which commits IREM to pay the going rate; but IREM were not yet in a position to provide evidence to demonstrate that they were doing this. The unions have suggested a system that had been implemented at another site because of concerns about the auditing process where the sub-contractor's workers wages are administered through a UK firm of accountants and paid directly to the individual workers bank account thereby ensuring full transparency. The NAECI agreement encourages and establishes terms of reference for a monthly audit facility as part of the management and union project control process on all major new construction projects. The project did appoint such

an auditor from the outset as part of the terms of the local site agreement. The auditor can look at matters such as the performance and pay levels of all employees. Had an initial audit been undertaken this might have helped to re-assure the unions. Although detailed discussions had taken place in relation to proposed terms and conditions, because the payroll only started in early January this audit had not taken place at the time the dispute arose. Because this is a contentious area and subject to the agreement of the parties, Acas would be willing to oversee this first audit if it was felt to be helpful.

12. The unions discussed their concerns with Jacobs and IREM over a series of meetings from November but an impasse was reached over the use of locally sourced labour. The lack of progress was communicated to workers at the Lindsey site and on 28 January 2009 the workers decided to take unofficial action. It was at this point that Acas was invited to conduct this enquiry.

13. A major source of tension underlying this dispute is the Posted Workers Directive and its application to construction work contracted out in the UK. The next section examines the provisions of the Directive relevant to the dispute.

The current legal context

14. The freedom to provide services, including construction work, in other Member States of the European Union is a fundamental principle guaranteed by Articles 49 and 50 of the EC Treaty. Restrictions based on nationality or residence requirements are prohibited.

15. The provision of services may involve an employer established in one Member State (the 'home state') temporarily posting its workers to another Member State (the 'host state') in order to fulfil a contract.² The Posted Workers Directive³ generally requires the host state to ensure that the workers posted to it are guaranteed the standards laid down by law, regulation or administrative provision in the host state in specified areas. The host state's rules in these areas apply to a posted worker even if the home state's rules provide inferior protection.⁴

² Special provisions currently apply to citizens of Bulgaria and Romania.

³ Directive 96/71/EC.

⁴ Article 3(1).

16. Article 3(1) of the Directive states that the host state's obligation applies to the following matters:

- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- minimum rates of pay, including overtime rates;
- the regulation of conditions of supply of labour by agencies;
- health, safety and hygiene at work;
- protective measures for pregnant women and those who have recently given birth, children and young people; and
- equal treatment of men and women and other provisions on non-discrimination.

17. The European Court of Justice has held that host states cannot require posting employers to comply with standards that go beyond the terms of the Directive. This means that the host state cannot, for example, require adherence to wage rates other than minimum rates nor can it require adherence to standards on matters that are not included in the Article 3(1) list.⁵ The Directive itself makes an exception for 'public policy provisions'.⁶ These are provisions that the host state has deemed 'so crucial for the protection of the political, social or economic order' in that state as to require compliance with them by all persons present on its territory and all legal relationships within it.⁷ The European Court of Justice has said that, as a derogation from the fundamental principle of the freedom to provide services, this exception must be interpreted strictly.⁸ Only the national authorities, and not private parties to a collective agreement, can rely upon it.⁹

18. In the case of activities within the construction sector collective agreements and arbitration awards can serve as a source of 'Article 3(1) standards' provided that certain conditions are met.

(1) Where collective agreements or arbitration awards 'have been declared universally applicable', that is where they 'must be observed by all undertakings in the geographical area and in the profession or industry concerned.'¹⁰

⁵ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2008] IRLR 160; Case C-346/06 *Rüffert v Land Niedersachsen* [2008] IRLR 467.

⁶ Article 3(10).

⁷ Joined Cases C-369/96 and 376/96 *Arblade* [1999] ECR I-8453, para 30.

⁸ Case C-319/06 *EC Commission v Grand Duchy of Luxembourg*, judgment of 19 June 2008.

⁹ *Laval*, above, note 5, para 84.

¹⁰ Article 3(1)(8).

(2) Where there is no system for declaring agreements or awards to be universally applicable, the host state may, if it so decides, rely on:

- collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or
- collective agreements which have been concluded by the most representative employers and labour organisations at national level and which are applied throughout national territory

provided that any such arrangements ensure equality of treatment between posting and national employers by imposing the same obligations with the same effects on each.¹¹

19. The NAECI agreement does not comply with these conditions and cannot, therefore, currently serve as a source of mandatory rules:

- English law does not contain a mechanism for declaring collective agreements or arbitration awards to be universally applicable;
- The UK has not decided to rely on this (or any other) agreement as a source.

20. It goes beyond Acas' terms of reference to consider whether the NAECI agreement may be capable, now or in the future, of being relied upon for this purpose should a UK Government wish to do this.

21. The European Court of Justice has held that it is not open to a host state to require posting employers to adhere to standards laid down in collective agreements which do not fall within (1) or (2) above¹² and the UK has not sought to do this. This means that the mandatory rules governing the terms and conditions of posted workers in the construction sector are derived only from the law or from administrative provisions.

22. IREM is not, therefore, legally obliged to adhere to the terms of the NAECI agreement (except insofar as the agreement may reflect obligations imposed in any event by law or administrative provision). However IREM may decide to do so of its own accord

¹¹ Article 3(8).

¹² *Ruffert* above, note 5.

and in fact because it is a term of their contract have made a commitment to do so in this case.¹³

Conclusions

23. Acas' inquiry has found no evidence that Total, Jacobs Engineering or IREM have broken the law in relation to the use of posted workers or entered into unlawful recruitment practices. We have also received assurances from management that they will abide by NAECI agreement though there are clearly some issues of interpretation to be determined between management and the trade unions. The dispute at the Lindsey Oil Refinery has, however, thrown up a number of issues.

24. The first is the application of the Posted Workers Directive in the UK, which applies in the circumstances of this dispute because workers were posted to the UK from elsewhere in the EU, and its relationship with the UK's industrial relations system. These issues have been highlighted by the recession. We understand the European Commission has agreed to establish a high level group to look at the operation of the Directive and has asked the social partners to look at the implications of the recent ECJ rulings.

25. The complexity produced by the interrelation of EU law, national agreements and supplementary local collective agreements is a real source of confusion and potential dispute. We note that the NAECI agreement was amended in 2007 to allow for more wide-ranging recruitment practices at times of skill shortages. Economic circumstances have now changed and we have moved to a time of labour surpluses. We welcome the new guidance from the ECIA encouraging contractors to explore and consider whether there are competent workers available locally. We also believe that there should be a review by the parties to the agreement of the interrelationship between national and local collective agreements to ensure greater consistency in terms and conditions of employment, with less scope for variation at local level. This would also aid transparency and reduce the potential for misunderstandings and conflict

26. Another issue of concern to both UK contractors and trade unions is whether UK, UK-based and European construction companies are able to operate on a level playing field given the differing income tax and social insurance regimes, statutory rights,

¹³ *Laval*, above, note 5, para 81.

and employment practices between UK and other EU countries. Attempts to check how level the playing field is can be difficult given the general principle that tendering and contractual matters are "commercial in confidence". An enhanced role for the NAECI independent auditor in both the tendering and project monitoring processes, if this could be agreed, would, we believe, play an important part in helping to overcome some of the difficulties that this dispute has raised.