

Attention is drawn to the non-publication order set out in footnote 2 which is made under clause 10(1), Schedule 2, Employment Relations Act 2000.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 171
5395140

BETWEEN HANS KRABO
 Applicant

AND TURNERS & GROWERS
 LIMITED

Member of Authority: Christine Hickey

Representatives: Graeme Malone, Counsel for Applicant
 Penny Swarbrick, Counsel for Respondent

Investigation Meeting: 26 March 2013 at Nelson

Submissions received: At the hearing
 Further documents requested at the investigation meeting
 received on 6 June 2013

Determination: 26 August 2013

DETERMINATION OF THE AUTHORITY

- A. Hans Krabo was unjustifiably disadvantaged by Turners & Growers Limited.**
- B. Turners & Growers Limited is to pay Hans Krabo \$6,000 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.**
- C. Turners & Growers Limited breached its duty of good faith under s.4(1A)(c) of the Act.**

Employment relationship problem

[1] Hans Krabo was employed by the New Zealand Apple and Pear Marketing Board, the respondent's predecessor, in November 1997. On 1 April 2000 the Apple and Pear Marketing Board became ENZA Limited. In October 2001 Mr Krabo was appointed ENZA's South Island Logistics manager. Turners & Growers Limited (Turners & Growers) operates ENZA as one of its divisions. By 2012 Mr Krabo had been working for five years as Kiwifruit Operations Manager in the kiwifruit business unit, also known as the Global Products Division (GPD). Mr Krabo's immediate superior was Murray Malone, who was the Kiwifruit Development Manager. The GPD also had the part-time services of Murray Sollitt, the Project Support Manager/Accountant. The GPD operated out of Nelson although most of the kiwifruit it dealt with was grown in the Bay of Plenty.

[2] Mr Krabo's role was managing Turners & Growers kiwifruit operations in New Zealand and Australia. This included managing the planting and production of Turners & Growers kiwifruit varieties in New Zealand and Australia, managing supply chain activities, providing technical support and managing sales.

[3] Mr Krabo dealt with about 100 kiwifruit growers and five packhouses all of which had contracts with Turners & Growers. He assisted Mr Malone with project development in other parts of the world. Mr Krabo also liaised with Zespri on collaborative marketing arrangements to export Turners & Growers patent kiwifruit varieties beyond Australia.

[4] In early 2012 the majority of shares in Turners & Growers were acquired by a German company, BayWa Aktiengesellschaft. A new Chief Executive and Chief Financial Officer were appointed. Turners & Growers embarked on:

... a major review of its management, executive and operations structure ... Whereas previously there were 15 operational divisions, each run by a General Manager, the company now has a new operational model comprising an Apple division, a Diversified Products division, an Operations division, and a Domestic and International Sales division. ... As a result of the changes most of the previous GM roles have been made redundant, as well as other management roles and new roles have been created.

The eventual disestablishment of the Global Products Divisions was part of the overall change¹.

[5] Consultation with staff about the major review of executive roles and operations structure began in July 2012.

[6] Prior to that Mr Malone was assigned to a specific project² and Mr Krabo was sent an email on 21 May 2012³ by Snow Hardy, ENZA's General Manager, saying that he had been authorised by the Turners & Growers Chief Executive:

...to be responsible for all aspects of the T&G/ENZA Kiwifruit program around the world from today. Therefore from this point on any decisions, commitments, contracts or the like regarding the ENZA Kiwifruit program must be sanctioned by me.

I trust this is clear.

I kindly ask you acknowledge this change.

[7] Mr Krabo received the email from Mr Hardy shortly before he boarded a flight to Tauranga to meet with Zespri. He acknowledged receipt of the email although he says he was not sure what it really meant.

[8] Mr Krabo was not consulted about the future of his role or the proposal to discontinue the Global Products Division as a part of the executive team review that took place in July 2012. However, in August 2012 Mr Malone's role as Development Manager of the Global Products Division was made redundant and Mr Malone left the company.

[9] On 17 August 2012 Mr Krabo emailed Rowan Tonkin, Chief Human Resources Officer for Turners & Growers. He raised a personal grievance over *the dis-establishment of my job on 21 May*.

[10] A consultation process began on 20 August and on 31 August Mr Krabo was notified that the Kiwifruit Operations Manger role based in Nelson had been *concluded* and as a result he had been made redundant. He was notified that if he wished to he could serve his notice period on garden leave.

¹ Brief of Evidence of Rowan Tonkin, the respondent's Chief Human Resources Officer, paragraphs 11 & 12. Mr Tonkin began working for Turners & Growers in early June 2012.

² Recovering a debt owed to Turners & Growers by a Hong Kong based company. I have not found to necessary to quote from the content of the documents provided to me by Mr Malone about the debt. However, documents 26 and 28 attached to Mr Malone's evidence in reply are commercially sensitive and should not be published.

³ Mr Malone and Mr Sollitt were sent the same email.

[11] Mr Krabo has received his full redundancy compensation entitlements. He does not dispute that he was made redundant for genuine business reasons.

The claims

[12] Mr Krabo claims that Turners & Growers disadvantaged him in his employment by:

- Significantly changing his role and effectively disestablishing his position on 21 May 2012 without any prior notice or consultation;
- Failing to provide him with any information as to its intentions for three months after effectively removing him from his role;
- Failing to acknowledge his redundancy and pretending that no change had occurred.
- Notifying suppliers of the change in role without first checking that he had himself had notice of the change and without advising him of its intention to notify third parties or giving him any opportunity to discuss how that might be handled;
- Unjustly denigrating him to others with whom he had business relations in the course of his employment; and
- Isolating him in his employment.

[13] Mr Krabo also claims that he was unjustifiably dismissed on 21 May 2012.

[14] Mr Krabo claims that the respondent failed to act towards him in accordance with its duty of good faith. No penalty was sought.

[15] Turners & Growers resists all of Mr Krabo's claims and says he was not unjustifiably disadvantaged in his employment and was made redundant after a fair process conducted in good faith.

[16] By way of remedy Mr Krabo claims:

- (a) Compensation for humiliation, loss of dignity and injury to his feelings from the disadvantage or dismissal; and

- (b) A determination that the respondent's actions were in breach of its obligation of good faith;
- (c) Legal costs.

The issues

[17] The Authority needs to determine:

- (a) Whether Mr Krabo was unjustifiably disadvantaged or unjustifiably dismissed;
- (b) Whether the respondent breached its duty of good faith to Mr Krabo;
and
- (c) Whether Mr Krabo is entitled to any remedies.

Determination

[18] To be successful in a claim for unjustifiable disadvantage, pursuant to s.103(1)(b) of the Act, Mr Krabo must show:

That the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment) is or are or was (during employment that has since been terminated), affected to the employee's disadvantage by some unjustifiable action by the employer.

[19] There are two limbs to the test for unjustifiable disadvantage as set out in s.103(1)(b):

- (a) There must be an unjustifiable action by the employer, and
- (b) That action must have caused disadvantage to the employee's employment or one or more of the employee's conditions of employment.

[20] The test of justification for an employer's action is set out in s.103A of the Employment Relations Act 2000. I need to look at whether the way that Turners & Growers acted towards Mr Krabo from 21 May 2012 onwards and what it did was what a fair and reasonable employer could have done in all the circumstances at the time.

[21] In considering whether an employer has acted fairly and reasonably towards an employee I also need to consider the procedural aspects set out in s.103A(3), as far as they can sensibly be applied to the situation. However, I should not find an action unjustifiable for any defects in a process followed by the employer if the defects were *minor and did not result in the employee being treated unfairly*⁴.

Did Turners & Growers significantly change Mr Krabo's role on 21 May 2012 and/or effectively dis-establish his position without notice or consultation?

[22] Turners & Growers says that as at 21 May 2012 there was no substantive change to Mr Krabo's role. It says that Mr Hardy's email to Mr Krabo merely notified him of a change in his reporting line; Mr Hardy had taken over Mr Murray Malone's role but not Mr Krabo's role.

[23] Turners & Growers says that while there were also some operational changes to how the kiwifruit business was managed after that point Mr Krabo continue to fulfil a substantial part of his role in managing the relationship with growers and getting their fruit to market. Mr Krabo continued to carry out at least some elements of his role. He was not deprived of his job or demoted and he was not required to report to Sue Willetts, the Post-harvest Manager for Kerifresh. Turners & Growers consider that Mr Krabo's employment, or any condition of it, was not affected by any of its actions and so Mr Krabo was not disadvantaged in his employment.

[24] In addition to the email sent to the GPD staff on 21 May 2012 Mr Hardy sent an email to Zespri notifying it that he had taken over responsibility for all aspects of the T&G/ENZA kiwifruit programme around the world. He also wrote that in the meantime:

- (a) Allan Kerr of Kerifresh was to be responsible for all aspects of growing, quality, post-harvest management and logistics; and
- (b) Alastair Hulbert of Delica was to be responsible for co-ordination of international sales and marketing; and
- (c) Alastair Petrie was to be responsible for New Zealand and Pacific Island sales.

⁴ Section 103A(5) of the Act.

[25] Kerifresh and Delica were wholly owned Turners & Growers companies which had previously operated quite separately from the GPD. Mr Kerr was the Kerifresh General Manager and Mr Hulbert was the Delica General Manager. Mr Petrie was the Turners & Growers New Zealand Markets General Manager.

[26] Later the same day Mr Krabo was sent an email by Mr Kerr asking him to join a conference call the following morning at 8am and notified him that Ms Willetts would also be taking part in the call.

[27] Mr Kerr sent a further email that evening to Mr Krabo and to Ms Willetts with copies sent to Mr Hardy and Mr Hulbert. The email set out the agenda for the conference call. When Mr Krabo received the agenda he understood that the purpose of the meeting was for him to brief the other participants on his current work.

[28] Beginning at 8 a.m. on 22 May Mr Krabo participated in two conference calls arranged by Mr Kerr. Later that day Mr Kerr sent an email to Mr Krabo, entitled *Meeting Notes*, which reported on the actions agreed at the meetings. Copies of the email were also sent to Ms Willetts, Mr Hulbert, Mr Hardy, Mr Petrie and three other Delica staff. The email revealed that there had been conference call discussions at 5.30 p.m. on Monday 21 May as well as at 8 a.m. and 9.15 a.m. on Tuesday 22 May. Mr Krabo was only involved in the discussions on 22 May 2012.

[29] Mr Krabo says that the following action points from the telephone conference on 22 May 2012 show that his duties and responsibilities were being reduced or taken over by others:

9. *Kerifresh advised Hans Krabo that from this point all communication with Zespri or Aerocool around logistics must be between Sue Willetts and these organisations. HK agreed from this will [sic] point will work through SW to SW instructions.*

10. *Delica advised HK that from this point all communication with Zespri or distribution partners must be between Delica and these organisations. HK agreed from this will [sic] point will work through Delica to Delica instructions.*

11. *Arising out of item 9 and item 10.*

(a) *HK advised that yesterday he executed a supply agreement document with Zespri (have since found out it is "registration to allow Zespri to enter growers into their system"), which HK indicated would now result in Zespri preparing a supply SLA for ENZA. It was agreed that from this point SW will*

take over direct discussions related to the supply Agreement and SLA and would report back to Delica. A conference call has been scheduled with Zespri today to start this. ...

- (b) *HK advised that yesterday he met with Lain Jager and Steve from Oppenheimers regarding market programmes. Al Hulbert has advised that Delica will now deal directly with Zespri regarding market programmes. Based upon the full inventory projection ... Delica will prepare recommended volumes for all markets (inclusive of Asia beyond CMA). Hulbert/Kerr/Krabo will meet with Zespri later this week to discuss/agree) Delica to set up meeting.*

12. *All fruit at Kiwi pack is to remain on hold pending AK discussions with Domestic. This may have to be dumped due to age.*

...

14. *HK advised of discussion that he was having with Zespri regarding shipping approach to EU. Hulbert to take over. Delica.*

[30] Mr Krabo presented further evidence that under Mr Kerr's instructions he progressively handed over his job roles and responsibilities to others. For example, on Wednesday 23 May 2012 Mr Krabo sent the following email to Seatrade New Zealand about shipments of kiwifruit to Europe:

I don't see this to happen at this point since I am now in the process of involving/handing over to Alastair Hulbert-Delica who is here in the Bay tomorrow Thursday and hope to come in and see you Thursday afternoon. This would definitely take this week out and look towards 10 June.

[31] On the same day Mr Krabo sent another email to kiwifruit suppliers:

There is change on-going in the whole ENZA kiwifruit process – order requests will now also arrive from Sue (Kerifresh) and possibly down the track direct from Delica – we look at that when we get that far.

For now please accept and generate orders as what Sue is sending through.

[32] On 24 June 2012 Lynette Winters of Assure Quality Limited sent an email addressed to Mr Krabo and Kathryn Baynham, the Compliance Manager for Kerifresh. The following day Ms Baynham replied:

Could you please CC Sue Willetts on all communications in place of Hans. Sue is responsible for Enza Post Harvest Fruit issues in Kerikeri and BOP and would be making any decisions on fumigations.

[33] Mr Krabo also says that in large part after the conference call on 22 May he became answerable to Sue Willetts, who had previously been junior to him. In particular Ms Willetts took over all the post-harvest logistics, which included dealing with all packhouses and growers. However, Mr Krabo continued to deal with one grower in the Bay of Plenty which refused to work with Ms Willetts.

[34] Ms Willetts says that Mr Krabo did not report to her and I accept that. I do not understand what Mr Krabo is claiming. Ms Willetts says that after the end of May 2012 she *had to undertake control of the whole inventory*. She says that was because of a sudden change in the company including greater dealings with Zespri. She says she was the only person in Turners & Growers to have access to appropriate software for dealing with kiwifruit orders which came through from Zespri and so it was logical that she controlled all Zespri orders through Kerifresh.

[35] Ms Willetts also understood that another reason she was dealing with post-harvest logistics was because of a service level agreement entered into with Turners & Growers. However, such a service level agreement was foreshadowed in item 11.b of the minutes of the 22 May teleconference and Ms Willetts was instructed to take the task of negotiating such an agreement over from Mr Krabo.

[36] I accept Mr Krabo's claim that Ms Willetts took over a number of his responsibilities. Turners & Growers submission that Messers Hardy, Kerr, Hulbert and Petrie only took over from Mr Malone and there were no significant changes to Mr Krabo's role is somewhat undermined by the fact that Mr Willetts' responsibility for post-harvest logistics increased markedly.

[37] Mr Krabo says that on 19 and 20 June 2012 he took Mr Kerr, Mr Hardy and Dennis Barker around to introduce them to individual growers and after that date he had nothing to do with the growers on a professional basis.

[38] Mr Krabo says that for about 1½ months after 21 May 2012 he had some work involved with getting the kiwifruit crop to market. However, he had less responsibility for that than usual and was under-employed during that time and significantly under-employed after that until notified of his redundancy.

[39] Mr Krabo did continue to do some work for Turners & Growers after 21 May 2012 until he was made redundant, particularly in getting the harvest to market. However, it is clear that as a result Mr Hardy's allocation of kiwifruit responsibilities to Messers Kerr, Hulbert and Petrie on 21 May a number of Mr Krabo's roles and responsibilities were removed from him. Specifically, Mr Kerr was put in charge of *all aspects of growing, quality, post-harvest management and logistics* although all of those aspects in New Zealand had until that point been ultimately managed by Mr Malone but carried out by Mr Krabo. In addition, Ms Willetts became involved, if not as senior to Mr Krabo, taking over some of Mr Krabo's responsibilities when she had not previously a member of the GPD.

[40] Although Mr Krabo's salary was not reduced he was effectively demoted because his levels of control over kiwifruit operations management and responsibility were reduced.

[41] Mr Krabo was not consulted about the changes to his duties or the change in the team structure and what effect it would have on him. The changes were significant and unilaterally imposed by Turners & Growers.

[42] The GPD was a very small team consisting of only two full time members. Even Mr Malone being replaced by Mr Hardy, without anything more, was so significant Mr Krabo should have been notified by a telephone call from Mr Hardy at the very least, rather than by an email alone. Also Mr Krabo should have been informed directly on 21 May 2012 what Messers Kerr's, Petrie's and Hulbert's new roles were and why Turners & Growers considered the changes necessary.

[43] Turners & Growers says that Mr Krabo could have talked to Mr Hardy when the change first happened and asked him what it meant for Mr Krabo's on-going employment. It says that Mr Krabo did not complain or question the changes at the time and so was not likely to have been disadvantaged by them. However, Mr Krabo says that he told Mr Kerr during the telephone conference call on 22 May 2012 that he was not happy but had no response.

[44] I do not consider Mr Krabo's compliance with Turners & Growers request to update it on his work and to undertake work in a different way from 22 May 2012 to be acquiescence in the change in his contracted duties. Mr Krabo was compliant in the face of what was a significant upheaval in Turners & Growers in relation to its

ownership, senior management and its overall direction. He correctly surmised that the events in May 2012 might lead to losing his job. He had no wish to lose his job and so carried out what remained of his role in the hope that once the more senior level management restructuring had been finalised he might be offered another role or confirmed in his existing role.

[45] Mr Krabo was not dismissed on 21 May 2012 but his role and responsibilities were significantly changed by some duties being taken off him and those changes were unilaterally imposed. That was disadvantageous to Mr Krabo in his employment because it made him feel unsettled and unvalued in his role and led him to suspect that he may lose his job.

In notifying third parties about the changes before notifying Mr Krabo did Turners & Growers disadvantage Mr Krabo?

[46] Mr Krabo says that in notifying Zespri and Aerocool of the reduction in his duties and the appointment of others in his stead on 21 May 2012 Turners & Growers disadvantaged him in his employment by failing to communicate adequately with him.

[47] Turners & Growers says that Mr Krabo was not disadvantaged in his employment, but if he was its actions were justifiable.

[48] The notification to Zespri that Mr Krabo refers to is the email sent by Mr Hardy in the morning of 21 May. Mr Krabo says that Zespri had already received that email, which he had no knowledge of, when he was having his four hour meeting with Zespri executives that afternoon. He says that discovering that later made him feel humiliated that Zespri had been informed of something he had no knowledge of although it directly affected him.

[49] Aerocool was a packhouse client of Turners & Growers. Richard Nicholson of Aerocool usually dealt with Mr Krabo. On 21 May 2012 Mr Kerr sent Mr Nicholson a copy of Mr Hardy's email to Zespri as well as the following:

As a first step I would appreciate you providing to Sue Willetts your current inventory report for packed ENZA product currently held by Aerocool. Sue will then be in touch with you and Hans later today to get an understanding of current picking and packing plans.

[50] Mr Nicholson forwarded Mr Krabo a copy of Mr Hardy's email to Zespri. Mr Nicholson also rang Mr Krabo that day and asked Mr Krabo what was going on and why Mr Krabo had lost his job. Mr Krabo was not sure what he meant and Mr Nicholson told him he had received an email advising that Snow Hardy was taking over responsibility and he had taken from that email that Mr Krabo was no longer part of the team and that instead Mr Nicholson's contact was to be Sue Willetts⁵.

[51] Mr Krabo says when read the email sent to Mr Nicholson by Mr Kerr and the email sent to Zespri it was the first he was aware that Mr Kerr, Mr Hulbert and Mr Petrie had been instructed by Mr Hardy to undertake kiwifruit operations roles. He considered that Mr Hardy had assigned his and Mr Malone's roles and responsibilities to the three of them.

[52] Mr Krabo was disadvantaged in his employment by the failure of Turners & Growers to let him know the information communicated to Zespri and Aerocool before it let those third parties know. It was unsettling and embarrassing for Mr Krabo to discover the information in a second-hand and indirect way and made him feel less secure in his employment.

Did Turners & Growers unjustly denigrate Mr Krabo in front of those with whom he had business relationships?

[53] On 23 May 2012, Mr Kerr went with Mr Krabo to meet Lee Hoggard, one of Turners & Growers ENZA Gold growers. Mr Krabo says that Mr Kerr explained to Mr Hoggard:

...that management of kiwifruit operations had changed because previous management had not done enough to promote ENZAGold the previous year and that it had a negative profile as a result, had stuffed up the Collaborative marketing application for Korea in 2012 and were against working co-operatively with Zespri.

[54] Mr Hoggard agrees that was what Mr Kerr told him. He says that Mr Kerr was introduced to him as the person who was taking over responsibility for management of Turners & Growers kiwifruit operations in New Zealand.

[55] Mr Krabo says that Mr Kerr's comments were clearly aimed at him and at Murray Malone and *were untrue, unnecessary and extremely humiliating to me.*

⁵ I have only heard from Mr Krabo on this point as I was unable to hear from and question Mr Nicholson. However, there is no dispute about Mr Krabo's evidence.

Mr Hoggard says that he formed the view that Mr Krabo and Mr Malone were *being replaced because of alleged poor performance*.

[56] Turners & Growers says Mr Kerr's comments were about Mr Malone and not Mr Krabo. However, I consider Mr Kerr explained the reasons behind Turners & Growers change in approach to Mr Hoggard in a way that gave the impression that Mr Krabo and Mr Malone were at fault and had fallen into disfavour with their employer. Mr Krabo was disadvantaged by that because he felt that his future with his employer was not secure and he had not previously been informed of the reasons behind the changes imposed by Turners & Growers on kiwifruit operations.

Did Turners & Growers isolate Mr Krabo in his employment?

[57] Mr Krabo says that when he went to the Zespri meeting⁶ with Mr Kerr at the last minute he was asked to stay outside the meeting. The request was made by Mr Kerr immediately outside of the Zespri office. Mr Krabo says that he found it embarrassing and unsettling.

[58] Mr Kerr's behaviour in excluding Mr Krabo from the Zespri meeting at the last moment was disadvantageous to Mr Krabo in his employment by making him feel unvalued and no longer necessary to Turners & Growers operations despite the fact that he was still, at least nominally, Turners & Growers Kiwifruit Operations Manager.

Were Turners & Growers actions justified?

[59] Turners & Growers says that its actions were justified because Mr Malone had been assigned to recover a debt associated with the GPD; that is why Mr Hardy took over his role. In addition, the respondent says that its actions were commercially necessary to protect its kiwifruit business in line with a change in its relationship with Zespri driven by BayWa's new direction for the company which fundamentally affected how its kiwifruit exports were dealt with.

[60] I do not dispute that Turners & Growers had justifiable business reasons for replacing Mr Malone with Mr Hardy and rearranging its kiwifruit operations, and particularly how it dealt with Zespri. Mr Krabo does not dispute that either.

⁶ Referred to in the minutes of the 22 May conference as 11.b, see paragraph [29].

[61] Turners & Growers commercial decisions alone did not necessarily have to disadvantage Mr Krabo. However the way those decisions were carried out did disadvantage him. The GPD was fundamentally changed on 21 May 2012 when Mr Hardy delegated Mr Kerr, Mr Petrie and Mr Hulbert to take on responsibilities that had previously been Mr Malone's and Mr Krabo's. Mr Krabo's duties were significantly altered without consultation and he was not given any rationale for the changes until well after the decisions had been made to implement them.

[62] There was no justification for Turners & Growers unilaterally imposing a significant variation of Mr Krabo's contracted duties on him without prior discussion and consultation.

[63] Turners & Growers says that what Mr Kerr said to Mr Hoggard was entirely justifiable as he was explaining to Mr Hoggard the rationale for Turners & Growers taking a different approach to its kiwifruit operations. However, Mr Kerr's explanation to Mr Hoggard consisted of reasons that Mr Krabo had not been told about by Turners & Growers. It was not justifiable to give Mr Hoggard the impression that Mr Krabo's performance had been lacking especially when that allegation has never formally been put to Mr Krabo.

[64] There is also no justification for Turners & Growers notifying Zespri but not Mr Krabo of Messers Kerr's, Petrie's and Hulbert's new areas of responsibility.

[65] I consider that Mr Krabo was unjustifiably disadvantaged in his employment by the actions of Turners & Growers. Turner & Growers actions were not justifiable and were not within the range of actions a fair and reasonable employer could have undertaken towards him. Therefore Mr Krabo has a personal grievance of unjustified disadvantage and is entitled to remedies.

Did Turners & Growers breach its duty of good faith to Mr Krabo?

[66] Mr Krabo says that by its lack of timely communication with him Turners & Growers breached its duty of good faith to him under s.4(1) and s.4(1A)(c) of the Act.

[67] Section 4(1) of the Act provides that employers and employees must deal with each other in good faith. Section 4(1A)(b):

requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment

relationship in which the parties are, among other things, responsive and communicative

[68] I consider that at a number of points in the events of 21 May and subsequently Turners & Growers failed in its duty to be adequately communicative with Mr Krabo about the changes to its kiwifruit business and about how those changes and/or proposed changes would affect him in his work. However, I have really already dealt with those as establishing unjustified disadvantage claims and I do not intend to deal with them any further.

[69] However, I now consider whether there was a breach of s.4(1A)(c). Mr Krabo says he was not consulted as part of the process used for the executive team review. Turners & Growers says that the executive team review was a review of management at a higher level than Mr Krabo and his role could not be considered for restructuring until the new structure had been confirmed.

[70] I consider Mr Krabo's claim that Turners & Growers disadvantaged him by failing to provide him with any information as to its intentions for three months is best analysed as a potential breach of the employer's duty of good faith.

[71] Mr Krabo also claims that Turners & Growers failed to acknowledge his redundancy and pretended that no change had occurred. This claim is also best dealt with under the mantle of the good faith considerations.

[72] Under s.4(1A)(c) an employer has an added duty of good faith if it:

... is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –

- (i) access to information relevant to the continuation of the employees' employment, about the decision; and*
- (ii) an opportunity to comment on the information to their employer before the decision is made.*

[73] Mr Krabo and Turners & Growers differ fundamentally about when Mr Krabo was effectively made redundant. However, I have already determined that Mr Krabo was not unjustifiably dismissed in May 2012 and Mr Krabo is not challenging the substantive decision to make him redundant. I do not intend to make a determination on whether Mr Krabo was made redundant prior to 31 August 2012.

[74] On 21 May 2012 Mr Hardy delegated significant aspects of Mr Krabo's role to Messers Kerr, Hulbert and Petrie. Mr Kerr further delegated part of Mr Krabo's roles to Ms Willetts.

[75] By mid-June 2012 Mr Krabo was asked to facilitate Mr Kerr, Mr Hardy and Mr Barker's introduction to the kiwifruit growers when he had previously managed Turners & Growers relationships with growers. I consider that if not in late May at least by mid-June Mr Krabo was entitled to have been given information relevant to the continuation of his employment and an opportunity to comment on the information before any decision was made. However, Turners & Growers did not provide him with any information or enter into any appropriate consultation with him.

[76] The documents entitled 'Executive Team Review Proposal for Consultation July 2012' show that Murray Malone's Development Manager role formed a part of that review. The documents also show a proposed non-apple structure in which Denis Barker was proposed to become the Kiwifruit Manager, Ms Willetts to become the Post-harvest Manager, with Lloyd Mills to become the Facility and National Manager. Mr Krabo was not involved with any consultation about the proposals in the executive team review.

[77] The review was far more than just a review of the executive team; it was a fundamental company re-structuring. The review proposed to dis-establish the Global Products Division. There was no role envisaged for Mr Krabo in any of the proposed new areas although Mr Malone had a role in the proposed international markets structure.

[78] Certainly by July 2012 when consultation about the proposed executive team review began Turners & Growers was proposing to make a decision that was likely to have an adverse effect on the continuation of Mr Krabo's employment. However, it did not comply with its s.4(1A)(c) obligation to give Mr Krabo access to information relevant to the continuation of his employment and did not give him an opportunity to comment on the information before any decision was made.

[79] No consultation about restructuring or about Mr Krabo's potential redundancy took place until after 17 August 2012 when Mr Krabo initiated communication on that topic. He emailed Mr Tonkin:

Can you please advise what the company is intending for me; obviously my old role has gone and yet know no one has spoken to me or told me what the company would like me to do in the future other than tell me I was to assist Sue Willetts instructed by Alan Kerr in getting this year's crop out. I am now no longer involved in any meetings or planning for kiwifruit matters and in fact any communication has dropped to virtually nothing. ...

Although I am unhappy with the way my job was removed I believe I have been fair in giving the company ample time to approach me to discuss options and to look to agree to some other role or to arrange for a formal termination on the grounds of redundancy.

... I have been operating under the view that the company has always intended to formally make me redundant once the export and domestic crop is sold, and, despite the increasing embarrassment and distress I have suffered over the last few months I prefer if possible to resolve this matter on pleasant terms and without fuss.

[80] Mr Tonkin replied on the same day:

I can appreciate the situation you feel you are facing and am more than happy to discuss it with you further. Please allow me to explain the following...

The company's perspective:

- *Your role has not been dis-established as your activities and responsibilities continued unchanged;*
- *As you know we have been in dialogue with your Manager (Murray M) about the [sic]his employment and the status of the Development Manager role. This only reached resolution this week with Murray leaving our employment. I can now confirm that the Development Manager role will not be replaced;*
- *We have also just confirmed the Executive team structure, creating a vacant role (GM International Markets) that your current role will report to. It would be the company's intention to develop a proposal and consult with you about any potential impacts on your role at that time of appointment.*
- *I have asked that your reporting line for your role be transferred to Snow Hardy until the structures can be finalised.*

[81] Rowan Tonkin's email response of 17 August 2012 said that he had asked as at that date for Mr Krabo's reporting line to be transferred to Mr Hardy. However, that had already happened as of 21 May 2012. As I have already found that Mr Krabo's activities and responsibilities did not continue unchanged after 21 May

2012 so Mr Tonkin's email is incorrect on that point too. Mr Tonkin showed a fundamental lack of understanding about Mr Krabo's role.

[82] When it became clear that Mr Malone was to be made redundant that was yet another point that should have triggered Turners & Growers duty to communicate information to Mr Krabo about the continuation of his employment. However, no communication on that point was entered into with him until after he initiated it.

[83] Also on 17 August 2012 Mr Tonkin wrote a letter to Mr Krabo. It was attached to an email sent on 20 August 2012 the purpose of which was to:

...consult with you regarding the proposal to conclude the Global Projects team which would also propose the conclusion of the Kiwifruit Operations Manager.

[84] Mr Tonkin asked Mr Krabo for feedback on that proposal. Mr Tonkin also wrote:

Hans, we also appreciate the offer you have made to the company last week and your suggestion that the role is redundant. However, you will understand that now we have confirmed the Executive structure and the Development Manager role we are in a position to formally discuss this proposal with you.

[85] Mr Tonkin's e-mail to Mr Krabo on 17 August saying that Turners & Growers intended to consult with him about his role only once it had appointed a new General Manager of International Markets is wholly inconsistent with the letter of the same date actually embarking on redundancy proposal consultation. The e-mail suggests that Mr Krabo's role would report to a newly established role of General Manager International Markets while the letter proposes to dis-establish Mr Krabo's role and does not propose to appoint him to any new role reporting to the General Manager of International Markets.

[86] Through his lawyer Mr Krabo conveyed to Turners & Growers that he thought the consultation was a sham and saw no point in it because the changes to operations had already been made. However, he asked for information about what other roles he may be deployed to by Turners & Growers.

[87] On 28 August 2012 Mr Tonkin responded that the company had genuinely engaged in consultation with Mr Krabo and that if Mr Krabo wanted to give feedback on the proposal he had until the following day. Turners & Growers did not offer to

deploy Mr Krabo to any other role. Mr Krabo gave no feedback to Turners & Growers about the proposed restructuring.

[88] Mr Krabo was made redundant and his employment ceased on 31 October 2012.

[89] Turners & Growers breached its obligation of good faith to Mr Krabo by not providing him with information relevant to the eventual dis-continuance of his employment in May and again in July 2012 when it consulted other employees about the proposed executive team review. Turners & Growers belatedly gave Mr Krabo an opportunity to comment on its proposal to disestablish the Global Products Division although effectively that decision had already been made at the latest when Mr Malone's Development Manager role was dis-established.

Remedies

[90] Mr Krabo claims compensation under s.123(1)(c)(i) for humiliation, loss of dignity and injury to his feelings. Mr Krabo says that the distress he suffered was not as a result of being made redundant but from the respondent's failure to treat him fairly and with respect in the three months leading up to his redundancy.

[91] Having determined Mr Krabo has a personal grievance, under s.124 of the Act I must now consider whether he contributed to the situation which gave rise to his disadvantage and if so reduce remedies accordingly.

[92] The evidence fails to that Mr Krabo engaged in any blameworthy conduct, so his compensation is not to be reduced on the grounds of contribution.

[93] Mr Krabo says that the email exchanges and the call from Mr Nicholson made him feel very unsettled. He was particularly upset by the fact that the Zespri executives that he had been meeting with on 21 May 2012 had been informed by Mr Hardy's email that Mr Kerr, Mr Hulbert and Mr Petrie were to take over what he considered to be his role. He was upset that he had only found out about that through Mr Nicholson and not by communication from Turners & Growers. That combined with Mr Hardy's email notifying that he was taking on Mr Malone's role and the agenda for the meeting made him fear for his job. He said that he spent a sleepless night worrying about his future in his job.

[94] Mr Krabo says that the period of time after 21 May 2012 until he was made redundant was an embarrassing time for him being at work with very little to do. In addition he received a number of calls from growers who had worked with over the previous five years asking why he was no longer working with them. Mr Krabo says that he was not able to give any real answers to them and it was humiliating for him as it looked as if his employer had made changes because he was at fault in some way. He says he found it difficult and stressful to deal with the uncertainty about the future of his role and without information from his employer he was not able to plan ahead. He says that the three months between 21 May and being made redundant on 31 August 2012 *were very miserable and stressful for me.*

[95] Mr Malone's evidence corroborates Mr Krabo's evidence about how worried and stressed he was by the on-going uncertainty about his work between May and August.

[96] I consider that Mr Krabo suffered significant hurt, humiliation and injury to his feelings by reason of the unjustified way he was treated in the course of the restructuring which ultimately ended in his redundancy process.

[97] Mr Malone also gave evidence about Mr Krabo being depressed and upset from the time he received formal notice of his redundancy until December of that year. However, in establishing the amount of compensation due to Mr Krabo I cannot and do not take any account of any emotional distress associated with Mr Krabo's redundancy from his job.

[98] I consider it reasonable that Turners & Growers pay Mr Krabo \$6,000 in compensation not for the eventual loss of his job but for the period of unnecessary uncertainty, stress and embarrassment that he suffered from 21 May 2012 before consultation about the proposal to disestablish his role began on 20 August 2012.

Costs

[99] Mr Krabo as the successful party is entitled to a reasonable contribution towards his actual legal costs. The parties are encouraged to resolve costs themselves. However, if that is not possible, then Mr Krabo has 28 days within which to file a costs memorandum and the respondent has 14 days within which to respond.

[100] In order to assist the parties to resolve costs by agreement I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs; \$3,500 per day. The parties are therefore invited to identify any factors which they say should result in an adjustment to the notional daily tariff.

Christine Hickey

Member of the Employment Relations Authority