

Citation: Woolard v. Unum Life Insurance Co. of  
Canada  
2002 BCSC 1178

Date: 20020809  
Docket: C995087  
Registry: Vancouver

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

**DENISE WOOLARD**

PLAINTIFF

AND:

**UNUM LIFE INSURANCE COMPANY OF CANADA**

DEFENDANT

**REASONS FOR JUDGMENT  
OF THE  
HONOURABLE MR. JUSTICE BURNYEAT**

Counsel for the Plaintiff

R.H. Hamilton, Q.C.

Counsel for the Defendant

R.A. Sider

Dates and Place of Trial:

September 17-21, 2001;  
December 3, 4 and 5, 2001;  
February 6 and 15, 2002;  
March 22, 2002 (written  
submissions)  
Vancouver, BC

[1] Denise Woolard worked for Unum Life Insurance Company of America (“Unum”) between January 12, 1998 and July 5, 1999. Her employment was terminated as a result of the merger of two life insurance companies and the resulting reduction of the combined sales force. Unum does not claim that the employment of Ms. Woolard was terminated for cause. In any event, no such finding could be made.

[2] The disputes between the parties relate to the commissions which remain payable after January 1, 1999, the special and general damages available to Ms. Woolard for breach of

contract amounting to wrongful dismissal, and whether Ms. Woolard is entitled to increased damages as a result of the “insensitive and bad faith manner” exhibited by Unum when the employment of Ms. Woolard was terminated.

## **BACKGROUND**

[3] Ms. Woolard kept extensive notes of her conversations while she was being recruited and while she discussed her potential employment with the General Manager of the Vancouver Branch of Unum, Mr. Erich Wronski, and the Vancouver Branch Assistant Manager, Mr. Shane Doyle. Those notes and the testimony allow me to conclude that it was anticipated by both parties that the income level of Ms. Woolard would be in the neighbourhood of \$120,000 a year and that her salary draw against that commission income would be in the neighbourhood of \$40,000 to \$50,000 a year.

[4] Ms. Woolard was compensated by commissions. Much of the dispute between the parties relates to an interpretation of the commission structure. In the offer of employment accepted by Ms. Woolard, she was assigned a sales territory in the Vancouver region and given the position of “Individual Sales Representative 1”. In addition to the commissions and bonus incentives available to her, Ms. Woolard was entitled to a bi-weekly draw and a subsidy. When she accepted the offer of employment Ms. Woolard accepted the following:

Your bi-weekly draw is based on an annual rate of \$42,000 with a subsidy of \$8,175.

[5] In order to match the vacation policy of her previous employer, the vacation entitlement of Ms. Woolard was set at 1.25 days for each calendar month of service with Unum to a maximum of 15 days each year. While it was understood that vacation time could be taken at any time, any “unearned vacation” had to be refunded to the company if Ms. Woolard left the company. She was referred to the “Employment Handbook” for further details in that regard.

[6] A number of benefits were available to Ms. Woolard: (a) Group Life Insurance; (b) Dependant Life Insurance coverage; (c) Extended Health Care coverage; (d) Dental care coverage after a three month waiting period; (e) Short Term Disability Insurance at a level which depended on the number of years of service; (f) Long Term Disability; (g) Optional Life Voluntary Accident Insurance; (h) a Registered Retirement Savings Plan contributed to by Unum after a one-year waiting period; and (i) a Deferred Profit Sharing Plan.

[7] Shortly after her employment commenced, Ms. Woolard attended a meeting of sales representatives and was provided with a 1998 “Canadian Group Rep. Compensation Plan”. I find that Ms. Woolard also received an undated “Canadian Group Sales Representative Compensation Plan” document as well as an undated “Canadian Group & Special Sales Production/Reporting” document. Those three documents set out the complicated commission structure which was in place as well as providing the definitions which form the basis for the calculation of the commissions and bonuses payable. I will refer throughout to the three documents collectively as the “Plan”.

[8] I reject the testimony of Ms. Woolard that she did not receive the latter two documents. Even though she may not have referred to the latter two documents, I am satisfied that they were in her possession and that the policies and definitions set out in all of the documents are binding on her. I am satisfied that the compensation structure set out in the Plan

remained in effect during 1999 and constituted the contract between the parties relating to the commission and bonus structures which were in effect.

[9] Ms. Woolard was marketing various long term disability (“LTD”) and Life and Special Risk coverage to insurance brokers as well as assisting those brokers in selling the advantages of the programs offered by Unum to their customers.

[10] The compensation structure was based on the generation of new business. Premium credits were only available during the first year of coverage. Unless the premiums increased in subsequent years or unless additional coverage was placed, the only commissions available to Ms. Woolard related to the premiums in place during the first year of the coverage.

[11] For new business from new customers or for different and new business from existing customers, sales representatives were given compensation based on a percentage of the premiums obtained from that new business. For premiums up to \$20,000, Ms. Woolard was credited with 5% of the premium. The credit received then reduced as the amount of the premiums from that source decreased. For instance, a credit of 3.25% of the premium was available where the total premium was between \$20,000 and \$50,000 and a premium credit of 2.25% was available if the total premium was between \$50,000 and \$200,000. This sliding scale for compensation was on a customer by customer policy by policy basis.

[12] Sales representatives were provided with additional compensation if there were rate increases relating to existing coverage. Compensation was generated as a percentage of the paid annualized rate increase and, again, the percentage of increase was dealt with on a sliding scale. The credit for premium increases up to \$20,000 was 7.5%, was 4.5% for premium increases between \$20,000 and \$50,000, and 2.75% for premium increases between \$50,000 and \$200,000.

[13] Each sales representative was assigned “Individual Sales Goals”. The goals for all sales representatives were set at a March 10, 1999 meeting. Sales representatives including Ms. Woolard were not provided with the opportunity of having any input into the setting of their goals. While the goals for Ms. Woolard apparently came as a surprise to her, I am satisfied that Unum was in a position to set those goals and, when it did, the 1999 goals set for Ms. Woolard were binding on her. I find that the goals that were set for Ms. Woolard were \$950,000 in LTD Premiums, 45 new LTD Premiums, \$110,000 in Life Premiums and 11 new Life Premiums. In addition to commissions, sales representatives were entitled to various bonuses, some of which were based on the goals that were set for Ms. Woolard at the May 10, 1999 meeting.

[14] Sales representatives were eligible for a “Market Share Coverage Bonus”, a “Quarterly Sales Goal Enhancer”, a “Revenue Bonus”, a “Packaging and Collaboration Bonus”, a “Block Asset Management Factor”, and a “Long-Term Incentive”.

### **CONCEPT OF THE “SCORECARDS”**

[15] A computer system maintained in the Toronto office of Unum created monthly “Scorecards” which set out the policy numbers, the names of policy holders, the names of the brokers involved, the status of the policies (whether they were paid up to date, whether a policy had been terminated, etc.), the anticipated premium for each policy based on the submission of the representative (“Submit Premium”), the premium as eventually paid (“Paid Premium”) and the compensation flowing to the sales representative. As well, there was a summary page setting out the various compensation schemes which were in effect and the status of each

representative under those schemes. The Scorecards set out the goals that had been set for each representative as well as the progress that a sales representative was making towards reaching those goals. The monthly Scorecards received showed the cumulative statistics for the year.

[16] Additionally, sales representatives received "Group Ltd. Renewal Case Strategy Worksheets" setting out the rates which were in force for each client, the proposed rate increase, the date of the increase and the amounts actually collected. It was to the obvious advantage of the sales representative that renewals be accomplished at a higher rate.

[17] Ms. Woolard states that there was considerable inaccuracy associated with these Scorecards. For instance, on April 22, 1999, Ms. Woolard advised that she thought that 74 renewals were missing from her Scorecard and she requested assistance in ascertaining why those renewals were "missing". Mr. Doyle on behalf of Unum confirmed that all representatives had problems with their Scorecards and that he had urged them to keep accurate records so that they could compare them against the Scorecards which were produced. He admitted that the problem relating to the Scorecards of Ms. Woolard was not resolved even up to the time of the termination of her employment. As a result of problems associated with the Scorecards, Ms. Woolard started to keep her own records of what premiums were payable and the commissions flowing from those premiums.

[18] Cheryl Stubbs was apparently responsible for the correction of the Scorecards. Ms. Woolard was in touch with her and Mr. Wronski on a constant basis. As a result of a number of meetings in January, 1999, it was agreed that both parties would deal with 1998 as being "even" so that no monies were owing by Ms. Woolard as a result of being over-compensated by her draws and no money was owed by Unum to Ms. Woolard as a result of under compensation of her commissions.

[19] There are a number of communications in evidence indicating the problems associated with the 1998 Scorecards. On the basis of that communication, I can be satisfied that there were a considerable number of commissions payable to Ms. Woolard which were not reflected in the 1998 Scorecards. Ms. Woolard testified that she "never received a correct one". On the basis of what was in evidence, I would have to agree with her assessment.

[20] However, I find that Ms. Woolard and Unum are bound by the agreement reached that the parties would deal with 1998 as being "even". Ms. Woolard was neither over or under compensated for that year and, subject to one exception, all matters between the parties started as a "clean slate" on January 1, 1999.

[21] It is clear that the 1998 and 1999 Scorecards present a woefully inadequate and inaccurate assessment of the commissions and bonuses available to Ms. Woolard. Much of the Trial was taken up with an attempt to reconcile the records that were maintained by Ms. Woolard with the records that were produced by Unum. Before reviewing the question of the entitlement of Ms. Woolard to damages for the breach of her contract of employment, I will review the question of the benefits and commissions owing to her.

### **BENEFITS AVAILABLE TO MS. WOOLARD**

[22] Unum had a generous benefit package available to sales representatives. Some of those policies were set out in the document entitled "Unum Canada 1998 Compensation Plan Policy and Procedures" and I find that what was set out in that document was binding on Ms.

Woolard. Other parts of the benefits available to Ms. Woolard are set out in the January 9, 1998 letter to her from Mr. Wronski confirming her terms of employment. I find this letter to be binding on her as well. The various benefits available to Ms. Woolard are as follows.

**(A) R.R.S.P.**

[23] This Plan had a one year waiting period. After that period was up, the maximum contribution from Unum was that it would contribute up to 50% of the contribution made by the employee but only up to a maximum of 6% of the eligible R.R.S.P. contribution that an employee could make (9% of income). Accordingly, Unum would contribute up to a maximum of 3%.

[24] Ms. Woolard was advised in a December 29, 1998 memorandum about the approaching first anniversary of her employment and was advised that she would not be enrolled in the R.R.S.P. program unless a completed application form was returned to the Human Resource Department of Unum. It was made clear in that memorandum that Unum would only match contributions actually made by an employee.

[25] Ms. Woolard made application on June 8, 1999 but was advised within the week that the application she had made had been incorrectly completed and was being returned. A corrected application was then forwarded by Ms. Woolard.

[26] While Ms. Woolard states that she was always ready, willing and able to contribute, I find that no contribution was actually made by her. Accordingly, I am satisfied that Unum is not required to make any contribution to the R.R.S.P. of Ms. Woolard. If Ms. Woolard had made any R.R.S.P. contributions, she could have triggered the requirement that Unum make a contribution to her R.R.S.P. in accordance with company policy. As she did not do so, there are no damages available to Ms. Woolard as a result of the failure of Unum to make any contribution to the R.R.S.P. of Ms. Woolard.

**(B) Conference Qualifications**

[27] Sales representatives could qualify for various "Conference Qualifications". Ms. Woolard remained a "Sales Representative I" during her employment with Unum. In order to be eligible for the "Leaders' Club", it was necessary for her to have "Compensation Credits" totalling \$41,000. In order to be a member of the "Leaders' Forum", it was necessary for her to attain Compensation Credits of \$63,000 and attain 100% of her LTD Premium Goal. In order to be a member of the "Super Forum", Ms. Woolard had to attain Compensation Credits of \$94,500 plus 100% of her LTD Premium Goal and 100% of her Life Premium Goal. These "Conferences" were combined sales meetings and holidays. Spouses of sales representatives were entitled to attend these conferences at company expense.

[28] If eligible in 1999, Ms. Woolard would have attended the 2000 Conference. The value of the Conference that Ms. Woolard could have attended would have been in the neighbourhood of \$14,250. She claims that amount. Even if she had been eligible and had remained an employee of Unum, Ms. Woolard could not have attended the 2000 Conference as she was about to give birth or had already given birth and could not have travelled to the Conference.

[29] At trial, Ms. Woolard confirmed that there was no “cash replacement” for someone who was not in a position to go to a Conference and that no one had ever said to her that she would receive a money equivalent if she and her spouse could not attend.

[30] I dismiss the claim made by Ms. Woolard for \$14,250. First, there is nothing in evidence which would allow me to conclude that an employee would be paid cash if he or she was not able to attend. Second, I am satisfied that a person had to be employed at the time of the Conference in order to be eligible to attend. Third, the Conference in the year 2000 was outside the notice period available to Ms. Woolard. Accordingly, even if Unum had provided her with the appropriate notice required under her contract of employment, Ms. Woolard either could not have attended because of the impending or recent birth of her child or because the conference was outside the period of notice.

### **(C) Preference Points**

[31] In March, 1999, Unum had a “March Madness Sale Contest”. Sales staff could earn points and points could then be used to purchase items from a catalogue which was distributed. Points earned but not used from previous years could be used for purchases. Employees were also in a position to “buy” additional points from the company for \$.01 a point so that they could purchase an item even though they did not have sufficient points. Employees were advised that they were to have their redemption forms in by May 11, 1999. Ms. Woolard had built up 53,524 points but did not submit a “purchase” request by the deadline.

[32] In the form which was circulated to all employees including Ms. Woolard, it was noted: “awards are non-transferable and are not redeemable for cash”. Ms. Woolard testified that she did not read the form as it was not filled out by her and as no products were ordered by her. The sum of \$535.24 is claimed by Ms. Woolard.

[33] I am satisfied that this claim should be dismissed. First, I find that points were not redeemable for cash and that Ms. Woolard is bound by that provision. Second, there was no evidence as to what could have been “purchased” or the retail value of what could be purchased for 53,524 points. Third, there is nothing in evidence which would suggest that Ms. Woolard has ever attempted to make a purchase. Fourth, there was nothing in evidence to suggest that points could be “carried forward” after the May 11, 1999 deadline.

### **(D) Deferred Profit Sharing Plan (“DPSP”)**

[34] Ms. Woolard was advised in a December 29, 1998 Memorandum that her first anniversary with Unum was approaching and that she would be automatically enrolled in the DPSP. In the materials received by her, it was clear that the DPSP would not vest until after an employee had been a participant in the Plan for three years (a one year waiting period and participation for two years). It was only after three years that any monies in the DPSP could be transferred out of the DPSP to another retirement plan. Ms. Woolard was advised in the materials that, if she left Unum before contributions were vested in her name, the contributions from Unum would revert to Unum. While Ms. Woolard testified that she had not read these materials before, she agreed that any contributions by Unum would only vest after two years of participation under the Plan.

[35] Ms. Woolard did not qualify under the DPSP. Although no claim is advanced by Ms. Woolard for benefits under the DPSP, any such claim would have been dismissed.

**(E) Income Stabilizer Account (“ISA”)**

[36] Commissions were payable on the basis of the Submit Premium but could subsequently be adjusted when the Paid Premium was known. A percentage of commissions payable to sales representatives was held back so that, if there was a subsequent calculation that commissions had been overpaid, there was a sum available to satisfy that overpayment rather than requiring employees to write a cheque for the balance owing. Charge backs in subsequent years were made to cover adjustments that had to be made when compensation had been credited on the assumption that the coverage would then stay in effect for at least 12 months but where that had not been the case.

[37] The level maintained in the ISA was 10% of commissions paid. The amount of the ISA at December 31, 1998 should have been \$2,707.00 but was \$109.00. Because there was a shortfall of \$2,598.00, that amount is shown in the various printouts from Unum as being subtracted from the commissions that were ordinarily payable to Ms. Woolard in 1999. The sum of \$2,707 is claimed by Ms. Woolard.

[38] Ms. Woolard testified that the requirement of this holdback was not part of the agreement that was struck regarding 1998 so that she should be entitled to payment of the total 1998 holdback of \$2,707.00. I find that to be the case. Unum was carrying forward the amount of the 1998 holdback. I am satisfied that Unum was treating the 1998 holdback as still being payable to Ms. Woolard and that they were not taking the position that it was no longer payable to her as a result of the agreement reached. In fact, Unum takes the position that this amount has already been paid as included in what was tendered at and after the date of termination of her employment.

[39] I find that the agreement reached was that, as at December 31, 1998, Unum was acknowledging that all monies that had been paid to Ms. Woolard were properly paid so that any monies previously held back or which should have been held back should be released. That being the case, I am satisfied that it was inappropriate for Unum to increase the 1999 holdback by \$2,598.00 to bring the ISA up to \$2,707.00 which is what should have been available in the ISA as at December 31, 1998 if the agreement reached had not been reached.

[40] The balances which were accruing in the ISA during 1999 should only have reflected 10% of the commissions available to Ms. Woolard after January 1, 1999. The full amount of the 1998 and 1999 ISA should be released to Ms. Woolard. As Unum has not provided a breakdown of what is included in the sum it has already paid to Ms. Woolard, I am not in a position to make a finding as to whether \$2,707.00 has been paid or not. If the sum of \$2,707.00 has not already been paid, it should be paid.

**(F) Vacation Pay**

[41] The vacation entitlement of Ms. Woolard was 1.25 days for each calendar month of service to a maximum of 15 days per year. I find that, while it was understood that vacation could be taken at any time and could be carried forward, any “unearned vacation” time taken had to be refunded to Unum if Ms. Woolard left the company. I am satisfied that the Plan explained that fully.

[42] The vacation earned from January, 1998 through July, 1999 was 22.5 days. I find that a total of 25 days were taken for vacation. While Ms. Woolard states that 3 days taken were “personal days”, there is nothing in evidence to verify that this was the case.

[43] However, no claim is made by Unum for repayment of the extra vacation days taken. Accordingly, I find that Ms. Woolard has no entitlement to additional vacation pay and Unum has no entitlement to payment back from Ms. Woolard of any alleged extra vacation days taken.

#### **(G) Insurance and Dental Care Coverage**

[44] A number of benefits were available to Ms. Woolard: (a) Group Life Insurance for two times her annual draw (therefore \$84,000 in the first year); (b) Dependant Life Insurance coverage of \$10,000 for her spouse; (c) Extended Health Care coverage covering drugs, medical services and supplies, professional services admission care at 80%, and hospital care for a semi-private room at 100%; (d) Dental care coverage after a three month waiting period; (e) Short Term Disability Insurance at a level which depended on the number of years of service; (f) Long Term Disability Insurance after a three month waiting period with a benefit of 2/3rds of earnings up to a maximum of \$6,000 per month; and (g) Optional Life Voluntary Accident Insurance with the premiums to be paid by Ms. Woolard.

[45] The Group Life Insurance and Dependent Life Insurance was replaced by Ms. Woolard on March 6, 2000 in the amount of \$400,000. The monthly cost of the replacement coverage was \$27.00 for the Group Life Insurance and \$53.33 for the Dependent Life Insurance. Taking into account the lesser coverage that was available from Unum and the pro-rated cost of the replacement coverage, I find that the pro-rated monthly cost was \$5.61 (Group Life Insurance) and \$1.33 (Dependent Life Insurance).

[46] The Extended Health Care coverage was replaced in November, 1999 at a cost of \$5.17 per day or, on average, \$157.40 per month. As the contribution of Unum was 80% of the Extended Health Care coverage, the amounts attributable to Unum after November, 1999 amount to \$125.93 per month.

[47] There was no evidence that the Dental Care, Short Term Disability Insurance or the Long Term Disability coverages were replaced by Ms. Woolard. Because there was no expenditure, there can be no claim against Unum for the value of this coverage: **Sorel v. Tomenson Saunders Whitehead Limited** (1987), 15 B.C.L.R. (2d) 38 (B.C.C.A.) and **Scott v. Lillooet School District No.29** (1991), 60 B.C.L.R. (2d) 273 (B.C.C.A.). The premium under the Optional Life Voluntary Accident Insurance was to be paid by Ms. Woolard when she was at Unum and, accordingly, no claim can be advanced for that sum either.

[48] The Group Life Insurance and the Dependant Life Insurance were only replaced by Ms. Woolard outside the reasonable notice period that I find applicable for her contract of employment. That being the case, Ms. Woolard is not entitled to the monthly cost of \$5.61 or \$1.33. Regarding the Extended Health Care coverage which was replaced in November, 1999, Ms. Woolard is entitled to the sum of \$125.93 per month for the months November, 1999 through January, 2000. Ms. Woolard is also entitled to reimbursement for \$313.36 relating to prescription drugs required by her husband during the period November 16 through December 8, 1999. The payment of that amount by Unum would ordinarily have been available through the coverage available to Ms. Woolard.

#### **(H) Cell Phone**

[49] Ms. Woolard testified that she received \$100 per month from Unum against the cost of her cell phone. However, there was no evidence that she had replaced this cost. Accordingly, no claim is available against Unum arising out of this benefit.

## **REIMBURSEMENT FOR EXPENSES**

[50] On March 5, 2001, a \$3,871.97 cheque was tendered and accepted by Ms. Woolard "in a full and final settlement of any and all claims which Ms. Woolard might have against UNUM and any of its associated or subsidiary companies with respect to any business expenses or business claims which she may have had against those companies". In view of that settlement, there is no amount payable to Ms. Woolard arising out of any expense account amounts which may be claimed as not reimbursed.

## **COMPANY COMPENSATION POLICY**

[51] Some of the confusion which has arisen between the parties arises as a result of the difference between the Submitted Premium recorded by Ms. Woolard when the policy was first submitted, the Paid Premium arising from the policy of Unum which annualized the amounts shown on the third bill prepared and the fact that a policy had to remain in force for 12 months from the effective day otherwise the amount of the premium would be charged back to sales staff such as Ms. Woolard. I am satisfied that she was aware of these provisions and that she is bound by them.

[52] While under cross-examination, Ms. Woolard appeared to be confused about what would happen if a policy was not in effect for a full 12 months, she made this note when she was being interviewed for the job: "Term equals terminated based on 12 months if terminated then zero". On the basis of that, I am satisfied that Ms. Woolard was fully aware of the requirement that a policy to be in effect for a full 12 months before full credit would be given for that new business.

[53] Similarly, I am satisfied that she was aware that it was the Paid Premium shown on the third bill that was binding and that it was not the Submitted Premium recorded by Ms. Woolard that was binding on Unum and on Ms. Woolard.

[54] The emphasis of Unum was on new business. In the "Canadian Group & Specialty Sales Production/Reporting" document, "new business" is defined as follows:

A new coverage is defined as the issuance of a new contract with a new client that is generating new premium dollars to the company by line of coverage. A coverage that is transferring from another UNUM contract for the same line of coverage is not defined as a new coverage but as a rewrite.

[55] The procedure for entering new business into the scorekeeping system is described as follows:

All New Coverages are initially entered onto the scorekeeping system on the basis of submitted premium. When the third bill is prepared by Inforce Services, that amount is annualized and the submitted figures are adjusted to reflect the paid annualized premium. From this point on additional production credit is limited to NBOC and first year growth on LTD. All new coverages must stay in force for twelve months from the effective date or all production/compensation will be charged back.

Any coverage on which production is generated that fails to stay in force for 12 full months from the effective date of the activity is charged back. The full

amount of all premium/compensation credit for the 12 month period is reversed from the same production year in which the credit was originally generated as well as any Sales Rep Bonus factors associated with the coverage.

[56] The Plan also defines New Business Old Contract (“NBOC”). A new line of coverage added to an “Old Contract” is defined as “New” business for production and compensation purposes. NBOC could be generated as a result of any one of the transactions outlined but a NBOC had to result in new benefits to the client in order to be credited for production/compensation credit:

A REWRITE occurs when an existing UNUM policy is rewritten to a new UNUM policy as requested by the client. Production and compensation is credited at the top of scale on the net increased premium, however the rewrite does not get credit as a new coverage. NBOC sold in conjunction with the rewrite receives full NBOC production and compensation credit at point of scale on the increased level of benefits. NBOC is not credited on standard benefits provided in the new contract which may not have been present in the old contract. The NBOC amount must be clearly specified on the green change for proper crediting. For all rewrites please provide the prior policy number on the submission form.

It is preferred that the above rewrite to a new contract be submitted as a green change (supersede) rather than a new policy number unless a new policy number is specifically requested by the client. Processing of a new policy is much more costly to UNUM and both methods provide the same level of compensation to the Sales Representative.) Even if a new contract must be set up to provide the level of customer service requested by the policyholder, compensation/production will be credited for the increase in revenues only.

A CHANGE IN BROKER COMMISSIONS which occurs in conjunction with an NBOC change is credited for production/compensation based on the net increase in premium. The net increase in premium includes the change in commission status whether it is the addition or deletion of broker commissions. It is not appropriate to net out the impact of changing the commission status when calculating the NBOC production.

Change in commission status alone does not meet the definition of NBOC since there are no benefits to the client. These activities are not eligible for production/compensation credit.

[57] Under cross-examination, Ms. Woolard admitted that on a renewal or on NBOC she only got the commission on the difference.

[58] Whether it was fair or not, the compensation policy of Unum was clear. I find that Ms. Woolard was aware of the policy and that she is bound by it. The policy is set out in the Plan. Ms. Woolard received these documents and she and Unum are bound by the following compensation principles:

- (a) the definition of “new business” set out above governs;
- (b) there is no commission payable unless the new coverage stays in force for a full 12 months;

(c) if a policy does not stay in force for that period, then the full amount of any commission or compensation credit is reversed. Therefore, even if 11 months of premiums are paid, the commissions ordinarily available on those premiums would be reversed;

(d) on policies being rewritten, compensation is credited only on the “net increased premium”. There is no credit given for the rewrite and it is not “new coverage”; and

(e) any NBOC sold in conjunction with the rewrite receives full production and compensation credit on the increased level of benefits sold.

### **BASE COMMISSIONS PAYABLE**

[59] At my request, counsel for the parties set out various tables to deal with the following categories of base commissions: (a) sales agreed upon between the parties; (b) sales where the documents are said not to be available or documentation is incomplete; (c) sales which were made in 1998 by Ms. Woolard but which were not credited to her until 1999; (d) the Federation policies which remain in dispute between the parties; and (e) sales which were effectively completed by Ms. Woolard prior to the termination of her employment where the commissions may or may not have been credited to her or to others. Once a determination of the commissions payable has been made, the complicated bonus scheme available from Unum can then be calculated.

#### **(A) Sales which are non-contentious**

[60] These sales include sales where a claim for commission has been abandoned by Ms. Woolard, sales where the difference between the parties with respect to the commission owed is less than \$15, sales where the commissions have been paid by Unum to Ms. Woolard, and sales where the policy was subsequently terminated and Ms. Woolard does not dispute the fact that the policy was terminated.

[61] I find that the total premiums represented by these sales is \$819,095.56 and that the total commissions payable as a result of these sales are \$31,482.36. Unum has already paid Ms. Woolard some monies arising out of commissions which it says were owing to her for 1999. It is not clear how they arrived at the sum that was paid.

#### **(B) Sales where Ms. Woolard was unable to review source documentation**

[62] In these cases, Ms. Woolard has a record of submitting sales but either no documentation was available from Unum or the documentation which was provided was incomplete. As a result, Ms. Woolard has not been in a position to accurately calculate the commissions which she says are owing to her.

[63] Unum takes the position that because the file cannot be found, the file does not exist and/or that the sale alleged by Ms. Woolard was never made. I cannot find that this submission has any credibility. There were numerous files that Unum could not find and initially said did not exist. In most cases, those file materials were eventually produced by Unum. It must be kept in mind that the records produced by Ms. Woolard were prepared prior to the termination of her contract of employment. Accordingly, she has been in a position to provide some of the policy numbers, group names, Submitted Rates, and Renewal Rates for policies in this category. I can think of no reason why Ms. Woolard would have concocted that type of information at a time

when she was of the belief that she would continue to be employed by Unum. As well, the credibility of Unum regarding what is and is not available by way of original file material is in serious doubt. In this regard, I note that Unum agrees that a base commission of \$393.98 is payable for policy number 83754 even though it says that the file source materials are not available.

[64] Ms. Woolard claims premiums totalling \$107,699.31, base commissions payable of \$4,871.44, and an actual balance paid of \$393.98. On the other hand, Unum claims that the commissions owing are \$237.57 and that the commissions already paid total \$393.98. I accept the figures advanced on behalf of Ms. Woolard and I make the finding that the total premiums sold, the total commissions payable, and the total already paid are as submitted by Ms. Woolard.

### **(C) Sales made in 1998 which were to be credited in 1999**

[65] In early 1999 after the 1998 year was finished, a dispute arose between Ms. Woolard and Unum over her remuneration. An agreement was reached between Ms. Woolard and Mr. Wronski that there would be no deficit to Ms. Woolard for 1998 and that 1998 would be treated as a "wash". After that time, Unum found additional sales where commissions were owing to Ms. Woolard and it agreed to credit those sales and commissions to her as part of her 1999 production. I am satisfied that it did so with the knowledge of the "wash" agreement. I am satisfied that Unum agreed to give Ms. Woolard credit for those additional sales in 1999 and that it should not be permitted to revoke that subsequent agreement.

[66] In this regard, the Plan provides that, where premiums are not paid in one year, the sale is advanced forward into the year where the premiums are paid. It is the submission of Ms. Woolard that, as the sales came towards the end of 1998, they mostly fell into 1999. My review of the sales alleged leads me to conclude that the sales claimed are all renewals where higher rates were put into force. It also allows me to conclude that, while there was one October, 1998 renewal, the remainder of the renewals were either in November (6) or December (6).

[67] I reject the submission of Unum that there should be no commissions payable and I accept the submission of Ms. Woolard and find that the total premiums sold was \$36,747.53 and that the total commission payable was \$2,756.06.

### **(D) Federation Policies**

[68] These files were discovered as a result of an Order made during the Trial. The issue between the parties is whether this was one policy or whether it was a number of policies. What was involved was renewals. The total of the increase premiums is said by Ms. Woolard to be \$166,028.42. Credit for premium increases up to \$20,000 of premiums was 7.5%, was 4.5% for premium increases between \$20,000 and \$50,000 and 2.75% for premium increases between \$50,000 and \$200,000. If these are separate policies, then the credit for the premium increases would be 7.5% for each of the premium increases. Ms. Woolard submits that this is the case and that the commissions total \$12,452.13. On the other hand, if this is one policy then the sliding scale would be in effect and the total of the commissions would be \$6,040.78.

[69] It is clear that the Federation Policies were treated together for the purpose of establishing the rates for the coverage extended. However, there was a separate policy for many of the entities making up the group, each entity was billed directly and separately, and many of the companies or entities had their own policy number. For instance, the Burnaby

Family Life Institute was part of the Federation Group but made separate application, was approved separately, and made separate payments to Unum for the premium that was payable by it.

[70] I am satisfied that there is nothing in the Plan which would indicate that individual policy holders had to be grouped together for the purposes of calculating the commissions payable on the premiums that were being paid even though the policy holders were treated together for the purposes of establishing the rates for the coverages extended.

[71] The matter is made more complicated by virtue of the fact that the policy number assigned to the Federation Group was number 81706. That same number was also assigned to three members of the Group. As well, there were a series of sub-policy numbers assigned to various members of the Group. For instance, the Burnaby Family Life Institute was assigned number 81706-17. Because none of these policies were shown on the Scorecards produced at Trial by Unum, it is not possible to ascertain how Unum would have treated these matters.

[72] However, I am satisfied that many of the policy holders under the Federation Group renewals should be treated as separate policies despite the fact that the Federation Group was treated together for rating purposes. To treat them separately for commission purposes is the natural result of separate policy numbers being assigned to 21 members of the Group. I find that the 19 members of the Group who were assigned policy number 81706 or a sub-policy number under policy number 81706 of that number are to be treated as having one policy whereas the other 21 members of the Group who were assigned separate policy numbers are entitled to be dealt with as separate policy holders for the purposes of establishing the commissions that are payable to Ms. Woolard.

[73] Members of the Group who were under policy number 81706 or sub-policy numbers under 81706 paid increased commissions on renewals totalling \$111,465.91. Ms. Woolard claims 7.5% of that amount or \$8,359.94. That calculation is in error. The sliding scale noted above should be in effect regarding the \$111,465.91. I find that the commission payable to Ms. Woolard on these policies totalling \$111,465.91 is \$4,540.31.

[74] For the remaining members of the Group where individual policy numbers were provided, I find that the total increased premium was \$54,562.51 and that the commission payable was \$4,092.19. In this latter regard, none of the increased premiums were in excess of \$20,000.00 and, accordingly, the applicable percentage throughout is 7.5%. From those combined figures it is necessary to subtract a Paid Premium of \$12,816.00 and commission payable of \$961.00 as that premium has been accounted elsewhere and as the sum of \$961.00 has already been paid to Ms. Woolard. The summary of what is available relating to the Federation policies is set out as follows:

	<b>TOTAL INCREASED PREMIUM</b>	<b>COMMISSION PAYABLE (SLIDING SCALE)</b>
POLICY #81706 (INCLUDING SUB- POLICY NUMBERS)	\$111,465.91	\$4,540.31
OTHER MEMBERS OF THE GROUP	<u>\$ 54,562.51</u>	<u>\$4,092.19</u>

TOTAL:	\$166,028.42	\$8,632.50
LESS:	<u>\$ 12,816.00</u>	<u>\$ 961.00</u>
	<b>\$153,212.42</b>	<b>\$7,671.50</b>

**(E) Sales effectively completed by Ms. Woolard prior to her termination.**

[75] Ms. Woolard submits that she was the effective cause of the sales in this category as (a) some of the applications and cheques were submitted prior to the termination of her employment, the items listed are on the Unum Scorecard but no commissions are said to be payable; (b) some renewals were made after her employment was terminated but were on policies of her clients; (c) some commissions are incorrectly stated; (d) some sales were as a result of her efforts although the effective date was after the date of the termination of her employment; (e) there are some sales for which she should get credit which were not shown on the Scorecards provided by Unum; and (f) there were some policies that Unum alleges were terminated but where there is said to be insufficient evidence of that termination or where it is said that Unum has had the benefit of the premiums for an extensive part of the year.

(A) Relating to clients listed in the Scorecards presented on behalf of Unum but where no monies are said to be payable, Ms. Woolard submits that the submitted premium was \$28,651.47 so that the base commission should have been \$2,132.68. On the other hand, Unum submits that the commissions owing for the nine policies listed by Ms. Woolard in this category would be \$354.21.

[76] I accept some of the submissions of Unum in this regard. Regarding policy number 80425, I am satisfied the policy was terminated on July 1, 1999 so that this policy was in effect for less than one year and there was no commission payable as a result. Similarly, policy number 82803 was terminated on June 1, 1999.

[77] Other than those two policies, I am satisfied that the other nine policies listed in this category are policies for which Ms. Woolard is entitled to a commission. I find that the total premium increase for these policies was \$13,961.70 and that the total commission payable relating to those premium increases was \$1,030.95.

[78] Even if I am wrong in concluding that Ms. Woolard was entitled to the benefit of the increase in premiums on renewals which occurred after the date of the termination of her contract of employment, I am satisfied that she is entitled to those increases which occurred during the notice period that should have been provided to her. If she had remained an employee, she would have been entitled to the benefit of the increased rates on the renewal. Unum breached its contract when it failed to provide her adequate notice of the termination of her employment. Unum should not also be allowed to breach its contract to pay her commissions on the increase of premiums occasioned at the time that the policies were renewed.

[79] I am satisfied that this ruling is in accordance with the policy set out in the "Canadian Group Sales Representative Compensation Plan". That document sets out a number of procedures including the "Sales Representative Termination Procedures". Those Procedures include the following:

*“Any business submitted after the date of termination will not be credited to the terminated Rep’s Scorecard including all Rate Increase Business.” “NOTE: If business circumstances dictate that an employee who is in good standing and terminating should not complete their two-week termination period, then any business submitted two weeks after their departure date will be credited to their account.”*

[80] Unum is not relying on that part of the Plan which provides for only a two week termination period. In the circumstances, I am satisfied that the outlined Procedure would be in effect for whatever termination period was in effect. From that, it is clear that business generated during the notice period was to be credited to the terminated sales representative. That being the case, I am satisfied that any business which was generated by Ms. Woolard but which was not submitted until after her employment was terminated but before January 6, 2000 should be credited to Ms. Woolard. I am also satisfied that this would include NBOC compensation relating to increases of premiums during the six-month notice period that should have been provided to Ms. Woolard. This ruling relates specifically to what has been referred to as the “Johnstone Policy”. Johnstone’s made an application for group insurance dated June 30, 1999 with an effective date of September 1, 1999. Despite the effective date, it is clear that some of the premiums and some of the people in the group would be paying as at August 1, 1999 or later. As well, part of the Johnstone Group had policies already in place with Unum so that it was only increased premiums or increased coverage that would attract NBOC compensation.

[81] When this policy was submitted, the Submitted Premium was \$1,126,640.52 based on the total number of lives covered in the policies of 671. What was in evidence relating to the Johnstone Policy was fraught with confusion. While there was considerable expansion of the policies already in effect with Unum, there was also some contraction of coverage, some termination of coverage, some former policyholders who decided to go elsewhere, and some new clients to Unum who came under the Johnstone Policy. As well, Unum entered into a special arrangement with Johnstone’s regarding their commission structure. Eventually, the commission structure payable to Johnstone’s was made retroactive to September 1, 1999 for LTD and August 1, 1999 for Life policies. Those two dates were stated as being the “start dates of the 2 policies”. On the basis of my ruling that Ms. Woolard should be credited for policies coming into effect during her notice period, I am satisfied that the commissions flowing from the Johnstone Policy should be credited to Ms. Woolard.

[82] The commission structure payable to Johnstone’s involved Unum effectively receiving the net balance of the premiums being paid rather than the gross balance of premiums and then remitting any commission being payable to Johnstone afterwards. Ms. Woolard testified that her commission was based on the “gross amount” of the premiums being paid and not net of any commission being paid to Johnstone. Despite any arrangement which may have been made between Unum and Johnstone, I am satisfied that Ms. Woolard should be credited with the gross amount of the premiums being paid.

[83] There is also controversy between the parties as to whether it was appropriate to deal with all of the coverage as new coverage when a substantial portion of it was merely existing coverage with Unum which was being transferred into the umbrella Johnstone Policy. In this regard, I conclude that the Johnstone Policy was being accepted by Unum as a new policy. First, I accept the testimony of Ms. Woolard regarding her conversation with Mr. Anderson an underwriter with Unum that the policy would be treated as a “switch-over” so that full credit would be given to Ms. Woolard even though some existing clients were being transferred.

Second, Ms. Woolard submitted the coverage as a new policy amount and no objection was taken by Unum as to this characterization. Third, I am satisfied that there were good business reasons for Unum to accept it as a new policy including the fact that a number of policies would be solidified into one business umbrella policy so that there would be less chance of individual policyholders moving to another company in due course.

[84] Mr. Ralph Johnstone testified regarding the Johnstone Policy and confirmed that 800 lives were insured by November, 1999. I find that Unum agreed to accept the coverage as new coverage and therefore find that Ms. Woolard is entitled to full credit for both the total premiums and the commissions flowing from those total premiums. I accept the calculations that she has put into evidence. I am satisfied that she has shown on a balance of probabilities that she should be entitled to the amounts set out in her submissions. As all of the information relating to the eventual results of the conversion of existing coverage into the Johnstone Policy lies with Unum, the task of Ms. Woolard has been a difficult one. However, I am satisfied that her efforts have been more productive and more accurate than the efforts of Unum and I place no reliance on the information produced by Unum which would suggest that the total coverage and the commissions flowing from the Johnstone Policy should be less than what has been projected by Ms. Woolard.

**(B)** I find that the total premium increase for the 14 policies that were renewed in August, 1999 produced increased total premiums of \$30,451.17 and commissions payable as a result of those increases of \$2,283.84.

**(C)** The next category relates to where the parties disagree as to the commission actually payable. Ms. Woolard submits that the total premiums sold on these policies was \$59,537.65 so that the total commission payable would be \$4,375.92. On the other hand, Unum submits that the commissions payable should be less as the Paid Premiums were less than the Submitted Premiums. Unum submits that the Submitted Premiums from their records were \$56,932 whereas the Paid Premiums were \$43,206.00. Taking into account the latter figure and the respective nature of the contracts, Unum submits that the commission payable should be \$3,238.00.

[85] I accept the submission of Unum in this regard. First, I am satisfied that Ms. Woolard was aware of and was bound by the practice of initially giving credit for the Submitted Premium but receiving final credit only for the Paid Premium. Second, I am satisfied that Ms. Woolard was aware of and is bound by the contract indicating that the amount billed at the third month would be the amount used for the calculation of the Paid Premium. I find that the Paid Premiums for this category amounted to \$43,206.00 and that the commissions payable as a result are \$32,038.00.

**(D)** Regarding sales where the efforts of Ms. Woolard were said to have produced sales even though sales were put onto the books of Unum after the termination of her contract of employment, Ms. Woolard claims total premiums sold of \$132,859.57, total commissions payable of \$8,071.44 and \$354.00 in commissions already credited. On the other hand, Unum claims that commissions in this category should be \$872.29 of which \$354.00 has already been paid.

[86] Nine of the policies involved in this category involve "Buydowns". This involves a lesser overall premium accompanied by decreased coverage of either the number of employees covered by the insurance or of the coverage itself. The submission of Unum is that there were actually premium decreases in the policies under this category. On the other hand, Ms. Woolard submits that she is entitled to some commission on the premium even though it was

reduced from the previous year as what remained represented an increase in the premiums chargeable for that part of the coverage which remained.

[87] I am satisfied that the attention paid to Ms. Woolard on this question is superior to the attention paid by the various employees of Unum who testified as to what had occurred relating to the various policies in this category. I am satisfied that it was increased premiums relating to that part of the coverage which remained in effect even though the overall premium being paid by the customer was reduced. I am also satisfied that the policies came as a result of the efforts of Ms. Woolard even though some of the renewals or some of the policies were not in effect until after the date of the termination of her contract of employment. I therefore find that the total premiums sold or increased was \$132,859.57, the total commissions payable as a result were \$8,071.44 and that the commissions already paid amount to \$354.00.

**(E)** The next category is sales which did not appear on the Scorecards prepared by Unum but which were nevertheless payable. In this regard, Ms. Woolard claims a total premium sold or increased of \$80,385.31 and total commissions payable of \$6,005.15. It is the submission that Unum that the commissions payable should be \$4,838.39. In reviewing the policies involved, three policies were terminated before one year had expired from the effective date of the policy (policy numbers 80041, 80405, and 82828). In accordance with my earlier ruling and the contract in effect, no credit should be given to Ms. Woolard even though substantial premiums were paid while the policies were in effect. Policy number 83567 is duplicated in one of the categories noted above and should be excluded from this category. Taking those matters into account, I find that the total premiums sold or increased amount to \$70,230.44 and that the total commissions payable are \$5,243.52.

**(F)** The last category are policies where Ms. Woolard alleges that there is "insufficient evidence" that the policies were terminated or alleges that she should be entitled to a commission because "Unum had the benefit of the premiums for an extensive part of the year". The amount claimed by her for total premiums sold or increased is \$13,165.67 and the total commissions payable of \$987.43. It is agreed between the parties that a commission of \$33.00 has already been paid relating to one of the eight policies in this particular category.

[88] In reviewing the policies involved, the effective date of the policies is either February or April, 1999. Unum submits that five of the policies were terminated on October 1, 1999 and I accept that submission. Two other policies were terminated before they could be renewed and I am satisfied that Ms. Woolard should not be entitled to commissions on those policies either.

[89] Policy number 83716 falls into the category of a policy which was a 1998 policy which was renewed in April, 1999. I am satisfied that Ms. Woolard should have commission credit for that policy. Policy number 83731 was a policy where Unum paid a commission of \$33.00 but now claims that no commission should have been payable. In the absence of an explanation as to why that should be the case, I am prepared to accept the submissions of Ms. Woolard regarding that policy. I therefore find that total premiums sold or increased was \$1,301.80, the commission payable was \$97.64 and the commission already paid was \$33.00 for the two policies.

[90] I therefore summarize the various total premiums sold or increased, and the total commissions payable as follows:

<b>COMMISSION CATEGORY</b>	<b>TOTAL PREMIUM SOLD OR INCREASED</b>	<b>TOTAL COMMISSIONS PAYABLE</b>
(1) Sales which are non-contentious	\$ 819,095.56	\$31,482.36
(2) Source documentation not available or not fully available	\$ 107,699.31	\$ 4,871.44
(3) Sales made in 1998 but which were to be credited in 1999	\$ 36,747.53	\$ 2,756.06
(4) Federation Policies	\$ 153,212.42	\$ 7,671.50
(5) Sales effectively completed by Ms. Woolard prior to her termination		
(A) Listed on scorecard but nothing paid	\$ 13,961.70	\$ 1,030.95
(B) August, 1999 Renewals	\$ 30,451.17	\$ 2,283.84
(C) Incorrect commission said to have been credited	\$ 32,039.00	\$ 3,238.00
(D) Sales where Ms. Woolard is Said to have Produced sales	\$ 132,859.57	\$ 8,071.44
(E) Sales which were never reflected on the scorecards of Unum	\$ 70,230.44	\$ 5,243.52
(F) Policies alleged to have been terminated	<u>\$ 1,301.80</u>	<u>\$ 97.64</u>
<b>TOTALS:</b>	<b>\$1,397,598.50</b>	<b>\$66,746.75</b>

[91] The total premiums sold or increased of \$1,397,598.50 then forms the basis of the calculation of the bonuses owing. As well, some of the bonuses are calculated taking into account the total premiums for LTD and Life policies and the total number of new policies relating to LTD and Life policies.

## **BONUSES**

[92] The bonuses available Ms. Woolard were as set out in the Plan. While most of the bonuses were calculated on a quarterly basis, the ultimate calculation was on an annual basis. Prior to the merger, Unum agreed that the half year to and including July 1, 1999 would be treated as a full fiscal year. The targets which had been put in place for the entire year were reduced by 55% so that the targets to July 1, 1999 were then 45% of what had been set for the year. As is the case with the other parts of the Scorecards, the parts of the Scorecards which show the calculation of bonuses also reflect considerable inaccuracies.

### **(A) Marketshare Coverage Bonus**

[93] This bonus rewarded sales staff for cross-selling to new and existing customers. The calculation involved determining the number of coverages written. The bonus related solely to the number of LTD and Life policies and not to the policy value. Policies included new customers as well as new Life or LTD policies for existing clients. No compensation was given if there were less than 25 additional policies. \$1,000.00 was given for between 25 and 29 additional policies. A further \$3,000.00 was given if the number of coverages written reached 30. For numbers over 30, \$200 per coverage was added for new coverages numbering between 30 and 49 and \$250 per coverage was added to the previous amounts for each coverage in excess of 50.

[94] This bonus should be calculated on a six-month basis so that the numbers of policies noted above should be reduced by half prior to the bonuses being available. The Scorecard provided by Unum states that 25 new policies were written by Ms. Woolard. On the other hand, Ms. Woolard calculates that she sold a total of 34 LTD and 15 Life policies.

[95] Not all of the objections taken by Unum are sustainable. First, while the effective date for policy number 84964 is November, 1999, I am satisfied that this account should be included in this Bonus as it came within the notice period which should have been provided to Ms. Woolard. Second, Unum has misclassified policy numbers 80052, 82079, 83078, and two of the Federation policies incorrectly as "NBOC" rather than "NLOC". At the same time, Ms. Woolard has improperly included policy numbers 83459 and 83567. Accordingly, I find the Market Share Bonus to be \$11,400.00 made up of \$1,000.00 for the first 14.5 new and NBOC transactions, a further \$3,000.00 for having achieved 15 new and NBOC transactions, a further \$200.00 per transaction for the transactions between 15 and 24.5 transactions, and a further \$250.00 per transaction for the 24 transactions between 25 and 47 new and NBOC transactions.

### **(B) Individual Sales Goal Achievement Bonus**

[96] Sales staff were given individual goals at the beginning of the year. The goals which were set for Ms. Woolard for 1999 were \$950,000.00 in LTD Premiums, 45 new LTD Premiums, \$110,000 in Life Premiums and 11 new Life Premiums. If those goals were met, then an "Individual Sales Goal Achievement Bonus" was available. The interpretation of how this bonus

was calculated is very much in dispute. The 1998 Canadian Group Representative Compensation Plan notes that: "If goals are achieved additional compensation will be generated based on the following schedule":

<b>Individual Goals</b>	<b>Percentage of Goal Achieved</b>	<b>Extra Percentage of Rep New/NBOC Comp. By Line</b>
LTD Premium	100%	20%
Life Premium	100%	20%
LTD Coverage	100%	10%
Life Coverage	100%	10%

There was a further note that this Bonus was paid out on a year-to-date pro rata basis of 20% for the first quarter, 45% for the second quarter, 70% for the third quarter and 100% for the fourth quarter. It was also noted that all New or NBOC Premiums were credited as were New or New Lines of Coverages.

[97] Ms. Woolard submits that there are three possible interpretations of how this Bonus is calculated. The first interpretation is that she receives a base commission on the amount of sales up to her goal and, as soon as the goal is achieved, the entire commissions earned after reaching the goal are boosted by 20% and, from that point on, she receives 120% of the normal commissions. Under this interpretation, Ms. Woolard submits that she would be entitled to a Bonus of \$9,534.69.

[98] The second interpretation is that, after the goals have been met, she then receives commissions equal to 20% (or 10%) of the total premiums on all sales including those sales booked prior to reaching her goal. Under this interpretation, Ms. Woolard submits that she would be entitled to a bonus of \$122,354.92.

[99] Under the third interpretation, she would receive the base commissions on all sales but, after the goal has been reached, she would not only receive the base commission amount but an additional 20% of all commissions. Under this interpretation, Ms. Woolard would receive her base bonus for all sales including those sales which had occurred up to the point where she was meeting her goal. Under this interpretation, Ms. Woolard submits that she would be entitled to the same bonus of \$122,354.92 but that her previous commissions payable would also be increased by 25%.

[100] Ms. Woolard submits that the proper interpretation of this Bonus is one of the last two interpretations given. First, such a bonus is in keeping with the representation that was made at the time of her hiring that she would have the capability of earning in excess of \$100,000.00 in her first year. Second, these interpretations are consistent with the "import" of the other bonus plans. The other Bonuses are designed to provide a higher bonus on subsequent sales after certain goals are reached and these interpretations about this bonus would be consistent with that. Third, Ms. Woolard testified that Mr. Wronski initialled a draft compensation calculation which had been prepared by Ms. Woolard and which showed all LTD Premium commissions based on 20%. In this regard, counsel for Ms. Woolard notes that Mr. Wronski was not called to

give evidence at Trial or on any others. Finally, Ms. Woolard submits that if there is any ambiguity in the interpretation of this Bonus, the interpretation should be interpreted against the drafter, Unum.

[101] I do not accede to the submissions of Ms. Woolard. First the Plan makes it clear that if goals are achieved “additional compensation will be generated” and that the “extra percentage” relates to “comp. [compensation]... by line.” The two uses of the word “compensation” allows me to conclude that it is a bonus based on an extra percentage of compensation and not an extra percentage of total premiums. The use of the word “compensation” should be contrasted with how the Revenue Bonus is calculated which uses the phrase “percentage of Premium Credited”. In the context of the calculation of bonuses, it is clear that the percentage here relates only to an extra percentage of compensation.

[102] Second, the testimony of Ms. Woolard in these regards was unconvincing. When asked in direct examination what the column “Extra Percentage of Rep New/NBOC Comp. By Line” meant to her, I record Ms. Woolard as stating: “I didn’t really consider it”. When asked to confirm that the extra percentage did not mention the premiums but only mentioned “Comp.”, I record Ms. Woolard as stating: “Didn’t consider”. “Don’t know what meant by Comp.”. “Could mean a lot of things.” When it was pointed out to Ms. Woolard that one of the documents in her handwriting showed the word “comp.” and whether she still stood by her statement that she didn’t know what “comp.” meant, Ms. Woolard was less than convincing when she stated: “I didn’t consider it”. For someone who is vitally concerned in what her compensation would be, Ms. Woolard was not convincing when she professed no understanding of what the term “comp.” meant.

[103] Third, I accept the evidence of Mr. Doyle that the percentage was calculated on the commission payable and not on the total premium which was in excess of the goals that had been set. I agree with his assessment that it would be “incorrect” to assume that if the goal was \$1,000,000.00 and sales were \$1,100,000.00, the representative would get 20% of \$100,000.00.

[104] Fourth, even though Mr. Wronski did not testify about his initialling a draft compensation calculation which had been prepared by Ms. Woolard, I am satisfied that Mr. Wronski was not in a position to bind Unum to pay compensation that was other than in accordance with the descriptions contained in the Plan.

[105] Fifth, the calculations set out in the various Scorecards are consistent with the interpretation submitted on behalf of Unum. While it may well have been that the Scorecards did not accurately record the policies and commissions that were attributable to Ms. Woolard, there is no evidence before me that Ms. Woolard sought to seek a correction of the calculations indicated in the Scorecards relating to the Individual Sales Goal Achievement Bonus. Her lack of action in this regard is consistent with an understanding that this Bonus would see commissions increased by either 10% or 20% on commissions earned on sales over and above the 1999 goals that had been set. I am satisfied that this is the only interpretation which can be given to the words which were used and to the Scorecards to which no objection was taken.

[106] In those circumstances, I am satisfied that Ms. Woolard is entitled to an Individual Sale Goal Achievement Bonus in the amount of \$9,534.69.

**(C) Quarterly Sales Goal Enhancer**

[107] Sales representatives were also potentially entitled to an “Enhancer”. The “Individual Sales Goal Achievement Bonus” was paid out quarterly on a pro-rated year-to-date basis. The “Enhancer” was paid out if the quarterly targets of 20% for the first quarter, 45% for the second quarter, 70% for the third quarter or 100% for the fourth quarter of the Individual Sales Goal Achievement Bonus were met. A bonus of \$500.00 for each of the four product goals (for a maximum of \$2,000.00 per quarter) was paid if the pro-rated year-to-date percentages set out were met. Ms. Woolard submits that she met six out of the eight possible goals in the first two quarters so that she is entitled to \$3,000.00. I accept that submission and find that Ms. Woolard was entitled to \$3,000.00 as her Quarterly Sales Goal Enhancer Bonus.

#### **(D) Revenue Bonus**

[108] This bonus is based on new business and premium increases. Where NBOC or new business was obtained or if rate increases were obtained, sales representatives were given a revenue bonus equal to .5% of the premium credited for premiums between \$1,000,000.00 and \$1,999,999.00; .6% of the premium for premiums between \$2,000,000.00 and 3,499,999.00; 6.5% of the premium between \$3,500,000.00 and \$4,999,999.00; and .7% of the premium for premiums totalling in excess of \$5,000,000.00. I have found that Ms. Woolard sold \$1,397,598.50 in new or NBOC premiums. Annualized, this amounts to \$2,795,197.00. This amount entitles Ms. Woolard to a credit of .5% of the total premiums between \$1,000,000.00 and \$1,999,999.00 (\$5,000) plus .6% of \$795,197.00 (\$4,771.18) for a total of \$9,771.18.

#### **(E) Packaging and Collaboration Bonus**

[109] This bonus rewards representatives for “packaging” sales with other representatives. Sales staff were provided with \$350.00 for each new package sold with an ID Representative and \$500.00 for each new package sold with a special risk representative. Ms. Woolard sold one new package with the ID representative and one In Force package with the Special Risk Representative and, accordingly, she is entitled to \$850.00. This entitlement was acknowledged by Unum and was previously paid.

#### **(F) Block Asset Management Factor**

[110] This bonus related to the over-all profitability of various branches of Unum. This bonus reflects an almost impossible calculation. The 1998 Canadian Group Rep Compensation Plan and the undated Canadian Group Sales Representative Compensation Plan have this description:

“This new factor is based on the Group Sales Rep’s business from their current office. Compensation will be paid for the Sales Rep’s ability to grow their in force block while contributing to the Office Persistency levels and Profitability of LTD and Life.”

[111] There are two parts to the calculation. The first calculation starts with a review of the “Persistency” of Ms. Woolard. In the Scorecard provided by Unum, her persistence was 94.66%. This figure relates to what Mr. Doyle described as a “recognition of keeping business on the books”. For the purpose of this calculation, I am prepared to accept the Unum figure of 94.66%. This persistency is then compared to a determination of the Total Office Group Premium Block Growth. This represents the growth shown in premiums between the year ending 12/31/98 and 12/31/99 or, because of the half year involved, between 12/31/98 and 06/30/99. The Scorecard indicates Block Growth of 9.22% and, while Ms. Woolard submits that

the growth should be determined at 20%, there is no statistical basis to do so. Accordingly, I find the Total Office Group Premium Block Growth for the period to 06/30/99 to be 9.22%.

[112] Having determined the figure of 9.22% and the persistency of Ms. Woolard at 94.66%, the Office Group Premium Persistency is calculated in accordance with the chart shown in the Plan. The chart produces a percentage of .075%. This percentage is then multiplied by the total premiums in force at the branch so that \$6,979,798.00 multiplied by .075% produces a resulting bonus available to Ms. Woolard of \$5,234.85.

[113] The second calculation of the Block Asset Management Factor requires a determination of the three-year LTD Average Gain for the Vancouver office of Unum. For an Average Gain of between 0 and 5%, two "LTD Points" are gained, three such Points are gained for Average Gains between 5 and 15%, and four Points are gained for an Average Gain in excess of 15%. Once the number of Points has been determined, the Part A Compensation is then multiplied by 50% if there are two points, 60% if there are three Points, and 70% if there are four Points. The only information which is available is from the Scorecard which was in evidence and that indicates an Average Loss rather than an Average Gain. If the Scorecard is accurate, then there would be no additional Bonus calculated under Part B of the Block Asset Management Factor. On the other hand, Ms. Woolard submits that it "would not be unfair to assume an average gain of at least 15%" so that I should find that four LTD Points were available and that the Part A Compensation should be multiplied by 70% for the additional bonus.

[114] It may well be that the Average Gain for the Vancouver office was positive and not an average loss of 6%. However, I have no way of knowing that. In the absence of any information which would allow me to undertake the calculation under Part B of the Block Asset Management Factor, I am unable to conclude that the Bonus under this section should be increased from \$5,234.85. Accordingly, I find that Ms. Woolard is only entitled to \$5,234.85 under the Block Asset Management Factor.

[115] In summary, I find the Market Share Bonus to be \$11,400.00, the Individual Sales Goal Achievement Bonus to be \$9,534.69, the Quarterly Sale Goal Enhancer to be \$3,000.00, the Revenue Bonus to be \$9,771.18, and the Block Asset Management Factor to be \$5,234.85. Having then determined the commissions payable to Ms. Woolard at \$66,746.75 and the bonuses available to Ms. Woolard at \$38,940.72, it is now necessary to review the question of her entitlement to damages for breach of contract in lieu of adequate notice being provided to her.

### **WHAT WAS A REASONABLE NOTICE PERIOD?**

[116] The test for determining a reasonable notice period was set out in *Bardal v. Globe and Mail Ltd.* (1960) O.W.N. 253 (Ont.H.C.) as adopted in *Ansari v. British Columbia Hydro and Power Authority* (1986), 2 B.C.L.R. (2d) 33 (B.C.S.C.). The primary factors to be taken into account when deciding what is the reasonable notice period are the length of service of the employee, the character of the employment, the age of the employee, and the availability of similar employment having regard to the experience, training and qualifications of the employee.

[117] Under a document entitled "1998 Compensation Plan Policy and Procedures" and a September, 1997 document headed "Unum Corporation Severance Plan", Ms. Woolard was only entitled to two weeks notice. I find that this policy was not binding. The best evidence of this is the July 2, 1999 letter to Ms. Woolard indicating that her job had been eliminated and that Unum was prepared to provide her with 12 weeks pay "based on your regular rate of pay as at

your last scheduled day of work noted above". Even though Unum does not seek to enforce the two week provision of the two documents referred to, I find that the written termination policy of Unum is not binding on Ms. Woolard.

[118] Ms. Woolard submits that the appropriate notice period is six months. While Ms. Woolard was relatively young at the time her employment was terminated (36), she had almost twenty years experience in sales and marketing. While her position was not that of a senior executive, she had a position involving considerable responsibility and an opportunity for significantly higher earnings than many middle and senior management positions.

[119] It is also submitted that the following factors should be taken into account: (a) Ms. Woolard's employment was terminated within two years of her hiring; (b) her employment was terminated as a result of a commercial decision by the employer to merge and to terminate some staff despite the representations that Unum had made to her at the time she was hired; (c) Ms. Woolard was terminated at the time when she was pregnant so that her chances of finding re-employment in the next year was virtually impossible; and (d) taking into account her education level, the contraction in the insurance industry, and the need for specific qualifications and certification in order to work in other insurance industry related jobs, Ms. Woolard faced a complete lack of similar positions available.

[120] In **Cassady v. Wyeth-Ayerst Canada Inc.** [1998] B.C.J. (Q.L.) No. 1876 (B.C.C.A.) the Court upheld an eight and a half month award for a Plaintiff employed in a junior capacity as a sales representative for three and a half months stating:

[Counsel] ... has drawn to our attention a number of authorities in this Province involving a short period of employment in which the Court has given much greater weight to the element of the Plaintiff's reasonable expectations than to the short period from hiring to dismissal. (at p. 20)

[121] In support of the entitlement to six months notice, Plaintiff submits the following decisions are applicable: **Davison v. Lee Valley Tools** [1987] B.C.J. (Q.L.) No. 130 (B.C.S.C.) (8 months for 2 months service); **Nevin v. B.C. Hazardous Waste** [1994] B.C.J. (Q.L.) No. 524 (B.C.S.C.) (10 months for 3 months service); **Kuhbock v. Caldwell Banker Affiliates of Canada** [1996] A.J. (Q.L.) No. 1029 (Alberta ALTA. Q.B.) (6 months for 3 1/2 years service); **Larsen v. A & B Sound Ltd.** [1996] B.C.J. (Q.L.) No. 696 (B.C.S.C.) (8 months for 2 years service); **Lynch v. J.D. Mack Limited** [1984] M.S.J. (Q.L.) No. 252 (M.S.S.C.) (12 months for 4 years service); **Pearl v. Pacific Enercon Inc.** [1985] B.C.J. (Q.L.) No. 2180 (B.C.C.A.) (6 months for 2 1/2 years services); **Reilly v. Steelcase Canada Ltd.** (1979) 103 D.L.R. (3d) 704 (Ontario ONT. H.C.) (9 months for 2 1/2 years service); **S.S. v. Port Alberni Friendship Centre** [2000] B.C.J. (Q.L.) No. 608 (B.C.S.C.) (7 months for 6 1/2 years service); **Bondi v. Geographics Marketing Canada Inc.** [1999] B.C.J. (Q.L.) No. 1582 (B.C.S.C.) (6 months for 4 years service).

[122] Unum submits that the appropriate notice period should be to September 30, 1999 (3 months notice). In support of that submission, Unum refers to the following decisions: **Blackmore v. Cablenet** [1994] A.J. (Q.L.) No. 938 (Alta. Q.B.) (4 months for 3 years service); **Buchanan v. RCA Inc.** [1988] B.C.J. (Q.L.) No. 1972 (B.C.S.C.) (4 months for 5 years service); **Craig v. Interland Window Mfg. Ltd.** [1993] B.C.J. (Q.L.) No. 1377 (B.C.S.C.) (3 months for 2 1/2 months service); **Denhoff v. B & L Lumber Ltd.** [1987] A.J. (Q.L.) No. 1410 (Alta. Q.B.) (4 months for 2 years service); **Ellchuk v. International Stage Lines Inc.** [1989] B.C.J. (Q.L.) No. 1654 (B.C.Ct.C.) (2 months for 18 months service); **Equitable Life Insurance Co. of Canada v.**

**Donnelly** [1993] O.J. (Q.L.) 171 (Ont. Gen Div.) (6 months for 3 years service); **Layne v. Computer Associates International Inc.** [1997] O.J. (Q.L.) No. 4147 (Ont.G.D.) (4 months for 34 months service); **Mitchell v. Lorell Furs Inc.** [1991] N.S.J. (Q.L.) No. 205 (N.S.S.C.) (4 months for 3 years service); **O'Shaughnessey v. Drake International Inc.** [1986] O.J. (Q.L.) No. 793 (3 months for 3 years service); **Priestman v. Swift Sure Courier Services Ltd.** [1989] B.C.J. (Q.L.) No. 344 (S.C.) (2 weeks for 1 year service); **Skene v. Dearborn Motors Ltd.** [1990] B.C.J. (Q.L.) No. 135 (B.C.C.A.) (1 month for 13 months service); **Spurway v. Royal Lepage Real Estate Services Ltd.** [1987] N.S.J. (Q.L.) No. 59 (N.S.S.C.) (2 months for 3 years service); **Stewart v. Intercity Packers Ltd.** [1988] B.C.J. (Q.L.) No. 2442 (B.C.S.C.) (3 months for 2 years service); and **Webber v. R.W. Hutton Agencies Ltd.** [1989] B.C.J. (Q.L.) No. 386 (B.C.S.C.) (2 months for 2 1/2 years service).

[123] Taking into account the factors as set out in **Bardal**, supra, and **Ansari**, supra, and the particular situation of Ms. Woolard, I find that six months is the appropriate notice period. Ms. Woolard had a responsible position and it was anticipated by both parties that her earnings would be in the neighbourhood of \$120,000.00 a year. Even as late as June, 1999, it was the expectation of both parties that Ms. Woolard would be employed on the sales staff for a long period of time. The expectation of Ms. Woolard in that regard was reasonable. Her performance had received accolades, most of her sales quotas had been met, and she was advised that she would be employed by the company resulting from the merger of Unum and another insurance company. I am also satisfied that the contraction of the insurance industry as well as her lack of professional designations within the insurance industry hindered the possibility of Ms. Woolard finding comparable employment within the industry.

[124] Although it was not known to her fellow employees and although she had not advised Unum, Ms. Woolard was pregnant when her employment was terminated on July 5, 1999. Ms. Woolard gave birth to her son on March 23, 2000. In relation to the reasonable period of notice, should the notice period be extended by the time Ms. Woolard would have been on maternity leave?

[125] The learned author of Wrongful Dismissal, 1999 edition (Ontario: Don Mills) states:

It is conceivable to argue that an individual who was fired during pregnancy, whether or not that termination was due to the pregnancy itself, ought to have greater compensation than one normally would expect in ordinary circumstances. The argument may presumably be made that a terminated pregnant woman has very little opportunity of finding alternate employment in a realistic market place. For that reason one could possibly argue that compensation should follow through to the date of delivery of the baby and following a period of pregnancy leave, the real notice obligation should start. This, of course, is strictly speculation and no authority exists to support this proposition. (at p.7-17)

[126] There is now some authority for the proposition that maternity leave and the notice period should not run during the same period: **Whelehan v. Laidlaw Environmental Services Ltd.** (1998) 55 B.C.L.R. (3d) 129 (B.C.S.C.) and **Aimola v. Cooper Market Ltd.** (1989), 27 C.C.E.L. 248 (B.C.S.C.). However, in both of those decisions, the plaintiffs had applied for and had been approved for maternity leave prior to the termination of their contracts of employment.

[127] In the case at bar, any maternity leave would have started after the appropriate notice period had expired. In those circumstances, the applicable notice period does not "coincide"

with the period for maternity leave. The period of notice should not be extended by the period of time available to Ms. Woolard for maternity leave. That being the case, the six month notice period which I find to be reasonable in the circumstances runs from July 5, 1999 and concludes on January 5, 2000.

[128] The question which then arises is how to calculate the monthly amount available during the six month notice period. In **Bibby v. Bucci Property Corporation** [1999] B.C.J. (Q.L.) 2629 (B.C.S.C.), Allan, J. stated:

An employee paid by straight commission is entitled to damages based on the commissions he or she would likely have earned during the notice period. However, there must be sufficient evidence to show that the commissions would have been earned during the notice period and to permit the Court to estimate the amount of those commissions. (at para. 23)

The Plaintiff relies on the principle that the Court may use his previous commissions as evidence of what he would have earned subsequently, but for the dismissal... (at para. 31)

I agree with the Defendant that in the circumstances of this case, the best evidence is the actual commissions earned by Bucci's employees between March and August, 1998: **Scott v. PE Ben Industries Co.** (1992), 42 C.C.E.L. 237 (Alta.C.A.) (at para 32.)

[129] If commissions are calculated using the average over the previous six months, the average would be \$9,414.40 per month. Unum submits that this is the "best case scenario" as it includes a number of sales which were extraordinary and a number of sales submitted after the date of termination. Unum submits that the amount should be somewhere between \$3,500 a month and \$9,414.40 per month or on average \$7,000 per month.

[130] Ms. Woolard submits that she was told she would be averaging commissions of \$10,000 a month when she was hired, that her trend was upwards during 1999, that she would likely have earned more during the notice period than she did in the first six months of 1999, and that \$9,414.40 is the appropriate amount to be used during the notice period.

[131] The submission that her commissions would be higher during the notice period is based on a number of factors. First, as a result of the merger and termination, fewer representatives would have been servicing more clients so that this would have meant more remuneration to her. Second, any new scheme of remuneration would have been at least as favourable to employees as the old remuneration system under Unum. Third, it is appropriate to assume an upward trend in earnings as evidenced by the large increase in commissions in 1999.

[132] It is difficult to assess what monthly amount should be used. First, it is clear that sales representatives were encouraged to put in an extra effort to maximize the commissions that were available prior to the merger of the two companies. I am satisfied that this resulted in higher than usual commissions for the period ending July 1. Second, there would be no guarantee that high commissions would be available to Ms. Woolard if she had worked during the notice period. The merged company would be undertaking an amalgamation of sales staff and might well have allocated customers to sales staff who would be permanently with the amalgamated company. Third, there was no evidence before the Court regarding the commissions available to the sales representatives who were retained by the amalgamated

company so that it would be possible to assess whether commissions would be higher than the \$10,000 a month which was contemplated when Ms. Woolard was hired by Unum in early 1998. Fourth, a number of the commissions for which Ms. Woolard should receive credit would only have been credited to her during the notice period and not during her last six months of employment.

[133] In those circumstances, I am not satisfied that there is sufficient evidence available to allow me to conclude that the commissions available to Ms. Woolard during the six month notice period would have averaged \$9,414.40. In the circumstances, I find that the average commissions available to Ms. Woolard during the six-month notice period would have been \$7,500.00 per month. This amount takes into account the factors noted above as well as the lack of sufficient evidence regarding what was more than likely to occur if Ms. Woolard had worked through the six-month notice period. Because this amount is in excess of the “base draw” which would ordinarily be available to Ms. Woolard, the “base draw” should not be added to the \$7,500.00 per month award made. Accordingly, I award Ms. Woolard \$45,000.00 damages arising out of the termination of her contract of employment.

### **WAS THERE A BREACH OF THE OBLIGATION OF GOOD FAITH AND FAIR DEALING?**

[134] In *Wallace v. United Grain Growers Ltd.* (1997) 152 D.L.R. (4<sup>th</sup>) 1 (S.C.C.), Iacobucci, J. on behalf of the majority considered the question of whether the notice period should be extended where the employer fails to meet the obligations of “good faith and fair dealing” with a dismissed employee and described that obligation as follows:

The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. (at p. 34)

[135] Ms. Woolard submits that the following actions of Unum which are said to be unfair and in bad faith should be considered so that the notice period should be increased by at least three months:

- (a) At the time of the merger, Ms. Woolard was led to believe that she would be part of the continuing group of employees including receiving a specific invitation to attend a Regional Workshop on July 26 and 27, 1999. Based on this clear impression, Ms. Woolard and her husband bought a new home the weekend before her employment was terminated. In *Singh v. British Columbia Hydro and Power Authority* [2001] B.C.J. (Q.L.) No. 2538 (B.C.C.A.), the Court referred to various representations made to employees about job security and raised the notice period from twelve and a half months to twenty-seven months;
- (b) Since her termination and until the commencement of the Trial, Unum failed and then refused to deal with the issue of the monies owing to Ms. Woolard and to account for the commissions she had earned;
- (c) Unum left Ms. Woolard in a vulnerable position regarding her American Express expense card which resulted in credit problems for her; and

- (d) Unum failed to pay Ms. Woolard's outstanding expenses until almost two years after employment was terminated.

[136] Unum submits that the decision in **Singh**, supra, should be distinguished on the basis that Mr. Singh was repeatedly told that he would have a job but that there is no evidence that Ms. Woolard received similar assurances. The case at bar is not a situation where Ms. Woolard was promised a position when it was known that this would not be the case. As well, it is not a situation where Ms. Woolard was told repeatedly that she would have a position or was guaranteed a position. I am satisfied that the circumstances found in **Singh**, supra, are not present here.

[137] Regarding the refusal to deal with the question of the commissions owing to Ms. Woolard, Unum submits that it has paid Ms. Woolard all of the monies that are owing to her but, in any event, there is a legitimate issue about whether any money is owing. I agree with that submission. While the record keeping of Unum was hopeless and while the Scorecards maintained were highly inaccurate, I am satisfied that it was appropriate for Unum to rely on their internal record keeping to deal with Ms. Woolard when it paid her what it thought was owing to her. The fact that Ms. Woolard had a different opinion of what was owing and the fact that the Court finds that the amount tendered to date is not sufficient to satisfy what was owing to Ms. Woolard are not sufficient reasons to attract a finding that Unum failed to meet its obligation of good faith and fair dealing.

[138] Regarding the problems with the American Express expense card of Ms. Woolard, it was unpaid but there is no evidence of credit problems resulting from the failure of Unum to pay the balance owing. In those circumstances, I cannot find that a failure to pay the balance owing on this business expense card amounts to a lack of good faith and fair dealing such as to require an extension of the notice period.

[139] On the question of the failure of Unum to pay outstanding expenses owed directly to Ms. Woolard, I find that expenses were not paid. However, I also find that these expenses were not initially submitted by Ms. Woolard and, when submitted, were paid. In those circumstances, this is also not evidence of a failure to meet the obligations of good faith and fair dealing.

[140] It should also be pointed out that Ms. Woolard was offered re-employment counselling but that Ms. Woolard did not take up that offer.

[141] In all of the circumstances, I find that Unum fulfilled its obligations of good faith and fair dealing with Ms. Woolard as they dealt with her in a candid, reasonable, honest and forthright manner and did not engage in conduct which can be described as untruthful, misleading or unduly insensitive. Accordingly, it is not appropriate to extend the notice period.

### **MITIGATION OF DAMAGES**

[142] Unum carries the onus of showing that Ms. Woolard has failed to mitigate her damages. However, Ms. Woolard must show that she has attempted to mitigate her damages and Unum may rely on the evidence presented by her when it attempts to establish a failure to mitigate: **Red Deer College v. Michaels** (1975) 57 D.L.R. (3d) 386 (S.C.C.); and **Schalkwyk v. Hyundai Auto Canada Inc.** (1995), C.C.E.L. (2d) 132 (Ont. G.D.).

[143] In seeking and accepting alternative employment, Ms. Woolard has a duty to act reasonably – to take such steps as a reasonable person in her position would take in her own

interest to maintain her income and her position in her industry, trade or profession. The duty involves a constant and assiduous application for alternative employment and an exploration of what is available through all means: **Leawood v. Thunderbird Home Centres** (unreported) April 3, 1995, C941213 – Vancouver Registry (B.C.S.C.).

[144] Unum submits that, in the circumstances, anything awarded for breach of contract to provide an appropriate notice period should be reduced by 25%. The first job application was made by Ms. Woolard on December 5, 2000 some 17 months after her employment was terminated. The first application to an insurance company was made December 19, 2000. Re-employment counselling was undertaken but only 14 months after her dismissal. The failure to take up the offer of re-employment counselling made by Unum is also said to constitute evidence that Ms. Woolard failed to mitigate her damages.

[145] The question of mitigation is complicated by the fact that Ms. Woolard became pregnant prior to the termination of her contract of employment. There are contrary decisions in British Columbia dealing with the effect of pregnancy on the duty to mitigate. In **Langton v. Mastercraft Development Corp.** (1989), 28 C.C.E.L. 272 (B.C.C.C.), Boyd, Co.Ct.J., as she then was, stated:

There may well have been difficulty in seeking full-time employment, in light of the pregnancy, but there was no effort of any kind, beyond her approaching Mr. Moy to seek out part-time employment, even as a temporary office assistant. In light of her background and experience, I am satisfied that had the Plaintiff made reasonable steps to seek employment, she would almost certainly have succeeded in finding part-time employment as a secretary or office assistant. (at p. 275)

[146] However, in **Whelehan**, supra, Allan J. stated:

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. (at para.17)

[147] I find that Ms. Woolard made no attempts to obtain employment during the first 17 months after her employment contract was terminated by Unum. However, I prefer the reasoning of Allan, J. as set out in **Whelehan**, supra. While Ms. Woolard had only been pregnant for several months, I find her situation to be identical to the situation of Ms. Whelehan who was seven months pregnant. Ms. Woolard could not reasonably have been expected to begin any job search prior to when any maternity leave would have come to an end in the Fall of 2000. I am satisfied that the notice period which should have been provided by Unum was of no practical assistance to Ms. Woolard as it was highly unlikely that she would be able to compete against equally qualified seekers of immediate employment when it was clear that, shortly after the commencement of any such new employment, her employment would be interrupted by a maternity leave.

[148] I also find the decision in **Langton**, supra, to be distinguishable on the basis that it would unrealistic to expect that there was any part-time employment available in the insurance industry for a sales representative such as Ms. Woolard.

[149] In the circumstances, Ms. Woolard was acting reasonably even though she did not make efforts to become re-employed until long after the six-month notice period had expired. It was

reasonable of Ms. Woolard to make efforts to become re-employed only after what would have been a maternity leave had concluded. As she did this, I am satisfied that Unum has failed to establish a failure by Ms. Woolard to mitigate her damages so that it is not appropriate for there to be the reduction requested by Unum of the damages awarded to her for the breach of her employment contract.

### **SHOULD THERE BE SPECIAL COSTS?**

[150] Ms. Woolard submits that she should be awarded Special Costs. Relying on decisions such as ***Garcia v. Crestbrook Forest Industries Ltd.*** (No. 2) (1994) 119 D.L.R. (4<sup>th</sup>) 740 (B.C.C.A.), Ms. Woolard submits that the conduct of Unum throughout has been reprehensible and deserving of rebuke. In support of that position, Ms. Woolard submits:

- (a) On August 16, 1999, Unum wrote advising that Ms. Woolard had compensation credits of \$37,343 but has never provided a breakdown or accounting of this figure;
- (b) The October, 1999 Statement of Claim contained a claim for outstanding commissions and for an accounting of those commissions but the Statement of Defence did not address this issue specifically;
- (c) On January 24, 2000, Unum was asked to explain discrepancies between the documentation that Ms. Woolard had about the commissions payable to her and that which had been produced by Unum but Unum refused to deal with those discrepancies;
- (d) In a January 24, 2000 letter, counsel sought production of specific documentation from Unum but Unum refused to produce the documentation although some of it was eventually produced pursuant to Orders made as late as the last week of the Trial;
- (e) After the Examination for Discovery of Mr. Doyle of Unum on January 18, 2001, Unum was requested to provide source documentation but did not;
- (f) Nine months after the termination of her employment, Unum finally paid outstanding business expenses to Ms. Woolard;
- (g) In July, 2001, Unum provided the answers to outstanding requests for documents flowing from the Examination for Discovery of Mr. Doyle and took the position that it had “no further documents”;
- (h) An application by Unum to amend its Statement of Defence to allege that Ms. Woolard owed it monies was adjourned on the basis that the application could only be re-set after Unum delivered a supplementary List of Documents relating to the existing pleadings and any proposed amendments;
- (i) On August 31, 2001, two weeks prior to the commencement of the Trial, Unum started to produce the backup documentation for its computerized records (Scorecards) but not the source material from the files maintained by Unum for its customers;

- (j) On the fifth day of the Trial, Unum was ordered to produce all source files referred to in each of the Scorecards in evidence and any source documentation relating to the \$37,343 which had been paid to Ms. Woolard. Dozens of boxes of material comprising thousands of documents were then produced. Ms. Woolard submits that, if these documents had been produced at the outset, full discoveries could have been conducted and much of the Trial could have been avoided;
- (k) At the resumption of the Trial in December, 2001 when it became apparent that additional documentation was missing, I was prepared to order that representatives of Unum swear Affidavits stating that there were no further documents available;
- (l) Source documents relating to commissions owing to Ms. Woolard were produced virtually up to the last day of the Trial;
- (m) Once produced, it was apparent that commissions were owing as a result of the efforts of Ms. Woolard relating to the original source materials from files that hadn't been previously produced;
- (n) But for the commissions tracking that had been undertaken by Ms. Woolard, many of the files would not have been produced as Unum consistently submitted that its "Scorecard" was kept in the ordinary course of business and accurately reflected the status of the Unum files for which Ms. Woolard would be entitled to remuneration;
- (o) Much of the source material which was eventually produced was produced from the Vancouver office of Unum and, accordingly, it is impossible for Unum to claim that it could not locate what had been requested for many months and what was only produced towards the end of the Trial;

[151] Unum submits that what was not produced included pre-January 1, 1999 matters as well as files after July 5, 1999 and that these materials are not relevant. However, pre-January 1, 1999 materials are relevant to ascertain whether there were commissions owing relating to rate increases on those files in 1999. Post-July 5, 1999 materials are relevant to the issues of whether Ms. Woolard was entitled to commissions on sales which she worked on but which did not complete until after July 5, 1999 and whether there were some policies where premiums were not paid for a full year so that Ms. Woolard is not entitled to commissions. The latter materials are also relevant to the issues of whether Ms. Woolard should be compensated for sales that she worked on but which were not completed until after July 5, 1999 but which were completed during the six-month notice period.

[152] In ***Kent v. Waldock*** [2000] 7 W.W.R. 10 (B.C.C.A.), the Court dealt with the non-disclosure of documents and described the non-disclosure as follows:

This non-disclosure was not a minor slip-up or error of the kind that can be expected to occur in a busy litigator's practice. It was an egregious and persistent failure to comply with the rules regarding the disclosure of documents to a party who needed them. (at p. 28)

[153] In the case at bar, the words used in **Waldock**, supra, are applicable. Some source materials have still not been produced. I do not accept the explanation offered on behalf of Unum that materials could not initially be found. I am satisfied that there was either a systematic concealment of relevant materials or a deliberate refusal to comply with the Rules requiring full disclosure of all relevant documents. Because hundreds of pages of materials were “found” after numerous orders were made during the Trial, I am satisfied that the source materials were always available but that Unum decided that its interests would be best served by those documents not being available for discovery or trial.

[154] I also reject the argument advanced on behalf of Unum that Ms. Woolard or her counsel were somehow to blame for the state of discovery when the Trial commenced. I do not accept the argument that it was counsel for Ms. Woolard who made the decision to proceed to trial even though there had not been full discovery of documents. The obligation to make all relevant documentation available lies with both parties. It is singularly inappropriate to advance the argument that, if counsel for one party decides to go to Trial even though the other side has not met their obligations, the party who wishes to proceed does so at their own peril if it is subsequently discovered that the other party has not fulfilled their obligations to provide full discovery.

[155] In the circumstances, I am satisfied that there has been an “egregious and persistent” failure to comply with the Rules regarding the disclosure of documents and that this failure is of such a reprehensible nature that it is deserving of rebuke. In the circumstances, Special Costs are awarded to Ms. Woolard.

### **SUMMARY**

[156] The amounts payable to Ms. Woolard are:

(a) I.S.A. Amount	\$ 2,707.00
(b) Replacement cost of the Extended Health Care Coverage (3 months @ \$125.93 per month)	\$ 377.79
(c) Reimbursement for Prescription Drugs	\$ 313.36
(d) Commissions Payable	\$ 66,746.75
(e) Market Share Bonus	\$ 11,400.00
(f) Individual Sales Goal Achievement Bonus	\$ 9,534.69
(g) Quarterly Sales Goal Enhancer	\$ 3,000.00
(h) Revenue Bonus	\$ 9,771.18
(i) Block Asset Management Factor	\$ 5,234.85
(j) Damages for termination of the contract of employment (6 months @ \$7,500 per month)	\$ 45,000.00
(k) Special costs to be assessed by the Registrar of the Court	
<b>TOTAL</b>	<b><u>\$154,085.62</u></b>

[157] From those amounts must be subtracted the following:

(a) the draw paid to 06/30/99	\$ 21,700.94
(b) Commissions paid to 08/99	<u>\$ 38,887.00</u>
<b>TOTAL</b>	<b><u>\$ 60,587.94</u></b>

[158] Ms. Woolard will be entitled to judgment for the net amount plus any applicable pre-judgment interest plus her Special Costs as subsequently assessed.

“G.D. Burnyeat, J.”  
The Honourable Mr. Justice G.D. Burnyeat