

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996
s.170LK certification of agreement

Diab Services Pty Limited
(AG2004/6676)

DIAB SERVICES PTY LIMITED CERTIFIED AGREEMENT 2004

Fast food industry

SENIOR DEPUTY PRESIDENT DUNCAN

SYDNEY, 5 NOVEMBER 2004

Certification of Division 2 agreement with employees.

DECISION

This is the edited version of a decision issued ex tempore on 24 October 2004.

[1] This decision is concerned with what is said to be an application by Diab Services Pty Limited for certification of an agreement between it and some of its employees pursuant to section 170LK of the *Workplace Relations Act 1996* (the Act). I deliberately use the phrase, “what is said to be an application” because the Shop, Distributive and Allied Employees Association (SDA), which intervened in the hearing, having satisfied the Commission that it was entitled to do so under s.43(2)(a) of the Act, submits that there is no application before the Commission because there is no valid majority as defined in section 170LE of the Act of the persons employed at the time whose employment will be subject to the agreement.

[2] There have been a number of decisions which have considered the requirements for an effective application. Those which have been relevant to my decision include Senior Deputy President Watson's decision in re *Clive Peeters Certified Agreement 2004*, PR951401, Vice President Ross' decision which was referred to by Mr Bliss in *Grocon Pty Limited Enterprise Agreement, Victoria*, which is to be found in PR927672 and the Full Bench, consisting of Senior Deputy Presidents MacBean and Harrison and Commissioner Harrison, in *Mobile Food Vans Enterprise Agreement[1998]* Print R4468.

[3] The SDA's argument is as follows.

[4] Section 170LH provides (that Division 2 of Part VIB of the Act sets out) the requirements that must be satisfied for applications for certification to be made to the Commission to certify certain agreements between certain employers and their employees.

[5] Section 170LI provides:

“(1) For an application to be made to the Commission under this Division, there must be an agreement, in writing, about matters pertaining to the relationship between:

- (a) an employer who is a constitutional corporation or the Commonwealth; and*
- (b) all persons who, at any time when the agreement is in operation, are employed in a single business, or a part of a single business, of the employer and whose employment is subject to the agreement.*

Note: Section 5AA also allows agreements to be made on a different constitutional basis about matters pertaining to the relationship between an employer and employees.

(2) The agreement must be made in accordance with section 170LJ, 170LK or 170LL.”

[6] The relevant section in this matter is section 170LK. Subsection (1) of that section provides:

“The employer may make the agreement with a valid majority of the persons employed at the time whose employment will be subject to the agreement.”

[7] The section has a number of other requirements, but the SDA's argument is concerned with subsection (1). It is that there is no valid majority as that concept is defined in section 170LE. This is said to be because amongst those who were given notice of the intention to make an agreement, were casual kitchen hands. Mr Hyland, who made the declaration which was filed in accordance with the rules of the Commission in relation to the application, and who is described in the declaration as Human Resources Manager of the applicant, in cross-examination on that statutory declaration stated:

“PN448

MR BLISS: You accept that casual kitchen hands were given a vote on the proposed agreement?---Yes, I believe so.

PN449

You accept that casual kitchen hands were invited to attend and some did attend at your explanation meetings?---I believe so.

PN450

You accept that casual kitchen hands were, from you - you intended all casual kitchen hands to get a copy of the, Notice of intention to make agreement called, "Re our employment arrangements"?---Yes.

PN451

So for all purposes, you intended them to have a say in the proposed agreement?---Yes.

Can I ask you, are casual kitchen hands covered by the proposed agreement?---No”.

[8] It must be assumed that some of them did vote. Mr Thompson, appearing for the company, confirmed that such employees had the right to vote but said that this was not fatal because casual kitchen hands, after certification, would have the ability to take up permanent part-time employment which was a form of employment dealt with by the agreement. Casual employment was not.

[9] The question is, accepting what Mr Thompson submitted, whether this avoided the flaw which the SDA pointed to, namely that the valid majority was affected and rendered ineffective because those who voted included persons who were not, at the time of making the agreement, or at the time the application was heard, persons who would be subject to the agreement.

[10] I am of the view that section 170LK(1) combined with section 170LE, does require that those who vote be subject to the agreement at the appropriate time.

[11] I reject the proposition that the possibility that those not then covered by the agreement might subsequently be covered and consequently could vote. It is not to the point that such persons could be covered in the future, after all, total strangers to the employer and the agreement could subsequently be employed and be subject to the agreement. There is no question that they could not vote. The casuals in this case are in no different position. They were strangers to the agreement and their vote destroyed the possibility that the agreement was approved by a valid majority.

[12] This being so, and in accordance with the reasons given in the decisions to which I have already referred, there is no valid application which meets the requirements of section 170LK - all of the requirements of section 170LK - and section 170LH.

[13] The application, such as it is, is therefore dismissed.

BY THE COMMISSION:

SENIOR DEPUTY PRESIDENT

Appearances:

B. Thompson for Diab Services Pty Limited.

D. Bliss for the Shop, Distributive and Allied Employees Association.

Hearing details:

2004.

Sydney:

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