



Goldsmith says the actions of Nirvana in not providing him any work ended his employment. He claims he was dismissed and that the dismissal was unjustified.

[4] Nirvana denies it dismissed Mr Goldsmith. Mr Kevin Smith, Managing Director, says Mr Goldsmith was a casual employee. He says when Mr Goldsmith took on the Satara contract he gave up his usual role knowing that the Satara contract was only a temporary contract. Mr Smith says that when he wanted to return to his school bus driving there was no work available and that he was retained as a casual employee.

[5] The issues for this determination:

- What was the true nature of the employment relationship – casual or permanent part-time?
- Was Mr Goldsmith unjustifiably dismissed?
- If Mr Goldsmith was unjustifiably dismissed what if any remedies should be awarded?

**What was the true nature of the employment relationship – casual or permanent part-time?**

[6] Mr Goldsmith says he worked continuously for two years as a bus driver delivering school children from Kaingaroa to the schools in Murupara. His hours of work were from 7.30am to 8.30am and from 2.50pm to 4.00pm five days a week. Mr Goldsmith was paid a total of 22 hours at \$13.20 per hour. Outside those regular hours of work Mr Goldsmith was available to drive chartered bus trips on behalf of Nirvana.

[7] Mr Smith says Mr Goldsmith was employed on a casual basis. Being employed on a casual basis implies that there was some ability for Mr Goldsmith to decline or accept work as he wished. However, the reality of the employment relationship was that Mr Goldsmith was employed regularly on a school bus route. He also undertook additional work undertaking chartered bus trips as and when he was available.

[8] I find Mr Goldsmith's employment was permanent part time.

**Was Mr Goldsmith unjustifiably dismissed?**

[9] Outside of his working hours Mr Goldsmith is a Board Member of the Network Murupara Board, an organisation which has been set up to drive social and economic development in Murupara and the outlying areas. In May 2007 he attended a meeting to discuss the potential for Murupara workers to be employed to fill a seasonal gap in the labour market in the Kiwifruit industry for Satara. Mr Goldsmith rang Mr Smith and told him of the discussions that had taken place. Mr Goldsmith then left the discussions to Mr Smith, Satara and the WINZ representative at the meeting to agree on any final outcome.

[10] As a result of that meeting, Nirvana secured a contract to transport workers from Murupara to Te Puke each night leaving Murupara at 9.00pm to travel to Te Puke and then leaving Te Puke each morning at 7.15am to travel back to Murupara. The run took place each Monday to Friday inclusive.

[11] Mr Goldsmith offered to drive the bus service for Nirvana. Mr Smith accepted this offer on the basis that Mr Goldsmith was able to find a replacement driver for his school bus route. Mr Goldsmith approached his friend Mr Eddie Brass and asked him if he would take over his school bus run so that he could undertake the Satara contract. Mr Goldsmith understood Mr Brass would only be doing the school bus run on a temporary basis and for as long as he was doing the Satara run. Mr Brass commenced employment on 9 May and on or about 30 May his employment was made permanent.

[12] It was common ground that Mr Goldsmith picked up additional employment working as a forklift driver for Satara during the hours between arriving with his bus load of workers, and departing at the end of the night shift. Mr Goldsmith was permitted by Satara to also have some rest time during the night shift so that he was not too tired to drive the bus back to Murupara.

[13] The Satara contract was to have lasted 13 weeks, however, it finished after 4 or 5 weeks. On about 8 June Nirvana received notice from Satara that the run would

finish on the following Monday 11 June 2007. When Mr Goldsmith returned to work at Nirvana on Monday 11 June he was told Mr Brass would continue to drive the school bus and that he no longer had a bus run. Mr Goldsmith went home and has not worked again for Nirvana.

[14] Nirvana says Mr Goldsmith relinquished his bus driving role when he took on the Satara contracted bus run. Mr Goldsmith says the contract with Satara was always temporary and if he had known he would not be able to return to his school bus run at the end of it, he would not have taken on the more onerous Satara run.

[15] In the absence of any written documentation, including any written agreement for Mr Brass, I have given the benefit of the doubt in this case to Mr Goldsmith. As already stated Mr Goldsmith was a permanent employee working on a part time basis. He took up the opportunity to do the temporary Satara bus run, but that did not change his employment status.

[16] After finishing the Satara contract, Mr Goldsmith was entitled to expect to continue working the day time hours he had worked prior to the Satara run. Ms Doris Pouwhare confirmed in her evidence that she had advised Mr Goldsmith on the day he returned to work on 11 June following the sudden ending of the Satara contract that Mr Goldsmith had no run. I am satisfied that since 11 June 2007 Mr Goldsmith received no work from Nirvana.

[17] Mr Smith refused to allow Mr Goldsmith to return to his previous school bus run. He did attempt, however, to locate alternative work for Mr Goldsmith but was unsuccessful. The failure to provide Mr Goldsmith with work was a repudiation of the employment agreement and Mr Goldsmith was entitled to treat his employment as being at an end.

## **Remedies**

### *Lost wages*

[18] Mr Goldsmith provided evidence to the Authority that he commenced new work from 2 August 2007. He was therefore without work for a period of seven weeks. Until his dismissal Mr Goldsmith was paid for 22 hours each week at the rate of \$13.20 per hour.

**Nirvana Coaches Limited is ordered to pay to Mr Goldsmith \$2,032.80 pursuant to section 123(1)(b) of the Employment Relations Act within 28 days of the date of this determination.**

*Compensation*

[19] Mr Goldsmith's evidence with respect to the hurt and humiliation he suffered as a result of his dismissal was remarkable for its paucity. In the particular circumstances of this case, and in light of the range of awards in similar cases, I consider an award of \$1,500 under s.123(1)(c)(i) is the appropriate level of compensation for the loss of dignity and injury to feelings of Mr Goldsmith arising from Nirvana's unjustified actions.

**Nirvana Coaches Limited is ordered to pay Mr Goldsmith \$1,500 without deduction pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000, within 28 days of the date of this determination.**

*Contribution*

[20] The Authority is bound by section 124 of the Act to consider the extent to which the actions of Mr Goldsmith contributed towards the situation that gave rise to his personal grievance, and if those actions so require, to reduce the remedies. I am satisfied Mr Goldsmith has not contributed to the actions giving rise to his personal grievance. It follows that remedies awarded to Mr Goldsmith will not be reduced.

**Costs**

[21] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Mr Goldsmith may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell  
Member of Employment Relations Authority