

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the

*Employment Standards Act*

-by-

Dial Direct Paging Ltd.

(“Dial Direct”)

-of a Determination issued by-

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 96/115

**DATE OF HEARING:** April 22nd, 1996

**DATE OF DECISION:** April 30th, 1996

## DECISION

### APPEARANCES

Jaye Rebinsky                      for Dial Direct Paging Ltd.

Deborah Leigh Bivens        on her own behalf

### OVERVIEW

This is an appeal brought by Dial Direct Paging Ltd. (“Dial Direct”) pursuant to section 112 of the Employment Standards Act (the “Act”) from Determination No. CDET 000999 issued by the Director of Employment Standards (the “Director”) on February 1st, 1996. The Director determined that Dial Direct owed Deborah Leigh Bivens (“Bivens”) the sum of \$744.00 representing unpaid wages earned by Bivens during two training sessions in late September 1995 and compensation under section 8 of the Act for a false representation.

Dial Direct, while acknowledging that Bivens is entitled to compensation for the two training periods, nonetheless maintains that her compensation should be based on an hourly rate of \$7.20 rather than the \$8.50 rate accepted by the Director. Further, Dial Direct says that it should not be obliged to pay anything to Bivens under section 8 of the Act as there was no misrepresentation and because Bivens refused to work the specific shifts that were made available to her. Bivens, for her part, simply seeks to uphold the Director’s Determination.

The appeal was heard at the Employment Standard Tribunal’s Vancouver office on Monday, April 22nd, 1996. At the appeal, I heard sworn testimony from Jaye Rebinsky, on behalf of Dial Direct, and from Bivens and her husband, John Bivens.

## FACTS

In late September 1995 Bivens was employed, but only on a part-time basis, and was looking for full-time work. Bivens had fixed in her mind that she would not be prepared to work for less than about \$14 per hour, given her prior experience and her qualifications. On September 20th, 1995, Bivens responded to an advertisement placed in the *Vancouver Province* newspaper by Dial Direct. In the mid-afternoon of that same day, Bivens met with Jaye Rebinsky, a supervisor with Dial Direct, at Dial Direct's offices on East Hastings Street in Vancouver.

During the initial job interview, which lasted about fifteen to twenty minutes, there was a discussion both as to the nature of the work and about Bivens' salary expectations. Rebinsky testified that Bivens seemed to be a most suitable candidate for the job (telephone answering service operator) and that Bivens indicated that she had specific salary and shift expectations in mind. According to Rebinsky, Bivens wanted \$8.50 per hour during her training and \$14.25 thereafter and only wanted to work an afternoon shift (10 AM to 6 PM or 11 AM to 7 PM). Bivens testified that she asked for \$8.50 per hour for training and \$14.00 per hour thereafter. Bivens testified that Rebinsky said that Dial Direct usually engaged employees at a starting wage of \$7.20 per hour but that Bivens made it clear that she was not prepared to accept that figure. According to Bivens, the interview concluded with Rebinsky expressing a real interest in hiring Bivens and that Bivens could start at \$8.50 per hour. According to Rebinsky, the interview concluded with Rebinsky saying that she would try to get approval to hire Bivens at \$8.50 per hour during her training and at \$14.25 thereafter.

At this point, I might parenthetically add that there is no documentation before me to corroborate either party's version as to the terms of the employment contract. Bivens did not complete an application form nor was any formal written offer of employment ever given to Bivens by Dial Direct.

According to Bivens, she spoke with Rebinsky by telephone on September 21st, 1995 and again on September 25th, 1995 (Bivens relied on a diary notation to refresh her memory as to the dates). During the latter conversation, Bivens says that she was offered a job at a starting rate of \$8.50 per hour and that her hourly rate would be increased to \$14.00 after three months; her regular employment was to commence on October 10th, 1995 and training was to commence September 26th, 1996. Sometime later on September 25th, Bivens gave notice of termination to her former employer (see Exhibit 1).

Bivens attended two training sessions, each lasting four hours, on September 26th and 28th, 1995. Thereafter, the employment relationship broke down and Bivens never did commence regular full-time employment with Dial Direct. According to Rebinsky, Bivens did not successfully complete her training, there was a problem with the shift schedule that Bivens wanted and, most critically, the principal of Dial Direct, a Ms. Els-Britt Lindholm, would not approve the \$14.00 per hour rate after three months. According to Bivens, there were several “false starts” in terms of scheduling her first day of regular employment culminating in a telephone conversation between her and Rebinsky on Sunday, October 15th, 1995 in which Rebinsky stated that Dial Direct would not pay anything more than \$8.50 per hour even after the first three months of employment. This was unacceptable to Bivens and led to the filing of a complaint with the Employment Standards Branch.

### **ISSUES TO BE DECIDED**

1. Was there an employment contract between the parties?
2. If so, what were the terms of that agreement?
3. Did Dial Direct make a false representation to Bivens under section 8 of the Act?

### **ANALYSIS**

Dial Direct is the appellant and, as such, bears the burden of proof to show that the Determination was in error. In my view, Dial Direct has failed to discharge its burden.

I am satisfied that an employment agreement was reached between Dial Direct and Bivens. I might also note that section 1 of the Act defines an “employee” as someone who, *inter alia*, is “being trained by an employer for the employer’s business”.

Bivens was clear as to her wage and work schedule expectations. Rebinsky testified as to those same expectations. In my view, given that there was no misunderstanding as to Bivens’ wage and schedule expectations, it falls to Dial Direct to show that it clearly communicated some other terms and conditions of employment to Bivens prior to her commencing her employment (i.e., prior to the

commencement of her training). Rebinsky's testimony was that she had not been specifically told by Ms. Lindholm that Dial Direct would not agree to Bivens' wage expectations when Bivens commenced training. Indeed, according to Rebinsky, the first discussion with Bivens about a "problem" with the higher wage rate was during a telephone conversation which occurred after Bivens had completed two training sessions.

Bivens commenced training on September 25th with the understanding that her wage and work schedule expectations had been incorporated into an employment contract. Dial Direct produced no documentary evidence before me to suggest that Bivens' employment agreement was anything other than as suggested by Bivens. Indeed, while given the opportunity to do so, Dial Direct never cross-examined Bivens and, for the most part, conceded that Bivens' recollection of the events in question was entirely accurate.

Bivens commenced work, as a trainee, on September 25th, 1995 with the understanding that that she was to be paid at an hourly rate of \$8.50 during her training and for the first three months of her regular full-time employment. Insofar as Rebinsky's understanding of the terms of Bivens' engagement is concerned, Rebinsky acknowledged during the hearing that she "didn't speak properly" and was "just learning to be a supervisor" when she first met Bivens. I take this to mean that Rebinsky may have caused Bivens to believe that Dial Direct was prepared to meet Bivens' wage and work schedule demands.

In my view, Dial Direct made an offer of employment to Bivens and this offer was accepted. The employment contract called for an hourly rate of \$8.50 per hour for the first three months and \$14.00 thereafter and for Bivens to work an "afternoon shift". I am also satisfied that Dial Direct breached its contractual obligations to Bivens. As Dial Direct was not prepared to honour this agreement (and on the evidence of Rebinsky was, apparently, never planning to honour the negotiated agreement), I cannot say that the Director erred in finding that Dial Direct breached section 8 of the Act. In particular, there is evidence before me that Dial Direct falsely represented the wages and the conditions of employment it was prepared to offer Bivens [subsections 8(c) and(d)].

During the hearing it was conceded by Dial Direct that it was obliged to pay Bivens for eight hours of training; the only issue concerned the hourly rate payable. I am satisfied that Bivens' eight training hours should be compensated at the contractually agreed rate of \$8.50 per hour. As for the matter of compensation under section 8 of the Act, section 79(4) permits the Director to order

reinstatement and/or monetary compensation. In my view, the monetary award in this case, eighty hours at \$8.50 per hour, is if anything, a conservative measure of the actual loss sustained by Bivens.

**ORDER**

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 000999 be confirmed in the amount of \$744.00.

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**Kenneth Wm. Thornicroft, *Adjudicator***  
**Employment Standards Tribunal**