

KIWIFRUIT EXPORT REGULATIONS 1999

IN THE MATTER OF the Enforcement Regime of the Export Authorisation issued by Kiwifruit New Zealand to Zespri Group Limited ("Zespri") pursuant to Regulation 33(1)

AND

IN THE MATTER OF a complaint of unjustifiable discrimination by [REDACTED] ("the complainant") made pursuant to clause 6.1.1 of that Export Authorisation.

BOARD

Peter J Trapski (Chairman)
Hendrik J Pieters
Malcolm J Cartwright
Bruce H Abrahams
Terry Richards

DECISION

21 December 2001

FINAL DECISION OF THE BOARD OF KIWIFRUIT NEW ZEALAND

The Parties

The complainant grows kiwifruit of the Tomua variety under a grower licence issued by the New Zealand Kiwifruit Marketing Board in 1998 ("the licence"). Zespri stands in the shoes of the New Zealand Kiwifruit Marketing Board in the licence by virtue of the provisions of section 21(3) of the Kiwifruit Industry Restructuring Act 1999 and of clause 12 of the licence itself.

The Complaint

In a letter dated 11 April 2001 the complainant claimed that under Regulation 9(2) of the Kiwifruit Export Regulation 1999 ("the Regulations") Zespri has unjustifiably discriminated against "the remaining six Tomua growers that were wishing to supply Tomua fruit to Zespri this season" (he is one of those growers) by not giving notice of the purchase terms and conditions to apply for the upcoming season before they were due to come into effect, and he sought "implementation of Regulation 6(6)". He claimed that those terms and conditions had not been agreed and notified and that Zespri was in breach of Regulation 14(2). He said that this had the consequence that the previous terms and conditions must then apply.

In a letter dated 19 April he expanded on his complaint and said :-

The Regulations further require that Zespri must publicly disclose 1 month before coming into effect its terms and conditions and amendments for the purchase of kiwifruit or at the latest before their coming into effect. With the 2000 supply terms expiring on 31st March 2001 and the 2001 season commencing in 1st April 2001 it is obligatory on Zespri to have negotiated and disclosed the terms applying in the 2001 season by the 1st April 2001 for them to have effect..... Having not met this deadline the current position (19th April) is that there are no agreed terms applying to this years' supply. I don't think it was ever the Governments intention in the 1999 Regulations that the sole marketer of NZ kiwifruit would ever enter a "season" without its terms of supply agreed and notified. To not do so must be seen to constitute discrimination against a particular group of growers.

The complaint further clarified his complaint in a letter dated 7 June 2001 saying (inter alia):-

A "season" is defined in the Regulations as being from 1st April in one year until the 31 March in the following year.

The 2000 Season Supply Contract expired on 31st March 2001

The Terms of Supply for Tomua fruit in a Service Level Agreement for the 2001 season were not agreed between Zespri and Tomua growers by the 1st April 2001 so it was impossible for them to have "effect".

Zespri was aware of the importance of the 31st March deadline for notification as it had agreed Terms with Suppliers and notified KNZ of the Generic Supply Contract on the 30th March 2001.

and he confirmed that his complaint was that Zespri was in breach of Regulation 14(2) and as a consequence there were no terms of supply that were "in effect", and that this constituted discrimination against growers of Tomua fruit.

The Regulations

Regulation 33(1)(b) requires this Board to monitor and enforce (inter alia) the information disclosure requirements of the Regulations. Among the information disclosure requirements in the Regulations are those set out in Regulation 14. It says:-

Disclosure of Kiwifruit Purchase Conditions – (1) ZGL must publicly disclose, 1 month before coming into effect, -

- (a) *Its terms and conditions, and any amendments to those terms and conditions, for the purchase of kiwifruit grown in New Zealand; and*
- (b) *The period for which each set of terms and conditions, including amendments, is applicable.*
- (2) *If it is not practicable to make the disclosure under subclause (1) 1 month before coming into effect, ZGL must make that disclosure as soon as practicable and no later than the date of coming into effect.*

Disclosure of Zespri's Purchase Conditions

Our investigations show that

- discussions between Zespri and Suppliers (those post harvest organizations that have supply contracts with Zespri) commenced on 23 February 2001;
- on 12 March 2001 Zespri make its proposal for a supply level agreement to all those persons and organizations who had registered with it as suppliers;
- the complainant did not receive this proposal as his orchard is fully leased to one of the Suppliers and all correspondence was directed to them;
- on 16 March 2001 Zespri sent a draft supply level agreement by e mail to all of Suppliers and to some Tomua growers;
- a copy of this document was sent to the complainant on 26 March 2001;
- Zespri's generic supply contract was "publicly disclosed" (in terms of Regulation 2 of the Regulations) on 30 March 2001.

On 17 April Zespri told this Board :-

The purchase conditions have not yet come into effect because ZESPRI is still in negotiation with some Tomua growers (including Mr Adams). A provisional Supply Level Agreement has been entered into with some Tomua growers and Suppliers and ZESPRI remains open to proposals from the remaining growers. Any additional terms that may be agreed will apply to those Tomua growers and Suppliers who have already entered into agreements with ZESPRI for this season. As soon as we have agreed SLA's with all Suppliers and growers, we will advise KNZ accordingly.

Conclusions

The complainant seems to be asserting that Zespri is obliged to disclose and to notify the terms and conditions which are agreed to by it and its suppliers prior to the commencement of a new season, but we do not read the Regulations in this way.

As we see it, Regulation 14(1) imposes an obligation on Zespri first, to disclose "its" terms and conditions, and any amendments to those terms and conditions – ie "its" terms and conditions – 1 month before they come into effect.

It appears to us that Zespri did just that. It "publicly notified" the terms and conditions on which it was prepared to purchase kiwifruit on 30 March 2001, one day before the beginning of the new season, if that is relevant. It had previously, before that date,

informed or notified its suppliers, including the complainant, of those terms and conditions, but it "publicly notified" its terms on that date. It then went on, after that date, to attempt to negotiate with those suppliers (including the complainant) who apparently did not wish to accept its publicly notified terms and conditions and who wished to negotiate different terms and conditions. That seems to us to be totally in accord with the Regulations, and with commercial good sense. The Regulations seem to take account of the possibility or probability of negotiations on Zespri's previously publicly notified terms and conditions, in that Regulation 14(2) provides that if it is not practicable to make the disclosure required under Regulation 14(1) 1 month before the coming into effect of Zespri's terms and conditions "and any amendments", then Zespri must make the disclosure

as soon as practicable and no later than the date of coming into effect.

Zespri makes the point, and we agree, that purchase conditions cannot come into effect until they are agreed, so that what regulation 14(2) requires is that the terms, with any amendments, be disclosed as soon as practicable after they are agreed but before they come into effect, that is when Zespri actually acquires title to the fruit.

There is in our view no obligation on Zespri under Regulation 14 to make any disclosures prior to 1 April of any year, the commencement of "the season", unless its terms and conditions come into effect on that date.

We conclude that Zespri has disclosed its purchase conditions in accordance with the requirements of Regulation 14 and that there has therefore been no breach of the Regulations. In those circumstances we do not have to make any finding whether such a breach by Zespri would be an unjustifiable discrimination against the complainant, or other Tomua growers, in this instant and we decline to make a finding on that matter.

We are of the view that there is no basis for this complaint.