

**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**

**REASONS FOR DECISION**

This is an appeal by Tricia Palchuk of a decision of the Director of Human Rights (the “Director”) made on November 14<sup>th</sup>, 2006, whereby complaints against De Beers Canada Inc. and De Beers Group, Corporate (“De Beers”) under sections 7 and 14 of the *Act* were dismissed (the “Decision”). Ms. Palchuk is unrepresented by legal counsel in these proceedings.

In short: Ms. Palchuk says that she is a “white woman”, i.e. of non-aboriginal descent, and that her employer discriminated against her on the basis of “race, colour [or] ancestry” because she was treated differently than aboriginal co-workers. Specifically she says that an aboriginal co-worker was transferred within De Beers in order to alleviate a relationship problem with another aboriginal co-worker whereas her employment was made unbearable and ultimately terminated by the employer to alleviate a similar problem with the other co-worker.

**The Record**

The adjudicator reviewed the “Record” of the letters, documents and reports considered by the Director in making her decision. That Record results from an agreement reached among the Parties at a pre-hearing conference which took place on February 21<sup>st</sup>, 2007. The Parties also agreed to proceed with this appeal by way of a documentary review supplemented by written submissions.

**The Applicable Legislation**

The NWT *Human Rights Act* (the “*Act*”) is intended to eradicate unlawful discrimination and other unwelcome conduct that is perpetrated in the workplace, in the provision of goods and services and in the provision of accommodations. These objectives are accomplished through the promotion of respect for and observance of human rights in the Northwest Territories<sup>1</sup> by a Commission whose role is to develop and promote public information, educational materials and human rights policies and by the creation of the Office of the Director of Human Rights<sup>2</sup>. The Director and her officials provide support to the Commission and, importantly in the context of this appeal, administer the complaint provisions of the *Act*.

Once a complaint of discrimination has been filed, the Director must attempt to settle it: s. 33(1). Failing settlement of a complaint, the Director has the authority to direct the investigation of a complaint under section 35 of the *Act*. The investigator has broad

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<sup>1</sup> *Human Rights Act* S.N.W.T. 2002, c. 18, as amended, preamble, paras 3 & 4.

<sup>2</sup> *Ibid*, sections 16 and 23, respectively.

powers of investigation and, on completion, must give the Director a written report: s. 41(1). The parties to the complaint are entitled to a copy of the report: s. 41(2). The Director may then use the report to decide whether to dismiss the complaint or, in the alternative, refer it for a hearing before an Adjudicator: s. 44(1) and s. 46(1).

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

*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*

- (a) this Act provides no jurisdiction to deal with the complaint or that part 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 this 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 another 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...*

Section 44(2) requires the Director to provide written notice to the parties of the reasons for the dismissal of a complaint. The decision of the Director to dismiss a complaint is not final. Section 45 allows a complainant to file a notice of appeal of the decision. An adjudicator will then hear the appeal (s. 51(b)). The parties to a s. 45 appeal include the Director and the parties to the original complaint.

The adjudicator who hears an appeal may affirm, reverse or modify a dismissal and has the discretion to give “*any direction that he or she considers necessary*”: s. 62(5). However a decision of an adjudicator on appeal is not “final”. A party who is dissatisfied with the decision of the adjudicator may file a further appeal with the Clerk of the Supreme Court, in Yellowknife. That appeal will then be heard by a Judge of that Court, pursuant to sections 66(1) and (2) of the *Act*.

### **Circumstances Leading to the Complaint**

The information and evidence contained in the Record is summarized below.

De Beers owns and operates a diamond mine in the Northwest Territories. The mine is at least in part administered out of offices located in Yellowknife. Ms. Palchuk was employed in those offices, specifically in the “Exploration Division”. Her employment commenced on August 1<sup>st</sup>, 2003. Shortly after her arrival at De Beers, her relationship

with an aboriginal co-worker, Eva Diveky, became very difficult. Indeed Ms. Palchuk describes herself as a victim of “co-worker bullying” perpetrated by Ms. Diveky.

Ms. Palchuk was hired to replace another aboriginal employee, Shawna Unka, who – on Ms. Palchuk’s first day with De Beers - was transferred out of the Exploration Division into De Beers “Mining Division”. Prior to Ms. Unka’s transfer (and for a short time after) she too had “problems” with Ms. Diveky, also.

Ms. Palchuk said she was bullied by Ms. Diveky repeatedly during the course of her employment. She said that she reported the bullying to her supervisor (Mr. McKinlay) during her first month on the job. Some “minor conflicts” were addressed by the supervisor.

Mr. McKinlay said that he began working with De Beers human resources people to manage the situation by November of 2003. He says he “facilitated” a meeting between Ms. Palchuk and Ms. Diveky and sent internal letters to them “insisting” that they improve their behaviour toward one another. Steps were taken to reduce regular office contact between them. He told Ms. Palchuk to avoid contact with Ms. Diveky and to keep a record of Ms. Diveky’s behaviour. Ms. Palchuk says that she found the steps to be “effective” for awhile but further relationship problems ensued and Mr. McKinlay decided to give her and Ms. Diveky the opportunity to use “an outside mediator” to resolve their relationship problems. Ms. Palchuk says that she would have been a willing participant but Ms. Diveky refused to participate in mediation.

In September 2004, following the “keying” of Ms. Palchuk’s automobile while at work, Ms. Palchuk says that she complained to Peter Holmes (who had replaced Mr. McKinlay as her supervisor) that Ms. Diveky had become increasingly “hostile” and that she actually feared for her life. According to Ms. Palchuk, she received “no response” from Mr. Holmes. She says her fellow employees “became distant and no longer supported her” in relation to Ms. Diveky. She says that, in addition, in November, 2004, she had to endure abusive language and aggressive conduct from another De Beers employee, namely a geologist. Ms. Palchuk interpreted that conduct as an attempt by senior management to “provoke” her.

According to Ms. Palchuk, in January 2005 Mr. Holmes wrote to her threatening disciplinary action if the situation with Ms. Diveky did not improve. The Appellant says that she responded by asking for assistance from DeBeers human resources staff but did not receive a response until after she took it upon herself to contact the human resources manager in the Mining Division.

The Appellant also alleges that Mr. Holmes stated to her that Ms. Diveky’s conduct “was being tolerated” because she was of aboriginal heritage. He is also alleged to have told Ms. Palchuk that a De Beers human resources employee (Kelly Arychuk) made comments suggesting that she (the Complainant) was “just the wrong color” and that Ms. Unka’s problems with Ms. Diveky were resolved to avoid creating a bad impression with “Indian Affairs”.

The impression left with the Complainant was that De Beers protected Ms. Diveky and that De Beers would not treat her complaints about Diveky in the same way as they might if she was an aboriginal person (like Ms. Unka).

Mr. McKinlay told the Investigator, however, that while there was some conflict between Ms. Diveky and Ms. Unka, they were task related and were resolved through discussions with him. He said that Ms. Unka transferred to Mining Division because that division had a position available that was more suitable to her work experience.

When Ms. Unka was interviewed by the Investigator, she said that she asked her supervisor (Mr. McKinlay) if she could work in the Mining Division and he agreed. She says she was motivated to do so to avoid the likelihood that the Exploration Division would eventually shut down and she would be out of work. She also wanted to avoid dealing with Ms. Diveky. She described Ms. Diveky's conduct as "harassment" but she says she never filed a formal complaint with De Beers. She did not feel that her race, colour or ancestry had anything to do with the harassment nor with how her employer dealt with it.

Ms. Arychuk was interviewed by the Investigator. She said she had several meetings with Ms. Palchuk and Ms. Diveky in an effort to "work through" their problems. She says she "worked quite feverishly" to mediate their differences but both employees felt that mediation "would be a waste of their time and no help". She says that she spoke to the Exploration Division Human Resources person and to Mr. Holmes about the situation. She says she also provided support to Ms. Palchuk after her car was "keyed" and a complaint was made to the RCMP (alleging Ms. Diveky's involvement). She says that, at times she "corresponded [with Ms. Palchuk] almost daily, by e-mail or telephone". Ms. Arychuk told the Investigator that she had no knowledge of the situation between Ms. Unka and Ms. Diveky nor was she "involved" in Ms. Palchuk's termination.

The Human Resources person working in De Beers' Corporate Division, Christine Sibley, also became involved in the ongoing personnel problems in Exploration Division. Ms. Sibley provided advice to Mr. McKinley. She also dealt with a harassment complaint against Ms. Palchuk filed by Ms. Diveky, eventually finding that it was unsubstantiated. Ms. Sibley handed over the matter to Ms. Arychuk in June of 2004 however she did have some knowledge of Ms. Palchuk's termination. She was aware that on November 17<sup>th</sup>, 2004, a letter was sent to all Exploration Division employees advising that the future of the Exploration Division was under review. She said that all of the employee's positions were reviewed to determine what, if any positions, could be transferred to the Mining Division. She said that "no compatible positions" were found for Ms. Palchuk or Ms. Diveky resulting in their terminations. Ms. Sibley said that the reason that Ms. Palchuk and Ms. Diveky's Records of Employment characterized their terminations as "dismissed" is that there was "no possibility" of rehiring.

Jerilynn Lamb, the senior manager of human resources at De Beers, also had some, if extremely limited, knowledge of the conflict between Ms. Diveky and Ms. Palchuk.

Catharine Kalafitis simply said that, in her view, “De Beers handled the conflict [between Ms. Palchuk and Ms. Diveky] in a thorough and professional manner.”

Ms. Palchuk says that none of the efforts of Mr. Holmes or De Beers Human Resources stopped the “harassment” and “bullying” she endured at work. According to Ms. Palchuk, Ms. Diveky continued to harass her verbally around the office and her complaints to the human resources person (Arychuk) went unanswered.

On March 11<sup>th</sup>, 2005, Ms. Palchuk’s employment was terminated. She was offered two weeks pay in lieu of notice. The Record of Employment provided by DeBeers described her termination as a “dismissal”. Ms. Palchuk says that had she been terminated due to a “shortage of work” she would have been entitled to more than two weeks pay. She says that she remains unpaid for overtime that she worked and expenses that she incurred during the course of her employment with De Beers. Ms. Palchuk refused to accept a further two weeks pay as consideration for releasing De Beers from any claims she may have against it.

### The Director’s Decision

The Director found – after reviewing the investigator’s report - that there was “no support for the Complainant’s statement that Ms. Unka was subject to preferential treatment because of her race, colour and ancestry...”. In the Director’s view, the evidence shows that De Beers did make an effort to address the relationship problems between Ms. Diveky and the Complainant. Further, Ms. Unka’s transfer had less to do with her aboriginality (and difficulties with Ms. Diveky) than the opportunity to have a more suitable, longer term job. As far as the alleged comments of the Appellant’s supervisor, Mr. Holmes, the Director says: “The one witness that was the basis for the Complainant’s allegation [Mr. Holmes]...denies making any of the statements attributed to him.” In the Director’s view, there was no motivation for Mr. Holmes to fabricate his response to the allegations since he no longer works at De Beers.

The Director also found that Ms. Palchuk’s complaint that she was harassed and had her employment terminated by De Beers because of her determination to end Ms. Diveky’s alleged bullying, to be lacking the grounds necessary for such a complaint to succeed, i.e. under section 5 of the *Act*.

### Grounds of Appeal

Ms. Palchuk’s “Reasons for Appeal” lists the following grounds:

- “1. There was sufficient evidence before the investigator and Director to warrant referring the matter to a hearing and as such credibility of witnesses should have been assessed by an adjudicator in a hearing.
2. The Director erred in finding that there was no jurisdiction to deal with the complaint:

- a. no weight was given to the fact that the harasser and the other employee who had been harassed were both of aboriginal origin;
  - b. no weight was given to the evidence of Todd McKinlay who stated that De Beers promotes the hiring of aboriginal employees;
3. The investigation was incomplete and/or flawed in that:
- a. key documents within the possession of DeBeers Canada Inc. were not reviewed;
  - b. key witnesses were not interviewed;
  - c. undue weight was given to information provided by witnesses who responded in writing, or who had limited knowledge of the situation;
4. Such further and other grounds as may be disclosed before or at the hearing of this appeal...”

On February 28<sup>th</sup>, 2007, following a pre-hearing conference, Ms. Palchuk sent a four page fax to the adjudicator’s offices in “support” of her appeal. In that correspondence, Ms. Palchuk says that the investigator chose not to interview other important witnesses. She raises questions relating to the “weight” of the evidence considered by the Director, in particular Mr. Holmes’ evidence. It is clear from the fax that Ms. Palchuk is of the view that there were “investigative errors” and that the investigation was not thorough enough. The suggestion is also made that the “affirmative action policy” of De Beers should have been reviewed by the investigator.

#### The Reply of De Beers Canada Inc.

Legal counsel for the Respondent submits first of all that the role of an adjudicator on an appeal is similar to that of the Chief Commissioner under the Alberta *Human Rights, Citizenship and Multiculturalism Act*. Accordingly, that role is “simply ...to determine whether there is a reasonable basis in the evidence to proceed to a hearing”.

In response to the submissions made by the Appellant, the Respondent says that mere disagreement with the investigative process is not sufficient to succeed on appeal. The Respondent says that “due process” was followed in this case because the Respondent was heard by the investigator and had the opportunity to reply to the investigator’s report.

With respect to the investigator’s report, the Respondent says that the investigator correctly chose between versions of events that were obtained from interviewees. The Respondent says that the investigator was entitled to assess the credibility of the interviewees and did so by assessing the “reasonableness of the evidence in light of all of the circumstances and by looking at whether there is anything to corroborate the evidence”.

The Respondent also says that the mere assertions of discriminatory treatment by the Appellant are not sufficient to warrant a hearing; that corroborative evidence or evidence that “put[s] a question in to the Investigator’s mind that ...discrimination occurred” must

be found and there was “no evidence” found by the Investigator in this case. It further states that some of the submissions made by the Appellant were “simply inaccurate” based on (its) review of the Investigator’s Report.

### The Adjudicator’s Role on Appeal

A recent decision of the N.W.T. Supreme Court (Aurora College v. Niziol, 2007 NWTSC 34) considered the standard of review to be applied by an adjudicator in reviewing a Directors’ Decision. After examining the statutory role of adjudicators on appeal under the *Act*, Judge Schuler found that a s. 45 appeal can be likened to an “appeal by way of rehearing”. That role does not limit the adjudicator to a mere review of the Adjudicator’s decision but rather includes making a “judgment on the issues” raised in the Complaint (paras 29, 30).

At para. 34, Mme. Justice Schuler went on to say:

*“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 the Director is: is there a reasonable basis in the evidence for sending the complaint to a hearing?...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.”*(underlining added)

In deciding whether there is a “reasonable basis in the evidence” for a hearing, the low threshold of assessment is very important. Complainants are not held to the high standard of proving that discrimination has occurred. Nor do they have to provide corroborative evidence in order to get past the screening process. However it is not sufficient to merely “assert” that discrimination has taken place. Such assertions must be assessed in light of all of the facts and circumstances under review. If the assertions (and, for that matter, other evidence presented by a Complainant) “*could reasonably be considered as evidence*” supporting the allegations, a hearing may be warranted (Niziol, paras. 55, 56).

In my view, the cases set out in the submissions of the Respondent in this case (*Mis v. Alberta (Human Rights Commisison)* [2001] A.J. No. 1094; *Callan v. Suncor Inc.* [2006] A.J. No. 30) support the Court’s analysis in *Niziol*.

### Applying the Standard of Review

I have reviewed the Record and the submissions of the parties to this appeal. For the reasons set out below, in my view the Director’s decision not to send this matter to hearing is a reasonable one in all of the circumstances.

The allegation that Ms. Unka was treated differently than Ms. Palchuk by DeBeers because Ms. Unka is an aboriginal person overlooks the situation that Ms. Unka was in at the time that she was reassigned and Ms. Unka's own (undisputed) evidence. Apart from the racially suggestive comments alleged to have been made by Mr. Holmes in January 2005, the circumstances surrounding Ms. Unka's transfer do not reasonably suggest that the treatment she received was racially motivated.

In any case, if there were racially suggestive utterances by Mr. Holmes they belie what appears from the evidence contained in the Record to be ongoing – if wholly ineffective - efforts by De Beers to resolve the relationship problems between Ms. Palchuk and Ms. Diveky; a relationship that appears to have been equally difficult for both employees. In other words: in my view it would be unreasonable to draw the conclusion that De Beers favored Ms. Diveky either in the dispute management processes employed by De Beers or in De Beers' termination process.

I agree with the conclusion of the Director that “workplace bullying” that is not related to a prohibited ground is not within the jurisdiction of the Director or an adjudicator. Had there been evidence that (e.g.) Ms. Diveky's alleged bullying was based on the prohibited grounds of “race, color [or] ancestry”, that might have lead to a different line of enquiry by the investigator and, possibly, a different result for the employer. That was neither the situation complained of by Ms. Palchuk nor was there any evidence that Ms. Diveky's conduct was racially motivated.

Ms. Palchuk argues that the investigation and report relied upon by the Director were flawed; that the investigator failed to interview all of the witnesses and failed to obtain corporate policies needed to decide whether or not this matter should go to a hearing.

But Ms. Palchuk does not say how any policies (including the so called “affirmative action policy”) of De Beers were or might have been misapplied in her particular circumstances. The Appellant only offered the vague suggestion that they might support her contention that she was treated differently than Ms. Unka and Ms. Diveky.

The Appellant expresses suspicion that the employer established a “unified front” for the purpose of answering the investigator's questions and (without detail) suggests that “regular staff and ex-employees” [and other managers] should have been “interviewed for their thoughts on what was said and done at the mid management level”. In my view these “systemic” lines of enquiry were speculative and not supported by the balance of the investigation. The investigator made a reasonable choice not to pursue them.

In my view, the investigator in this case made no unreasonable investigative omissions. The process was procedurally fair.

I have no doubt that Ms. Palchuk has experienced a great deal of personal stress and emotional discomfort as a consequence of what appears to have been the inability of De Beers to deal effectively with a serious employee-employee dispute. I am not able to find, however, after a “somewhat probing examination” of the evidence considered by the

