

April 5th, 2024

Dan Mathieson
Chief Executive Officer
Zespri International Limited
PO Box 4043,
MOUNT MAUNGANUI 3149

Attention: Dan Mathieson

cc: Jason Te Brake Chief Operating Officer
Alyson Hendron Head of Legal NZ
Rachel Lynch NZ Government & Regulatory Affairs Manager

Re: Ruby Red Complaint

The Board has considered the formal complaint by [REDACTED] (the complainant) received on 2 February 2024 regarding Zespri's handling of RubyRed kiwifruit, in particular the complaint alleged that Zespri acted in a discriminatory manner when determining the grade and size standards for RubyRed kiwifruit.

Regulations 9 and 10 of the Kiwifruit Export Regulations 1999 (Regulations) state that Zespri must not unjustifiably discriminate among suppliers in respect of a decision on whether to purchase kiwifruit or the terms of the purchase contract, unless that discrimination is justified on commercial grounds.

KNZ considered the complaint as an enforcement event under 6.1.1(a) of the Export Authorisation (EA). In accordance with clause 6.1.3 of the EA, KNZ decided to carry out a preliminary assessment to establish whether or not there were sufficient grounds to justify an investigation under the enforcement procedure in clause 6.3 of the EA.

In accordance with clause 6.1.5 of the EA, KNZ requested and received further information from Zespri. The Board has considered the information received and, for the reasons set out below has determined that there are insufficient grounds to justify an investigation under 6.3 of the EA.

The complaint

1. The essence of the complaint is that Zespri acted in a discriminatory manner when determining the grade and size standards for RubyRed kiwifruit.
2. The complainant also said that Zespri is "is taking advantage of its dominant powers, as the arbiter of Kiwifruit in New Zealand, to force these inappropriate standards on its Growers and is resulting in unacceptable wastage and losses to the very Growers that have invested heavily in your Red variety".

Regulatory framework

3. Zespri is authorised to export kiwifruit pursuant to the EA. The terms and conditions of the EA are in accordance with Regulations 5 to 7.
4. KNZ has the function of monitoring and enforcing the non-discrimination rule under Regulation 33(1)(b)(i). The non-discrimination rule (Regulations 9 and 10) is one of the mitigation measures set out in Part 3 of the Regulations. Regulation 9 provides that Zespri must not unjustifiably discriminate among suppliers and potential suppliers in respect of either (a) a decision on whether to purchase kiwifruit or (b) the terms of the purchase contract.¹ The purchase contract refers to Zespri's 'Supply Agreement' which is negotiated and entered into by the Registered Suppliers.
5. KNZ's monitoring and enforcement of the non-discrimination rule is limited by Regulation 9 and Regulation 6. Regulation 6(1)(b),(c),(f) (outlined below) is particularly relevant to this complaint as those provisions specifically exclude certain matters from inclusion in the EA.
 6. Matters that must not be included in authorisation
 - (1) The export authorisation must not provide for any of the following:
 - (b) a requirement that ZGL purchase any particular proportion of the kiwifruit crop:
 - (c) the basis on which ZGL is to purchase and pay for kiwifruit (other than in connection with the non-discrimination rule):
 - (f) the Board to have any rights or powers in respect of kiwifruit pool administration or control (other than in respect of collaborative marketing):

Zespri's purchase terms and conditions

6. The Board considered Zespri's purchase terms and conditions for each variety as outlined in the Supply Agreement and additional documents. The Board noted that Zespri has applied different grade standards, size standards and payment to each variety based on the fruit characteristics it required for its marketing plans. However, Regulation 6 is clear that the EA cannot impose any requirement on Zespri as to the basis on which it is to purchase or pay for kiwifruit. It follows therefore that the regulations are not intended to operate in a manner that would limit Zespri's ability to set grade standards or size requirements.

Conclusion and additional comments

7. In conclusion, after considering the information provided as part of the preliminary assessment and for the reasons outlined above, the Board does not consider there are sufficient grounds to justify an investigation under 6.3 of the EA in respect of the complaint.

¹ KNZ Decision '2022 May – Preliminary Assessment Decision – COKA Discrimination Complaint', paragraph 4

8. KNZ intends to provide a copy of this letter to the complainant when advising the outcome of the preliminary assessment. KNZ will determine whether this letter should be published on the KNZ website and will take into account Zespri's request to redact information contained in this letter.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Geoff Morgan', with a small dot at the end of the line.

Geoff Morgan
Chief Executive