

# Briefing note: Lindsey oil refinery dispute

## Engineering construction walk-outs test EU contract labour rulings

In the first major industrial dispute of this downturn, most media attention has dwelt on the unfortunate nationalist overtones of unofficial walk-outs which began at Total's Lindsey oil refinery near Immingham and rapidly spread to other engineering construction sites throughout the UK. However, a closer look behind these headlines reveals that trade unions have been warning for some time over the way in which contract labour might be used as a result of a series of recent high-profile rulings in the European Court of Justice (ECJ). These judgments have all ruled in favour of the employers in cases which involve the use of contract labour from outside of the UK, who are covered in European law by the terms of the 'Posted Workers Directive'.

A key backdrop to this dispute is in relation to these controversial rulings and we also examine their implications for the UK-wide National Agreement for the Engineering Construction Industry, otherwise known as the large sites agreement or the NAECI 'blue book'. This collective agreement was originally established jointly by the major employers in the industry and the trade unions in order to prevent 'wildcat', or unofficial, disputes and first came into operation in 1981. It has since determined the actual rates of pay for workers at all major sites and, because it requires that all member firms abide by the terms of the agreement, it has until now also acted as an important bulwark against any attempt by one firm to undercut another.

Membership of the NAECI includes major transnational corporations involved in a range of activities from the oil industry and power generation through to steel production and major construction projects as well as the major contractors and sub-contractors. Among the multi-nationals involved are such firms as Shell, BP, Corus, ICI, Centrica and the other major power supply companies – British Energy, RWE, E.ON, EDF, Scottish Power and Scottish & Southern Energy. Most of the contractors are multi-national corporations which carry out engineering construction work throughout the world and routinely subcontract parts of their work to other sub-contractors. This includes names such as Balfour Beatty, Balfour Kilpatrick, Bechtel, Amec and Amey as well as the American firm, Jacobs, which is the main contractor at the Lindsey oil refinery.

A substantial proportion of the engineering construction workforce involved at these sites are skilled welders, pipefitters and fabricators who may also specialise in instrumentation work, electrical and mechanical engineering. Most of them routinely move from one site to the other in the UK and also to other parts of Europe and this workforce, it should be stressed is not entirely indigenous but includes a substantial number of the workers from other EU states already employed in the UK in engineering construction, including the Polish workers who joined the sympathy stoppage at Langage power station near Plymouth. There are

unwritten codes involved here about which job they will move to next and part of the reason for the current dispute is that much of the normal custom and practice established over many years has been disturbed by recent developments.

The work being carried out at the Lindsey Oil Refinery involves the installation of a new desulphurisation facility. The purpose of this unit is to reduce the sulphur, nitrogen and aromatic hydrocarbons to acceptable levels to allow the subsequent processing of the gas oil in a conventional refinery catalytic cracker or hydrocracker. The Lindsey oil refinery is the third largest oil refinery in the UK and was the first to process North Sea Oil. It handles around 10 million tons of crude oil each year and has one of the most advanced refining and conversion processes in the country. The site was first established in the 1960s and was deliberately located five miles from the Humber Estuary, providing it not only with access to the North Sea oil fields but also to deep water berthing which allows the largest crude oil tankers in operation to berth.

### Latest NAECI pay deal

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

**Examples of engineering construction sites and projects covered by the NAECI agreement**

- Sellafield nuclear plant, Cumbria
- BP and Inneos oil refineries, Grangemouth
- Fiddlers Ferry power station, Cheshire
- South Hook Liquefied Natural gas terminal, Milford Haven
- ICI Chemical refinery, Teeside
- Corus steel plant, Redcar
- Conoco Phillips refinery, Immingham
- Longannet power station, Fife
- Cockenzie power station, East Lothian
- Shell gas processing plant, Aberdeen
- British Energy power station, Torness
- Mossmorran chemical plant, Fife
- Aberthaw power station, South Wales
- Fawley oil Refinery, Southampton
- Heysham power station

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.

US and European contractors bidding for work in the UK are also required to join the employers’ association and abide by the terms of the NAECI agreement which currently applies for around 20,000 workers employed in fabrication work on large sites and in installation and maintenance projects at power stations and refineries. In public statements made so far, management at Total’s Lindsey refinery insist that the 200 ‘posted’ workers at the heart of this particular dispute, who are directly employed by the Italian sub-contractor, IREM, are being paid exactly the same as those on other contracts. However, unions claim that they have not been provided with full details of the contractual arrangements and this has been one of the key underlying issues in the dispute. Another accusation made by the unions is that that not all of the firms involved in the contracting chain contribute to the statutory levy which goes to the industry training provider ECITB which provides apprenticeships for the future generation of skilled workers

It is worth mentioning at this point that an important feature of the engineering construction

industry in the last few years is that a large proportion of the workload has shifted towards repair and maintenance projects and some employers have been able to offer significantly longer periods of employment than was previously the case. As a result, a growing proportion of the workforce no longer fits the traditional NAECI profile of short-term employment because many are engaged more or less permanently in the maintenance of existing plants. The exception here is short-term maintenance work where the permanent workforce needs periodic expansions in order to deal with upgrading or major repairs. The installation of a new de-sulphuration plant at the Lindsay oil refinery falls into this category. IREM was awarded this contract last year after the original subcontractor, which did employ UK labour, had allegedly failed to meet contractual commitments. The main contractor on the site is Jacobs Engineering, formerly Jacobs Babbit.

**Posted Workers’ Directive**

The EC Directive which deals with the ‘posting’ of workers (Directive 96/721/EC) was adopted in 1996 and member states were expected to implement it by 16 December 1999. In broad terms, the Directive defines the set of terms and conditions of the host state that must be guaranteed to workers posted in its territory, irrespective of the law that governs the contract of employment of the posted worker.

However, even before adoption of the Directive, several member states (Germany, Austria and France) had already introduced their own national legislation on the posting of workers in order to address perceived distortions to competition and the possible adverse effects on the protection of workers resulting from the trans-national provision of services. Once the Directive was finally adopted, the laws of these countries were amended with a view to meeting the requirements of the Directive. In other member states (Spain, Denmark, Finland, Greece, Italy, the Netherlands, Portugal and Sweden) the terms of the Directive were transposed into existing employment law provisions and, in Ireland, all employment legislation covered by the Directive applies to posted workers.

As for the UK, a review conducted on behalf of the European Commission in January 2003 to look at implementation of the Posted Workers Directive within member states, noted that ‘the authorities have not deemed it necessary to adopt any specific instrument to transpose the Directive, since domestic law applies to all workers regardless of their situation. All that has been done is to amend certain more restrictive texts in order to extend their scope to posted workers’.

**Exclusion of collective agreements**

The Directive only required that the minimum terms and conditions of employment set down by

national law or 'universally applicable' collective agreements be extended to posted workers. In the UK there is no procedure for declaring the universal applicability of collective agreements or any system of universally applicable arbitration awards, nor has it been considered necessary to devise a specific procedure for applying collective agreements to posted workers. As a result, the only rules which apply here to posted workers are those enshrined in law or in other regulatory or administrative instruments.

In its guidance for businesses on implementation of this Directive, the Department for Business, Enterprise and Regulatory Reform (BERR) explains that employers will need to abide by the terms of 'any universally applicable mandatory collective agreements which apply in the member state they post workers to'. However, they also point out that: 'There are, at present, no such agreements in the UK, apart from the National Minimum Wage'.

This approach clearly has considerable implications for the way in which the terms of the National Agreement for the Engineering Construction Industry are applied because – although it has acted as a very effective instrument for maintaining stability in what can be a highly volatile industry for nearly 30 years – it is not regarded as a legally enforceable agreement under UK law and is not directly affected by the UK version of the Posted Workers' Directive.

In the last few years, the Government's more flexible approach to labour market liberalisation has been widely credited with producing the climate for the sustained period of jobs growth which took place, until the onset of the current downturn last year. In other parts of Europe, the regulatory environment is not always as accommodating to business interests and partly because of this advocates of a more rapid liberalisation of European labour markets have been pressing for the removal of any remaining barriers to the free movement of both labour and capital across the EU.

### Important legal cases

Symptomatic of this trend are four important court cases which have been dealt with by the European Court of Justice in the last few years and which all involve – directly or indirectly – employers' plans to replace workers from one EU country with lower-paid workers from another member state. The four cases are known as Laval, Viking, Ruffert and Luxembourg and the way in which they were dealt with by the European Court of Justice has alarmed trade unions across the EU, not only in the UK.

In the Laval case, a Latvian construction company (Laval) was awarded the contract to carry out construction work on a school at Vaxholm in

Sweden following a public tender process. When Laval 'posted' a number of workers from Latvia to work on the site, in May 2004, the Swedish building workers' union (Byggnads) initiated negotiations with Laval to conclude a collective agreement but Laval refused to sign. Instead the company signed a collective agreement with its own building-sector trade union, in Latvia, which agreed wages lower than those which would have been required in Sweden. The Swedish union initiated a blockade of the construction site, with the support of other unions. When this case came before the ECJ it held that the blockade unjustifiably restricted Laval's freedom to provide services under Article 49 of the EC Treaty, since the Posted Workers Directive – which the unions had thought would provide a floor or minimum standard for workers' rights. In effect, the Directive's minimum protection was treated by the ECJ as a ceiling and this ruling was regarded at the time by the UK union Amicus (now Unite) as 'an encouragement to drive down wages and conditions in the host state'.

The Viking case involved a Finnish shipping company, Viking Line, which operated a passenger ferry between Helsinki and Tallinn in Estonia under the Finnish flag. Even before Estonia joined the EU in 2004, the company had intended to re-flag its ship to Estonia so that it could use an Estonian crew on lower wages. The Finnish Seaman's Union succeeded in preventing this move and had called on the International Transport Workers' Federation (ITWF) for support but Viking responded by taking legal action in London in August 2004 to allow the vessel to be re-registered. When the case reached the ECJ, it held that the ITWF's proposed collective action potentially impinged upon the company's right to business freedom. Although the union's action might be justified, the ECJ thought it unlikely in the absence of any services threat to jobs. In the event, the Viking case was subsequently referred back to London and the issue was subsequently settled in a confidential deal between the company and the unions.

In the Ruffert case, which took place more recently, the ECJ upheld the right of a Polish sub-contractor operating in Germany to pay construction workers 46.5 per cent of the wage to which German workers were entitled, under the terms of regional legislation in Lower Saxony. The Luxembourg case arose because Luxembourg law requires companies which post workers to its territory to comply with certain conditions. Here, the European Commission itself brought legal proceedings before the ECJ, arguing that its legislation exceeded the terms allowed under the Posted Workers' Directive. Again, the ECJ ruled that the way in which Luxembourg had implemented the Directive created an obstacle to the free provision of cross-border services and Luxembourg is now required to change its laws.

**Unions protest at ‘social dumping’**

Taken together, these ECJ rulings have been seen by the trade unions as having potentially far-reaching implications for the lawfulness of any industrial action taken against employers operating trans-national undertakings. In the cases of both Viking and Laval, the unions took action against what they regard as a form of ‘social dumping’, whereby employers establish themselves in states with less beneficial employment laws in order to provide services more cheaply in another. Although the fear that these recent ECJ judgments provide employers with an entirely free hand may be exaggerated, it is nevertheless the case that they serve to emphasise the scope for trans-national employers to challenge measures aimed at improving the lot of workers by asserting their own rights under EC law.

The Lindsey dispute has arisen largely because of a perception that recent interpretations of the Directive, and of the EC Treaty facilitate the exclusion of British workers from applying for vacancies in British plants and factories. This has led to calls from unions for the Directive to be amended – calls that the Government may be heeding if the Health Secretary, Alan Johnson’s comments are anything to go by, when he said that: ‘These various judgments have distorted the original intention and we need to bring in fresh directives to make it absolutely clear that people cannot be undercut in this way.’ However, as the ECJ made clear in the Laval case, the EC Treaty protects economic freedom as well as the rights of individual workers and where these two interests collide, a balance must be struck. Thus, any attempt to strengthen workers’ rights at the expense of those of businesses operating across European borders may require fundamental changes to the founding principles of the EC. Any such constitutional change would be hugely controversial and would most likely be a long time coming.

Perhaps the most unexpected aspect of the current dispute is the ease with which a network of skilled and semi-skilled workers get to know what work is available on major sites and are in regular contact with each other across the UK. The current protests are taking the form of ‘wildcat strikes’ – the colloquial term for unofficial industrial action. Nevertheless, they have so far involved secondary action taken by construction workers from two other oil refineries operated by Conoco Phillips on Humberside, at a BP gas terminal in Yorkshire, at the BP and Inneos oil refineries in Grangemouth, at Scottish Power’s Longannet and Cockenzie power stations, at the Fiddlers Ferry power station, at Sellafield and Heysham nuclear plants and at the liquefied natural gas terminals in South Wales.

Despite the legal obstacles to secondary strike action which were erected by the incoming Conservative Government following the widespread industrial unrest of the late 1970s, the refinery workers in the current dispute seem to be co-ordinating a programme of secondary action up and down the country. This escalation is no mean feat given the legal inhibitions under which their relevant unions are operating.

At an official level, union leaders have more of a focus on the broader political and legal issues. One of their key demands is for an amendment to the Posted Workers’ Directive which will clearly identify how mandatory standards can be guaranteed through collective agreement and also defended through collective action. They also want to see a social progress clause being introduced into EU legislation which will make it clear that the fundamental right to organise and the right to strike are not subordinate to the economic freedoms afforded to big business.

**References**

*IDS Pay Report 985, September 2007 ‘Engineering Construction: Parties agree a major restructure of the national agreement’. National Agreement for the Engineering Construction Industry 2007-2010. www.njceci.org.uk*

<b>Nationally agreed hourly rates in Engineering Construction 5 January 2009</b>			
<b>Grade</b>		<b>Nationally guaranteed rates (formerly category 4) £ph</b>	<b>Categorised work rates £ph</b>
1	Adult trainee	7.94	8.72
2	Adult trainee	9.10	10.01
3	Adult trainee	10.32	11.35
4	Craftsman	12.10	13.41
5	Advanced craftsman	12.70	14.00
6	Skilled working chargehand	13.27	14.59

Engineering construction projects are categorised to permit the appropriate application of the NAECI to the following specific work sectors:

- Category 1 – major new construction projects
- Category 2 – major repair and term maintenance sites
- Category 3 – events such as major shutdowns, turnarounds and outages

National guaranteed rates apply to general engineering and construction work which were previously classified as category 4 sites