IN THE MATTER OF an appeal of
a decision of the Director of Human Rights
pursuant to section 45 of the *Human Rights Act,*
S.N.W.T. 2002, c. 18 as amended

AND IN THE MATTER OF a complaint filed by Rhonda Merko
against Tundra Transfer Ltd.

REASONS FOR DECISION

INTRODUCTION

This is an appeal by Rhonda Merko (the "Appellant") of a decision of the Director of Human Rights (the "Director") made on July 17, 2006, wherein a complaint against Tundra Transfer Ltd. (the "Respondent") under sections 5 and 7 of the *Human Rights Act* (the "Act") was dismissed.

Neither the Appellant or Respondent are represented by counsel in these proceedings. The Director has filed the record in this matter, but decided not to be further involved in the appeal proceedings.

THE RECORD

A list of the documents and writings reviewed by the adjudicator is contained in Appendix "A" to these Reasons for Decision. During a conference call with the Appellant and Respondent that took place on April 3, 2007, the parties agreed that I should have all materials that were in front of the Director when she made her decision. Further, the parties agreed that the appeal could be dealt with on the basis of these materials, and without the need for an oral hearing.

THE LEGISLATIVE SCHEME

The Act is intended to deter and eradicate unlawful discrimination in the workplace; in the provision of goods and services; and in the provision of accommodations.

The Act establishes the Human Rights Commission, which has the role of promoting human rights throughout the Northwest Territories; developing educational materials on the issue of human rights; developing human rights policies; and creating the office of the Director of Human Rights.

When a complaint is filed, the Director must attempt to settle the matter (s. 33). If the

complaint is not settled, then the Director has the authority to direct an investigation of the complaint (s. 35). An investigator who is appointed by the Director has broad powers of investigation and, on completion of the investigation, provides the Director with a written report outlining his or her findings and recommendations. The Director may then use the investigator's report to decide whether to dismiss the complaint or refer it to the Adjudication Panel [s.44(1) and s. 46(1)].

Section 44(1) of the Act sets out the circumstances in which a complaint may be dismissed. It states:

> "44.(1) The Director may, at any time before a complaint is referred for an adjudication under section 46, dismiss all or part of the complaint if the Director is satisfied that
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> (a) this Act provides no jurisdiction to deal with the complaint or that of the complaint;
> (b) the acts or omissions alleged in the complaint or that part of the complaint are not the kinds of acts or omissions to which the Act applies;
> (c) the complaint or that part of the complaint is trivial, frivolous, vexatious or made in bad faith;
> (d) the substance of the complaint or that part of the complaint has been appropriately dealt with in an other proceeding; or,
> (e) the complaint or that part of the complaint alleges a contravention of this Act that occurred more than two years before the complaint is required to be filed ..."

The decision of the Director to dismiss a complaint can be appealed to the Adjudication Panel (s.45). An adjudicator will then be assigned to hear the appeal [s.51(b)]. The adjudicator who hears an appeal may affirm, reverse or modify the dismissal of the complaint, and has discretion to give "any direction that he or she considers necessary" (s. 62(5).

BACKGROUND

<u>Summary of the Complaint</u>

In her complaint, the Appellant states that she was discriminated against by her employer, the Respondent company, on the basis of family status and contrary to sections 5 and 7 of the Act.

The Appellant states that she was employed by the Respondent company from June 2, 2003 to September 1, 2005. In her complaint, the Appellant outlines her need for time off from work for a variety of reasons, including:

- massages for lower back problems
- to deal with personal issues, including health issues
- house problems

*	family deaths
*	accompanying her husband to medical appointments in Edmonton, Alberta

On September 1, 2005, the Appellant was dismissed from work while attending in Edmonton with her husband for his medical appointments. In her complaint, she quotes from a fax received by Peter and Annette Austin (the "Austins"), who are the owners of the Respondent company. The fax stated in part:

> "... your frequent illnesses and absences from work have left us with no choice but to find someone who will consistently be at work with us. We recognize you have helped us come a long way forward over the past 2 years and we are most grateful for you insights, your talents, your people skills and you will not be forgotten ..."

In the end, the Appellant felt that her dismissal for missing work to attend medical appointments with her husband was unacceptable, and that she was treated unfairly.

The Respondent's Response to the Complaint

The Austins responded to the Appellant's complaint by letter dated November 13, 2005.

In the response, the Austins outline numerous times when the Appellant was absent from work. They specifically deny that the Appellant was dismissed due to her husband's illness, but rather, indicate that the dismissal was the culmination of the Appellant's frequent absences from work.

The Investigator's Report

Duncan McNeill was retained by the Director to investigate this matter, and completed an investigation report dated May 30, 2006.

The investigator interviewed the Appellant, the Austins, and various employees of the Respondent company. The investigator also reviewed the time cards of the Appellant.

A review of the interviews and the data collected appears to show that the Appellant missed a significant amount of work over the course of her employment. This seemed to have had an effect on some other employees.

The investigator recommended to the Director that the complaint be dismissed, as he did not find that the evidence supported that the Appellant's family status was a factor in the termination of her employment. In part, he stated:

> "Was the Complainant's family status a factor in the termination of her employment? The evidence does not seem to support this position. In *Health Sciences Association of British Columbia* v. *Campbell River and North Island Transition Society* (2004), 50 D.H.R.R.

> D/140, 2004 BCCA 260 the British Columbia Court of Appeal looked to define what criteria would need to be met to establish a case of discrimination based on family status. In its decision the Court of Appeal wrote that
>
> > a prima facie case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in serious interference with a substantial parental or other family duty or obligation of the employee. I think that in the vast majority of situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a prima facie case.
>
> The evidence does not support that the respondent changed "a term or condition of employment." Leaving aside the element of change, in my opinion the evidence does not support that the Complainant had a substantial "family duty or obligation" to care for her spouse. ... In order for discrimination on the basis of family status to take place the Complainant would have to show that the Respondent denied the Complainant the opportunity to do something that logically should be done by the Complainant or something that only the Complainant could reasonably do. In this instance the Complainant was not compelled to accompany her spouse. There was no suggestion or request made by the physician. ..."

The investigator further stated:

> "At the start of the last absence the Respondents were, or appeared to be, supportive of the Complainant. They considered, however, that the Complainant did not make sufficient efforts to return to work as soon as possible. It was only when the Complainant did not show the effort the Respondents felt was appropriate to return to work as soon as possible that they terminated the Complainant's employment."

Appellant's Response to the Investigation Report

The Appellant responded to the investigation report by letter dated June 3, 2006. In her response, the Appellant questions the investigators findings in terms of the amount of time she was absent from work, and she again provides her perspective on the reasons for her absences from work.

Respondent's Response to the Investigation Report

The Respondent chose not to provide a written response to the Investigation Report.

The Director's Decision

By letter dated July 17, 2006, the Director dismissed the Appellant's complaint. In part, the Director stated:

> "The information on file indicates that the Complainant was frequently absent from work and frequently did not work her full scheduled daily hours for a variety of reasons., including vacations, scheduled appointments such as medical appointments for herself and her husband, massage appointments, and hair appointments. the Complainant

maintains that all of her absences were approved prior to her taking them.

The Complainant relates her absences to family status because her last absence was to support her husband and accompany him to Edmonton for medical appointment - including an appointment for a specialist that has been booked some time prior. However, there is no indication on file that there was compelling medical reasons to accompany her husband.

In her response to the investigation report, the Complainant points out many workplace issues that she feels relate to the complaint. She indicates that the Respondent never spoke to her about her absences. She either provides explanations for her absences, or disputes that the absences listed in the investigation report were valid. She states that she was considered a good employee, and that the Respondent wanted to get rid of her because she made too much money and they wanted to increase their profit margins. The Complainant also disputes the witnesses' statements and disputes that she took long coffee breaks. However, the Act does not cover issues of progressive discipline and other labour practices that are non-discriminatory.

Having reviewed the information on file, I have determined that the Complainant's allegations are not the kinds of act or omissions to which the Act applies. this matter is therefore dismissed further to Section 44(1)(b) of the Act."

The Appeal

The Appellant filed a Notice of Appeal to the Adjudication Panel dated July 18, 2006.

The Notice of Appeal essentially reiterates the points raised in the Appellant's initial complaint.

The Respondent's Response to the Appeal

The Austins chose not to provide a written response to the appeal.

ANALYSIS

The Standard of Review

In the case of *Aurora College* v. *Niziol*, 2007 NWTSC, Justice Schuler of the Supreme Court of the Northwest Territories considered the standard of review to be applied by an adjudicator in reviewing the Director's decision to dismiss a complaint. Justice Schuler found that an appeal under section 45 of the Act can be likened to an "appeal by way of rehearing". Justice Schuler stated:

"The purpose of the provision in question is to screen complaints. This is not an adjudicative function, since the very issue is whether the complaint merits an adjudicative hearing. It is an administrative function with a low threshold of assessment of merit. The

> adjudicator is faced with the same questions as the Director: is there a reasonable basis in the evidence for sending the complaint to a hearing? For the reasons explained above, the adjudicator's role on an appeal should not be greatly restricted: at the same time, it should not duplicate the role of the Director and calls for some deference.
>
> The nature of the question, whether there is a reasonable basis in the evidence for sending the complaint to a hearing, is primarily fact-driven. Although that would normally require deference to the decision-maker, since the adjudicator can also hear evidence and submissions on the question, this is not decisive.
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> After reviewing the factors, I conclude that although some degree of deference is due by the adjudicator to the Director, the adjudicator also has to exercise his own judgment; the standard of review is therefore reasonableness."

Complaints are not held to a high standard of proving that discrimination occurred. No corroborating evidence is required, but any assertions must be assessed taking into consideration the facts and circumstances under review. In cases where the versions of events put forward by the Complainant and Respondent are diametrically opposed, the Director should "consider whether, if the Complainant's version is accepted as true, it could reasonably be considered as evidence of the discrimination or harassment alleged and warrant a hearing" (*Niziol* at para. 56).

Applying the Standard of Review

I have reviewed the record in this matter. Based on this review, I am of the view that the Director's decision not to send this matter to a hearing was a reasonable one in the circumstances:

* The investigator's report, which was received and reviewed by the Director, certainly suggests that the Appellant missed a significant amount of work for a variety of reasons. The evidence suggests that some of these absences may have been with the approval of the Respondents. However, the evidence also suggests a growing frustration on the part of the Austins in regard to the Complainant's absenteeism, and the Act does not prohibit an employer from dealing with absenteeism in the workplace.

* In regard to the absences for her husband's medical appointments in Edmonton, there is no evidence that there was a substantial family duty or obligation on the part of the Appellant to care for her husband, nor was there any evidence that a physician required the Appellant to travel with her husband. Rather, the Appellant simply decided that she wanted to be with him. While this is understandable, there is nothing in the Act that prevents an employer from dealing with what it saw as an unapproved absence from work.

* The evidence suggests that the Respondents terminated the Appellant's employment while the Appellant was on leave to accompany her husband to Edmonton because they did not see her as returning to work on a timely basis. Essentially, this was the "last straw" for the Austins.

I am not able to find, after a somewhat probative evaluation of the evidence considered by the Director, that the steps taken by the Respondents resulted from or were related in some way to the family status of the Appellant. I am not able to say that was a reasonable basis in the evidence for sending the complaint to a hearing.

DISPOSITION

For reasons I have already stated, I affirm the Director's dismissal of the Appellant's complaint.

Dated this _______ day of ________, 2007.

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Shannon R. W. Gullberg
Human Rights Adjudication Panel Member

APPENDIX A - The Record

1. Appellant’s complaint dated October 17, 2005.

2. Response of the Respondent dated November 13, 2005.

3. Investigation Report dated May 30, 2006.

4. Appellant’s response to the investigation report dated June 3, 2006.

5. Deputy Director’s Memo to File, dated June 27, 2006, confirming that the Respondent would not be responding to the investigation report.

6. Deputy Director’s Memo to File confirming that the Respondent would not be responding to the Appellant’s June 3, 2006, submission.

7. Director’s decision letter dated July 17, 2006.

8. Appellant’s Notice of Appeal dated July 18, 2007.