



# Pathway to fair dismissal

*Small businesses as well as their employees need protection, insists*

**Craig Emerson**

**R**EMEMBER the television ads showing a single mum at home with her children being called into work under threat of being sacked if she didn't comply?

As part of the Your Rights at Work campaign organised by the trade union movement, these advertisements tapped into a strong Australian sentiment that it is unfair to sack good employees on the spot with no explanation and no remedy.

At the same time, everyday Australians have no sympathy for employees who behave violently in the workplace, or who steal from or defraud their bosses. And reasonable people feel businesses should be able to let go underperforming employees, as long as they alert them to the problem and give them a reasonable opportunity to lift their game.

Only a political party with no interest in fairness in the workplace would disagree with these basic tenets of common decency. The Coalition, the party of Work Choices, legislated to deny the four million Australians working in businesses with up to 100 employees any protection from being dismissed unfairly.

In keeping with its election commitment, the Rudd Government will legislate to provide basic protection for good employees against being dismissed unfairly while allowing business owners to manage their workforce according to their commercial needs. Any truly fair system must recognise the special circumstances of small-business owners. They need the confidence to hire without being

worried that they may not be able to dismiss bad employees or employees who just don't measure up.

Small businesses don't have human resource management departments, they cannot afford to lose time or pay expensive legal bills, and they cannot readily redeploy employees in other positions or workplaces.

The Government approached the task of designing an unfair dismissal system for small-business employees with two questions in mind: would a person in the street answer "That's fair" when asked to comment on it, and would a coffee-shop owner and a farmer be able to say, "That's reasonable, I can follow that"?

These are the two tests that guided the deliberations of a small-business working group and a union working group in helping to design the new regime. The simple, non-legalistic system that came out of these deliberations provides small-business employers with 12 months to assess whether a new employee has come up to scratch. During this time no claim for unfair dismissal can be made.

If an employee is incompetent, they would have to cleverly hide the incompetence for a year.

To enable small-business owners to dismiss staff fairly, the Government has developed a six-paragraph fair dismissal code. If the employer follows the code, the dismissal is deemed fair.

The code provides that anyone who has engaged in serious misconduct such as stealing, violence or serious breaches of occupational health and safety regulations can be dismissed on the spot.

For underperforming employees, the code requires only that they be warned and that they be given a valid reason for dismissal, based on the employee's conduct or capacity to do the job, as well as a reasonable chance to improve. Multiple warnings are not required. No three strikes and you're

out. It is desirable, but not necessary, for a warning to be in writing. It is a matter of basic fairness that an employee be given a warning. How else can an employee know that they are at risk of being dismissed?

A simple checklist has been developed to help small-business employers comply with the code.

Unfair dismissal remedies will not apply in cases of genuine redundancy or where employees have walked out on their employer.

Where a claim of unfair dismissal is made, a simple process will apply for small as well as larger businesses.

Unfair dismissal claims must be lodged with Fair Work Australia within seven days. Fair Work Australia will be able to make initial inquiries and discuss the issues with employers and employees, including in informal conferences at mutually agreed locations, with a view to achieving a mediated resolution.

The new system will be non-legalistic, the aim being to keep lawyers and contingency fee agents out of the process.

The system will not provide for appeals beyond Fair Work Australia.

Reinstatement will be the remedy for unfair dismissal unless it is not in the interests of either of the parties. In small businesses, where relationships have broken down, reinstatement may not be feasible.

Where it is not, compensation may be ordered but a cap on compensation will apply. The maximum compensation will remain six months' pay but normally compensation will be well beneath the cap.

Employers will no longer need to pay go-away money, as the process will be quick, simple and informal, but good employees will be protected.

That's fair.

Craig Emerson is the federal Minister for Small Business.