

The Importance of Employer Protection Provisions (EPPs)

Employee Protection Provisions (“EPPs”) were introduced by the Employment Relations Amendment Act 2004 as a measure that applied where a restructuring involving either the outsourcing of work or the transfer or sale of a business or part of it occurred. “Restructuring” does not extend to the sale or transfer of company shares.

An EPP is a provision –

- (a) *the purpose of which is to provide protection of the employment of employees affected by a restructuring; and*
- (b) *that includes –*
 - (i) *the process that the employer must follow in negotiating with a new employer about the restructuring to the extent that is relates to affected employees; and*
 - (ii) *the matters relating to the affected employees’ employment that the employer will negotiate with the new employer, including whether the affected employees will transfer to the new employer on the same terms and conditions of employment; and*
 - (iii) *the process to be followed at the time of the restructuring to determine what entitlements, if any, are available for employees who do not transfer to the new employer.*

The Act required existing employment agreements to be varied to include such a provision no later than by 1 December 2005 but did not expressly say what the consequences were of the parties not doing this.

The importance of having EPPs in place before considering restructuring has been highlighted in the recent decision of *Pulp & Paper Industry Worker Union v Norske Skog Tasman Limited*. There the Employment Relations Authority held that Norske Skog could not carry out a restructuring involving a contracting out of part of its operations until negotiations with employees to add EPPs to their collective employment agreements were completed.

In Pulp & Paper, Member King held that

“An EPP is a fundamental first step in any restructuring process. Accordingly, without it, an employer is simply not in a position to know what its obligations are let alone comply with them. It would therefore be nonsense for an employer to be able to restructure its business without having a provision in the appropriate employment agreement which complies with [the Act] that would cut right across the purpose of Subpart 3.”

The remedy granted in Pulp & Paper by the Employment Relations Authority was a compliance order forcing Norske Skog to reach an agreement with affected employees about the inclusion of an EPP in their employment agreements before Norske Skog could restructure. The Authority ordered Norske Skog not to implement its proposed restructuring until the EPP had been negotiated.

The effect of Pulp & Paper is that, unless the decision is overturned on appeal, it is currently possible for any employee whose employment agreement does not contain an EPP to prevent their employer from carrying out a restructuring until they have negotiated with the affected employee for the inclusion of an EPP in their employment agreement.

This gives employees that are aware of a sale process significant advantage to bargain the type of EPP they wish, which could include provisions guaranteeing employment with a new employer or dealing with redundancy compensation even if the employee might be offered employment by the new employer.

Employers need to ensure they have these clauses in place now. The Employers should definitely consider negotiating such clauses before any business transfer or sale is contemplated.