

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Wilson v. UBS Securities Canada Inc. et al.***,
2005 BCSC 563

Date: 20050415
Docket: S041698
Registry: Vancouver

Between:

Marcia Wilson

Plaintiff

And

**UBS Securities Canada Inc.
BW Employee Holdings Limited**

Defendants

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Counsel for the Plaintiff:

Christopher R. Forguson

Counsel for the Defendants:

Dan J. Shields

Date and Place of Trial/Hearing:

March 7-10, 2005
Vancouver, B.C.

Introduction

[1] Ms. Marcia Wilson sues for damages claiming that her employment contract with UBS Securities Canada Inc. was wrongfully terminated. UBS Securities says Ms. Wilson resigned when she refused to relocate to San Francisco, California, upon closure of the company's Vancouver office.

[2] Ms. Wilson also claims that she was wrongly required to sell shares of UBS Bunting Limited as a consequence of a maternity leave that exceeded three months in duration. She seeks to recover the distributions which she says she would have received had she not been required to sell the shares.

[3] The action raises the following issues:

1. Was Ms. Wilson wrongly deprived of her shares of UBS Bunting when her maternity leave exceeded three months?
2. Did Ms. Wilson resign or was she wrongfully dismissed from her employment with UBS Securities?
3. If Ms. Wilson was wrongfully dismissed:
 - (a) on what date did the dismissal occur;
 - (b) what is the reasonable notice period; and
 - (c) what is the appropriate measure of damages having regard for the fact that during employment her compensation was comprised of base salary, a discretionary bonus and a

performance distribution tied to the ownership of shares in UBS Bunting?

4. What is the effect, if any, of the company's maternity policy on the assessment of damages?

Share Claim

[4] In 1989, Ms. Wilson commenced employment with Bunting Warburg Inc. in Vancouver, British Columbia. Through a series of name changes and corporate reorganizations that are not material for present purposes, the employer's name was changed to UBS Securities Canada Inc.

[5] All of the issued shares of UBS Securities are owned by UBS Bunting. One-half of the issued shares of UBS Bunting are owned by UBS Bank (Canada). The other half of the shares are owned directly by employees of UBS Securities or by a company called UBS Employee Holdings Ltd. which, in a variety of circumstances, is obliged to buy shares from employees leaving UBS Securities. Shares of UBS Bunting owned by Employee Holdings are regarded as being owned by UBS Securities employees in proportion to their direct shareholdings in UBS Bunting. The involvement of Employee Holdings is designed to ensure that the desired 50/50 ownership of shares of UBS Bunting by employees and UBS Bank (Canada) will be maintained.

[6] Dividends are not paid or declared on the shares of either UBS Securities or UBS Bunting. Instead, one-half of what might be loosely described as pre-tax

earnings of UBS Securities are paid as a fee to UBS Bank (Canada) and one-half of such earnings are paid to the employees of UBS Securities in proportion to their ownership of shares of UBS Bunting and their notional ownership of UBS Bunting shares through Employee Holdings. The amount of the performance distribution has always been reflected in employment income for income tax purposes.

[7] The number of shares any employee of UBS Securities is entitled to acquire is determined by a management committee comprised of members of the UBS Bunting board of directors with reference to an employee's performance and contribution to the affairs of UBS Securities. Shares are bought and sold at book value which, because of the payment practices described previously, does not change significantly from year to year.

[8] From 1989 through to December 31, 2001, Ms. Wilson was granted rights to acquire, and did acquire, 7,000 shares of UBS Bunting. She was granted the right to acquire, and did acquire, an additional 1,000 shares effective March 6, 2002, so that she then held 8,000 shares of UBS Bunting. By 2002, the payment from UBS Securities called a performance distribution and determined by reference to shares of UBS Bunting owned personally and notionally through Employee Holdings comprised a substantial portion of Ms. Wilson's income.

[9] In November 2001, Ms. Wilson advised Mr. Estey, the UBS Securities managing director and chief executive officer of UBS Securities who was based in Toronto, that she was pregnant. She asked whether UBS Securities had a maternity leave policy and was told it did not. On December 5, 2001, Mr. Estey announced

the creation of a Women's Issues Committee of which he was the chair and to which six female employees were appointed. The committee formulated a maternity leave policy that was announced to employees on May 10, 2002.

[10] The maternity policy provided that an employee who took leave would receive base salary for a maximum of 21 weeks but no performance bonus. In the event maternity leave extended beyond a period of three months, the employee would be obliged to sell all shares of UBS Bunting at the end of the three-month period, but would be entitled to repurchase the same number of shares on the resumption of service provided the leave period did not exceed 12 months. An employee on maternity leave required to sell shares was not entitled to the UBS Securities performance distribution computed by reference to share ownership in UBS Bunting.

[11] Ms. Wilson's maternity leave commenced May 31, 2002, and ended April 16, 2003. As required by the policy, she sold her UBS Bunting shares effective August 31, 2002 and repurchased the shares on April 29, 2003. In 2002 and 2003, Ms. Wilson received the performance distribution for the part of each year during which she owned the shares.

[12] Ms. Wilson says that the share divestiture policy penalized her by reducing income and impairing her right to acquire additional shares. She does not claim that the divestiture requirement constituted a breach of her employment contract nor has she claimed entitlement to a remedy under the *Employment Standards Act*, R.S.B.C. 1996, c. 113, or the *Human Rights Code*, R.S.B.C. 1996, c. 210. She says, however, that the policy is not binding on her because it was not contemplated by

the shareholders' agreement pertaining to ownership of the shares nor reflected in any amendment to it, the policy was unconscionable, and she acceded to it under duress. Ms. Wilson claims recovery of the performance distribution as if she were the owner of UBS Bunting shares in the period from September 1, 2002, through April 29, 2003.

[13] UBS Securities says that nothing in the shareholders' agreement prohibited implementation of the divestiture requirement. Instead, the requirement constituted an amendment to the employment contract which, by her conduct, Ms. Wilson accepted. UBS Securities says there is no foundation to Ms. Wilson's claim that the policy was unconscionable or that her acceptance of it was obtained by duress.

[14] The agreement among the UBS Bunting shareholders contained provisions relating the acquisition and disposition of shares and governance of the company as is customary in such agreements. The agreement contemplated that it should be considered in conjunction with an operating agreement. Section 3.03(4) of the shareholders' agreement provided as follows:

3.03 Limited Executive Committee

- (4) The Limited Executive Committee shall be responsible for (i) recommending to the Board allocations of Class "A" Commons Shares in accordance with this Agreement; (ii) determining the re-allocation of Class "A" Commons Shares in accordance with this Agreement; (iii) fixing the salary, bonus and any other compensation to be paid or provided to each officer and employee of the Corporation in each Financial Year in accordance with Article VIII of the Operating Agreement; (iv) recommending to the Board the declaration and payment of dividends in accordance with the Operating Agreement; (v) recommending to the Board Employee Shareholder distributions to be made in accordance with Article VIII of the Operating

Agreement; (vi) nominating directors of the Board for recommendation to the Shareholders in accordance with Section 3.02(1) hereof; (vii) nominating officers of Limited for recommendation to the Board; and (viii) filling vacancies on the BW Management Committee in accordance with the provisions of this Agreement and the Operating Agreement.

[15] The term "BW Management Committee" was defined by the operating agreement.

[16] Article IV, section 6.01 of Article VI, and section 13.08 of Article XIII are relevant in present circumstances. They provide as follows:

ARTICLE IV
DISPOSITION OF SHARES AND HOLDINGS SHARES

4.01 **Restrictions on Transfers of Shares.** Each Shareholder hereby covenants and agrees that such shareholder will not sell, assign, transfer or enter into any agreement or option to otherwise dispose of any of the Shares of Limited beneficially owned or controlled by such shareholder to any Person except (1) in accordance with the Articles of Incorporation and the terms of the Agreement, or (ii) with the prior written consent of the Board.

4.02 **Restrictions on Transfers of Holdings Shares.** Each Holdings Shareholder hereby covenants and agrees that such shareholder will not sell, assign, transfer or enter into any agreement or option to otherwise dispose of any of the Holdings Shares beneficially owned or controlled by such shareholder to any Person except (i) in accordance with the Holdings Articles of Incorporation and the terms of this Agreement; or (ii) with the prior written consent of the board of directors of Employee Holdings.

...

ARTICLE VI
SALES BY EMPLOYEE SHAREHOLDERS AND HOLDINGS
SHAREHOLDERS

6.01 **Disposition of Shareholdings on Departure**

(1) Subject to Section 6.02 hereof, each of the Employee Shareholders and Holdings Shareholders hereby covenants and agrees that in the event of:

- (a) termination of such shareholder's employment by the Corporation for cause or otherwise;
- (b) resignation or retirement from such shareholder's employment prior to December 31 in the calendar year in which such shareholder attains the age of 60;
- (c) disability through bona fide illness, physical or mental, resulting in such shareholder's inability to render adequate time and attention (which inability shall be determined by the BW Management Committee in its absolute discretion, acting reasonably) to the affairs of the Corporation for a continuous period of three months or more; or
- (d) such shareholder's death,

(collectively, the "Departure Events") such shareholder, or such shareholder's personal representative, as the case may be, (the "Selling Shareholder"), shall, within 5 Business Days of the happening of the event, provide Limited and Employee Holdings with notice in writing of the happening of such event and shall be required to:

- (e) sell all of such shareholder's shareholdings in Limited to Employee Holdings, and Employee Holdings shall purchase such shareholdings, at a price per share equal to the least of:
 - i) the Book Value as on the Valuation Date;
 - ii) the Book Value on the last day of the month in which the Departure Event occurs; and
 - iii) the Book Value on the last day of the month immediately preceding the month in which the Departure Event occurs; and
- (f) sell all of such shareholder's shareholdings in Employee Holdings to Employee Holdings, and Employee Holdings shall purchase, subject to any legislative prohibition against such purchase, such shareholdings for cancellation, at a price per share equal to the lesser of:

- i) the Holdings Book Value on the last day of the month in which the Departure Event occurs; and
- ii) the Holdings Book Value on the last day of the month immediately preceding the month in which the Departure Event occurs.

...

ARTICLE XIII
MISCELLANEOUS

...

13.08 **Amendment.** This Agreement shall not be amended or superceded except by written agreement signed by all the parties.

[17] Certain terms of the operating agreement are relevant in the circumstances.

Section 3.03 provided for the payment of dividends by UBS Securities as follows:

Section 3.03. Dividends. Dividends shall be declared and paid by the Corporation only as and when, and upon such terms, as Limited's Board of Directors direct. Limited may pay dividends in the discretion of Limited's Board of Directors. Limited's Board of Directors shall ensure equitable treatment of all shareholders through the payment of dividends and performance distributions reflective of Shareholders' respective contributions to the Corporation and Limited.

[18] Section 5.04 provided for the appointment of a compensation committee in the following terms:

Section 5.04. BW Compensation Committee. (1) There shall be constituted and maintained in each Financial Year of the Corporation a committee (the "BW Compensation Committee") consisting of the members of the BW Management Committee, and a minimum of one and a maximum of two additional members to be appointed annually by the Corporation's Board of Directors from among its members. A majority of the Committee's members shall constitute a quorum. The BW Compensation Committee shall not constitute a committee of the Corporation's Board of Directors.

(2) The BW Compensation Committee shall be responsible for recommending to the Limited Executive Committee, the salary,

bonus and any other compensation to be paid or provided to each officer and employee of the Corporation in each quarter in each Financial Year.

(3) The BW Compensation Committee shall keep minutes of its meetings, copies of which shall be submitted, as soon as practicable, to each member of the BW Compensation Committee.

[19] Article VIII of the operating agreement provided for the payment of compensation as follows:

ARTICLE VII COMPENSATION

Section 8.01. Salary. The Limited Executive Committee may, based on the recommendations of the BW Compensation Committee, but otherwise in its discretion, from time to time fix a base salary for each officer and employee of the Corporation, in accordance with the aggregate amount of salaries fixed by the applicable Annual Budget and Business Plan.

Section 8.02. Bonus. The Limited Executive Committee may, within the limits established by Limited's Board of Directors and based on the recommendations of the BW Compensation Committee, but otherwise in its discretion, from time to time fix bonuses, to be paid such of the employees of the Corporation and in such proportion as it may determine.

Section 8.03. Performance Distributions. Any performance distribution shall be paid by the Corporation in accordance with a performance distribution policy approved by Limited's Board of Directors.

Section 8.04. Payments The (i) salary of any officer or employee shall be paid in equal monthly instalments not later than the last day of each month; and (ii) bonus of any officer or employee shall be paid in quarterly instalments (or on such other periodic basis as the Limited Executive Committee shall unanimously agree) in each Financial Year, in an amount for each instalment as determined by the Limited Executive Committee (subject to the aggregate provision for bonuses approved by the Corporation's Board of Directors). Where the bonus installments are paid on a quarterly basis, they shall be paid within 60 days of the preparation of the financial statements relating to such quarter.

[20] The phrase "performance distribution" was not defined in either the shareholder or operating agreements. In fact, the policy approved in the manner contemplated by s. 8.03 of the operating agreement was that previously described: payment of one half of pre-tax earnings to UBS Bank (Canada) and payment of one half to UBS Securities employees in proportion to share ownership in UBS Bunting. No dividends were declared or paid by UBS Securities to UBS Bunting. As a result, no dividends were paid or declared on the shares of UBS Bunting.

[21] I find that the combined effect of the shareholders' agreement and the operating agreement was that any UBS Securities employee received three forms of compensation, namely base salary, a bonus in the discretion of management, and a performance bonus varying in response to the financial performance of UBS Securities and the number of shares of UBS Bunting owned by the employee. The difference in the two bonuses is that the discretionary bonus is compensation for short term or annual performance whereas the performance distribution was designed to reward service and contribution over a longer period of time. I find that no employee of UBS Securities received any dividend on a share of UBS Bunting.

[22] Counsel for Ms. Wilson argues that the shareholders' agreement gave the compensation committee discretion to confer the right on UBS Securities employees to acquire shares, but once they had been acquired they could only be retracted or repurchased pursuant to Article VI which did not require an employee to sell shares in the event of maternity leave. Counsel says that Ms. Wilson did not ask to sell her shares. Rather, the requirement that she sell was unilaterally imposed upon her by the defendant.

[23] I concur in Ms. Wilson's claim that nothing in section 6.01 of the shareholders' agreement compelled her to sell shares. Quite clearly pregnancy, childbirth, and the need to nurture a newborn are not disabilities within the meaning of section 6.01(1)(c) of the shareholders' agreement. That said, nothing in the agreement prohibits an employee from agreeing to sell shares and, indeed, sales other than on the mandatory terms contained in the agreement are contemplated by Article IV of the agreement. The overriding requirement is that any such sale be made in accordance with the articles of incorporation of UBS Bunting and the terms of the shareholders' agreement or with the prior written consent of the board. The requirements contained in Article IV are disjunctive. As I construe the agreement, nothing prevented a sale pursuant to the terms of one's employment contract provided the sale was made with the prior written consent of the board. There is no suggestion that prior written consent was lacking nor could there be any claim to that effect given the implementation of the maternity policy.

[24] It follows that in present circumstances, the issue is whether or not Ms. Wilson accepted a modification of her employment agreement whereby she agreed to sell her shares in the event of a maternity leave that exceeded three months in duration.

[25] Ms. Wilson knew that a maternity policy was being developed by UBS Securities. She testified that as she anticipated maternity leave and made her initial inquiries about a leave policy, she thought she should continue to receive her base salary but she did not expect to receive a bonus. She says she thought she should continue to receive the performance distribution because she regarded it as a

dividend. For the reasons I have stated, her belief that the performance distribution constituted a dividend on shares was ill-founded.

[26] Ms. Wilson was aware of the fact that a maternity policy was being developed. She made no representation to the committee nor is there any evidence that she spoke to any member thereof about concerns she might have in relation to it. She offered no objection to any of the terms of the policy when its terms were announced and commenced her leave in accordance with its terms. She sold her shares without raising an objection at the time of sale. She returned to her duties in mid-April 2003 and repurchased her shares on April 29, 2003. She made no claim for compensation associated with share ownership until the commencement of her action for wrongful dismissal.

[27] In all of the circumstances, by continuing in her employment fully aware of the terms of the policy and by taking actions that conformed to its terms, she must be regarded as having accepted the resulting change in her employment contract.

[28] The remaining issue is whether the amendment to the employment contract was ineffective because Ms. Wilson's agreement was obtained under duress. In that regard, counsel for Ms. Wilson refers to the reasons of Lambert J.A. in *Harry v.*

Kreutziger (1978), 95 D.L.R. (3d) 231, p. 241 as follows:

In my opinion, questions as to whether use of power was unconscionable, an advantage was unfair or very unfair, a consideration was grossly inadequate, or bargaining power was grievously impaired, to select words from both statements of principle, the *Morrison* case [*Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 (B.C.C.A.)] and the *Bundy* case [*Lloyd's Bank Ltd v. Bundy*, [1974] 3 All E.R. 757] are really aspects of one single question. That

single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded. To my mind, the framing of the question in that way prevents the real issue from being obscured by an isolated consideration of a number of separate questions; as, for example, a consideration of whether the consideration was grossly inadequate, rather than merely inadequate, separate from the consideration of whether bargaining power was grievously impaired, or merely badly impaired. Such separate consideration of separate questions produced by the application of a synthetic rule tends to obscure rather than aid the process of decision.

The single question of whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded must be answered by an examination of the decided cases and a consideration, from those cases, of the fact patterns that require that the bargain be rescinded and those that do not. In that examination, Canadian cases are more relevant than those from other lands where different standards of commercial morality may apply, and recent cases are more germane than those from earlier times when standards were, in some respects, rougher and, in other respects, more fastidious. In my opinion, it is also appropriate to seek guidance as to community standards of commercial morality from legislation that embodies those standards in law. I have, therefore, particularly considered the facts and decisions in *Morrison v. Coast Finance Ltd.*, *supra*; *Knupp v. Bell et al.* (1996), 58 D.L.R. (2d) 466; affirmed 67 D.L.R. (2d) 256 (Sask. C.A.); *Miller et al. v. Lavoie* (1966), 60 D.L.R. (2d) 495, 63 W.W.R. 359; *Marshall v. Canada Permanent Trust Co.* (1968), 69 D.L.R. (2d) 260; *Gladu v. Edmonton Land Co.* (1914), 19 D.L.R. 688, 8 Alta. L.R. 80, 7 W.W.R. 279; and *Hnatuk v. Chretien* (1960), 31 W.W.R. 130; and I have considered the provisions of the *Trade Practices Act*, 1974 (B.C.), c. 96, and the *Consumer Protection Act*, 1977 (B.C.), c. 6.

[29] There is nothing to indicate that the maternity policy was unduly onerous, unreasonable, or unfair. To the contrary it was generous. In the absence of the policy Ms. Wilson would have been entitled to leave of limited duration without pay as provided in the *Employment Standards Act*. The policy that was developed provided for the continuation of base salary for 21 weeks but termination of the discretionary bonus which Ms. Wilson thought to be appropriate. The performance

distribution was another form of bonus reflecting long term contribution to firm profitability. Providing for the termination of that bonus after three months of leave was not unreasonable. Other alternatives to mandatory disposition might have been adopted. One alternative would have been to revise the performance distribution policy so that shares owned by an employee on leave would be excluded from the pro rata distribution calculations after a period of time rather than requiring the disposition of shares. Such a policy would have had the same effect but would have been less generous as the employee would have been denied the opportunity to derive any return on invested capital when deemed to be out of the pool. The divestiture requirement allowed the employee to enjoy the use of capital in the period during which entitlement to the performance distribution was restricted.

[30] There is no evidence to suggest that Ms. Wilson would have been able to carve out a maternity leave arrangement for her that differed from that available to other employees, some of whom took advantage of it. There is no reason why Ms. Wilson should have expected any right to a continuing share of profits whether through the discretionary bonus or the performance distribution when she was not there to contribute to profitability.

[31] As previously discussed in the context of contractual amendment, there was no expression of reluctance on Ms. Wilson's part to accept the amendments which were developed by a committee, albeit one of which Mr. Estey was the chair, but of which all other members were women employed by UBS Securities. There is no evidence that any of those members of the committee regarded the result as one

that was unfair or unilaterally imposed upon them. There is no evidence that anyone other than Ms. Wilson regarded the policy as being unfair or obtained by duress.

[32] None of the evidence would support a claim that the agreement departed from a commercially acceptable standard so that it should be regarded as having been obtained by duress and rescinded.

[33] Ms. Wilson's claim for compensation lost in the period during which she was on maternity leave and not the owner of UBS Bunting shares is dismissed.

Wrongful Dismissal

[34] The issue in relation to the termination of Ms. Wilson's employment in 2004 when the Vancouver office of UBS Securities closed is whether it was wrongful or resulted from her resignation. Her employment history is the following.

[35] Ms. Wilson was first employed July 31, 1989 at the age of 23 by UBS Securities as an "assistant/trader". The terms of her employment were reflected in a letter dated July 1989, that briefly discussed salary, benefits, vacation and bonus. At the time, UBS Securities had offices in Toronto, Montreal, Calgary and Vancouver. There was no reference to relocation in the letter setting forth the terms of employment or any other corporate document and no discussion at the commencement of employment or subsequently regarding any corporate expectation that Ms. Wilson would move or relocate from one office to another.

[36] Over time, Ms. Wilson's responsibilities increased. In 2002, she held the title of vice-president. In 2004, her title was changed to that of director as part of an

internal reorganization. The change did not reflect any change in employment or status. In 2004, Ms. Wilson was one of three individuals employed in the Vancouver office. In her capacity as an institutional trader she bought and sold Canadian equities for institutional investors carrying on business in British Columbia and the United States. Although more than 70% of the revenue earned by the Vancouver office was derived from clients based in the United States, growth of the business seems not to have been impaired by the location of the Vancouver office. The revenue generated by the office increased more than thirteen-fold in the period from 1991 to 2001.

[37] In September 2003, Mr. Estey advised Ms. Wilson and others that the relocation of the Vancouver office to San Francisco was under consideration. He advised that if immigration, work visa, licensing, and examination issues could be resolved, the Vancouver employees would be expected to move to San Francisco. The relocation was the subject of further discussion in October. Ms. Wilson made inquiries about the manner in which employee benefits would be affected were she to move. She determined that maternity would be afforded fewer benefits than were provided by UBS Securities in Canada. She discussed the possibility of the move with her husband. She concluded that because she, her husband, and their son were Canadian citizens, and because she was concerned about domestic safety issues in the United States, she did want to move to San Francisco. On October 14, 2003, she wrote in response as follows:

As per our conversation, I have decided that I don't want to relocate to San Francisco to work for UBS in the Q1/2004.

[38] Ms. Wilson testified that she discussed relocation with Mr. Estey in mid-October and he advised her that the decision to relocate the office remained dependent upon answers to questions surrounding immigration and licensing issues.

[39] On December 15, 2003, UBS Securities advised all of its employees that a decision had been made to relocate the Vancouver office but no date had been fixed. The communication informed all employees that Ms. Wilson had decided not to relocate.

[40] On January 19, 2004, Ms. Wilson was told by Mr. Paul Sinclair, the chief financial officer, that the Vancouver office would close January 31, 2004, as it did. During the conversation, Mr. Sinclair and Ms. Wilson discussed severance. She testified that Mr. Sinclair asked if she had seen a lawyer and advised that it better be a good lawyer because "to get a penny, [she] would have to sue". Mr. Sinclair testified to having a discussion with Ms. Wilson about the relocation issue. He did not adopt Ms. Wilson's recollection of what was said but acknowledged that he told her a refusal to relocate would be regarded as a resignation and not a termination.

[41] I find as a fact that Ms. Wilson's employment contract contained no term, express or implied, requiring her to relocate to San Francisco upon closure of the Vancouver office. I find that the termination of Ms. Wilson's job in Vancouver upon the closure of the Vancouver office without notice was wrongful and is therefore actionable. My findings are based on the following evidence.

[42] The letter describing the terms of employment in 1989 made no mention of transfer whether domestic or foreign. Mr. Estey did not testify at the trial of this

action but in response to a question asked of him on examination for discovery, he admitted that until 2001 employees would not have expected to be moved from place to place. His response is an admission that as of 2001 there was no contractual requirement that an employee agree to any move to that point in time. He testified on the discovery that the employee's expectation should be different from 2001 forward because, by then, UBS Securities had become part of an international firm and employees had seen others move. Mr. Estey's perception of a difference from 2001 forward does not justify a finding that acceptance of a move to the United States when required by the employer had become a term of Ms. Wilson's employment contract.

[43] The affairs of UBS Securities had always been ultimately controlled by a foreign financial institution. At the commencement of Ms. Wilson's employment in 1989 the controlling force was Bunting Warburg Inc., a company whose head office was in England and Wales but which had offices elsewhere in the world. The Union Bank of Switzerland with head office in that country and business interests elsewhere became involved affairs of UBS Securities in 1998. There is no suggestion of any change in corporate policy at that time. At no time were UBS Securities employees advised of any change in corporate orientation that would make acceptance of transfers a term of employment.

[44] The fact that relocation was something negotiated with employees on a case by case basis is evident from transfers involving other employees. There was evidence that when a particular employee, Mr. Beasley, was transferred from research to sales, he acknowledged he was likely to be transferred at a later date to

Vancouver. Mr. Beasley was transferred to Vancouver. He was one of the Vancouver employees transferred to San Francisco. There was no evidence from Mr. Beasley or anyone on behalf of UBS Securities regarding the terms of his employment contract.

[45] There was evidence of an employee being transferred to London, England. The circumstances of the transfer or discussions and agreements in relation to it were not described in the evidence.

[46] In September 2002, Mr. Estey advised employees that an employee "ha[d] agreed" to return to Canada from another location not identified in the evidence. There was evidence of personnel moving from Montreal to Toronto in March 2003, and limited evidence of a small number of other moves. UBS Securities offered no evidence of the circumstances or discussions surrounding the employment contracts of, or relocation negotiations with, the individuals involved in those transfers.

[47] Ms. Wilson testified that she was aware that personnel had been transferred on various occasions which she understood to be instances of promotion. She was also aware that the closure of the Calgary office had resulted in an employee being moved. She testified that she was not aware of anyone having refused a move, leaving the company's employment, and being paid severance. No evidence was provided by UBS Securities indicating that anyone had refused a move and left the employ of the company without the payment of severance.

[48] In the course of submissions counsel for UBS Securities stated that the increasingly international nature of the company's business, the desire to reduce

operating costs, and the opportunity to increase revenue made the request of Ms. Wilson to relocate to San Francisco reasonable so that a term permitting it to insist on the relocation should be implied. There is no reliable evidence of the reasoning which resulted in the decision to close the office. In any event, corporate motive and need are only part of the relevant picture. The question is whether any term of Ms. Wilson's employment contract required her to relocate to San Francisco.

[49] The law in relation to implied terms in employment contracts was thoroughly canvassed by Wallace J. in *Longman v. Federal Business Development Bank* (1982), 36 B.C.L.R. 115 (S.C.). The learned judge cited with approval the reasoning of the House of Lords in *Trollope & Colls Ltd. v. North West Metro Regional Hospital Board*, [1973] 1 W.L.R. 601 at 609 as follows:

Faced with the conflict of judicial opinion in this case, I prefer the views of Donaldson J. and Cairns L.J. as being more orthodox and in conformity with the basic principle that the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it have been suggested to them: it must have been a term that went without saying, a term *necessary* to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves. (The italics are Lord Pearson's.)

[50] Wallace J. went on to address the issue of repudiation of a contract in the following terms at p. 131:

My research has led me to conclude that the question is not, 'Can the employer unilaterally vary the terms of a contract of employment without being guilty of wrongful dismissal?', but rather is 'Does the employer's direction to the employee amount to a repudiation by the employer of that contract?' This, of necessity, requires one determining what are the express or implied terms of the contract and what is the nature of the alleged breach.

As previously stated, I consider a term should not be implied unless it reflects the intention of the parties - assuming they had considered the question. It should not be imposed upon the parties to achieve - what the court considers - a 'reasonable and just' contract: *Trollope & Colls Ltd. v. North West Metro. Regional Hosp. Bd., supra*, p. 609.

Further, whether or not the breach of the implied term, as in the case of any other term of the contract, constitutes a repudiation of the contract depends on the nature and degree of seriousness of the breach, the intention of the parties and the prevailing circumstances.

[51] There was no reason prior to the fall of 2003 for Ms. Wilson to consider that she might be required to relocate in response to direction from the company or that her job would be jeopardized in the event she did not agree to move. Her work consisted of trading Canadian equities for the benefit of institutional investors in Canada and the United States. The task was done in Vancouver without any expression of corporate dissatisfaction with the rate of business growth in the Vancouver office.

[52] On all of the evidence I find that UBS Securities repudiated Ms. Wilson's employment contract when it closed the Vancouver office and extinguished Ms. Wilson's job. She was under no contractual obligation, express or implied, to relocate to San Francisco.

[53] The present case differs materially from those cited by counsel for UBS Securities. It is not a case in which the requirement to move was raised with the employee at the time of hiring or subsequently in the course of any performance review or planning procedure: *Holgate v. Bank of Nova Scotia*, [1989] 27 C.C.E.L. 201 (Sask. Q.B.); nor a case in which the employee had accepted prior transfers: *Reber v. Lloyds Bank International Canada* (1985), 18 D.L.R. (4th) 122 (B.C.C.A.), *Jim Pattison Industries Ltd. v. Page*, [1984] S.J. No. 448 (C.A.), *Durrant v. Westeel-Rosco Ltd.* (1978), 7 B.C.L.R. 14; nor a case in which the employer faced financial difficulties compelling consolidation or restructuring: *Smith v. Viking Helicopter Ltd.* (1989), 68 O.R. (2d) 228, *Morris v. International Harvester Canada Ltd.* (1984), 7 C.C.E.L. 300; nor a case in which the employer was attempting to accommodate an employee who was no longer able to perform at a level required of the position in which the individual was employed: *Canadian Bechtel Ltd. v. Mollenkopf* (1978), 1 C.C.E.L. 95, and *Marko v. Toromont Industries Ltd.*, [1998] O.J. 5539 (QL) (Gen. Div.); nor a case in which it could reasonably be expected that transfer would be a fact of life as was the case in *Stefaovic v. SNC Inc.*, [1988] 22 C.C.E.L. 82 (Ont. H.C.) where a move should have been reasonably anticipated upon completion of an engineering project at a specific geographical location.

Notice Period

[54] In the absence of cause, an employment contract may only be terminated on reasonable notice which was not provided in this case. The principal factors to be taken into account in fixing the reasonable period of notice are well settled. They are the character of the employment, the length of service, the age of the employee,

and the availability of similar employment having regard for the experience, training, and qualifications of the employee: see *Ansari v. British Columbia Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33 (S.C.) applying *Bardal v. The Globe & Mail Ltd.* (1960), 24 D. L.R. (2d) 140 (Ont. H.C.).

[55] Ms. Wilson was 37 at the time of termination. She had been employed by UBS Securities for 14 years and six months. The evidence, including that of Mr. Estey on examination for discovery, persuades me that hers was a young person's work and traders of her kind were not likely to sustain their careers much beyond the age of 45 because of the intensity of the job. I cite that fact in order to explain why I would conclude Ms. Wilson should be regarded as an individual who was well-advanced in her working career notwithstanding her age. UBS Securities offered no evidence suggesting that jobs for institutional traders such as Ms. Wilson are readily available. I have no evidence of the absorption rate. I do note however, that Ms. Wilson has applied, without success, for like work with suitable alternate employers in Vancouver. UBS Securities does not suggest that she failed to mitigate her loss by omitting to take reasonable steps to find replacement employment. Ms. Wilson is an individual who has considerable professional experience and administrative expertise. While she may not be expected to find precisely comparable employment, she should be able to find a reasonably acceptable alternative.

[56] UBS Securities submitted that the appropriate notice period in the event of wrongful dismissal was twelve to fourteen months. Ms. Wilson claims that the appropriate notice period should be eighteen months notwithstanding reference to other cases in somewhat comparable circumstances where the notice period was

less: *Chan v. RBC Dominion Securities Inc.* [2004], O.J. No. 5340 (QL) (12 months); and *Gillies v Goldman Sachs* (2001), 95 B.C.L.R. (3d) 260 2001 BCCA 683 (13 months). Having regard for all of the relevant circumstances, I regard the reasonable notice period to be 12 months.

[57] The parties disagree on the date from which the notice period should run. Ms. Wilson claims notice was given on January 19, 2004, when UBS advised of the actual closure date. UBS Securities says the notice date should be October 14, 2003, when Ms. Wilson advised that she would not move to San Francisco.

[58] The Ontario Court of Appeal discussed the question of effective notice in *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474, p. 481-482, in the following terms:

Notice of termination need not use the words 'you are hereby dismissed effective. . .' or some such equivalent. Notice of termination must, however, lead a reasonable person to conclude that his or her employment is at an end as of some date certain in the future: *Gibb v. Novacorp International Consulting Inc.* (1990), 48 B.C.L.R. (2d) 28 at p. 34 (C.A.). The fact that no effective date of termination is to be found in a letter indicating that employment is shortly to end is a circumstance that may support an inference that the requirement of specific notice has not been met. All of the circumstances must, however, be considered: *Gibb, supra*, at p. 34 B.C.L.R. In *MacAlpine v. Stratford General Hospital* (1998), 38 C.C.E.L. (2d) 1, 98 C.L.L.C. 210-030 (Ont. C.A.) the employee was advised by letter on January 20, 1992 that her position as part-time coordinator at the hospital would become 'redundant . . . effective 1992 06 15'. That letter made it clear that MacAlpine's position would end June 15, 1992. The issue was whether the invitation to MacAlpine to apply for other jobs detracted from the clarity of the notice given, and this court held that it did not. Notice cannot be assumed to have been given if an employee is simply warned that his or her job will probably be eliminated 'within six months to a year'; notice must be clear and unambiguous: *Ahmad v. Procter & Gamble Inc.* (1991), 1 O.R. (3d) 491, 77 D.L.R. (4th) 515 (C.A.).

[59] In the present case the fact of relocation had been a topic of ongoing discussion from early October 2003. On December 15, 2003 the following email was sent to all staff:

As you are aware, we have made the strategic decision to relocate our Vancouver office to San Francisco in order to maximize our internal synergies and customer interactions. While no exact date has been set for the move, we are anticipating that the Visa's [sic] and required registrations will be obtained early in the new year, allowing us to close the Vancouver office in February.

I regret that Marcia has decided not to join the team in San Francisco. As a key member of the trading team for over 14 years, Marcia has been instrumental in developing our business on the west coast and her deep customer relationships will be greatly missed. Please take the opportunity over the next couple of months to join me in wishing Marcia the very best for the future, and thank her for her tremendous contribution.

[60] Ms. Wilson testified that Mr. Estey told her on or about December 15, 2003, that the closure was 70% probable. Visa and registration requirements had not been satisfied resulting in uncertainty regarding the feasibility of closure. Because of the nature of the business in the Vancouver office, closure and relocation could occur within a short space of time once a final decision was made. That is what happened. I accept the evidence of Mr. Sinclair, the UBS Securities chief financial officer, that he first advised Ms. Wilson on January 19, 2004, that the office would close January 31, 2004. All employees were advised on January 24, 2004, of the closure to be effective January 31, 2004.

[61] I find that January 19, 2004 was the date on which Ms. Wilson was given notice that her termination would be effective January 31, 2003. Any date earlier fails to reflect the fact that administrative issues that were a critical part of the

closure had not been resolved and a final decision had not been made. In particular, and contrary to the company's submissions, I find that no sufficiently certain date for closure had been identified at October 14, 2003, with the result that it cannot be regarded as the date on which notice of termination was given.

[62] The notice period began January 19, 2004, and ended January 18, 2005, unless that determination is affected by the prospect of a second maternity leave, an issue to which I will return in the context of assessing damages.

Assessment of Damages

[63] The computation of damages in a wrongful dismissal case is not a mathematical calculation but an assessment of that which would likely have been earned had the proper period of working notice been provided to the employee.

[64] At the time of dismissal, Ms. Wilson's earnings were comprised of base salary of \$125,000, a bonus determined by the compensation committee of the board of directors with due regard for the recommendation of Mr. Estey to whom Ms. Wilson reported, and the performance distribution determined by reference to the ownership of UBS Bunting shares. In 2001, the three kinds of compensation resulted in total employment income of \$829,982 as reported on Ms. Wilson's T4 Statement of Remuneration Paid. Her total remuneration for 2002, and 2003 was \$401,622 and \$562,909, respectively. Those amounts do not provide a reliable indication of probable earnings in the notice period because of the maternity leave of which Ms. Wilson took advantage in those years.

[65] Ms. Wilson would have earned her annual base salary of \$125,000 in the notice period and that amount must be included in the assessment.

[66] Ms. Wilson earned a discretionary bonus of \$295,000, \$485,000, \$500,000, \$100,000 and \$200,000 in 1999, 2000, 2001, 2002 and 2003, respectively. The discretionary bonus had comprised part of the compensation package before 1999. There is no doubt that Ms. Wilson had a contractual right to a discretionary bonus. The only evidence regarding the manner in which discretion was exercised was provided by Mr. Sinclair who said that he advised department heads of the amount of the bonus pool, information supplied to him by Mr. Estey, and he summarized the initial recommendations of the department heads for use at a meeting of the compensation committee which he attended. He was not part of the decision-making team. I do not regard his very limited testimony regarding the criteria applied by those responsible for the bonus process to be reliable. Most assuredly, he was not in a position to testify with regard to the bonus calculations for employees such as Ms. Wilson and her peers. In the absence of any contradictory evidence, I infer and find as a fact that it was implicit in the employment arrangement that the responsible UBS Securities officials exercise discretion in such a manner that Ms. Wilson would be treated fairly and reasonably in comparison to her peers.

[67] The evidence regarding bonuses paid to Ms. Wilson's peer group consisted of a summary comparing bonuses as a percentage of commission revenue generated for the company in the period 1999 through 2003. In 2000, seven of eight employees received larger bonuses than Ms. Wilson when measured as a percentage of commission revenue attributed to the employee. In 2001, three of

fifteen employees received bonuses less than that paid Ms. Wilson when measured as a percentage of commission revenue attributed to the employee. In 2002 and 2003, Ms. Wilson's discretionary bonuses were substantially less, as a percentage of commission revenue attributed to her, than was the case in 2000 or 2001.

[68] UBS Securities called no evidence to explain the exercise of discretion, to describe the factors taken into account when exercising discretion to decide upon the appropriate amount of Ms. Wilson's bonus in any year, or to support a claim that her likely bonus for a notice period of 12 months beginning January 19, 2004, would likely have been less than in prior years because of anticipated poor corporate performance or otherwise. The evidence satisfies me that Mr. Estey was the individual who was primarily responsible for recommendations regarding the bonus to be paid to an individual employee. He did not testify.

[69] On all of the evidence that was adduced I assess the amount of the bonus to which Ms. Wilson would have been entitled in the notice period had discretion been exercised in a fair and reasonable manner to be \$425,000, an amount which approximates the average of her discretionary bonuses for the period 1999 through 2001.

Performance Distribution

[70] In the years 1999 through 2003, Ms. Wilson received performance distributions determined by reference to the ownership of shares of UBS Bunting in the amounts of \$114,922, \$246,840, \$257,530, \$206,542 and \$274,367, respectively. She claims she would have been entitled to a performance distribution

throughout a period of working notice based on share ownership. UBS Securities says she must be denied the performance distribution because her employment was terminated “for cause or otherwise” on January 31, 2004 whereupon she was obliged to dispose of her shares by virtue of section 6.01(1)(a) the shareholders’ agreement, *supra*, para. [16].

[71] UBS Securities supports its claim by reference to cases in which wrongfully dismissed employees were denied the right to exercise share options granted to them in the course of employment: *Brock v. Matthews Group Ltd.* (1991), 34 C.C.E.L. 50 (Ont. C.A.), *Palumbo v. Research Capital Corp.* (2004), 72 O.R. (3d) 241 (C.A.), and *Kieran v. Ingram Micro Inc.* (2004), 33 C.C.E.L. (3d) 157 (C.A.).

[72] In my opinion the material distinctions between this case and those cited by counsel are that in present circumstances share ownership was a vital part of the process by which annual remuneration was determined and Ms. Wilson paid for her shares. In combination, the shareholders’ agreement, the operating agreement and Ms. Wilson’s employment contract clearly expressed the intention of the parties in relation to the acquisition and disposition of shares and the effect of ownership on annual compensation. In the cases cited by counsel, share options appear to have been granted as a form of compensation at a point in time. Once granted, the options and conduct in relation to them were independent of any entitlement to compensation. The expectation was that the option-holder would benefit by exercising the option at a time when share value exceeded the exercise price, sometimes called the strike price. In such circumstances it was perfectly reasonable

to conclude that the right to continue to own options or exercise the options should mature on the termination of employment for any reason.

[73] Because of the importance of share ownership to the determination of annual compensation, the performance distribution must be a factor in the assessment of that which she would have received in the notice period or in the assessment of that which should have been paid to her in lieu of reasonable notice being given. To say otherwise is to permit the UBS Securities to reduce its obligation to make the employee whole for that which was lost by virtue of repudiation of the contract.

[74] In the years 1999 through 2003, the annual performance distribution averaged \$41.46 per share. The average amount in 2001 through 2003 was \$40.05. No evidence was adduced to suggest that the performance distribution would have been less in the notice period. I assess the amount that would have been payable to Ms. Wilson as a performance distribution during the appropriate notice period of one year commencing January 19, 2004 at \$320,000.

Effect of Maternity Leave

[75] The remaining issue is the effect, if any, of maternity leave on the assessment of damages which would otherwise total \$870,000.

[76] Ms. Wilson was pregnant with her second child at the time she was dismissed. UBS Securities was not aware of the pregnancy. It follows and I find that pregnancy was not a factor in the UBS decision resulting in the termination of Ms. Wilson's employment. The company did not act in contravention of s. 54(2) of

the *Employment Standards Act* which prohibits an employer from terminating employment because of pregnancy or maternity leave.

[77] Ms. Wilson claims that damages should be assessed without reference to prospective maternity leave or the UBS Securities maternity leave policy. UBS Securities claims that, as she had done on a prior occasion, Ms. Wilson would have enjoyed the benefit of the company's maternity policy in a 12 month working notice period thereby earning less income, a factor which should be taken into account in the assessment of damages.

[78] Ms. Wilson's claim has its origin in three decisions of this court: *Whelehan v. Laidlaw Environmental Services Ltd.* (1998), 55 B.C.L.R. (3d) 129, *Winterburn v. Domtar Inc.* (2002), 20 C.C.E.L. (3d) 283, and *Wells v. Patina Salons Ltd.* (2003), 29 C.C.E.L. (3d) 211. In each of the three cases, maternity leave was governed exclusively by the *Employment Standards Act*, ss. 50, 51 and 54 of which provide as follows:

- 50 (1) A pregnant employee who requests leave under this section is entitled to up to 18 consecutive weeks of unpaid leave
- (a) beginning
 - (i) no earlier than 11 weeks before the expected birth date, and
 - (ii) no later than the actual birth date, and
 - (b) ending
 - (i) no earlier than 6 weeks after the actual birth date unless the employee requests a shorter period, and

(ii) no later than 17 weeks after the actual birth date.

(2) An employee who requests leave under this section after the birth of a child or the termination of a pregnancy is entitled to up to 6 consecutive weeks of unpaid leave beginning on the date of the birth or of the termination of the pregnancy.

(3) An employee is entitled to up to 6 additional consecutive weeks of unpaid leave if, for reasons related to the birth or the termination of the pregnancy, she is unable to return to work when her leave ends under subsection (1) or (2).

(4) A request for leave must

- (a) be given in writing to the employer,
- (b) if the request is made during the pregnancy, be given to the employer at least 4 weeks before the day the employee proposes to begin leave, and
- (c) if required by the employer, be accompanied by a medical practitioner's certificate stating the expected or actual birth date or the date the pregnancy terminated or stating the reasons for requesting additional leave under subsection (3).

(5) A request for a shorter period under subsection (1)(b)(i) must

- (a) be given in writing to the employer at least one week before the date the employee proposes to return to work, and
- (b) if required by the employer, be accompanied by a medical practitioner's certificate stating the employee is able to resume work.

51 (1) An employee who requests parental leave under this section is entitled to up to,

- (a) for a birth mother who takes leave under section 50 in relation to the birth of the child or children with respect to whom the parental leave is to be taken, up to 35 consecutive weeks of unpaid leave beginning immediately after the end of the leave

taken under section 50 unless the employer and employee agree otherwise,

- (b) for a birth mother who does not take leave under section 50 in relation to the birth of the child or children with respect to whom the parental leave is to be taken, up to 37 consecutive weeks of unpaid leave beginning after the child's birth and within 52 weeks after that event,
- (c) for a birth father, up to 37 consecutive weeks beginning after the child's birth and within 52 weeks after that event, and
- (c) for an adopting parent, up to 37 consecutive weeks of unpaid leave beginning within 52 weeks after the child is placed with the parent.

(2) If the child has a physical, psychological or emotional condition requiring an additional period of parental care, the employee is entitled to up to 5 additional weeks of unpaid leave, beginning immediately after the end of the leave taken under subsection (1).

(3) A request for leave must

- (a) be given in writing to the employer,
- (b) if the request is for leave under subsection (1)(a),(b) or (c), be given to the employer at least 4 weeks before the employee proposes to begin leave, and
- (c) if required by the employer, be accompanied by a medical practitioner's certificate or other evidence of the employee's entitlement to leave.

(4) An employee's combined entitlement to leave under section 50 and this section is limited to 52 weeks plus any additional leave the employee is entitled to under section 50 (3) or subsection (2) of this section.

...

54 (1) An employer must give an employee who requests leave under this Part the leave to which the employee is entitled.

- (2) An employer must not, because of an employee's pregnancy or a leave allowed by this Part,
 - (a) terminate employment, or
 - (b) change a condition of employment without the employee's written consent.

- (3) As soon as the leave ends, the employer must place the employee
 - (a) in the position the employee held before taking leave under this Part, or
 - (b) in a comparable position.

- (4) If the employer's operations are suspended or discontinued when the leave ends, the employer must, subject to the seniority provisions in a collective agreement, comply with subsection (3) as soon as operations are resumed.

[79] In none of *Whelehan*, *Winterburn*, or *Wells* did the employment contract provide for the payment of any remuneration during maternity leave. The *Employment Standards Act* applied, the appropriate request for leave was made by the employee, and unpaid leave was taken. In *Whelehan*, Allan J. described the relationship between maternity leave and notice of termination of an employment contract as follows at paras. 16-20:

In this case, maternity leave is a statutory benefit which confers job security but no financial benefit on the employee. Ms. Whelehan did not receive any benefits analogous to disability benefits as a substitute for her regular salary.

The notice period provided by Laidlaw was of no practical assistance to Ms. Whelehan as she was approximately seven months pregnant at the time and unable to seek employment.

It is useful to compare the underlying purposes of reasonable notice and maternity leave. The law requires employers to provide dismissed employees with compensation for an adequate period of time to enable

them to pursue suitable re-employment without reasonable financial disadvantage. The philosophy behind maternity leave is that women who are pregnant are entitled to a leave of absence from their jobs in order to accommodate childbirth and they are entitled to the assurance that their job tenure is secure during the period of their absence. That philosophy is reflected in s. 56 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the "Act") which provides that the services of an employee on maternity leave are deemed to be continuous for the purposes of calculating vacation entitlement, pensions, medical benefits or other plans beneficial to the employee.

The policy basis underlying maternity leave -- protecting pregnant women against penalties with respect to their job tenure and other terms of the employment by reason of pregnancy and childbirth -- would be defeated if an employer could terminate a pregnant employee at the commencement of her maternity leave so that her period of notice as spent during that leave.

I conclude that Ms. Whelehan's maternity leave should not coincide with the applicable notice period which I have determined to be eight months.

[80] Allan J. suspended the notice period for the duration of pregnancy leave. The reasoning in *Whelehan* was applied by McEwen J. in *Winterburn* to similar effect. In *Wells*, Satanove J. also excluded unpaid maternity leave from the notice period and said the following at para. 21:

Pregnant women are entitled to take a leave of absence from their jobs in order to accommodate childbirth and they are also entitled to an assurance that their job is secure during their absence. This policy of protecting women from penalties in the workplace due to pregnancy would be defeated if an employer could include maternity leave as part of a notice period.

[81] Nothing in the three seminal cases stands for the proposition that maternity leave occurring in the notice period is to be disregarded so that damages are assessed as if no leave would have been taken in the notice period. Instead, the continuity of the notice period is interrupted. Were the principle enunciated in

Whelehan to apply in Ms. Wilson's situation, the notice period would run from January 19 through June 1, 2004, be suspended for a period of 21 weeks until October 25, 2004, resume on October 26, 2004, and expire 21 weeks after January 18, 2005, on June 15, 2005. The result would be unusual. Instead of recovering as damages that which she would have received in respect of a 12 month working notice period, the UBS Securities maternity policy would have to be respected, and Ms. Wilson would be entitled to base salary for 21 weeks, a performance distribution payable for the first 90 days or 13 weeks of maternity leave after which she would be required to dispose of her shares only to be regarded as having reacquired them upon resumption of the notice period, and damages in respect of a 12 month notice period, part of which would precede an part of which would follow the leave period.

[82] The result I have described can only be avoided in one of two ways. Either the assessment of damages must be made on the basis that the wrongful termination of the contract resulted in the maternity policy having no application in the circumstances, or the amount of damages assessed must be reduced to reflect the reductions in income during maternity leave. An interrupted notice period cannot produce an appropriate result in the circumstances of this case.

[83] The first alternative would respect the purpose of the *Employment Standards Act* which is designed to minimize the effect of pregnancy and maternity on job security. It would permit an assessment that conforms to the general principle stated in *Sylvester v. British Columbia*, [1997] 2 S.C.R. 215 at para.15 as follows:

Damages for wrongful dismissal are designed to compensate the employee for the breach by the employer of the implied term in the

employment contract to provide reasonable notice of termination. As discussed above, the damages are assessed by calculating the salary the employee would have received had he or she worked during the notice period, notwithstanding that the employee may, in fact, have been prevented from doing so. The damages are based on the premise that the employee would have worked during the period.

[84] Disregarding maternity leave conforms to the requirement that damages be assessed on the basis of the assumption that nothing would have prevented the employee from working in the leave period.

[85] The second alternative would respect the fact that the parties directed their minds to the impact of leave and made provision for considerably more reasonable and fair treatment than is provided by the *Employment Standards Act*. In such circumstances the result flowing from this alternative is not inconsistent with the objectives of the *Employment Standards Act* or the objective stated by Allan J. in *Whelehan*, namely to provide reasonable financial security in the course of pregnancy and maternity leave.

[86] In my opinion, the UBS maternity policy to which Ms. Wilson agreed cannot be ignored nor can or should the principle enunciated in *Whelehan* be modified to apply in present circumstances. The *Whelehan* case arose in circumstances to which the *Employment Standards Act* applied. It does not apply in this case because Ms. Wilson's request was not made pursuant to its terms. Ms. Wilson's maternity leave would occur in the context of a paid leave policy to which she agreed. She does not suggest she would have omitted to avail herself of the pregnancy and maternity policy in the course of her second pregnancy.

[87] In the same way that the employer cannot deprive Ms. Wilson of damages assessed in part by reference to a performance distribution by claiming she was obliged to dispose of her shares on the date of termination, Ms. Wilson cannot say that the agreement on paid maternity leave should be disregarded to her benefit.

[88] The purpose of damages in the case of wrongful dismissal is to provide an employee with damages equivalent to earnings from employment in the notice period. Neither the employee nor the employer should be better off than would have been the case had working notice been given. While it is correct to say, as in *Sylvester*, inability to perform the duties of employment occasioned by an event subsequent to termination should be disregarded in the assessment of the loss arising from dismissal, it does not follow that adjustments reflecting post-termination events will be ignored.

[89] In *Sylvester*, the Supreme Court of Canada considered whether disability insurance receipts in the notice period should reduce the damage award. In that case the benefits in respect of which deduction was sought were not related to the contract of employment but were statutory in nature. Such is the case in present circumstances. In *Sylvester*, the Court stated that the question of deductibility would turn on the terms of employment contract and the intention of the parties. For the reasons I have stated, I cannot reasonably conclude that these parties intended the maternity policy that would have been operative in a period of working notice should be ignored in the assessment of damages occasioned by a wrongful dismissal that was unrelated to pregnancy.

[90] It follows that the base assessment of \$870,000 must be reduced by the $\frac{21}{52}$ nds of that part of it which is attributable to a discretionary bonus and $\frac{8}{52}$ nds of that part of it which is attributable to the performance distribution. The amounts are \$171,635 and \$49,230, respectively. Consequently, I assess Ms. Wilson's damages for wrongful dismissal in the amount of \$649,135 subject to three additional adjustments, the calculation of which I leave to counsel.

[91] Ms. Wilson was paid a bonus for the months of April 2003 through January 2004. The *pro rata* share of the bonus for the period January 19-31, 2004, must be regarded as a payment in the notice period made on account of the damage award.

[92] Ms. Wilson was paid no performance distribution for the period January 1-19, 2004. The damage award must be increased by $\frac{19}{365}$ ths of the performance distribution I have assessed in the amount of \$320,000.

[93] Any base salary for the period January 19-31, 2004, paid to Ms. Wilson must be regarded as a payment on account of the damage award.

Costs and Adjustments

[94] If necessary, the parties may, by written submission, address the issue of costs and differences with respect to the residual adjustments I have directed them to calculate.

"Mr. Justice Pitfield"