

IT'S TIME FOR THE SMALL BUSINESS FAIR DISMISSAL CODE TO WORK AS INTENDED

Small business employers go to considerable effort to retain their people. Decisions to terminate employment are not made lightly.

Where small business employers are faced with such decisions, it is widely recognised that they face resourcing constraints and do not employ dedicated human resources experts, creating unique challenges when confronted with issues such as misconduct and underperformance.

The Small Business Fair Dismissal Code was introduced by the former Rudd/Gillard government in recognition of such circumstances.

However, the Code is not meeting its intended purpose and is not providing the intended balance and practicality for Australia's smallest employers and those who work with them.

43% of applications to the FWC are
unfair dismissal claims

WHAT IS THE SMALL BUSINESS FAIR DISMISSAL CODE?

The Code was developed by Government with union and employer input and applies to small businesses (under 15 employees).

The Code provides a checklist of practical steps to follow when terminating employment.

In theory, the Fair Work Commission will deem a dismissal to be fair if the employer follows the Code and can provide evidence of this.

WHAT IS THE INTENT OF THE CODE?

Twelve years ago, Julia Gillard promised a "simpler, faster and less costly unfair dismissal process."

LABOR'S 'FORWARD WITH FAIRNESS' POLICY

Labor's 'Forward with Fairness' policy – which became the Fair Work Act and current unfair dismissal system – provides insight into the policy objective of the Code:

"The Code will be tailored to the needs of small business and will be reduced to a clear and concise reference to help these employers meet their obligations under Labor's simpler unfair dismissal system."

Where a small business employer has genuinely complied with the Code, the dismissal will be considered a fair dismissal."

EXPLANATORY STATEMENT

The Explanatory Statement accompanying the Code provides further insight on its intended purpose:

"The Code recognises the special circumstances of small business employers by providing separate, simple rules for small business employers to follow when dismissing an employee."

If a small business employer complies with the Code when dismissing an employee, the dismissal will be considered fair."

COMMENTS FROM THE FAIR WORK COMMISSION

MORE ONEROUS THAN GENERAL PROVISIONS

*"...I draw to the attention of policy-makers responsible for the Small Business Fair Dismissal Code my observations concerning its **confusing interpretation** and (in some respects) its potentially **more onerous application than the general provisions of the FW Act** pertaining to harsh, unjust or unreasonable dismissals.*

*Given that in this decision I have considered it necessary to deal with constructions of the Code in the alternative, this matter has been attended to by an unnecessary degree of complexity. This would appear to be **at odds with the legislative intent to provide a simpler procedure for small business employers and employees** to navigate the unfair dismissal jurisdiction as expressed in the Explanatory Memorandum to the FW Act and in decisions of the Commission."¹*

POORLY DRAFTED

*"...It is necessary to make the observation at the outset that this issue is not easy to resolve because the Code generally, and this section of the Code in particular, is **very poorly drafted**."²*

CONFUSING... AND PERHAPS EVEN MORE STRINGENT

"The terms relating to "Other Dismissal" are somewhat confusing. It is not clear to me whether the requirements of the Code include the existence of a valid reason for the dismissal, as distinct from a valid reason being given that there is a risk of being dismissed.

*If the meaning of the Code is that there must be demonstrated to be a valid reason for the dismissal, **it appears that the requirements of the Code are similar, and perhaps even more stringent in some respects, than the requirements relating to unfairness for other dismissals generally**."³*

NOT POSSIBLE TO MEET LEGISLATIVE INTENT IN CURRENT FORM

"While the legislation clearly intended the Code to provide an expedited mechanism for the consideration of fairness in dismissal involving a small business, I have not found it possible to do this in any way other than a detailed assessment of the criteria addressed in the Code in a form which is inherently similar to that set out in s 387 of the Act."⁴

THE CODE IS NOT WORKING AS INTENDED

Despite the clear policy objectives behind the Code, it is not meeting its intended purpose or expectations across our community.

Too many small business people managing their businesses over the kitchen table, and struggling to keep the doors open and keep their people in work, are subject to costly and time consuming unfair dismissal claims even where they actively strive do the right thing, and too many are still being forced to pay go away money.

"... in the way [the Code] is being applied, it fails to fulfil the stated rationale and public policy purpose that accompanied its introduction."

- Bruce Billson of Agile Advisory, Working Better for Small Business - Report from the Connect & Engage small business consultation program, prepared for the Fair Work Commission, July 2018

TIME FOR A 'FIT FOR PURPOSE' CODE

With the Small Business Fair Dismissal Code having been in operation for a decade and continuing reports of its inadequacy and failures to meet its intended purpose, it is high time the Code was re-examined to ensure small businesses and their staff are given the certainty, balance and practicality they deserve.