Case Name:

Brown v. PML Professional Mechanical Ltd.

IN THE MATTER OF the Human Rights Code, R.S.B.C. 1996, c. 210 (as amended)
AND IN THE MATTER OF a complaint before the British Columbia Human Rights Tribunal
Between
Camilla Brown, Complainant, and
PML Professional Mechanical Ltd. and Donald Wightman, Respondents

[2010] B.C.H.R.T.D. No. 93

2010 BCHRT 93

File No. 4869

British Columbia Human Rights Tribunal

Panel: Lindsay M. Lyster, Member

Heard: February 16-20, 23-25, November 16-20, 23 and 26, 2009.
Decision: March 17, 2010.

(1218 paras.)

Appearances:

Counsel for the Complainant: Steve M. Winder, Sara Forte and Sara Zintz, articled student.

Counsel for the Respondents: Peter A. Csiszar, Rhonda Bender and Sarah Mathews, articled student.

REASONS FOR DECISION

I INTRODUCTION

1 Camilla Brown worked for Donald Wightman at his company, PML Professional Mechanical Ltd., from 2000 until 2007. PML is an HVAC company, owned and operated by Mr. Wightman. "HVAC" refers to heating, ventilation and air-conditioning. On February 5, 2007, Ms. Brown re-

turned to work at the end of her second maternity/parental leave (referred to throughout simply as "maternity leave") while at PML. For reasons and in circumstances that are in dispute, Ms. Brown left PML that day, never to return.

2 Ms. Brown alleges that PML and Mr. Wightman discriminated against her after she returned from her first maternity leave in October 2003, and again before and during her second maternity leave. She alleges that the discrimination culminated in her constructive dismissal on February 5, 2007. She alleges that she was, throughout, discriminated against on the basis of sex (pregnancy) and family status, contrary to s. 13 of the *Human Rights Code*.

3 In addition to her own circumstances, Ms. Brown relies on what she says was the discrimination suffered by two of her female co-workers, Rhonda Klatt and Carrie Snalam, in relation to their maternity leaves from PML. Ms. Brown alleges that their experiences constitute similar fact evidence on which I can rely in determining whether she was discriminated against.

4 PML and Mr. Wightman deny any discrimination.

5 This was a hotly contested complaint, which gave rise to three preliminary decisions from the Tribunal, addressing applications to dismiss the complaint, for disclosure of Ms. Brown's medical records, and to adjourn the hearing: *Brown v. PML and Wightman*, 2007 BCHRT 377 (denying the respondents' dismissal application); *Brown v. PML and Wightman (No. 2)*, 2008 BCHRT 82 (denying the respondents' application to adjourn the April 2008 hearing dates, although those hearing dates were later adjourned on consent in order to permit Ms. Brown to pursue her application for judicial review of the Tribunal's subsequent disclosure decision); and *Brown v. PML and Wightman (No. 3)*, 2008 BCHRT 118 (ordering Ms. Brown to disclose her medical records).

6 Ms. Brown unsuccessfully sought judicial review of the decision ordering her to disclose her medical records (*Brown v. PML Professional Mechanical Limited*, 2008 BCSC 1429), while the respondents unsuccessfully sought review of part of the decision denying their application to dismiss the complaint (*PML Professional Mechanical Limited et al v. Brown et al*, November 26, 2008, oral reasons for judgment). In the course of proceedings related to that judicial review, Ms. Brown abandoned her allegation that the respondents engaged in systemic discrimination on the basis of sex and pregnancy, but continued to rely on the evidence relating to Ms. Klatt and Ms. Snalam as similar fact evidence.

II EVIDENCE

7 Both parties led extensive evidence, relating to the history of Ms. Brown's and Mr. Wightman's relationship, and especially the breakdown in their employment relationship; the respondents' treatment of other employees who were pregnant or had family responsibilities requiring accommodation; and the effects of the alleged discrimination on Ms. Brown, including on her ability to seek other employment.

8 Ms. Brown testified on her own behalf. In addition, she called the following witnesses:

1. Dr. Elizabeth Zubek - Ms. Brown's general practitioner. Dr. Zubek was qualified, without objection, as an expert in family medicine. The focus of Dr. Zubek's evidence was the effect of the alleged discrimination on Ms. Brown's ability to seek employment, especially in the HVAC field. Dr.

Zubek's clinical notes were entered into evidence, and she was subjected to extensive cross-examination.

2. Ron Angelini - Ms. Brown's personal friend and neighbour. He worked with her at another HVAC company, Honeywell, in the 1990s. Ms. Brown was instrumental in Mr. Angelini being hired to work at PML in 2001 as Service Manager. Mr. Angelini left PML in January 2008, and now works at another HVAC company.
3. Carrie Snalam - worked for PML between 1997 and 2006, initially part-time dealing with accounts payable and receivable. By the end of her employment with PML, she held the title of Office Manager, was part of the management team, and was responsible for the company's finances.
4. Rhonda Nairn (neé Klatt) - PML's former Service Coordinator. She worked for PML between 1998 and 2007, when she chose not to return after the end of her maternity leave.

9 Mr. Wightman testified on behalf of the respondents. In addition, they called the following witnesses:

1. Dr. Gordon McFadden - a general practitioner. Dr. McFadden was put forward as an expert in the general practice of medicine, with specialization in the review of medical records. Ms. Brown accepted his expertise as a general practitioner, but objected to his qualification in the latter regard. I qualified Dr. McFadden as an expert in the general practice of medicine, with it being left open to the parties to address any further scope of his expertise in final submissions. Neither party did so. Dr. McFadden testified about his expert opinion about various issues relating to Dr. Zubek's opinions and clinical notes.
2. Gina Do - a former PML employee, who worked in its accounting department between October 2005 and July 2009. She testified by telephone about her experience as a single mother working at PML.
3. Ken Bowes - a former PML salesperson. Mr. Bowes worked at PML between January 2005 and November 2007, when he obtained employment with another HVAC company. In addition to being Ms. Brown's former colleague at PML, Mr. Bowes and his wife used to be close friends of Ms. Brown. Mr. Bowes testified about his relationship with Ms. Brown, his experience as a salesperson at PML, and in particular, his role in the development of a new sales model in 2006.
4. Natalie Freer - has worked for PML since February 5, 2007. Ms. Freer has known Ms. Brown for many years, having been her neighbour growing up. She is also Cher Novinc's sister. She testified about her experience as a mother working at PML.
5. Brianne Mahy - a PML employee since January 2006. Ms. Mahy testified about her brief experience working with Ms. Brown.
6. Erica Bowes - Ken Bowes' wife, and Ms. Brown's former friend. Ms. Bowes testified about her relationship and communications with and about Ms. Brown.

7. RJ Lundquist - the wife of Don Lundquist, now a manager with PML. Ms. Lundquist testified about a conversation she had with Ms. Brown at a cottage in or about the summer of 2005 in which Ms. Brown allegedly told her about having weekly sales meetings at her home.
8. Cher Novinc - a PML salesperson since November 1, 2004. Ms. Novinc testified about her experience working with Ms. Brown, and her role in the development of the new contract sales model.
9. Byron Rilling - a PML manager. He has worked at PML since March 1998, working his way up from service technician, to a foreman, to his current role as Retrofit Manager. As such, he is currently the second longest serving PML employee. Mr. Rilling testified about his experience working with Ms. Brown, and his dealings with Ms. Klatt before she left her employment with PML.
10. Kathy Tibbitts - a PML employee since October 2001. She worked with Ms. Brown as a Contract Associate and, after Ms. Brown did not return to work, became a Contract Administrator. Ms. Tibbitts testified about her experience working with Ms. Brown, and her observations on February 5, 2007.
11. Janet Davie - PML's controller. Ms. Davie began work at PML on a temporary basis in August 2005, when she replaced Ms. Snalam, who was on leave. Ms. Davie is a Certified Management Accountant ("CMA"). She testified about her role replacing Ms. Snalam, initially temporarily, and later permanently; her involvement at the end of Ms. Snalam's employment in March 2006; her involvement in various issues relating to Ms. Brown during her last maternity leave; and her observations on February 5, 2007.

10 This is a case in which credibility is in issue with respect to certain key factual disputes. In all cases, I have assessed the evidence of the witnesses in accordance with the principles expressed by the Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.):

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carries conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. (p. 357)

11 Because of the large number of factual issues, and disputes in the evidence, I have reviewed the evidence extensively. I have not, however, referred to all of the evidence, although I have considered it all. Where necessary, in making my findings of fact, I have outlined discrepancies in the evidence, and given reasons for my conclusions about what happened. In doing so, I am entitled to accept some, none or all of each witness' evidence.

12 Some opening comments about Ms. Brown's and Mr. Wightman's evidence are warranted. As would be expected, Ms. Brown's and Mr. Wightman's evidence is crucial to this case. I have serious concerns about the reliability of both of their testimony.

13 As will become clear in the course of my findings, both Ms. Brown and Mr. Wightman are capable, forceful, and even stubborn individuals, who have succeeded in business on the strength of their own ambition, abilities, determination and hard work.

14 Both Ms. Brown and Mr. Wightman are obviously interested parties, who have a great deal at stake in these proceedings. Given the substantial remedies sought, and the investment both have made in the litigation, that stake includes a significant financial component. Both have also put their personal and business reputations at stake.

15 Both parties have litigated the matter with vigour, with the respondents, in particular, employing aggressive litigation strategies. Both raised and pursued issues which were of peripheral if any probative value in deciding whether Ms. Brown was discriminated against by the respondents, the primary purpose for which appeared to be to embarrass or blacken the character of the other.

16 In both Ms. Brown's and Mr. Wightman's cases, I find that they have been willing to tailor their evidence where they considered it to be in their self-interest to do so.

17 It is noteworthy that both Ms. Brown and Mr. Wightman, despite the central nature of their evidence, made the somewhat unusual choice to testify last in their respective cases. Because each attended the entirety of the hearing, this meant that they each had the opportunity to hear all of their own witnesses' evidence before testifying, enabling them to shade their testimony accordingly. I find that Mr. Wightman, in particular, who was the last witness to testify in the proceedings, took full advantage of this opportunity.

18 The respondents sought to challenge Ms. Brown's credibility on the basis that she was, in essence, acting. In this connection, they relied on her alleged references in the workplace to her high school drama teacher, who gave her tools she found valuable in sales; her alleged ability to turn her tears on and off at will in the hearing, and to otherwise control her apparent emotional state; and an overall tendency to exaggerate her evidence.

19 There is substantial merit to the respondents' submissions with respect to Ms. Brown's credibility. I found her often overly dramatic both in giving her testimony and in reacting to hearing the testimony of others. Her tears, and other signs of distress, while testifying appeared to come and go with questionable suddenness. I found that her evidence was sometimes exaggerated, especially with respect to the impact of the alleged discrimination on her, and its effects on her ability to seek work in the HVAC industry after she left PML.

20 I have different, but even more significant, concerns about Mr. Wightman's credibility. There were a number of occasions, discussed in detail below, when he was shown to be untruthful in affidavits sworn by him in support of the respondents' application to dismiss the complaint. The excuses he offered when challenged with these untruths in cross-examination, such as it being his lawyer's fault, did nothing to assist the credibility of his evidence. I wish to make clear that the lawyer whom Mr. Wightman tried to blame was not counsel appearing in this hearing.

21 There were also matters raised by Mr. Wightman in his direct evidence, which ought to have been raised with Ms. Brown's witnesses in cross-examination, but were not, which I found to be frankly incredible, in particular his explanation for the "cunt" comment, discussed at length below.

22 Because of their substantial personal interest in the outcome of these proceedings, their evident antipathy to one another, and particular instances where I concluded that they either exaggerated or were otherwise less than truthful, I have exercised considerable caution in relying on both

Ms. Brown's and Mr. Wightman's evidence in areas of factual dispute. This has presented particular challenges in those areas where theirs' is the only evidence about what occurred. In all cases, I have considered both Ms. Brown's and Mr. Wightman's testimony in the context of the evidence as a whole, looking for reliable corroboration where available, and in all cases assessing whether it is in accordance with the preponderance of the probabilities.

23 I address the credibility and reliability of other witnesses' evidence as necessary in making my findings of fact.

III SUMMARY

24 In what follows, I first consider the evidence at length, and make my findings of fact, with respect to Ms. Brown's relationship with the respondents, the course of her employment with PML, her allegations of discrimination, and the effects of that alleged discrimination on her. In the latter regard, I consider Ms. Brown's evidence about her efforts to mitigate her damages. I also consider her evidence, and the medical evidence of Drs. Zubek and McFadden, about whether she was incapable of seeking work in the HVAC field, or it was medically inadvisable for her to do so, after she left PML.

25 I then consider the evidence relating specifically to Ms. Klatt and Ms. Snalam, and whether it is admissible as similar fact evidence. In doing so, I also consider the respondents' evidence about their treatment of other employees requiring accommodation for pregnancy and family-related obligations.

26 Having made my findings of fact, I proceed to determine if Ms. Brown established that she was discriminated against on the basis, first, of sex (pregnancy), and second, family status. In doing so, I consider the respondents' defence that they did not discriminate, but that their actions were the result of legitimate business considerations.

27 I conclude that the respondents discriminated against Ms. Brown on the basis of both sex (pregnancy) and family status, contrary to s. 13 of the *Code*.

28 Having determined that the complaint was justified, I consider the appropriate remedies for the discrimination. I order the respondents to pay Ms. Brown $10,000.00 in compensation for injury to dignity, feelings and self-respect under s. 37(2)(d)(iii) of the *Code*, but decline to order them to pay her any compensation for lost wages under s. 37(2)(d)(ii). I also order the respondents to pay Ms. Brown $10,000.00 as costs for improper conduct under s. 37(4).

29 By separate letter, the parties will be asked for their additional submissions with respect to two remaining remedial issues, relating to Ms. Brown's claims for compensation for legal expenses and expert witness expenses, both pursuant to s. 37(2)(d)(ii).

IV FACTS

1. Background information about the parties

Mr. Wightman and PML

30 PML performs new HVAC construction work, retrofit work on existing buildings, service on existing HVAC systems, and installs and services sprinkler systems. The contract sales division, in which Ms. Brown worked, sells maintenance contracts for the service department.

31 Mr. Wightman and his wife each own half the shares in PML, but he testified, and I accept, that she has no involvement in the business.

32 Mr. Wightman testified about his employment and business background. He graduated from high school in 1980. He obtained his ticket as a heavy duty mechanic in 1986. Later, when construction trailed off following Expo 1986, he became a log scaler. In the late 1980s, he moved into refrigeration, obtaining his ticket in that trade. At about that time, he became employed by Aerco Industries, an air conditioning service and light construction company, working as a service technician.

33 Mr. Wightman left Aerco in 1993 to join Harbourview Electric as a technician in their mechanical division. Mr. Wightman testified that he wanted to go into business for himself, but did not know how to go about it. Harbourview ran into financial difficulties, and the opportunity arose for Mr. Wightman to buy its service division, which he did, along with two partners. Together, they started PML in March 1995.

34 Mr. Wightman testified about various difficulties in that partnership. By March 1996, he had bought both of his original partners out. A third partner, who had bought in in the meantime, remained until he also bought her out in October 1997, leaving Mr. Wightman and his wife as the sole owners of PML.

35 PML has grown significantly since its inception. By the time Mr. and Mrs. Wightman became PML's sole owners, it had been running at a substantial loss for some time. Mr. Wightman continued to work in the field. At about this time, he started to perform work for Great Canadian Casino ("GCC"), dealing with a manager whom I chose not to refer to by name in these reasons, who at that time was in charge of maintenance for GCC. Later in this decision, I will return to some evidence Mr. Wightman gave about that GCC manager. The work for GCC increased substantially over time, moving from service work to designing and building the HVAC systems for their new locations. In addition, PML continued to attract new clients, and added new divisions. As will be discussed in detail below, Ms. Brown joined PML in 2000, and Mr. Wightman acknowledged that, through 2000-03, she did a good job in expanding PML's contract base. The work for GCC continued, reaching a peak with the construction of the HVAC systems for River Rock Casino in 2003-04, a construction contract worth nearly $23 million to PML. Mr. Wightman testified, and I accept, that he was extremely busy while this project was under construction. PML's employee complement and payroll expanded dramatically, and as Mr. Wightman testified, PML would either live or die on that project.

36 Throughout, Mr. Wightman has been a pilot, flying both commercially and for pleasure.

37 As PML has grown, it has on several occasions moved to larger premises. At the start of 2000, when Ms. Brown joined the company, it was in very small premises on Winston Street in Burnaby. PML moved into larger premises on Norland Avenue in Burnaby in the fall of 2000. In September 2007, PML moved to its current, yet larger, premises in Port Coquitlam. By the time the company moved to Port Coquitlam, space in the Norland premises was at a premium, with employees frequently being obliged to share office space.

Ms. Brown

38 Ms. Brown is the mother of three children, born in August 1999, January 2003 and February 2006, the latter two while on maternity leave from PML. She also has a foster daughter. Ms. Brown is married to Rick Schmohl, a residential builder.

39 Ms. Brown graduated from high school in 1988, and attended college. She has certificates in business accounting and business management, but no other education or professional designations. Ms. Brown's entire working life, prior to the end of her employment with PML, was in the HVAC industry. Her first exposure to the industry was during a college practicum at Aerco Industries. After her practicum, she was hired by Aerco, and worked there for about two years in its accounting department. She then moved into a job in its service department as a service coordinator/dispatcher, in which she remained until 1993.

40 Ms. Brown testified that she was then head-hunted by another HVAC company, Custom Air-Conditioning, where she worked for six months in sales. She was then head-hunted by Honeywell, a very large HVAC company, to work in their sales department. She remained at Honeywell until she moved to PML in the spring of 2000. Ms. Brown did very well at Honeywell, earning upwards of $65,000.00 by the time she left in 2000. At the time she left it for PML in the spring of that year, she was due to return to work at Honeywell following the end of her maternity leave with her first child.

Relationship between Ms. Brown and Mr. Wightman

41 Ms. Brown and Mr. Wightman first became acquainted while they were both working at Aerco, Ms. Brown as a dispatcher, and Mr. Wightman as a service technician. They worked together at Aerco for about two years before Mr. Wightman left for Harbourview and Ms. Brown for Custom Air-Conditioning.

42 Ms. Brown and Mr. Wightman characterized their relationship differently. Ms. Brown said that they were friends. When she married her husband in 1996, Mr. Wightman and his wife attended the wedding. She testified that they spoke to one another from time to time over the years.

43 When asked to describe their relationship, Mr. Wightman testified that Ms. Brown is incredibly bright and well organized, and has a way of handling people to get them to do what she wants them to do. He said she can be very assertive and direct, and can also be very accommodating. Ms. Brown's skills as a dispatcher in handling technicians at Aerco persuaded him to always have female dispatchers in his own company.

44 Mr. Wightman agreed with Ms. Brown that they had periodic telephone contact. He testified that she called him several times after he left Aerco to talk about her nervousness contemplating doing the same. According to Mr. Wightman, Ms. Brown is ambitious, and wanted to advance, and was not being given the opportunity to do so at Aerco. Mr. Wightman testified that he tried to support her. He thought her move to Custom Air-Conditioning in 1993 would be good for her. He testified that they continued to have telephone contact after she moved to Custom Air-Conditioning. When asked why, he said that he likes bright people who "get off their butt" and do something, and Ms. Brown was that type of person. She does not, he testified, take no for an answer.

45 Mr. Wightman testified that he was aware that, after a short time at Custom Air-Conditioning, Ms. Brown moved to Honeywell. He believed she was head-hunted. While she was at Honeywell, they continued to be in periodic telephone contact. While Honeywell was a much larger company, it was a direct competitor of PML in the service contract sector, and Mr. Wightman

described losing several contracts to Honeywell because of Ms. Brown's efforts. Despite being in competition, they remained in contact. He recalled her coming to the Wightmans' home after the birth of their daughter in 1993. He was not certain how often they saw one another prior to 2000, though he thought they might have gone boating together, and that he likely went skiing with her husband. He recalled attending their wedding in the summer of 1996.

46 When asked, however, if they were friends before Ms. Brown came to work at PML, Mr. Wightman demurred, saying that ""friends" is such a huge word". He testified that he would classify their relationship differently, as a "business-generated relationship", although he conceded they could be classed as friends, given their boating and skiing trips. He also recalled Ms. Brown and her husband attending a dinner for his 40th birthday with another "work couple".

47 Overall, I find that Mr. Wightman tried to downplay in his evidence what was clearly a friendship with Ms. Brown prior to her coming to work at PML. They remained in contact for nearly ten years while not working at the same company, and shared significant life events, such as weddings, births, and milestone birthdays, with one another and their families.

48 Mr. Wightman frequently referred to Ms. Brown as demanding, assertive, and aggressive. He attempted to paint a picture of her telling him what to do, and him meekly doing it. When asked in cross-examination if it bothered him that she was assertive, he said no, it was what made her a good salesperson.

49 I accept that Ms. Brown can be demanding, assertive and even aggressive. I do not accept, however, that Mr. Wightman was as powerless in their relationship as he tried to portray. Mr. Wightman can be every bit as demanding, assertive and aggressive as Ms. Brown, and had the added advantage, in his dealings with Ms. Brown after she joined PML, of being her employer. When Mr. Wightman agreed to Ms. Brown's demands, or acquiesced in her conduct while employed at PML, he did so because he believed it was in his business interests to keep Ms. Brown, whom he testified was responsible for unbelievable growth in contract sales, happy and satisfied.

50 A point not in dispute is that Ms. Brown is an excellent salesperson. Mr. Wightman testified that she was the best in the industry, an opinion confirmed by several witnesses, including Mr. Angelini and Ms. Davie.

2. Ms. Brown becomes an employee of PML

Initial discussions

51 Mr. Wightman pursued Ms. Brown to join him at PML while she was on maternity leave from Honeywell with her first child.

52 Ms. Brown testified that, in January 2000, Mr. Wightman telephoned her to ask if he and his family could come by her home to visit her and meet her baby. Mr. Wightman, his wife and daughter came for a visit, in the course of which he brought up the idea of Ms. Brown coming to work for him at PML. According to Ms. Brown, she told him that she was very well compensated at Honeywell, and did not think he and his company were in a position to pay her as well.

53 Again according to Ms. Brown, Mr. Wightman asked her what she was looking for when she returned to work, and she told him that she was planning to have another child, and wanted to work three days a week. She told him that it was very important to her to be able to balance her family and professional life, and wanted to be her children's primary caregiver. Mr. Wightman told

her that his company could provide those conditions, and that he would be interested in talking to her more about the idea of her coming to PML.

54 Ms. Brown added that she also told Mr. Wightman that she had a home office with Honeywell, both prior to and during her maternity leave. According to Ms. Brown, she told Mr. Wightman that, if she was going to work three days a week, she would require a home office in order to be able to have time to do the job.

55 Mr. Wightman agreed in his evidence that he pursued Ms. Brown during her maternity leave from Honeywell. He thought that the discussions began even earlier than Ms. Brown testified, placing them shortly after the birth of Ms. Brown's child in August 1999. Whenever the discussions began, Mr. Wightman initially thought that Ms. Brown was very happy at Honeywell, and would stay. However, he persevered, telling her he would like her to come to PML. He estimated that, prior to January 18, 2000, he had six to twelve conversations with Ms. Brown about her coming to PML.

56 Mr. Wightman testified that, at some point in their discussions, Ms. Brown's opinion started to change and to revolve around being able to work part-time. According to Mr. Wightman, Ms. Brown asked him about wanting to be able to work part-time, three days a week. He told her he would do whatever she needed. She told him it had to be three days a week, guaranteed, to which he agreed.

57 Ms. Brown testified that, after her January 2000 meeting at her home with Mr. Wightman, Bob Wray, a PML construction manager, telephoned her. According to Ms. Brown, Mr. Wray told her that he had recently joined the company, and that he would like to meet with her to explain why he had made that move. Ms. Brown and Mr. Wray met, at which time Ms. Brown testified that Mr. Wray told her what Mr. Wightman was offering clients, why he had recently moved to the company, and how the company was poised to grow.

58 Mr. Wightman testified that Mr. Wray had, at this point, only recently joined PML to get its construction division up and running. According to Mr. Wightman, that never materialized under Mr. Wray's leadership, and Mr. Wray actually worked in other areas. His evidence about Mr. Wray wanting the title "Construction Manager", and him giving it to him, but that Mr. Wray did not really fill that role, mirrored his later evidence about Ms. Brown's title of Contract Sales Manager.

59 Mr. Wightman testified that Mr. Wray talked with Ms. Brown, and was impressed by her. Mr. Wightman thought that he likely told Ms. Brown it would be a good idea for her to meet Mr. Wray.

60 Mr. Wray wrote Ms. Brown a letter on January 16, 2000, in which he referred to having met her the previous week, and expressed his hope that she would join PML.

61 After meeting with Mr. Wray, Ms. Brown testified that she telephoned Mr. Wightman to tell him she was interested in pursuing the opportunity to work with him at PML. She testified that it was after her meeting with Mr. Wray that she seriously considered PML. For his part, Mr. Wightman testified that, by sometime in or about January, they had a meeting of the minds, and that the subsequent letters, discussed below, merely confirmed the agreement they had reached.

62 In cross-examination, Ms. Brown agreed that, at some point in these discussions prior to March 10, 2000, she told Mr. Wightman that she was Honeywell's top-ranked salesperson, but they did not want her to go to a three day a week schedule, as it was against their corporate policy. In his evidence, Mr. Wightman confirmed this. She also shared with him that she had no interest in re-

turning to Honeywell unless it was on a three day work week. She testified that she also told Mr. Wightman that she had other concerns about Honeywell, including that they were no longer going to honour their agreement to pay increased car insurance after she had an accident.

Offer letter

63 On January 18, 2000, Mr. Wightman wrote Ms. Brown a letter in response to her phone call. As this letter is key in these proceedings, I reproduce it in full:

> **Re: Contract Sales Manager Position**.
>
> Thank you for the phone call yesterday afternoon, Camilla. I am very happy that you have decided to continue to pursue the avenue of joining forces. I strongly believe that with the addition of your proven skills, teamed up with the abilities we have now, this will make a group of individuals that will be impossible to beat. The result of that will be prosperity for you as an individual and the company as a whole.
>
> In the times that we live in now, it is a constant juggle of trying to balance work responsibilities with family life. You have requested that there be a ***permanent*** condition of flexibility in your work environment to meet the needs of your family requirements. We will make this promise a lasting ***commitment*** to you.
>
> The vision that I have of the position in which you would hold would be,
>
> ***Contract Sales Manager.***
>
> Responsibilities consisting of;
>
> * Customer maintenance contract sales.
> * Customer maintenance contract renewals.
> * Attending weekly and monthly manager meetings to help deal with issues and short and long term planning.
> * Acquiring staff for your department so that you may build the ***Contract Sales Department*** as you see appropriate, in conjunction with corporate funding.
>
> I am looking forward to the next few weeks ahead when we meet and start planning the structure of the position, so that we may ensure all of your needs and expectations of the position are met. (this and all documents reproduced as written, except as indicated) (emphases in this and all documents, as in the original, except as indicated)

64 In testifying about this letter, Ms. Brown emphasized the second paragraph, and Mr. Wightman's "lasting commitment" that there be a "permanent condition of flexibility" in her work environment. She testified that she had told Mr. Wightman that it was her first concern that she be the major caregiver for her child. With some display of what I accept was genuine emotion, she testified that she thought "she could have it all", that is, both a successful career and family life.

65 In his evidence, Mr. Wightman agreed that Ms. Brown told him about her need for permanent flexibility in order to be able to be the major caregiver for her child. But he said that, in all their discussions, his impression was that, by flexibility, she meant working three days a week, which, he maintained, she was always granted. He testified that the permanent condition of flexibility to which he agreed in this letter was that Ms. Brown would never be forced to work more than three days a week, with any additional time being at her choice. In cross-examination, he acknowledged the force and significance of the words "permanent" and "commitment", and testified that he always stuck by them.

66 Mr. Wightman testified that he wrote this letter to prove to Ms. Brown that he was serious. She was very concerned about being able to work three days a week, and he wanted to make sure it was written down.

67 I return later to the question of the nature of Mr. Wightman's commitment to Ms. Brown, and what the promise of a "permanent condition of flexibility" consisted of.

68 In cross-examination, Mr. Wightman denied that it was, as he had written, "his vision" that Ms. Brown would be Contract Sales Manager. He testified that he was merely writing what Ms. Brown wanted to be called. I do not accept this evidence. While it may have been Ms. Brown's desire to be Contract Sales Manager, Mr. Wightman clearly offered Ms. Brown this position.

Ms. Brown considers Mr. Wightman's offer

69 Ms. Brown took some time to decide whether to accept Mr. Wightman's offer. After receiving it, she decided to approach her boss at Honeywell and ask if she could return to work three days a week. He told her that Honeywell did not offer part-time sales positions, and would not be prepared to enter into such an arrangement.

70 Ms. Brown testified that, after receiving that information, she did not want to restrict her options to PML, so she contacted friends at two other HVAC companies, Siemens and Johnston Controls. She testified that she received offers of part-time employment from both. She testified that she declined those offers, largely because she decided she wanted to step outside of the corporate realm and move to PML, which, as a smaller company, she thought would offer more flexibility and opportunity for growth, including the opportunity to have a management role, which none of the others offered. Mr. Wightman testified that Ms. Brown told him about one or both of these companies at the time. I accept that Ms. Brown had discussions with these companies.

71 By this point, Ms. Brown had clearly decided that she was only interested in a position if it allowed her to work part-time. The importance to Ms. Brown of being able to work part-time was clear on all the evidence. Ms. Novinc, for example, testified that Ms. Brown told her that she came to PML because Mr. Wightman would accommodate a part-time schedule, while Honeywell would not.

Home office

72 According to Ms. Brown, she then decided to have further discussions with Mr. Wightman about her requirement for a home office. She testified that she told him that, if she was going to resign from Honeywell, she would need to return its office equipment. He told her that was not a problem; he would give her an old printer and fax machine from his office, which he did in March 2000.

73 Ms. Brown testified that, had Mr. Wightman not provided this equipment, and with it the opportunity to work from home, she would not have accepted employment with PML, as she did not believe that the job could be done on a strict three day a week schedule. She agreed in cross-examination, however, that there was nothing in writing that guaranteed that she would be able to or, for that matter, be required to work at home. She denied, however, both that she created the situation under which she worked from home, and that it was neither requested from nor approved by Mr. Wightman.

74 Mr. Wightman testified that, sometime before May 1, Ms. Brown told him what she needed to work. Initially, he referred to the usual range of office furniture and equipment, which were located in an office within PML's premises. He testified that he expected her to use this office and equipment, and that, after she started work, she was in and out all the time. When asked if he expected her to be in the office when not in the field, he said he would assume so. Later in his direct evidence, Mr. Wightman testified that they did discuss working from home. So far as setting up a home office was concerned, he said that everybody has one.

75 Mr. Wightman was then asked if Ms. Brown told him that she needed an office at home. His answer was, "provide an office? No." He was then asked if, prior to May 1, Ms. Brown requested to be able to work from home, to which he responded, "all her work? No." When asked if she wanted to be able to perform some work from home, he said that Ms. Brown would work from home in her off hours. He said that she had a cell phone, but was not sure if she had a home office. He testified that, on Mondays, Wednesdays and Fridays, she was expected to be in the office or with clients. He said that she abided by this agreement until she went on her first maternity leave.

76 In cross-examination, Mr. Wightman was asked when he helped Ms. Brown set up her home office. Initially, he denied that he did. He then referred to his actions in the fall of 2002, discussed below, in setting up remote e-mail access for her. When the matter was pursued further in cross-examination, Mr. Wightman finally testified that, in early 2000, Ms. Brown requested a fax machine, printer and other equipment, and he gave it to her. He argued, however, that just because he gave her "stuff" did not mean he <u>required</u> her to have a home office. That, of course, was not the question asked, but Mr. Wightman's reference to that issue is illustrative of his evasive and defensive responses in this area. He was most reluctant to admit what I find to be true, that he helped Ms. Brown to set up a home office by providing her with the necessary equipment.

77 Later in cross-examination, Mr. Wightman added that Ms. Brown made it clear to him that she would be working from home, and that it was important to her to be able to do so, but he assumed it would be around her work hours, not during them.

78 I accept that, given the nature of Ms. Brown's job, she needed to be able to perform work from time to time from home during her off hours. That fact was known and agreed to by Mr. Wightman. That does not necessarily mean that she needed, or was permitted, to work from home during her scheduled work hours. However, as the facts will demonstrate, Mr. Wightman acquiesced in Ms. Brown working from home during her regular scheduled work hours on a regular, ongoing basis.

Ms. Brown resigns from Honeywell

79 On March 10, 2000, Ms. Brown wrote a letter of resignation to her boss at Honeywell, stating:

> It is with great sadness that I am writing this letter to you. After almost 6 years I am resigning my position from Honeywell as Service Account Specialist.
>
> It is unfortunate that at this time there was no opportunity for me to work in a successful part-time career schedule as a Honeywell Employee. Since the birth of my child, my priorities have changed and I must endeavour to find a career or company that can support my family time and a successful career.

80 Ms. Brown went on to write that she had continued to perform "countless hours" of work for Honeywell while on leave.

81 In cross-examination, Ms. Brown testified that this letter was accurate and truthful, with the exception of the expression of "great sadness", because in fact she was excited about her new possibilities. She testified that it was true that she continued to support Honeywell during her leave, saying that she worked diligently.

82 Ms. Brown testified that she took the resignation letter and office equipment to Honeywell's premises. While there, her boss told her that he did not want her to leave, and offered her a 50% contract position with Honeywell. According to Ms. Brown, she told him that, out of respect for the people she had been in discussion with since January, she was not going to use them to get an offer from him, and rejected the offer. She thanked him, and offered to train her replacement.

83 Mr. Wightman testified that, at about this time, Ms. Brown told him that she was resigning from Honeywell, and would definitely be accepting the position with PML. He also thought she told him something about Honeywell offering her part-time work at the last minute.

Did Ms. Brown work for PML either before resigning from Honeywell or before her official start date of May 1?

84 It was a matter of some dispute between the parties precisely when Ms. Brown actually started to perform work for PML, and whether, as asserted by the respondents, she did so before resigning from Honeywell and while still on leave from that company.

85 Ms. Brown was asked in cross-examination how long she continued to perform work for Honeywell. She said that her maternity leave was only for six months, and that after that she was on a leave of absence, and she was not sure how much she did after her maternity leave ended. She was then asked if she continued to perform work for Honeywell until the date of her letter of resignation, March 10, and she said that was probable. She agreed that, until she resigned, she was an employee of Honeywell, and had a responsibility to serve their interests.

86 It was put to Ms. Brown in cross-examination that she performed work for PML between January and March 10, 2000. She testified that she initiated one call to the District of Pitt Meadows or Maple Ridge with Mr. Wightman, but was not sure if it was before or after March 10. She denied that she attended PML's offices, although she said she attended a function at a restaurant where she met Mr. Rilling. Ms. Brown was unable to confirm or deny whether she began to perform work for PML before March 10. During that period, she said she was home full-time with her child. Later in cross-examination, Ms. Brown denied the suggestion that she secretly worked for PML until she resigned from Honeywell.

87 Mr. Wightman was asked in direct examination if Ms. Brown performed any work for PML between January and March 10, 2000. He answered, somewhat vaguely, that she was becoming

more active, and was assisting him with skills he did not have. The only specific example he gave was that he believed Ms. Brown went to a meeting with a client, which he believed was either a city or school district. He was not sure of the extent of this, and said that PML did not acquire the client. When asked if this was before March 10, Mr. Wightman could not give the date, but said it was on or around then. Mr. Wightman also testified that Ms. Brown was possibly at PML's offices in this period, but he was not sure for what purpose. He could not recall the specific restaurant meeting referred to by Ms. Brown, but he said that they often had meetings at that location.

88 I am unable, on the evidence before me, to conclude that Ms. Brown performed any work for PML before she resigned from Honeywell on March 10. While she was increasingly involved in discussions with PML, from which PML may have derived some benefit, she cannot be said to have been actually performing work for PML before her resignation from Honeywell.

89 Mr. Wightman also testified that, after March 10, but before her official start date with PML on May 1, Ms. Brown was becoming more involved with the company, actively working in the office or with clients. He testified that Ms. Brown asked to be paid for time worked prior to May 1, and have it banked, to be paid after May 1, so as not to damage her benefits. He testified that he agreed to this arrangement, because "you do what you are told when it comes to Camilla", and that Ms. Brown was paid a lump sum after she was placed on the PML payroll.

90 After this evidence was led, counsel for Ms. Brown objected on the basis that it had not been put to Ms. Brown in cross-examination, and that he had sought and the respondents had declined to disclose documents relevant to the question of whether Ms. Brown worked and banked hours for PML prior to May 1. Counsel for the respondents responded that he would be relying on Ms. Brown's conduct prior to May 1, but not on the banking of hours during this period.

91 In any event, Mr. Wightman was not sure when Ms. Brown's maternity leave with Honeywell ended, or whether it was nine or 12 months in length. Ms. Brown testified that it was six months in length, and that thereafter she was on a leave. I accept Ms. Brown's evidence about the length of her maternity leave from Honeywell. Given that it was only six months long, she would not have been in receipt of Employment Insurance maternity leave benefits by March 10, when I find she started to perform some work for PML, prior to her official May 1 start date.

92 In light of my finding that her Employment Insurance maternity benefits were already at an end, there was nothing wrong with Ms. Brown performing work for PML after she resigned from Honeywell, and banking the time to be paid after her official start date. It is nonetheless notable that Mr. Wightman testified that he knew it was wrong to agree to this arrangement, but that when faced with an ultimatum, you make a decision. He also testified that there are a lot of ultimatums in dealing with Ms. Brown. Again, I find this attempt to shift responsibility from his own shoulders to those of Ms. Brown unpersuasive. As he testified, he really wanted Ms. Brown to come to PML, and was prepared to enter into an arrangement which he believed to be wrong to further that end.

93 While there was nothing wrong about this particular arrangement, there were, as will be shown below, other occasions when Mr. Wightman and Ms. Brown did enter into arrangements which both knew, or ought to have known, were wrong. Both of them must bear the responsibility for doing so. Their willingness to enter into arrangements which they knew, or as in this case on Mr. Wightman's part, at least believed to be wrong, is illustrative of both parties' willingness to make false representations when they believe it to be in their interests to do so.

Formal acceptance

94 On April 13, 2000, Ms. Brown wrote Mr. Wightman accepting his offer to join PML as Contract Sales Manager, stating that she was very excited to be joining his team. She set out a salary, benefit and incentive structure for his consideration. Key terms included that she would work full-time from May 1 to August 1, 2000, moving to a part-time position, based on a 25 hour week, starting August 1 and continuing indefinitely. Ms. Brown testified that the initial full-time period was intended to enable her to provide PML with some immediate attention, such as the development of policies and procedures, while her husband took some parental leave to look after their child.

95 As set out in her letter, Ms. Brown's initial weekly salary was to be $1250.00, and $800.00 weekly starting August 1. She was to receive a monthly car allowance of $600.00 initially, and $400.00 starting August 1. She was also to be provided with a gas card and benefit plan. Ms. Brown's sales quota was to be $120,000.00 in the first year, with incentives as follows: 5% on the first 70% of quota; 10% on the next 30% of quota; and 13% after quota was reached. In cross-examination, Ms. Brown testified that her base salary was based on $65,000.00 for full-time work, prorated depending on the number of days actually worked.

96 Mr. Wightman agreed that Ms. Brown's April 13 letter was accurate. He also testified that he was prepared to accept the terms set out by her in that letter. In doing so, he emphasized his view that Ms. Brown will tell you what she wants, you don't tell her, and his own lack of sophistication in such matters. He said he likely just "signed and filed" the letter.

97 While Mr. Wightman may lack a formal education in business, he is not the naïf, subject to the whims of Ms. Brown, that he attempted to portray both at this point and at others in his evidence. Mr. Wightman is a highly successful businessman, more than savvy enough to deal with the equally savvy Ms. Brown. Both parties knew exactly what they were doing in agreeing to the terms and conditions under which Ms. Brown would come to work at PML. Both understood the benefits of the arrangement they agreed to as it pertained to them.

98 In direct, Mr. Wightman was asked whether, as alleged by Ms. Brown in her complaint, he "enticed and induced" Ms. Brown to leave Honeywell. He neither confirmed nor denied that he did so, but said that, without a doubt, he talked to her about leaving Honeywell. On the evidence before me, I conclude that Mr. Wightman actively pursued Ms. Brown while she was on leave from Honeywell, and induced her to leave it.

99 In cross-examination, Ms. Brown denied that the commitment to flexibility made to her by the respondents was captured in the paragraph of her letter in which she referred to having a part-time management position based on a 25 hour work week. She testified that it was, more broadly, the flexibility to balance family and professional life, and noted that there were periods when she did work full-time. She agreed that she was seeking to work part-time on a regular basis. She accepted, albeit with some reluctance, that she would have continued to work with Honeywell had they been prepared to allow her to work part-time.

3. Ms. Brown's employment with PML prior to first maternity leave

100 Ms. Brown officially began work for PML on May 1, 2000. As agreed, she worked full-time until August 1, when she moved to part-time hours.

101 At this time, PML was located in a small office in a strata building in Burnaby. In addition to herself and Mr. Wightman, Ms. Brown recalled Mr. Wray, Ms. Snalam, Ms. Klatt, and about five

technicians working for PML at this time. The business' focus was service work, with Mr. Wray having been hired to increase retrofit construction and Ms. Brown to increase contract sales. Mr. Wightman testified that, at this time, PML was still a very small business, with him still working in the field. He said that Ms. Brown initially had a little desk that was crammed into a corner, and then moved into Mr. Wray's office after PML leased some extra office space in the same building.

102 There was no evidence of any difficulties in the relationship between Ms. Brown and the respondents in the first year and a half before she left for her first maternity leave in December 2002.

Ms. Brown's job duties

103 While Ms. Brown testified in cross-examination that her primary role at this time was growing the sales division, the fact is that her primary responsibility at this time was the sale of HVAC service contracts. Service contracts are contracts to perform ongoing maintenance work. At the time she commenced employment with PML, Ms. Brown was the only sales employee.

104 In his evidence, Mr. Wightman denied that Ms. Brown was, at this time, a manager in anything but name only. He testified that she had no one to manage, and that her job was to sell contracts, which he said she did at an unbelievable rate, resulting in unbelievable growth during Ms. Brown's first few years selling contracts for PML.

105 While the respondents attempted to downplay Ms. Brown's management responsibilities and status, it is clear, on all of the evidence, that Ms. Brown was also, from the outset, a member of the management team. This is clear on the face of Mr. Wightman's January 18, 2000 letter offering her a position as "Contract Sales Manager". Mr. Angelini, who joined PML in 2001, described her as a member of the management team. Likewise, Ms. Tibbitts testified that, from the outset of her employment in 2001, Ms. Brown performed some management duties.

106 At the outset, Ms. Brown was the only employee in the contract sales department, with the result that her management duties did not include the management of employees. However, she had responsibility for setting policies and procedures for things like estimating, proposal format, and record-keeping. In doing so, she relied on the training and information she had gained while working for Honeywell, a much larger company with more established policies and procedures.

107 Mr. Wightman, while minimizing any non-sales role performed by Ms. Brown, did testify that she was very good with computers, that his level of documentation at this point was quite poor, and that she started working to clean it up.

108 Over time, the sales department grew, with Ms. Brown being involved in the hiring, training and ongoing supervision of additional salespeople and support staff. The managerial aspect of her position grew accordingly. In 2000, Ms. Brown hired Sandra Stewart to assist with sales. Ms. Tibbitts joined the company as a Contract Associate, working under Ms. Brown's supervision, in October 2001. Her duties initially included data entry, working with spreadsheets and word-processing. Ms. Tibbitts and Ms. Brown knew each other before this through mutual friends.

109 Shortly after Ms. Tibbitts was hired, Ms. Stewart left on a maternity leave. By this point, PML had already moved to its new offices on Norland in Burnaby. According to Mr. Wightman, Ms. Brown's husband assisted with the construction, and Ms. Brown with the design, of the new premises, in which she had a larger office. In 2002, when Ms. Brown knew that she would herself soon be going on a maternity leave, she hired Mike Bottom as a salesperson. Also in this period,

Mr. Angelini left Honeywell and was hired by Mr. Wightman, on Ms. Brown's recommendation, as Service Manager, to be in charge of providing service on the contracts Ms. Brown and her growing staff were selling.

Ms. Brown's work schedule

110 For most of Ms. Brown's employment, she worked three days a week, although she varied the number of days and days of the week worked from time to time. Her most common schedule saw her working Mondays, Wednesdays and Fridays, with Wednesdays usually being spent in the field attending meetings and selling contracts. On January 10, 2002, she wrote Mr. Wightman a letter proposing that her salary be adjusted to accord with a recent change from a three to a four day work week. When Mr. Wightman was asked about this letter, he repeated his refrain that, when Ms. Brown tells you what you are going to do, you do what you are told. Her salary was adjusted accordingly.

111 Similarly, on August 22, 2002, Ms. Brown again altered her schedule, advising all staff by way of memo that she was changing her schedule from Wednesday, Thursday and Friday, to Monday, Thursday and Friday. She indicated that, on her off days, she could be reached on her cell or home telephone.

112 There is some dispute in the evidence about the amount of time that Ms. Brown worked at home during various periods of her employment. Ms. Brown testified that in this early period she was in the office about one day a week, with the remaining time being spent on the road selling or working from home. She testified, and I accept, that Mr. Wightman did not, in this period, express any concerns about her work or the amount of time she spent at home or in the office. Mr. Wightman confirmed as much in his evidence.

113 Ms. Tibbitts, who worked with Ms. Brown closely from October 2001 on, said that she sometimes worked from home, and sometimes from the office. Mr. Angelini testified that Ms. Brown often worked at home on two of the three days she typically worked, with the third day, Wednesdays, being spent in the field. On the other two days, as well as on her off days, he would often transport documents back and forth between PML's premises and her home.

114 On all of the evidence, it is clear that Ms. Brown always performed at least some work from home. Further, I find that the amount of time Ms. Brown worked at home, and the amount of time she spent in the office, was not of concern to Mr. Wightman until significantly later, after she went on her second maternity leave in February 2006.

Ms. Brown's compensation

115 The basic structure of Ms. Brown's compensation package remained essentially the same between 2000 and 2004. Ms. Brown earned a base salary based on a full-time salary of $65,000.00, prorated to reflect the days worked. In addition, she earned commissions (sometimes referred to as incentives) based on a percentage of sales made by her. She had a quota each year, with the percentage on which the commission was based increasing depending on whether the quota had been reached.

116 Ms. Brown's employment income from PML grew substantially between 2000 and 2005, from $45,133.94 to $110,808.82.

4. Ms. Brown's first PML maternity leave

117 Ms. Brown went on her first maternity leave from PML from December 2002 to October 2003.

118 Ms. Brown sent Mr. Wightman a memo about her upcoming maternity leave on December 20, 2002, the day it was scheduled to begin. According to the memo, Ms. Brown and Mr. Wightman had discussed and agreed to a number of terms, which were said to be confidential. Among the terms set out by Ms. Brown were that her taxable benefits, including medical and extended medical benefits and car allowance, would continue to be paid by PML during her maternity leave. She stated that she would hand in her gas card as she did not believe PML should pay for her personal gas consumption, but would provide an expense report for mileage if she attended work-related functions while on maternity leave.

119 Ms. Brown also wrote that, as mutually agreed, during her leave all incentive earned would be "banked", and paid out on her return.

120 Further, Ms. Brown was to continue performing work for PML during her leave. In particular, she was to provide regular sales/account management and customer support from her home via e-mail, voice mail and fax. She was to continue to approve all sales quotations via fax. She would be accessible to PML employees via fax, e-mail and cell phone. She would, if possible, attend customer-related events. The length of her leave was undetermined, but would last until at least September 30, 2003, dependent on sales success in her absence.

121 Ms. Brown wrote that there were a couple of options for reimbursement for work performed by her during her leave. She stated that she would be happy either to log it to be paid to a maximum of $100.00 per week (the amount permitted by Employment Insurance), or to log it and be paid out on her return, whichever Mr. Wightman preferred. She proposed an hourly rate of $25.00 an hour, a reduction from her usual rate of $33.00 an hour.

122 Ms. Brown closed by stating that, "**MOST IMPORTANTLY DON**, while I am off please phone me at any time as I want to be available as much as possible for you, Mike and Kathy."

123 Ms. Brown testified that Mr. Wightman agreed to these terms. It was her desire to continue to work during her maternity leave. She could not say whether Mr. Wightman's willingness to continue to pay her car allowance was related to the fact she intended to continue performing work for PML.

124 Mr. Wightman testified that he did agree to the terms set out by Ms. Brown, despite being uncomfortable with a couple of things.

125 Consistent with her letter, Ms. Brown performed work for PML during her first maternity leave. Ms. Brown testified, and I accept, that Mr. Bottom, who had been recently hired as a salesperson, required direction in the performance of his duties, which she provided, for example through approving quotes. Ms. Brown signed off on all contracts during this maternity leave. She also attended industry functions. Ms. Tibbitts testified that, if necessary, she would telephone or e-mail Ms. Brown at home for help during this period.

126 Ms. Brown testified that, before this time, she did not have access to her PML e-mail account from home. She testified that Mr. Wightman had a friend of his come to her home in or about January 2003 to provide her with access. Mr. Wightman confirmed this in his evidence, although he thought it occurred somewhat earlier, in the fall of 2002.

127 Through her first maternity leave, Ms. Brown continued to receive benefits, including her car allowance.

128 Ms. Brown also received Employment Insurance maternity and parental benefits throughout. She gave some unclear testimony about her understanding of her legal obligation to report employment earnings to Employment Insurance while in receipt of benefits. Overall, it appeared that she reported only up to $100.00 of earnings per week to Employment Insurance, regardless of the amount of time worked or money earned, thereby avoiding any reduction to her Employment Insurance benefits. On her return to work, she was paid out her banked earnings.

129 Ms. Brown's and Mr. Wightman's mutual willingness to enter such an obviously questionable arrangement reflects poorly on them both.

130 Ms. Brown also testified that Mr. Wightman told her it was her responsibility to deal with Employment Insurance and she assured him that she would take care of it. She also testified that it was her idea, as set out in her memo of December 20, 2002, that all incentive earned by her during her maternity leave would be banked. She had no explanation as to why it was necessary to bank her earnings if it was her responsibility to report her earnings to Employment Insurance, other than that was what had been done at Honeywell.

5. Ms. Brown returns from her first maternity leave

131 Ms. Brown returned from her first PML maternity leave in October 2003.

Mr. Wightman is unsatisfied with sales performance in Ms. Brown's absence

132 All was not well between Ms. Brown and Mr. Wightman on her return to work. Ms. Brown testified that Mr. Wightman was upset with the sales performance in her absence. Mr. Wightman confirmed this in cross-examination when he testified that sales went way down during her absence. I do not accept his denial of being upset about this, as he clearly blamed Ms. Brown for the poor performance, saying that the employee she put in place, Mr. Bottom, did not perform in her absence.

133 Ms. Brown and Mr. Wightman met in his office, where Mr. Wightman expressed his displeasure with Mr. Bottom's sales. Mr. Wightman asked Ms. Brown to do a full evaluation of the sales department, including providing him with short and long range plans to get the department back on track. Ms. Brown testified that Mr. Wightman also told her that she was to call him daily, and tell him her whereabouts, and what was going on. According to Ms. Brown, Mr. Wightman did not tell her why he was imposing this new requirement.

134 Ms. Brown testified that she felt that Mr. Wightman was upset, as was she. She felt that it appeared she was not to be trusted, and had to prove herself again. In cross-examination, she explained that she felt that she was not trusted because the department had done poorly in her absence, and she was being punished for it, not because Mr. Wightman did not know where she was. While upset, she accepted Mr. Wightman's direction and did as he asked, at least initially.

135 Mr. Wightman testified that Ms. Brown had had limited time to get Mr. Bottom up to speed before she went on maternity leave. He said that, while Ms. Brown was on leave, Mr. Bottom constantly requested help from him and Mr. Rilling. Mr. Wightman testified that, during Ms. Brown's maternity leave, contract revenues were not what he had hoped because Mr. Bottom was the only one selling.

136 Mr. Wightman also testified that, during his discussions with Mr. Bottom during this period, Mr. Bottom conveyed to him several times that he had "only limited to zero contact" with Ms. Brown through her maternity leave. According to Mr. Wightman, Mr. Bottom felt abandoned, and had to muddle through. Mr. Wightman testified that this was consistent with his observations, and noted that Mr. Bottom had not done this kind of sales before.

137 Mr. Wightman's evidence about what Mr. Bottom told him is, of course, hearsay, which I take into account in assessing the weight to give it. In this regard, it is significant that PML only hired Mr. Bottom shortly before Ms. Brown was scheduled to go on maternity leave, and Mr. Wightman knew that he was inexperienced. Clearly, he required significant support to perform effectively.

138 Mr. Wightman testified that, after Ms. Brown returned to work, he talked to her about her lack of support of Mr. Bottom, and she told him she was on the phone or in contact with him in writing consistently during her maternity leave. Mr. Wightman testified that Mr. Bottom denied this was true, and said that he never talked to her while she was on her maternity leave. While somewhat inconsistent on this point, the implication of Mr. Wightman's evidence was that he took Mr. Bottom's word for it about the lack of support he received from Ms. Brown. It is surprising that he would do so, given that Mr. Bottom was a junior employee, and Ms. Brown was a trusted manager with whom he had a long personal and business relationship.

Ms. Brown provides forecast for 2004

139 Mr. Wightman testified that he requested Ms. Brown to make a forecast for 2004, in order to be able to put a plan in place.

140 As requested, on October 31, 2003, Ms. Brown wrote Mr. Wightman a memo entitled "Service Contract Department Forcasting and Reporting". In it, she indicated that she had spent the last two days reviewing information about the department, and had identified "definite areas of concern" and "exciting accomplishments".

141 Ms. Brown stated that, "as my number of staff increase I feel the need to implement more structured reporting with regular meetings." She reviewed certain financial information. She reported limited growth in 2002 and 2003, which she attributed to a reduction in her selling time due to time spent training inexperienced staff and her maternity leave. She forecast a 50% growth in the department's sales in 2004, based on her, Mr. Bottom, and another salesperson, to be hired by January 1, 2004, selling. She forecast, however that she would be spending an increased amount of time on management duties and contract retention, leaving less time for her to sell.

142 Ms. Brown summarized as follows:

1. Since 2000 PML has undergone huge growth on the service contract side of our business.
2. Gross Margins have **increased** from 14%/18% in '98 and '99 to a constant 32% in 2002 and 2003.
3. **Re-curring** contract profit has **increased** from $21,000.00 per year to close to $170,000.00 per year in the past 3 years, 800% increase.
4. **Re-curring** contract values have **increased** from $155,000 in 1999 to $595,000 as of October 31, 2003, 383% increase.

5. Although % of contract value business increases have remained low in 2002 and 2003 (1% & 2% respectively) our annual recurring contract profit is in line to produce an additional $15000/$20,000 for 2003. **A gross profit increase even though we were training a new sales rep and I was on Maternity leave.**

143 The respondents raised an issue about the financial information Ms. Brown accessed to produce this memo. She testified that she got the information from financial statements for which she asked Ms. Snalam. Her understanding was that Ms. Snalam asked Mr. Wightman for those statements, and he told her that she could see them. Ms. Snalam did not testify about this matter.

144 Mr. Wightman testified that he remembered this document well because he was infuriated by the reference to "**all numbers ... are off true financial statements**". He testified that he asked Ms. Brown where she had got the financial statements, and she told him she got them out of his office. When he challenged her on this, she asked how else she was supposed to do the forecast. Mr. Wightman testified that the problem is that people do not know how to read financial statements, and that within 24 hours he put a lock on his office door. He also testified, inconsistently, that this was information to which Ms. Brown was completely entitled.

145 I find Mr. Wightman's evidence on this point impossible to understand. He asked Ms. Brown, a manager he trusted, to create a forecast to allow him to engage in planning for 2004. Given the comparatively poor performance of the sales department in 2002-03, such planning was necessary. It is neither surprising nor untoward that Ms. Brown would have needed access to financial information in order to complete the forecast requested. Mr. Wightman himself testified that this was information to which she was entitled. Whether, as testified to by Ms. Brown, she asked Ms. Snalam for these statements, or, as testified to by Mr. Wightman, she told him she simply got them out of his office, I am unable to find anything inappropriate in Ms. Brown's behaviour. Mr. Wightman's self-described continuing infuriation at her having done so is evidence that he is not always as mild-mannered as he would wish to portray himself.

146 Ms. Brown testified that she and Mr. Wightman had had ongoing discussions about her spending increased time performing management duties as opposed to direct sales, and that he agreed with her. She testified that, after she showed him the memo, he told her that she would be held accountable for the department meeting the targets she had set out, which was fine with her. Further, she testified that Mr. Wightman told her that, at the end of the day, she would work less and make more money, as her staff would be doing the majority of the actual selling.

147 Ms. Brown testified that she worked on the short change revisions set out in the memo, including: hiring another salesperson, Petra Ross; working on the redesign of PML's webpage; revising the incentive plan; requiring salespeople to report to her what they were doing each day; meeting with Mr. Bottom (the only salesperson in the department before Ms. Ross was hired) about targets for new contract meetings; dealing with all existing contract issues; and, on an informal basis, working with Mr. Wightman to establish salaries for persons hired in sales.

Reporting requirement

148 Ms. Brown characterized her relationship with Mr. Wightman in this period as strained. She testified that she would call him, as he had requested, but he would not answer his telephone and she would leave a message. Other than him agreeing to the terms set out in her October 31, 2003 memo, she did not recall many discussions with him in this period. Ms. Brown testified that

she continued to telephone Mr. Wightman daily for a few months, after which time she simply stopped doing it. She testified that he was not acknowledging her calls, she was letting staff know where she was, and she did not think it was a big deal. He expressed no concerns to her about her stopping the daily phone calls. Ms. Brown estimated that it took four to five months before the relationship stopped being strained.

149 In cross-examination, Ms. Brown acknowledged that, as her superior, Mr. Wightman was entitled to know her whereabouts while working. She said that, in most circumstances, a reporting requirement would be fine, and she had no qualms about imposing such requirements on her own subordinates. She agreed that such requirements could legitimately be imposed for safety reasons or for monitoring performance.

150 In cross-examination, Ms. Brown admitted that she spoke to someone about Mr. Wightman's new reporting requirement at the time it was imposed. She was asked whether she told that person that "she would do it for a couple of weeks, then Don'll forget about it". Ms. Brown said that she might have said words to that effect. When asked, she said that it was Mr. Rilling to whom she spoke. I find that Ms. Brown did make the statement alleged to Mr. Rilling, as it is entirely consistent with her admitted behaviour in stopping reporting to Mr. Wightman after the passage of some time. Further, her statement was an accurate prediction: Mr. Wightman did not take any issue with Ms. Brown's unilateral action in stopping reporting to him. He acquiesced.

151 For his part, Mr. Wightman testified that, while he continued to trust Ms. Brown as a salesperson, he was starting to lose trust with respect to where she actually was. This was the period when he was extremely busy with the construction project on the River Rock Casino, and he had no time to be checking up on people. He needed to be able to trust them. He testified that he did ask Ms. Brown to contact him about what she was doing and where she was.

152 Mr. Wightman testified that in this period there were larger and larger gaps between when Ms. Brown was in the office, and that he had a growing concern about the amount of time she was working from home.

153 I find, however, that given that Mr. Wightman was, as he testified, spending 95% of his time at the River Rock Casino project, he would not be in a position to know how much time Ms. Brown was spending in the office in this period. Further, and in any event, Mr. Wightman testified that, at no time between Ms. Brown's first and second maternity leaves, did he take any action to stop her from working at home. If Mr. Wightman had any concerns, Ms. Brown would therefore not have known about them.

154 Mr. Wightman also testified that other people were claiming Ms. Brown was harder to contact at this time. The evidence does not substantiate, however, that other PML employees were having any difficulty reaching Ms. Brown at this time.

Ms. Brown's management responsibilities in this period

155 Mr. Wightman testified that, in this period, Ms. Brown was not really a manager - her job was to sell contracts, and that is what he wanted her doing. He said that there was only one other salesperson at the time, Mr. Bottom, and there was no need for a manager for one employee.

156 Yet, on December 2, 2003, Ms. Brown wrote a memo with respect to the assignment of different territories and market sectors to each of herself, Mr. Bottom, and Ms. Ross, the newly hired salesperson. Ms. Brown herself was to oversee all existing contracts, as well as do some sales.

Mr. Wightman testified that he thought the assignments given by Ms. Brown in this memo were good.

157 This memo indicates that, contrary to Mr. Wightman's testimony, there was more than one other salesperson in the department by the time, and that Ms. Brown was fulfilling management functions, such as assigning work.

158 Then, on December 29, 2003, Ms. Brown wrote another memo, entitled "Customer Service and Sales Incentive Plan", for the upcoming year. Mr. Wightman testified that he accepted this document, which set out the incentive structure for all salespeople. He said that Ms. Brown did a very good job of this document. This document again reflects Ms. Brown's continued performance of management duties. So too does Mr. Wightman's evidence that he was relying on her to take care of the service contract sales part of his business.

159 On February 2, 2004, Ms. Brown changed her work schedule for the month. According to her e-mail of that date, she changed some of her work days from Thursday to Wednesday because of daycare issues. The end result remained that she worked three days per week. Mr. Wightman testified that his initials on this document indicated his acceptance of the change. Ms. Tibbitts testified that it was common for Ms. Brown to change her schedule in this way.

160 The evidence did not indicate that there were any difficulties in Ms. Brown's employment relationship with the respondents in 2004.

6. Sales department in 2005

Personnel - Ms. Brown's evidence about her supervisory relationship with her staff

161 There were a number of changes in the personnel working in the sales department through this period.

162 Mr. Bottom and Ms. Ross had both left by this time. Ms. Ross stayed only briefly, as the job and she were not a good fit. Mr. Bottom left shortly after Ms. Brown returned from her maternity leave. According to Mr. Wightman, Mr. Bottom's parting words were, referring to Ms. Brown, "I will not work with that woman". While this is hearsay, if true, it only highlights that Mr. Bottom's alleged statements about the lack of support Ms. Brown gave him during her maternity leave should have been taken with a grain of salt by Mr. Wightman, as Mr. Bottom appears to have borne some animus towards Ms. Brown.

163 In any event, with the departure of Ms. Ross and Mr. Bottom, only Ms. Brown was left in the sales department. She needed additional staff, and, to that end, Lee Etherington was hired sometime in 2004 as a full-time salesperson. Ms. Novinc was hired on a part-time basis in October 2004. In addition, Mr. Bowes was hired as a full-time salesperson in January 2005.

164 Each of these salespeople was hired by Ms. Brown with Mr. Wightman's approval. An e-mail chain from January 2005 indicates that there was some conflict around the terms and conditions of employment offered to Mr. Bowes by Ms. Brown without Mr. Wightman's approval, but the conflict appears to have been resolved without further issue.

165 By January 2005, there were therefore three salespersons in the department in addition to Ms. Brown. In addition, Ms. Tibbitts remained, coordinating contracts. Of the three salespeople, Ms. Brown characterized Mr. Etherington as more seasoned. Mr. Bowes, and especially Ms. No-

vinc, however, were comparatively inexperienced, and Ms. Brown felt that she needed to spend time with them to train and support them.

166 Ms. Brown testified that, after this time, she still did some selling, but only in conjunction with her staff. Her focus was on management and providing support to the sales team. Ms. Brown denied, however, that it was only in January 2005 that she assumed a management role. She testified that it was a shift towards managing staff, and not selling independently. I accept the accuracy of that characterization.

167 According to Ms. Brown, the form her supervision took of the three salespeople then in the department varied.

168 Mr. Etherington and Ms. Brown conversed almost daily, on phone or in person. She accompanied him to sales meetings at his request. They met monthly to discuss his sales, and she signed off on his estimates and reviewed his proposals before they were sent out.

169 Ms. Brown described Mr. Etherington as being a great "cold-caller" and "door-opener", but as struggling thereafter, and requiring her help. While she said he had many great attributes, his sales numbers did not look good by the time he chose to leave PML in or about July 2005.

170 Ms. Novinc started work on November 1, 2004. She had known Ms. Brown since she was a child, and telephoned her about the possibility of obtaining work with PML. She wanted to work part-time in order to accommodate her childcare obligations. At the time, Ms. Brown was looking for someone to work part-time in contract sales, and hired Ms. Novinc. For the first couple of months, Ms. Novinc did customer service, following up on existing service contracts. In January 2005, she moved into contract sales. She worked three days a week, Tuesdays, Wednesdays and Thursdays, and shared an office with Ms. Brown.

171 Until September 2005, Ms. Novinc and Ms. Brown worked opposite schedules; the only day they were both scheduled to work was Wednesday. Ms. Brown testified that she made a concerted effort to attend sales calls with Ms. Novinc on Wednesdays. They would meet at clients' premises, in PML's office, or wherever it was convenient. In addition, Ms. Brown testified that they would have lengthy discussions on the majority of her days off. She would also attend strata council and other evening meetings with Ms. Novinc. Overall, Ms. Brown testified that she worked very closely with Ms. Novinc. In her evidence, which I deal with in more detail below, Ms. Novinc confirmed that Ms. Brown worked with her generally as described by Ms. Brown.

172 Ms. Brown spoke highly of Ms. Novinc, whom she described as a "go-getter" who learned quickly under her tutelage, having come to PML with no HVAC knowledge, but a great background in advertising. She struggled with some of the technical terms, but was likeable and formed great relationships. She was also demanding of technicians.

173 Ms. Brown testified that Mr. Bowes was more independent, kept more to himself, and did not ask for as much support as Ms. Novinc. She would accompany him to client meetings at his request, and recalled three occasions on which she did so. Ms. Brown also approved Mr. Bowes' quotes and proposals. They would meet, as necessary, either at the office or in the evening in their respective home offices. Ms. Brown did not require Mr. Bowes to report to her on a daily basis.

174 In 2005, his first year with PML, Mr. Bowes was assigned to the GCC River Rock Casino project, which kept him fully occupied. I address the evidence about this project in greater detail below. Otherwise, Mr. Bowes did not have the same level of activity as Ms. Novinc.

175 At this time, Ms. Brown and Mr. Bowes were friends, their friendship arising out of the close relationship between Ms. Brown and Mr. Bowes' wife. Ms. Brown testified that she was careful not to do anything which might appear to be favouritism for Mr. Bowes.

176 Ms. Tibbitts also continued to work in the sales department in 2005, providing contract administrative support and reporting to Ms. Brown. Ms. Brown spoke very highly of Ms. Tibbitts, whom she described as a fantastic employee. Ms. Tibbitts provided Ms. Brown with various financial reports on a regular basis. They did not deal with each other directly very frequently, as Ms. Tibbitts was very experienced, and required little in the way of direction.

177 Ms. Brown described a number of projects she and her staff were working on in 2005, including a large one to retain a key public sector client (the District of Maple Ridge); reselling a major contract to a private client under new management (Olivieri Pasta); and dealing with some financial difficulties related to a contract sold by Mr. Etherington before he left PML in the summer of 2005 (Inex Pharmaceuticals). She said there were also many smaller projects that she worked on in 2005.

178 Overall, Ms. Brown testified that the sales department was doing wonderfully in 2005. She testified that Mr. Wightman told her he would throw a party when sales hit $1 million, and that he would take her and her husband, together with the employee of her choice, along with their spouse, to Las Vegas. Ms. Brown testified that she wanted to take Ms. Tibbitts and her husband, and told Ms. Tibbitts as much. Ms. Tibbitts denied ever having been told that by Ms. Brown. I accept her denial. In any event, the Las Vegas trip did not happen, but a party was held at the Hart House Restaurant in Burnaby in August 2005 to celebrate reaching the $1 million mark in sales, which Ms. Brown organized, and to which all PML staff were invited.

Revised compensation structure and duties

179 Ms. Brown characterized this period as "the turning point of 'work less, earn more'". According to her, Mr. Wightman told her her compensation package should be changed to reflect the staffing changes.

180 Therefore, on January 25, 2005, Ms. Brown wrote Mr. Wightman a letter entitled "Revised Pay Structure", "to confirm our conversations regarding my shift to Staff Management and the necessary salary adjustments". Her salary was adjusted to $70,000.00 per year, effective January 1, with an increased car allowance of $500.00 per month. Her work days were to continue to be Monday, Wednesday and Friday, and she stated that she was often available on her cell phone on Tuesdays and Thursdays. The commission structure was to remain in place with adjustments for "on plan" new sales of $450,000.00. She stated that, "in short I will receive 5% of all factored new sales as sold by the sales team."

181 Ms. Brown closed by saying that, "as you are aware I thoroughly enjoy working with you and look forward to our growing success". In cross-examination, Ms. Brown confirmed that this was a truthful statement, and that any concerns she had had to date were "little or general, but nothing longstanding". As of this date, Ms. Brown testified that "we had a fantastic time", did very well, it was a "great group", Mr. Wightman was very flexible with her family, and she enjoyed what she did.

182 The terms set out by Ms. Brown in her January 25 letter were confirmed by Mr. Wightman in a January 29 e-mail to Ms. Snalam in which he stated that Ms. Brown's ""commision" is based on

quartly performance of her department", at 5% of a total quota of $450,000.00 per year. He testified that he approved the terms in Ms. Brown's January 25 letter. He testified that he continued to expect her "and all managers" to be in the office when not in the field. This reflects Mr. Wightman's acceptance that, by this point at least, Ms. Brown was a manager.

183 Ms. Brown followed this up with two more memos to Mr. Wightman, both dated February 8, 2005, in which she stated that incentive would be 5% on contract sales up to $450,000.00, and 10% thereafter. Mr. Wightman agreed to the terms set out therein, testifying that "she puts things forward, and I generally always agree".

7. Issues with respect to Ms. Brown's performance in 2005

184 In their Response to Complaint, and Mr. Wightman's subsequent affidavits in support of their application to dismiss, the respondents made a number of criticisms of Ms. Brown's performance as manager of the contract sales department in 2005. (All subsequent references to Mr. Wightman's affidavits are to those he swore in support of the respondents' application to dismiss.) These criticisms included: working at home, and therefore spending insufficient time in PML's offices; being difficult to reach; falsely claiming to hold weekly sales meetings in her home; providing insufficient support to her sales staff; and not preparing the monthly Excel spreadsheets for the accounting department reporting on the department's sales. In this part of my decision, I address the evidence concerning these and other criticisms.

Mr. Bowes' concerns about the GCC project

185 In direct, Ms. Brown was asked if there were any issues with her staff in 2005. She said that sometime in the summer Mr. Bowes approached her because he felt Ms. Novinc was being given an unfair share of the leads coming into the company. He was frustrated because he was not earning the income he wanted.

186 Ms. Brown testified that she addressed the issue with Mr. Bowes, telling him that the GCC River Rock Casino project, to which he was assigned, was a great opportunity, and he had no reason to be concerned. In cross-examination, Ms. Brown testified that, after Mr. Bowes expressed his concerns to her, the allocation of the commissions on the River Rock Casino were changed from 2/3 for Mr. Bowes and 1/3 for Ms. Novinc, to 3/4 for Mr. Bowes and 1/4 for Ms. Novinc. She testified, however, that it was obvious he still was not happy with it. Ms. Brown denied that she said to him that "I'm the boss, and that's the way it is". In re-examination, she testified that, while she reallocated the commissions for the Casino, she did not think it was fair, given that the sale was "given" to Mr. Bowes.

187 Ms. Brown also testified that she was involved in this project, facilitating the maintenance contract for the River Rock Casino after it was completed, and attending some meetings with Mr. Bowes. She testified that she suggested to Mr. Wightman a new model for this contract, under which PML would provide a full-time employee to be on site during the machinery's warranty period. According to Ms. Brown, Mr. Wightman told her this was a great idea.

188 Mr. Bowes testified about his concerns about this project. He testified that he had taken care of the account, and put it together, although he acknowledged that he had worked with Ms. Brown on it at the beginning. According to Mr. Bowes, he tried to open up a discussion about the split of commissions on this project, which he felt was not fair, as other staff were able to work on other accounts, while he was stuck on this one. He said that the discussion did not go very far. He

testified that, when he tried to raise it with Ms. Brown, she said, "I'm the boss, that's the way it is", and that nothing changed. When asked in cross-examination, Mr. Bowes said that he did not know what the commission split was or whether it was changed.

189 It is clear that Mr. Bowes was dissatisfied with the commission split on the Casino project. Ms. Brown reallocated the commissions, but he remained unhappy. Little turns on whether Ms. Brown said "I'm the boss, and that's the way it is". In fact, she was the boss, and did make the decision on the commission split, and likely said words to the effect of those attributed to her by Mr. Bowes. I am unable, on the evidence before me, to find that Ms. Brown handled this matter inappropriately. Mr. Bowes' dissatisfaction is likely one of the factors that entered into the eventual breakdown of his relationship with Ms. Brown.

Time spent in the office by Ms. Brown and alleged difficulties contacting her

190 In issue between the parties was the amount of time spent by Ms. Brown in the office in 2005, and whether her staff had difficulty contacting her. This issue was raised by the respondents in their Response to Complaint, and Mr. Wightman's affidavit, in which he stated that Ms. Brown was rarely seen in PML's offices in 2005; he estimated, no more than a dozen during the course of the entire year.

191 Mr. Wightman testified that, by this time, construction on the River Rock Casino project was winding down, and that while he remained busy, he was beginning to have more time to devote to other aspects of PML's business. He testified that, in the first half of 2005, the contract salespeople were becoming increasingly vocal with him about not being able to reach Ms. Brown.

192 Mr. Bowes was asked in direct how accessible he found Ms. Brown during the day. His evidence was somewhat equivocal - he said that he would telephone her and leave a message, but that it was hard to tell, and she only worked part-time. He also said that he had it a little easier because he lived nearby Ms. Brown and could drop by after work if it was important.

193 When asked why he would need to contact Ms. Brown, Mr. Bowes said that, in the beginning, he needed help with things like pricing, signing proposals, training and product knowledge. With time, he said he needed less help, but if he needed help with something like signing a contract, "it was time to drive to Maple Ridge".

194 In cross-examination, Mr. Bowes was asked whether he had lots of telephone calls with Ms. Brown in 2005. He agreed that, over a year, that was true, and that he was sure he talked to her every day or so, perhaps 15 or even 30 times a month. He estimated he talked to Ms. Brown every day she worked. The majority of their communications were by telephone.

195 Mr. Bowes stated in cross-examination that he e-mailed Ms. Brown as much as he e-mailed anyone he worked with. He could not estimate how often he and Ms. Brown communicated by e-mail, although he did say that his preference was to talk on the telephone.

196 In cross-examination, it was put to Mr. Bowes that his cell phone records showed approximately 463 telephone calls to and from Ms. Brown in 2005. Mr. Bowes was given a break to review his cell phone records. After reviewing those for January and February, he noted that, of the 33 he saw, only nine were over a minute.

197 A review of Mr. Bowes' cell phone records shows that he frequently telephoned Ms. Brown. I am unable from those records to determine how frequently Ms. Brown called him, as the incoming calls do not indicate the originating phone number.

198 Also in cross-examination, Mr. Bowes was asked about having Ms. Brown sign off on contracts for him. He agreed that it was one of her job duties to sign off on contracts. He testified that initially she signed off on all his contracts. Later, he found it more convenient to have Mr. Wightman sign off on some of them. His evidence was speculative as to the percentage of his contracts that each of them signed off on.

199 Mr. Bowes was asked in cross-examination how often he saw Ms. Brown in the office. He thought perhaps once a week, or 50 times in a year, and said they would interact when they were both in the office at the same time.

200 In an affidavit sworn in support of the respondents' application to dismiss, Mr. Bowes swore that "during 2005, I rarely saw or spoke to Ms. Brown ... For the most part, I was on my own throughout 2005 and did not receive much in the way of sales support from Ms. Brown. When questioned in 2005 by Don Wightman ... about the levels of support I was receiving, I gave him this response." When this part of his affidavit was put to him in cross-examination, Mr. Bowes attempted unsuccessfully to explain it, and to maintain, despite his evidence about meeting with, telephoning and e-mailing Ms. Brown, that it was true that he rarely saw or spoke to her.

201 Overall, it is clear that Ms. Brown and Mr. Bowes were in frequent telephone, e-mail and face-to-face contact in 2005. It is not true that Mr. Bowes "rarely saw or spoke to Ms. Brown" in 2005. I do not accept any suggestion that Mr. Bowes found it difficult to contact Ms. Brown, or that he was, by virtue of her being difficult to reach, left without adequate support. Nor is it true, as I address below, that Mr. Bowes never met with Ms. Brown for business reasons at her house. I have taken Mr. Bowes' untruthfulness in his affidavit, and his responses when cross-examined about it, into account in assessing his evidence throughout.

202 In her affidavit sworn in support of the application to dismiss, Ms. Novinc also stated that she rarely saw or spoke to Ms. Brown in 2005, and that while she received telephone calls and e-mails from her, she was on her own throughout 2005, and did not receive much in the way of sales support from Ms. Brown. Ms. Novinc swore that she told Mr. Wightman this when he questioned her about the subject in 2005.

203 Towards the end of her direct evidence, Ms. Novinc said that Ms. Brown trained her for the first couple of months, looked over her proposals and made modifications to them, created a new spreadsheet and changed codes in the accounting system. Not mentioned by her at this point in her evidence, but otherwise acknowledged by Ms. Novinc, was the fact that Ms. Brown also attended sales meetings with her, both on Wednesdays and occasionally in the evenings. She also testified that Ms. Brown sent e-mails when there were problems with customers, made notes on contract summaries, and took her to meetings to introduce her to clients. Despite all this, Ms. Novinc testified that Ms. Brown provided her with only very minimal supervision.

204 Ms. Brown denied in cross-examination that she would sometimes take Ms. Novinc on lengthy shopping trips on Wednesdays. Ms. Novinc testified that on a few occasions they went shopping for non-PML purposes, but she did not suggest these trips were frequent or lengthy. I accept Ms. Novinc's evidence on this inconsequential point.

205 Ms. Novinc testified that Ms. Brown was not often in the office. However, in assessing this evidence, it must be kept in mind that Ms. Novinc and Ms. Brown usually only worked one day a week together, Wednesdays, and they usually spent that day on the road in meetings.

206 Ms. Novinc testified that, other than on Wednesdays, her contact with Ms. Brown was mostly by telephone or e-mail. They would send documents requiring Ms. Brown's signature back and forth through Mr. Angelini.

207 Ms. Novinc said that Ms. Brown was usually not available between about 2:00 and 3:00 p.m., when she would be picking up her child from school. On Mondays, she was generally not available after 4:00 p.m.

208 In cross-examination, Ms. Novinc acknowledged that it was not fair to say, as she had in her affidavit, that she only rarely saw or spoke with Ms. Brown in 2005. She testified that that was, in fact, not true. She had no explanation for why she had sworn an affidavit that she acknowledged could be misleading.

209 While Ms. Novinc was, like Mr. Bowes, untruthful in her affidavit, her acknowledgment in cross-examination of its inaccuracy, as opposed to Mr. Bowes' unpersuasive attempts to explain the inaccuracies in his, left her credibility less damaged than his.

210 Also in cross-examination, it was put to Ms. Novinc that Ms. Brown had reviewed and approved some 46 estimates put together by her in 2005. While she had initially estimated there were only about 20, she could not disagree with the number put to her.

211 Given their respective schedules, it is not surprising that Ms. Novinc would not see Ms. Brown in the office often, and would sometimes see work piled on her chair, awaiting her next attendance at the office. Nor do I find the fact that the majority of Ms. Novinc's and Ms. Brown's interaction, other than on Wednesdays, was by telephone or e-mail surprising, given that any other contact would have been on one or the other of their days off.

212 Ms. Tibbitts testified that she would communicate with Ms. Brown by telephone, in person in the office, by e-mail and by fax, depending on where she was and what she was doing. She did not indicate that she had any difficulty reaching Ms. Brown as required for work purposes. She testified that Ms. Brown would always let her know what her schedule was and where she would be. She testified that Ms. Brown might work from home, but might also come into the office before a meeting, and that her whereabouts depended on what was happening in her weekly schedule.

213 Ms. Tibbitts' perception was that Ms. Brown was busy, and was doing a lot of work. One of her larger projects in 2005 was the development of a checklist of computer tasks, which Ms. Tibbitts agreed was a huge job taking many hours of work. In this period, Ms. Brown also developed a new contract pricing spreadsheet.

214 According to Ms. Brown, with one exception, no employees raised any concerns with her about her availability. That exception arose when Scott Hamilton, in retrofit sales, was unable to reach her one afternoon. In particular, none of Ms. Novinc, Mr. Etherington or Ms. Tibbitts ever expressed concerns to Ms. Brown about her availability. As mentioned, Ms. Brown and Mr. Bowes had a personal friendship at this time. Despite this, according to Ms. Brown, Mr. Bowes never expressed any concerns to her about her work, the amount of time she spent in the office, or difficulties contacting her when she was out of the office. Mr. Bowes also never suggested to Ms. Brown that he felt manipulated or lied to about her work day.

215 Ms. Brown introduced into evidence an edited version of her 2005 day timer. She calculated that it showed her being in PML's office 57 times in 2005. This was down two from her earlier calculation of 59, which she had given in her affidavit in response to the application to dismiss. She

provided an adequate explanation for the discrepancy, and I accept her evidence that she was in the office at least 57 times in 2005.

216 In cross-examination, Ms. Brown testified that in this period she was, on average, in the office seven to ten hours per week. She suggested that she was typically working at home on Mondays, in the field with Ms. Novinc on Wednesdays, and Fridays would depend on what was required. This could vary, depending on the circumstances. As already indicated, Ms. Novinc's and Ms. Tibbitts' evidence about Ms. Brown's whereabouts was to similar effect.

217 While I accept that Ms. Brown was in the office at least 57 times in 2005, I find that she has overestimated the number of hours she was present on average in a week. Nonetheless, I accept that Ms. Brown was in the office for at least some time every week.

218 Ms. Brown sometimes accompanied sales representatives to meetings with clients. She frequently did so with Ms. Novinc on Wednesdays. In cross-examination, Mr. Bowes estimated that Ms. Brown accompanied him to client meetings perhaps ten times in 2005.

219 I find that other employees, and in particular the sales team, generally had no difficulty reaching Ms. Brown by telephone or e-mail when they needed to do so. I also find that Ms. Brown provided her staff, and Ms. Novinc, in particular, with appropriate sales support, attending sales meetings with her and providing her with instructions by e-mail, as in that dated January 8, 2005. Ms. Novinc consistently under-reported the amount of support provided to her by Ms. Brown. The adequacy of the support provided is reflected in Ms. Novinc's evidence that she was able to do the job just fine under Ms. Brown's supervision.

220 I also find that salespeople were not, as testified to by Mr. Wightman, becoming increasingly vocal in complaining to him in 2005 that they could not reach Ms. Brown. He gave no specifics in support of this assertion. Neither Mr. Bowes nor Ms. Novinc testified that they made such complaints to Mr. Wightman in 2005. From other evidence, it is doubtful that Ms. Novinc would have made this complaint to him, especially at this time, as she testified that she was scared to talk to Mr. Wightman because Ms. Brown had told her not to do so. In cross-examination, Mr. Wightman added the never before heard assertion that Ms. Novinc told him she would go 90 days without seeing Ms. Brown. I do not accept that Ms. Novinc ever made this clearly exaggerated and wholly implausible statement to Mr. Wightman. There was no evidence of Mr. Etherington making any complaints to Mr. Wightman. Nor did the evidence substantiate that Mr. Bowes made such complaints to Mr. Wightman in 2005. Mr. Wightman testified in cross-examination that he did not raise this issue with Ms. Tibbitts, who would have been a good person to ask about Ms. Brown's availability. I find that the assertion that salespeople were becoming increasingly vocal to Mr. Wightman about their supposed inability to contact Ms. Brown is an after-the-fact construction of Mr. Wightman.

Weekly sales meetings

221 There was also an issue about whether Ms. Brown was having weekly sales meetings with her staff at her home, or falsely claimed that she was doing so. This issue was raised by the respondents in their Response to Complaint and Mr. Wightman's affidavit, in which Mr. Wightman said that, when he raised his concerns with Ms. Brown about her being rarely seen in PML's offices and difficult to reach, she told him she was doing a considerable amount of work from home, and was having weekly sales meetings with the sales team at her home. He said he acquiesced in her desire to continue working from home, but remained concerned.

222 Ms. Brown denied ever telling Mr. Wightman that she had weekly sales meetings in her home. She testified that employees, in particular Mr. Etherington and Mr. Bowes, did come to her home from time to time for various work-related reasons including going over presentations to clients and reviewing quotes. In cross-examination, she estimated this occurred perhaps three or four times a year. She recalled one meeting with technical field staff. Neither Ms. Brown nor Ms. Novinc recalled Ms. Novinc ever coming to her home for a sales meeting. In her affidavit and oral evidence, Ms. Novinc stated that she did go to Ms. Brown's house with Mr. Bowes once to learn a new contract summary sheet and to do an estimate. Ms. Brown did not specifically recall this occasion. Any other visits by Ms. Novinc to Ms. Brown's home were social in nature.

223 In their Response to Complaint, the respondents stated that Ms. Novinc told Mr. Wightman that she had never been to Ms. Brown's house. Ms. Novinc testified in cross-examination that she never told Mr. Wightman that she had never been to Ms. Brown's house, only that she had never been there for a sales meeting. In his affidavit, Mr. Wightman repeated the claim that Ms. Novinc had told him she had never been to Ms. Brown's house, and only later remembered she had been there once for business. I prefer Ms. Novinc's recollection that she never told Mr. Wightman she had never been to Ms. Brown's house.

224 Mr. Bowes testified that he had been to Ms. Brown's home for business meetings. He recalled one sales meeting in particular that he and Mr. Etherington attended. He estimated that he had 15 meetings in total with Ms. Brown at her home in 2005. In addition, Ms. Brown occasionally came to his home to talk about business, although that was rare. It was, he said, sometimes hard to separate social and work interactions.

225 In his affidavit, Mr. Bowes swore that he had been to Ms. Brown's house for social reasons, but did not believe he had ever been there for a meeting. In cross-examination, he acknowledged that this was incorrect, saying that he met with her quite a few times at her house. When asked to explain the discrepancy, Mr. Bowes stated that he probably misread the affidavit when he swore it, and did not read it carefully. I have already expressed my concerns about Mr. Bowes' credibility arising from this and other inaccuracies in his affidavit, and his unimpressive efforts to explain them.

226 There was also evidence about whether Ms. Brown told RJ Lundquist, a friend of the Wightmans, that she had weekly sales meetings at her house. It was alleged by the respondents that Ms. Brown had done so while staying at a vacation home near the Lundquists, whom she had met through the Wightmans.

227 When it was put to Ms. Brown in cross-examination that she told Ms. Lundquist she had weekly sales meetings at her home, she testified that she had never had weekly sales meetings at her home, and therefore she did not think she would have said that. She had no specific recollection.

228 Ms. Lundquist testified about meeting Ms. Brown and her family through the Wightmans in or about 2004, and seeing them again while on vacation in 2005. She testified about a conversation in which Ms. Brown talked about having recently discovered she was pregnant, and the challenge of juggling family and business responsibilities. It was in this context that Ms. Lundquist testified that Ms. Brown told her she had weekly sales meetings at her house. Ms. Lundquist testified that she later told Mr. Wightman's wife about this, who in turn relayed to her husband what she had said.

229 In cross-examination, it was revealed that Ms. Lundquist could not recall when or why she told Mrs. Wightman about this conversation, and that her memory was shaky with regards to the details of her conversation with Ms. Brown.

230 Ms. Lundquist testified that she and her husband had known the Wightmans for 20 years, and that her husband is Mr. Wightman's best friend, and now works at PML. Ms. Davie described Mr. Lundquist as one of Mr. Wightman's "right hand people". Ms. Lundquist recalled a very specific aspect of a conversation while on vacation some four years ago, but had no real recollection of how or when she came to recount it to Mrs. Wightman. Her memory of other aspects of her brief social relationship with Ms. Brown was vague. For example, she testified that she met Ms. Brown in 2004, but later admitted it could have been 2002.

231 Mr. Wightman testified that his wife told him that Ms. Lundquist told her that Ms. Brown told her at Green Lake that she had sales meetings at her house all the time. Mr. Wightman was unable to provide any context to explain why his wife, with whom he testified he avoided discussing business, suddenly told him about Ms. Lundquist's alleged statement. In this connection, he testified that, contrary to Ms. Brown's evidence and later statement to Ms. Davie, Ms. Brown had never been his wife's friend, and she had told him that she never liked Ms. Brown.

232 Mr. Wightman's evidence about what his wife told him Ms. Lundquist told her about what Ms. Brown told her is triple hearsay, and of no probative value whatsoever. Nor is his evidence about his wife telling him she never liked Ms. Brown. Mrs. Wightman did not testify, and no reason was given as to why she did not. If the respondents believed that her evidence was relevant, she should have been called. In any event, Mrs. Wightman's purported dislike of Ms. Brown is another example of Mr. Wightman's after-the-fact reconstruction of relationships.

233 Taking all of these factors into account, I am unable to accept Ms. Lundquist's evidence on this point. I find that Ms. Brown did not tell Ms. Lundquist that she had weekly sales meetings at her home.

234 Mr. Wightman testified that, sometime after his wife told him what Ms. Lundquist had told her, and in light of the information he had that Ms. Brown was hard to contact, he decided to confront Ms. Brown. He testified that he asked her if she was having sales meetings at her house. Her response, according to Mr. Wightman, was to say that "we have wonderful sales meetings; we get so much done because the phone doesn't ring." Mr. Wightman recounted this alleged statement several times in his evidence; each time, he put on what can only be called a silly, exaggeratedly feminine voice, and waved his arms in an expansive gesture, apparently in imitation of Ms. Brown. He testified that he did not argue with Ms. Brown, but merely said ok, and asked if the meetings went well, to which she responded that they did.

235 As already indicated, Ms. Brown denied that she told Mr. Wightman that she had sales meetings at her house. I prefer Ms. Brown's evidence on this point. Mr. Wightman's evidence about Ms. Brown's alleged representation had a strange, rehearsed quality that was simply unbelievable. Further, given that Ms. Brown in fact did not hold sales meetings at her house, a fact she readily acknowledged in her evidence, it is difficult to imagine why she would have told Mr. Wightman that she did, especially given that the truth or falsity of such a statement could have been readily verified with the sales staff. I find that Ms. Brown did not tell Mr. Wightman what she had weekly or regular sales meetings at her house.

236 Mr. Wightman was also asked in direct examination if, in this same meeting, he raised questions Ms. Brown about her availability. He testified, in a halting manner, that he believed he did but could not be sure, and therefore did not want to answer. In cross-examination, he said he did not remember pushing the issue at this time. I find that Mr. Wightman did not raise any questions with Ms. Brown about her availability at this time.

237 Mr. Wightman was asked if he followed up with the sales representatives about whether they had sales meetings at Ms. Brown's house. He said that he did so in an informal way, asking Ms. Novinc how many times she had been to sales meetings at Ms. Brown's house, and Mr. Bowes how often he had been to Ms. Brown's house, including for sales meetings. The answers he recounted were consistent with the information given in Ms. Novinc's and Mr. Bowes' affidavits, namely, that they had not been to any sales meetings at Ms. Brown's house. I have already made my findings about the inaccuracies in those affidavits on this point. Mr. Wightman testified that he was beginning to put together a pattern that Ms. Brown was consistently working from her home and not actually managing anybody.

238 It is important to note that neither Ms. Novinc nor Mr. Bowes was asked in direct examination about whether Mr. Wightman posed these questions to them. I find that Mr. Wightman did not ask them these questions in the summer of 2005.

Preparation of monthly sales reports

239 In their Response to Complaint, and Mr. Wightman's affidavit, the respondents asserted that, sometime in 2005, Mr. Wightman learned that Ms. Brown was not preparing the monthly Excel spreadsheets for the accounting department that reported on the division's sales results. They asserted that Ms. Novinc or Mr. Bowes was preparing them on their own, and e-mailing them to Ms. Brown, who would then calculate and insert her 5% commission, and submit the report to Mr. Wightman for his approval.

240 Ms. Brown was asked about this issue in cross-examination. She readily agreed that Ms. Novinc and Mr. Bowes would each prepare a sales report and submit it to her. She would then create a cover page, summarizing their reports, which she would then submit to Mr. Wightman. She was not sure if she attached to that cover page the reports prepared by Ms. Novinc and Mr. Bowes.

241 It was put to Ms. Brown in cross-examination that she would somehow "skew" the sales reports to ensure that both Ms. Novinc and Mr. Bowes met their monthly quota. She denied doing so, and stated that there would be no benefit to her if she did, as her commission did not depend on which sales representative made the total sales on which her commission was based.

242 No documents were introduced by the respondents to substantiate the suggestion that Ms. Brown engaged in any impropriety with respect to the preparation of monthly sales reports.

243 Consistent with Ms. Brown's evidence, Ms. Novinc testified that she and Mr. Bowes provided Ms. Brown with monthly sales reports, and Ms. Brown submitted one report to Mr. Wightman. She also testified about discovering problems with the sales reports submitted by Ms. Brown sometime after Ms. Brown went on maternity leave in February 2006, and discussing these problems with Mr. Bowes and reporting them to Mr. Wightman. I deal with the evidence about this issue below in discussing the development of the new sales structure during Ms. Brown's maternity leave. What is important for present purposes is that Ms. Novinc was very clear in her testimony

that she did not report any problems about the monthly sales reports to Mr. Wightman in 2005, but did so only sometime in 2006.

244 Mr. Bowes did not testify about this issue. Significantly, despite the assertions made by him in his affidavit and by both respondents in their Response to the Complaint, neither did Mr. Wightman.

245 I accept Ms. Brown's evidence with respect to the preparation of monthly sales reports. She prepared the report submitted on a monthly basis to Mr. Wightman on the basis of the reports submitted to her by her staff. There was nothing improper in her doing so. There is no evidence that Mr. Wightman learned of any problems in the preparation of the monthly sales reports in 2005. I address the evidence about what Ms. Novinc told Mr. Wightman about the sales reports in 2006 below.

E-mails sent at strange hours

246 In a similar vein, the respondents attempted to establish that Ms. Brown purposely sent e-mails at strange hours to give the false impression she was working late at night. In particular, it was suggested to Ms. Brown in cross-examination that she had told Ms. Novinc of such a plan, and that she had in fact acted in accordance with the alleged plan. She denied both suggestions.

247 Ms. Novinc testified that Ms. Brown told her that she would send e-mails to people at odd times or on her days off to let people know she was working all the time. She said that she sometimes received e-mails from Ms. Brown at unusual times. In particular, Ms. Novinc referred to a plan Ms. Brown and her husband came up with to do this to Ms. Snalam. Ms. Novinc testified that this did not sit well with her. In cross-examination, Ms. Novinc testified that she was not suggesting that Ms. Brown was not working, just that she was sending e-mails to provide evidence that she was. She continued to maintain, however, that Ms. Brown would somehow queue up e-mails to send at strange hours.

248 The alleged plan to send e-mails to Ms. Snalam in particular at odd hours was not put to Ms. Brown and I put no weight on Ms. Novinc's evidence about it. I accept Ms. Novinc's evidence that Ms. Brown told her she sometimes sent e-mails at odd hours to let people know she was working all the time. I do not accept that Ms. Brown was, as suggested by Ms. Novinc, attempting to make her life difficult by sending her e-mails at times when Ms. Novinc was not at work; rather, it is more likely that Ms. Brown simply sent e-mails when it was convenient for her to do so, without particular regard for whether the recipient would be at work at the time. It was clear on all the evidence, including that of Ms. Tibbitts, that Ms. Brown did work, including making telephone calls and sending e-mails, at times other than her scheduled hours. I do not accept that she purposely queued up e-mails to send at odd hours to give the false impression that she was working all the time.

Staff support

249 The respondents led evidence in an attempt to show that Ms. Brown failed to provide appropriate support and direction to her staff. I have already addressed suggestions that Ms. Brown failed to provide them appropriate support by not being available. In addition, the respondents relied on a number of e-mails written by Ms. Brown to her staff about issues in the department, which the respondents suggested were overly critical and did not provide constructive feedback.

250 An example is an e-mail dated January 25, 2005 from Ms. Brown to six employees about the cancellation of a service contract. She expresses her "shock and amazement" at learning of the cancellation, and suggests that each employee should view it as a "personal insult". Ms. Brown denied suggestions that the e-mail was not constructive or that she failed to provide Ms. Novinc or anyone else with appropriate guidance about the issue. Ms. Novinc testified that she found the e-mail very harsh and negative, and that Ms. Brown did not give any other feedback on how to prevent such a situation recurring.

251 This e-mail is not persuasive evidence that Ms. Brown failed to provide her staff with appropriate direction. While I agree the tone may be characterized as harsh, the e-mail addresses a serious matter - the loss of a service contract due to poor client service. Further, it is not accurate to say that Ms. Brown offered no guidance on this occasion. She closes the e-mail with the specific request that staff call her with their comments. If Ms. Novinc or others felt the need for further direction, all they had to do was call. In her evidence, Ms. Novinc acknowledged that she could have done so, but chose not to.

252 The respondents also relied on a February 5, 2005 e-mail from Ms. Brown, in which she asked staff to read an attachment "regarding how we are doing" at a particular client's establishment. She asked one staff member, Mr. Hamilton, to note the need for his involvement under "needs improvement", and asked that any technicians who needed a copy of the report get one. Ms. Novinc testified that she thought Ms. Brown's e-mail was unnecessary, because the report spoke for itself, and that the criticism of Mr. Hamilton was not constructive.

253 I am unable to find anything untoward in this e-mail from Ms. Brown. It is polite and merely asks staff to take note of the report.

254 The respondents also relied on an August 17, 2005 e-mail from Ms. Brown to staff about a customer service report. The tone of this e-mail is unquestionably harsh - she refers to the report as "absolutely pathetic", says she is "very disappointed", and asks "are we getting lazy?". She closes by asking for all staff's comments.

255 Ms. Tibbitts, who reported to Ms. Brown for over five years, much longer than any other employee testifying in these proceedings, described Ms. Brown as very direct in her communications with her, letting her know the assignments she expected her to complete. She said she was very organized. She was, in her opinion, generally a good manager. Her only criticism was that sometimes Ms. Brown could be a little tactless.

256 Overall, the e-mail communications relied upon by the respondents demonstrate that Ms. Brown could, as she herself acknowledged in her testimony, be harsh and demanding. Ms. Tibbitts, who was a fair and impartial witness on whose evidence I rely, found her to be direct communicator, who could be a little tactless. One expects that such an attitude may have been necessary on occasion to achieve the superior sales performance which everyone acknowledged Ms. Brown attained. They do not demonstrate a lack of guidance, direction or accessibility. She consistently provided direction, albeit in a tone all staff may not always have appreciated, and asked for staff feedback.

Conclusion with respect to respondents' alleged concerns about Ms. Brown's performance in 2005

257 Overall, the evidence does not substantiate the respondents' assertions about Ms. Brown's alleged managerial failings in 2005. Staff were able to contact her when they needed to; she was in the office from time to time; and provided appropriate support and direction to staff. The sales staff did not complain to Mr. Wightman about any problems at this time. Ms. Brown did not falsely claim to be holding weekly sales meetings at her home. While Ms. Brown was not a perfect manager, and her management style was likely not to the taste of all employees under her supervision, any issues which may have existed have been exaggerated by the respondents after-the-fact. Any concerns the respondents may have had were not communicated to Ms. Brown at the time.

8. July 2005 meeting disclosing pregnancies

258 On July 5, 2005, Ms. Brown and Ms. Snalam had a meeting with Mr. Wightman in which they both disclosed to him that they were pregnant. All three participants testified about the meeting. There is little material difference in their recollections. To the extent of any discrepancy, I generally find Ms. Snalam's evidence about the meeting to be the most reliable, both because she testified first, without hearing anyone else's evidence about the meeting, and because she has no direct interest in the outcome of this proceeding.

259 Ms. Snalam testified that she was not sure why the meeting had been called, or why Ms. Brown was there. For her part, Ms. Brown testified that Mr. Wightman was proposing to start having her involved in budget preparation, and he called the meeting to go over the budgets he had prepared for 2006.

260 It was suggested to Ms. Brown in cross-examination that there was no scheduled meeting with either of them, which she denied. This was Mr. Wightman's evidence, who indicated that he was merely sitting in his office when the two women appeared at the door and told him they needed to speak to him. They sat down, closing the door behind them.

261 I find that there was a scheduled meeting, and that whatever the reason for it, it was not called for the purpose of disclosing their pregnancies.

262 Ms. Brown testified that the three of them sat down and Mr. Wightman started to go over the budgets. She interrupted him, telling him she was pregnant. She testified that she did so because she thought he needed to be prepared for the fact she would be on maternity leave in 2006. In addition, she was just past the three month mark, and thought it was time to disclose her pregnancy. This is consistent with Ms. Snalam's evidence that Ms. Brown simply announced she was pregnant.

263 It was suggested to Ms. Brown in cross-examination that disclosing a pregnancy was a confidential matter, it being implicit in the questions posed to her that it was in some way odd for her to disclose her pregnancy in this way. She did not accept this suggestion, and I find that there was nothing odd about Ms. Brown disclosing her pregnancy at the time and in the manner she did.

264 In light of Ms. Brown's announcement, Ms. Snalam thought she had better let Mr. Wightman know she was pregnant too. She had been hesitant to do so to this point, both because she wanted to wait until the pregnancy was farther along in case she miscarried, having had such problems in the past, and also because she was anxious about how Mr. Wightman would react. But when Ms. Brown made her disclosure, Ms. Snalam thought it was only fair that she do the same, and did so. Until Ms. Snalam announced that she too was pregnant, Ms. Brown was unaware of that fact.

265 According to Ms. Snalam, Mr. Wightman was very upset, aggressive and irate, and he raised his voice. He repeatedly said that he could do without Ms. Brown, but not her, and that it had better not be like last time. He also yelled that she had told him she would never get pregnant again.

266 Ms. Brown's evidence about Mr. Wightman's reaction was to similar effect. She testified that Mr. Wightman clenched his fists and turned his attention to Ms. Snalam, and told her that she had said she was not going to have any more children. In cross-examination, she added that he sat back in his chair and opened his eyes wide. Mr. Wightman told Ms. Snalam that it would not be like last time, and that he could do without Ms. Brown, but he could not do without her, and she had better start looking for a replacement right away. He also said that two of his managers are pregnant. According to Ms. Brown, both she and Ms. Snalam were shaken. She described the atmosphere in the meeting as horrible and tense. In testifying about this meeting, Ms. Brown herself appeared angry.

267 Mr. Wightman testified that he started the conversation by asking "what's up?", and that Ms. Brown said in response that she would like to inform him that she was pregnant, to which he responded "Great!". He testified that he said "good, no problem, we've got you covered with Cher, Kathy and Ken. So good - this'll work out fine". He continued to maintain that he said this in cross-examination.

268 According to Mr. Wightman, Ms. Snalam then blurted out "I'm pregnant too", to which he responded "What?!?". The tone of voice in which he recounted this response was very forceful.

269 When asked why he reacted in that way, Mr. Wightman referred to "what happened the last time", and discussed at some length the difficulties Ms. Snalam had experienced getting pregnant the first time. In that connection, he referred to how excited she had been the first time, and how he had been one of the first to know. He then testified about how important Ms. Snalam was to PML, and how important it was to have a replacement for her. He testified that he was "on her" right from the start about getting a replacement, that there had been problems in obtaining one in a timely way, and the replacement eventually hired was completely inadequate. He testified that the effect on the company was an absolute disaster. Mr. Wightman did not suggest that he said any or all of this to Ms. Snalam when she announced her pregnancy; rather, he referred to it in his evidence as an explanation for his reaction. While Mr. Wightman's evidence was somewhat unclear as to what he was thinking as opposed to what he actually said, he did testify that he said that "what happened last time is not happening again!". Mr. Wightman testified that the meeting quickly broke up at this point, with tears welling up in Ms. Snalam's eyes.

270 In her evidence, Ms. Snalam denied that she had told Mr. Wightman that she would never get pregnant again. Mr. Wightman did not testify in direct that Ms. Snalam had told him this. In cross-examination, he said that Ms. Snalam said that but he never did. I accept Ms. Snalam's evidence on this point. I make my findings of fact with respect to Ms. Snalam's first maternity leave, to which Mr. Wightman was referring, and a significant inaccuracy in Mr. Wightman's affidavit about it, below in addressing the evidence about Ms. Snalam.

271 In cross-examination, it was put to both Ms. Snalam and Ms. Brown that, after Ms. Brown made her disclosure, Mr. Wightman said "good, fine". Ms. Snalam did not recall that, and did not believe that it happened. According to her, Mr. Wightman's response was not positive, but merely that they could do without Ms. Brown. He was agitated. For her part, Ms. Brown testified that Mr. Wightman used words about Mr. Bowes and Ms. Novinc being there, but did not say it was "good".

She said that Mr. Wightman was not happy, and whatever words he used were in the context of indicating he could do without her.

272 In cross-examination, it was put to Ms. Brown that she had never before indicated that Mr. Wightman clenched his fists in response to the disclosure of the pregnancies. It is true that it did not appear in her complaint form or affidavit. Nonetheless, I find that he did make gestures of the kind described by Ms. Brown in her testimony.

273 Ms. Snalam testified that, in the meeting, she told Mr. Wightman that her due date was December 31, 2005.

274 After the announcement of the two pregnancies and Mr. Wightman's negative response, the meeting came to an end. According to Ms. Brown, he said that there was no reason to discuss 2006 budgets.

275 Considering the entirety of the evidence about this meeting, I find that Ms. Brown and Ms. Snalam both disclosed their pregnancies to Mr. Wightman. He reacted badly to both, and especially to Ms. Snalam's announcement. In essence, he said that he could make do without Ms. Brown. So far as Ms. Snalam was concerned, he reacted with anger, telling her that she had told him that she would never get pregnant again, and that it had better not be like her last maternity leave. Both women were shaken by the encounter.

276 Mr. Wightman appeared to see nothing untoward in the way in which he reacted to Ms. Brown and Ms. Snalam's announcements of their pregnancies, despite his acknowledgement both of the negative and forceful way in which he responded to Ms. Snalam's announcement in particular, and of the fact that she had tears in her eyes at the end of the meeting.

9. Events in the remainder of 2005

Mr. Wightman takes no action with respect to his alleged concerns about Ms. Brown

277 Mr. Wightman testified that, because of the various concerns he allegedly had at this time, he started to feel that Ms. Brown was misleading him. He began to wonder why he needed a manager, given that the salespeople were doing exceptionally well on their own. He testified that Ms. Brown was going off on maternity leave soon, and that he decided he would deal with it later. He did not address any of the concerns he testified he had about Ms. Brown misleading him or failing to provide adequate management for the sales department prior to her going on maternity leave. When asked why, he testified that there were only a few months to wait, then the maternity leave, when she would have time to herself, and he would address it after that. In cross-examination, he added that he wanted to observe her for a while and see if it was true.

278 Also in cross-examination, Mr. Wightman testified that he felt that Ms. Brown had lied to him about having sales meetings at her house. When asked why he did not fire her if he felt that she lied to him, he posed the rhetorical question in response: why not try and work with her and see? He referred to Ms. Brown being an excellent sales person, and to not wanting to throw out the baby with the bathwater.

279 Mr. Wightman's failure to raise any of these alleged concerns with Ms. Brown in the summer of 2005 or at any time prior to her eventual return from her maternity leave is a factor which leads me to doubt the veracity of those concerns. If Mr. Wightman had had serious concerns about the honesty of one of his managers upon whom he relied for the success of his business, I find that he would have dealt with them there and then, rather than letting them go for a year and a half. I

find that he did not have the concerns about Ms. Brown which he testified he had. If, on the contrary, Mr. Wightman really had those concerns, he was under an obligation, as Ms. Brown's employer, to raise those concerns with her in a timely and effective manner. He failed to do so.

Ms. Snalam goes off work unexpectedly and Ms. Davie joins PML

280 Both Ms. Snalam and Mr. Wightman testified that he was immediately "on" her to find a replacement for her maternity leave, which was anticipated to begin in or about November or December 2005.

281 As discussed in more detail below in dealing with Ms. Snalam's circumstances, in August 2005 Ms. Snalam experienced complications with her pregnancy, was hospitalized, and lost her baby.

282 Before Ms. Snalam was hospitalized, Mr. Wightman had left the office for his annual summer vacation in Osoyoos.

283 Ms. Brown testified about being in the office when Ms. Tibbitts took a phone call advising that Ms. Snalam was in hospital. It was payroll week, and Ms. Snalam was responsible for payroll. According to Ms. Brown, Mr. Wightman and Ms. Klatt discussed Ms. Klatt doing payroll, but she and Ms. Tibbitts had concerns about Ms. Klatt performing this job. Ms. Brown spoke to Mr. Wightman, and volunteered to do it, with whatever assistance Ms. Snalam could provide from hospital. Ms. Brown testified that, when she told him she did not want Ms. Klatt to do the payroll, Mr. Wightman was angry and stated "here I am again, left unprepared". This would appear to be the period in which Mr. Wightman, as discussed below in dealing with Ms. Snalam's personal circumstances, returned from vacation and found out something about her situation.

284 Ms. Brown testified that she had a number of conversations with Mr. Wightman about Ms. Snalam through the remainder of 2005. Ms. Brown testified that she knew Ms. Snalam was trying to contact Mr. Wightman because she had called Ms. Tibbitts. Ms. Brown testified that she talked to Mr. Wightman about this in his office, and told him she had seen Ms. Snalam at Playland sometime after the miscarriage, and that she appeared pretty good. Mr. Wightman made a remark about how she could go to a park but she could not come to work. Ms. Brown testified that she asked Mr. Wightman if he had no compassion, as she had just lost her baby, and he said no, he was left unprepared.

285 Mr. Wightman testified that this evidence was half true and half false, as he recalled Ms. Brown telling him about seeing Ms. Snalam at Playland, and saying she looked good, but denied the remainder of Ms. Brown's evidence. I found Ms. Brown's evidence on this point, as on some others, overly dramatic. I find Mr. Wightman's evidence with respect to this conversation more probable.

286 By this point, Mr. Wightman had enlisted the help of a family friend, Wayne Stoilen, a Chartered Accountant ("CA"), to find a replacement for Ms. Snalam. He was looking for someone with as much experience as possible, who could take charge immediately of what was, by this point, a very large company. Mr. Stoilen recommended that Mr. Wightman retain someone with a professional accounting designation. Mr. Wightman testified he had little to do with the process of finding a replacement, leaving it to Mr. Stoilen and a recruiting company. Shortly thereafter, Janet Davie started work at PML, initially as a temporary replacement for Ms. Snalam, on contract. Ms. Davie and Mr. Wightman both testified that she was initially retained, starting August 30, 2005, for what was anticipated to be a four to six month term.

287 As this is the first time that Ms. Davie has been introduced in the narrative, I pause to note that I found her to be a truthful witness, who strove to provide honest testimony, even in difficult circumstances where it may have reflected poorly on her or the respondents. She testified, and I accept, that she had never been involved in anything like this over her long career.

288 I have no difficulties with Ms. Davie's credibility. My only concerns with respect to Ms. Davie's evidence arise in circumstances where I conclude that Mr. Wightman may have been less than candid with her, leading to her acting on an incomplete or inaccurate understanding of the facts. Mr. Wightman was, on the evidence, not always completely open with Ms. Davie, despite the fact that she described herself as one of his "right hand people". I address these concerns as they arise in dealing with her evidence. Otherwise, I am comfortable relying on Ms. Davie's evidence.

289 Ms. Davie and Ms. Brown had a cordial introduction to one another shortly after Ms. Davie started at PML. Ms. Brown testified that Ms. Davie greeted her with "so you're Camilla, one of the reasons the company has done so well". In cross-examination, Ms. Davie testified that she might well have said that, as that is how Mr. Wightman painted Ms. Brown. Ms. Davie testified that Ms. Brown was very welcoming to her, and told her they needed "accounting horsepower". According to Ms. Davie, Ms. Brown told her that Mr. Wightman was "a little rough around the edges", but "was pretty good to deal with". She also told her she was very close to Mr. Wightman's wife.

290 When asked about the extent of her interaction with Ms. Brown until the latter left on maternity leave in February 2006, Ms. Davie said that she did not have many dealings with her, but what dealings she had were very cordial. She assisted Ms. Brown with some benefits issues.

291 Ms. Davie testified that there were three very junior employees in accounting at this time, and none of them was able to perform Ms. Snalam's duties in her absence. She characterized the accounting department as being in a state of turmoil due to a variety of factors, including a lack of formal procedures or manuals, and Ms. Snalam having been forced to leave unexpectedly. The production of financial statements was very far behind, and she worked to provide Mr. Wightman with the financial information he required to make decisions.

292 Sometime later in 2005, Ms. Brown testified that she had another conversation with Mr. Wightman about Ms. Snalam. According to Ms. Brown, Mr. Wightman told her that he did not want to have Ms. Snalam back. He referred to the fact that Ms. Davie is a CMA, and more qualified. He also stated that Ms. Snalam would have free lawyers, while he would have to pay thousands of dollars to get rid of her. He also, according to Ms. Brown, called Ms. Snalam a "fuck-up", and laughed. I address the remaining evidence and make my findings about this conversation below.

Ms. Brown's work in September 2005

293 In September 2005, Ms. Brown changed her days and hours of work to better suit her daycare needs. She communicated this to affected PML staff by way of an August 27, 2005 e-mail. As of September 6, she was scheduled to work a full day, from 8:00 to 4:30, on Mondays, and from 8:00 to 1:00 or 2:00, on Tuesdays, Wednesdays and Thursdays. The total hours of work per week remained the same as before. In her e-mail, Ms. Brown stated that, "as always these may fluctuate with business needs", and asked people to contact her if they had any questions. Mr. Wightman expressed no concern to Ms. Brown about this change when she advised him of it. Ms. Brown testified in cross-examination, and I accept, that her decision to change her days and hours of work on this occasion was reflective of the flexibility she enjoyed.

294 On September 21, 2005, Ms. Brown held a restaurant breakfast meeting with the contract sales department to go over a new contract estimate sheet she had developed. Mr. Bowes testified that they met at this same restaurant on a number of occasions for operational meetings. Ms. Novinc testified that the sales team met at other restaurants on other occasions. This supports my earlier conclusion that Ms. Brown provided appropriate support and direction to the staff under her supervision.

Christmas party

295 There was evidence about Ms. Snalam not being invited to the PML Christmas party in 2005. In her complaint, Ms. Brown alleged that Mr. Wightman told Ms. Tibbitts that he did not want to invite Ms. Snalam to the party. In her direct evidence, Ms. Brown testified that she overheard a discussion between Mr. Wightman and Ms. Tibbitts about how the numbers were getting large for the party, and issues about the size of the room. Ms. Brown testified that she heard Ms. Tibbitts ask Mr. Wightman if he wanted to invite Ms. Snalam, and he said that "we barely have enough room for our own staff without inviting people on maternity leave".

296 Ms. Tibbitts testified that she talked to Ms. Davie about numbers for the party, and that it was in this context that they discussed the possibility of Ms. Snalam coming. Ms. Tibbitts testified that she said to Ms. Davie that she thought it would be a little thoughtless to send Ms. Snalam an "e-vite" in light of her bereavement. She testified that she and Ms. Davie asked Mr. Wightman what he thought, and he said "you ladies take care of it". Ms. Tibbitts testified that she thought it would be kind of inappropriate to invite Ms. Snalam, and did not think she would want to attend. In the end, the decision was made not to invite Ms. Snalam. She had no recollection of Mr. Wightman saying anything about barely having enough room for our own staff without inviting people on maternity leave.

297 Ms. Davie testified that two employees were in the process of sending employees invitations to the party with their payroll. She said that Ms. Tibbitts came into her office, where they discussed that they were over capacity for the room they had booked, the RSVP list was rapidly filling up with people they had not expected to come, and they were juggling, trying to anticipate who would actually come. According to Ms. Davie, the question of whether Ms. Snalam should be invited came up. She testified that, while in hindsight it was probably wrong, they decided to take what they thought was the compassionate approach and not invite her. Ms. Davie testified that Ms. Snalam had lost her baby, and she (Ms. Davie) was originally only supposed to be there four months, but Ms. Snalam had said that she was not ready to return to work. They called Mr. Wightman into the office. He was feeling caught in the middle, and said that it was Ms. Davie's and Ms. Tibbitts' decision to make.

298 Mr. Wightman did not testify about this matter in direct. In cross-examination, he denied saying anything about there being no room for people on maternity leave. He confirmed that he told Ms. Davie and Ms. Tibbitts to make the decision. His affidavit, in which he stated that he was part of a three way conversation and that the feeling among the three of them was that Ms. Snalam was emotionally distraught and ought therefore not to be invited, was put to him. He testified in response that he did not make the final decision. He agreed that this portion of his affidavit was misleading.

299 I find that there was a discussion about whether to invite Ms. Snalam, involving Ms. Tibbitts and Ms. Davie, in which Mr. Wightman played only a minor role. There was a legitimate con-

cern about the numbers for the party, and an attempt to take Ms. Snalam's feelings into account. Mr. Wightman told Ms. Tibbitts and Ms. Davie to make the decision, and they decided not to invite Ms. Snalam, predominantly for what they believed to be compassionate reasons. Mr. Wightman was not responsible for this decision. Nor do I find that he said anything about barely having enough room for their own staff without inviting people on maternity leave. At best, Ms. Brown misconstrued a conversation only parts of which she overheard.

300 In considering this issue, I find it significant that Ms. Snalam did not raise the matter of not being invited to the Christmas party in her evidence; there is no evidence that she was unhappy because she was not invited.

Ms. Mahy is hired

301 In December 2005, Ms. Mahy was hired as an administrative assistant in the service contract department. Ms. Brown was involved in the initial stages of the hiring process, which was completed by Ms. Davie and Ms. Tibbitts while she was on holidays. Ms. Mahy reported to Ms. Tibbitts. At this stage, her job duties consisted of switchboard, filing and data entry.

E-mail issue

302 In December 2005, there was an incident in which Mr. Wightman and Ms. Novinc discovered that it was possible for any employee with remote access to access any other employee's e-mail. Ms. Brown was on vacation at the time, and Ms. Novinc was checking her work e-mail for her in her absence. Mr. Angelini sent Ms. Brown an e-mail to her home address warning her that Mr. Wightman "went totally NUTS.!!!!", and was interrogating everyone in the office, as a result of which morale "sucks". There was no evidence of any fallout from this issue.

10. Events leading up to Ms. Brown's second maternity leave

Initial discussions about upcoming maternity leave

303 In December 2005 Ms. Brown and Mr. Wightman began to talk about her upcoming maternity leave.

304 Ms. Brown testified, and I accept, that it was very important to her to continue to be involved with the company while on maternity leave.

305 According to Ms. Brown, to this end she asked Mr. Wightman if she could continue to be involved with PML as she had during her first maternity leave, and he agreed that she could. In direct, she testified that his only stipulation was that he did not want to be billed for the hours worked by her as he had been during the first maternity leave, to which Ms. Brown agreed. Ms. Brown also testified that she asked if she would be paid her car allowance, as she had been during her first maternity leave, and Mr. Wightman agreed that she would. They discussed ways she could be compensated, and he asked her to put together a proposal for his review.

306 Mr. Wightman testified that, in the last quarter of 2005, Ms. Brown began coming to him with requests, demanding what she wanted during her upcoming maternity leave. He testified that he started saying no, that it was not going to happen. Later, he testified that he could not say how firm he was, but he was implying that he did not want her to continue. He did so through saying things like that he wanted her to have her time off, and expected that she would have her hands full.

307 Mr. Wightman's evidence that Ms. Brown was demanding is consistent with his general portrayal of the dynamics of their relationship, and my earlier comments apply. That said, I accept

that Ms. Brown was requesting to be allowed to continue to work with PML during her upcoming maternity leave, as she had in the past, and Mr. Wightman was not inclined to agree, but was not saying so unequivocally.

Ms. Brown's January 8, 2006 memo and Mr. Wightman's response

308 In cross-examination, Ms. Brown testified that Mr. Wightman neither agreed nor disagreed to her proposal when she first made it. I find that it is more probable that Mr. Wightman made no commitments at this time, as that is consistent with the memo Ms. Brown wrote Mr. Wightman on January 8, 2006 about her upcoming maternity leave.

309 In her January 8 memo, Ms. Brown wrote that its purpose was to "provide you with written documentation of my intentions should you chose for me to remain involved in the business during my maternity leave." Clearly, as of the time of writing, Mr. Wightman had not yet agreed to Ms. Brown's proposals. Equally clearly, Ms. Brown was writing in recognition of it being ultimately Mr. Wightman's decision.

310 Ms. Brown suggested that her involvement could include approving department expenses; holding monthly sales meetings with Ms. Tibbitts, Mr. Bowes and Ms. Novinc; authorizing contract estimates; accompanying Ms. Novinc and Mr. Bowes to client meetings; managing staff; and attending functions.

311 Ms. Brown was clearly anxious to continue to be involved in the business during her leave:

> As I have worked so hard over the past 6 years with PML to develop a 1.3 million dollar contract base I am very nervous not to have a hand in it for the length of my maternity leave. I especially believe that with the growing service business such as ours the my ongoing support and expertise will help us maintain the levels that you have paid for and we have worked so hard to achieve.
>
> Should you wish for my continued involvement as I have outlined I would propose that I maintain my taxable benefits, including car allowance and gas card, and continue on the Management incentive plan which we would bank until my return. As mentioned earlier by you this way you would not receive any hourly charges for my working hours.

312 In cross-examination, it was put to Ms. Brown that her proposal that her incentives be banked until her return would have been a benefit to her, as it would have meant that her Employment Insurance benefits would not be reduced while on leave. She would not agree that this would be a benefit to her, although she accepted that the consequence of banking would be that her Employment Insurance benefits would not be affected. She testified that it did not matter to her one way or another if her incentives were banked, it was just how she had done it in the past at both Honeywell and PML.

313 I do not believe that it was a matter of indifference to Ms. Brown whether her incentives were banked. Doing so would have been to her financial benefit, and was her consistent preference.

314 Mr. Wightman testified about his views in and around this time. He testified that he concluded that it would be better to have Ms. Novinc and Mr. Bowes, both of whom he considered independent self-starters, to report to him directly. He saw no need to hire a manager to oversee them,

nor did he think it necessary for Ms. Brown to continue to be involved during her maternity leave. In reaching these conclusions, he took into account, not only the abilities of the existing staff, but also Mr. Bottom's earlier alleged comments, and his own alleged concerns about Ms. Novinc and Mr. Bowes having difficulties contacting Ms. Brown. In cross-examination, he revised this, denying that he took Mr. Bottom's earlier comments into account at this time.

315 I accept some of this evidence from Mr. Wightman. Mr. Bottom's alleged comments were, by this time, two or more years in the past, and I do not accept they were a motivating concern. I have already found that Ms. Novinc and Mr. Bowes had not expressed to Mr. Wightman the supposed concerns about not being able to reach Ms. Brown. Rather, I find that Mr. Wightman concluded that he could make do without a manager, and simply have the salespeople report directly to him. I accept his evidence that he was thinking that Ms. Brown's performance in an exclusively management role did not provide him with the same value as her performance as a salesperson. I also accept that he did not feel that he obtained good value from her continuing involvement during her last maternity leave.

316 At some point in this process, Mr. Wightman consulted Ms. Davie. Ms. Davie testified that Mr. Wightman told her that Ms. Brown wanted to be paid by the hour for work performed while on maternity leave, with the pay banked and paid out on her return to work. In addition, she understood that Ms. Brown wanted to continue to be paid her car allowance and medical benefits.

317 Ms. Davie testified that she told Mr. Wightman that it was not legal to bank time while on Employment Insurance, as earnings must be reported as they are earned. She advised Mr. Wightman that PML should continue to cover Ms. Brown's medical benefits while on maternity leave, but not her car allowance.

318 Specifically in relation to Ms. Brown's January 8 memo, Ms. Davie testified that she took it from Ms. Brown's "should you wish" introduction that the question of whether Ms. Brown would work during her maternity leave was purely in Mr. Wightman's discretion. She advised Mr. Wightman not to accept the proposal put forth in the last paragraph of Ms. Brown's memo, telling him that she thought it would be against the law, and very risky.

319 Ms. Davie testified that Mr. Wightman did not want to comply with Ms. Brown's request, as he felt that PML had sufficient coverage with the salespeople it had, and thought Ms. Brown's continued participation during her maternity leave was unnecessary. He told her that they had done this in the past during Ms. Brown's first maternity leave, but he did not feel it was beneficial to PML. She also testified that, while Mr. Wightman did not want Ms. Brown to perform work for PML during her maternity leave, he expressed a high opinion of Ms. Brown, and on a number of occasions said that he thought very highly of her sales ability.

320 Ms. Davie testified that, during this period, she observed Ms. Brown speaking to Mr. Wightman on a number of occasions, trying to persuade him to reconsider paying her the car allowance.

321 I accept Ms. Davie's evidence with respect to her conversations with Mr. Wightman about Ms. Brown's request to continue working during her maternity leave, her observations during this period, and her opinion about the advisability of allowing Ms. Brown to work and bank her earnings. Her advice was reflected in Mr. Wightman's evidence that, since he has been guided by accountants, he takes a different view of matters such as paying car allowances when employees are

not working, and Ms. Davie's very adamant view about the legality of banking time worked while on maternity leave.

322 Ms. Brown and Mr. Wightman met on January 9, 2006. According to Ms. Brown, she started to give him her proposal, but he interrupted her, telling her that he did not want her to be involved at all. He told her that a legal action had started with Ms. Snalam, and he did not want there to be any confusion about how he treated women on maternity leave.

323 Mr. Wightman denied that he made this statement. On a balance of probabilities, I find that he did not say that a legal action had started, as none in fact had. Also on a balance of probabilities, I find that he likely did refer to Ms. Snalam, and his desire that there not be any confusion about how he treated women on maternity leave. Clearly, this was a period when Mr. Wightman was trying to regularize his practices and procedures.

324 Ms. Brown asked him about the car allowance, and he told her that he would not pay it. Ms. Brown complained that that would make things difficult for her as she was not prepared for not being paid her car allowance. Mr. Wightman told her that he had spoken to Ms. Davie, and he did not have to pay the car allowance. According to Ms. Brown, Mr. Wightman said he had only done it before to lure her away from Honeywell.

325 By way of background on this point, Ms. Brown had testified that she telephoned Mr. Wightman when she was about to go on maternity leave from Honeywell in 1999. An issue had arisen at Honeywell with respect to whether employees were entitled to the continued payment of their car allowance while on maternity leave. According to Ms. Brown, she called Mr. Wightman in order to ask his opinion on whether she would be entitled to payment of her car allowance when she went on maternity leave, and he told her that she would be, and should ask for it. In the result, Ms. Brown was paid her car allowance by Honeywell while on maternity leave.

326 Also in this connection, Mr. Wightman testified about a conversation with Ms. Brown's husband and Mr. Lundquist in the winter of 1999 - 2000 about Honeywell refusing to pay Ms. Brown's car allowance while on maternity leave. He testified that she told him in their subsequent meetings that she had forced Honeywell to do so. Mr. Wightman could not see how he could use this to lure Ms. Brown in light of the fact she had already got the car allowance from Honeywell.

327 In cross-examination, Ms. Brown maintained her view that it was unfair for PML not to pay her car allowance while on leave, as she had purchased a car that was appropriate for representing PML, and could ill afford to continue to pay for it without the car allowance.

328 According to Ms. Brown, Mr. Wightman was getting angry with her. She asked if there was anyone else that knew what the rules were. He said that Ms. Davie did. Ms. Brown asked if there was anyone else they could contact. Finally, she asked Mr. Wightman who his lawyer was, and Mr. Wightman gave her the name and business card of his legal counsel.

329 Mr. Wightman testified that he did, at one time, although he was not sure in which conversation, tell Ms. Brown to go ahead and write his counsel about her claims under the *Employment Standards Act.*

330 As a result, on January 12, Ms. Brown wrote a letter to Mr. Wightman's legal counsel, in which she indicated that Mr. Wightman "has kindly suggested that I contact you regarding our concerns for clarity with respect to benefit payments while I am on maternity and parental leave". Ms. Brown wrote that Mr. Wightman had told her he would not be paying the car allowance portion of

her taxable benefits while on leave, as to do so would be illegal. Similarly, she wrote that Mr. Wightman had told her she could not legally perform any work during the first 17 weeks of her leave. Ms. Brown indicated that:

> My overall concern is for PML and the employees that work in the Service Contract Division ... I do not feel that it is right that so many employees should be affected financially by my maternity and parental leave. The sales employees rely on commission to earn a living and eliminating my ability to help them inhibits their ability to earn money ....
>
> I have poured my heart into Don's business since 2000 and do not feel that we are serving him well by eliminating my involvement for any period of time.
>
> I look forward to your assistance in the early resolution of our concern regarding the (2) aforementioned items.

331 Mr. Wightman's counsel did not respond.

332 I find that Mr. Wightman gave Ms. Brown the contact information for his lawyer, but that his suggestion that she contact his lawyer for clarification was not genuine. He must have instructed his lawyer not to respond to Ms. Brown.

333 Ms. Brown testified that, when she did not hear back from Mr. Wightman's lawyer, she asked Mr. Wightman if he had heard anything about her working while on maternity leave. He told her he had not. She asked if she should put together lists of tasks for others to complete in her absence, and he told her to do so.

Ms. Brown's January 18, 2006 Minutes

334 In response, on January 18, 2006, Ms. Brown wrote a document entitled "Minutes". It refers to a meeting "regarding Camilla's maternity leave", with Ms. Brown, Ms. Davie, Ms. Novinc, Mr. Bowes, Ms. Tibbitts and Ms. Mahy listed as being in attendance. There is a January 26, 2006 e-mail from Ms. Brown to those same persons, as well as Mr. Wightman, to which these "Minutes" were attached, in which she stated that "Don approved these minutes yesterday".

335 Ms. Brown testified that she scheduled a meeting, to which Mr. Wightman and the others were invited, but that Mr. Wightman did not attend. The implication of her evidence was that the meeting was held in his absence, but that the agenda items relating to Mr. Wightman were not discussed.

336 On the evidence before me, however, no such meeting was held. None of the other listed attendees testified that they attended such a group meeting. Neither Ms. Tibbitts nor Ms. Davie recalled attending such a meeting. Rather, it appears that Ms. Brown created this document, and likely sent it to each of the listed "attendees", without a meeting actually being held, other than that described below between Ms. Brown and Mr. Wightman.

337 The document states that the purpose of the meeting "was to discuss the work load effect of my maternity/parental leave as it currently sits with me having no involvement in the Service Contract Department until my return unless staff is otherwise notified by Mr. Don Wightman". Ms. Brown created a number of documents, each also entitled "Minutes"; each one lists the duties she

foresaw being performed by a particular individual in her absence. The evidence is inconsistent with respect to whether the "attendees" were given copies of these "Minutes"; Ms. Tibbitts did not recall ever seeing the one referring to her anticipated duties, but Ms. Davie did recall seeing the "Minutes", and understood that they were intended to indicate who would be doing what in Ms. Brown's absence.

Ms. Brown and Mr. Wightman meet on January 24, 2006

338 Ms. Brown testified that, after January 9, she and Mr. Wightman had very little discussion about her upcoming maternity leave. They did meet, however, on January 24 at a restaurant in Coquitlam. Both Ms. Brown and Mr. Wightman testified about the meeting.

339 According to Ms. Brown, she invited Mr. Wightman to attend the meeting to go over what needed to be done in preparation for her leave. At this point, she had two weeks of holidays before the scheduled start of her leave. Mr. Wightman testified that it was at this meeting that Ms. Brown gave him the "Minutes" referred to earlier. He identified certain notes on the "Minutes" as having been made by him at that time.

340 Ms. Brown testified that the meeting was tense. They sat down, and she went over the sales for 2005. She wanted to go over her expectations for 2006, and the "Minutes". According to Ms. Brown, Mr. Wightman seemed agitated, and they talked a little more about her leave. She asked him what was going on with Ms. Snalam, and he again told her that he did not want her back.

341 Also according to Ms. Brown, she asked Mr. Wightman if he had come to any conclusion about her working during her leave. On her recounting, he put his fists on the table and asked her if she wanted him to get angry.

342 Ms. Brown testified that she mentioned that she had received no response from Mr. Wightman's lawyer, and that Mr. Wightman said he was probably wondering who was going to pay him $350.00 an hour to read it. Ms. Brown told Mr. Wightman that she thought he would, as he had asked her to send the letter. Mr. Wightman only stared at her in response.

343 Ms. Brown testified that she asked Mr. Wightman about the car allowance again, but got nowhere. As a result, Ms. Brown wanted the meeting to end, and to end on a positive note. She told him that they would have to agree to disagree. She asked him why he was so angry, and if she had done something wrong. In response, Mr. Wightman said that no, she was the only manager who had done everything right.

344 Again because she wanted the meeting to end well, Ms. Brown changed the subject to a discussion of the new office PML was scheduled to move into during her leave. She told Mr. Wightman that he should feel free to call her. Outside the restaurant she gave him a hug, and again asked him to call her. That was the end of the meeting.

345 In testifying about the meeting, Ms. Brown was visibly upset and overly dramatic in her presentation.

346 For his part, Mr. Wightman testified about going over parts of the Minutes with Ms. Brown in this meeting.

347 He testified that Ms. Brown brought up the car allowance several times, and he told her that he would not be paying it, nor would she have a gas card. He described her as emphatically not happy about this. He recalled her talking about having had to buy a car of sufficient quality to

represent PML, and that he was responsible for paying for it. She said she could not afford to pay for it without a car allowance. When he continued to say he would not pay, she said, "fine, you're going to force me to sell the car then", which he told her was her decision. She retorted that she would then have to drive an old car when she returned to work, in response to which he reminded her that at that time she would have a car allowance again. Mr. Wightman testified that Ms. Brown said that her family would have to eat Kraft macaroni and cheese, which he gave little weight to.

348 Mr. Wightman did not recall any discussion about Ms. Snalam or saying that he did not want her back. He remembered some comment about Ms. Brown not receiving any response from his lawyer. He described as completely false Ms. Brown's allegation that she asked him why he was so angry and that he said she was the only manager who had done everything right. He thought it was possible that she might have tried to change the subject by talking about the new office.

349 Overall, Mr. Wightman described the mood of the meeting as getting very tense very quickly. He described Ms. Brown as very assertive and demanding.

350 Because of the tension, Mr. Wightman testified that he decided to end the meeting. To that end, he stood up. He believed he probably said words to the effect of "I don't want to get mad, you don't want to see me get mad". He denied that he put his fists on the table as described by Ms. Brown, but accepted that the words she alleged he said were probably correct. He paid the bill and headed for the parking lot. He denied hugging Ms. Brown.

351 There is little material difference between Ms. Brown's and Mr. Wightman's evidence about this meeting. It was clearly tense. Ms. Brown repeatedly raised her concern about the car allowance, and Mr. Wightman was adamant he would not pay.

352 In light of the fact that Mr. Wightman had already clearly told Ms. Brown that he did not want her to work during her maternity leave, she would not be paid, and would not be paid her car allowance, it seems strange that she brought these issues up again with him in the January 24 meeting. When asked in direct why she did so, Ms. Brown testified that she had never got a resolution from Mr. Wightman about these issues, and reiterated that it was Mr. Wightman who told her to write to his lawyer. She still hoped she could maybe work after the first six weeks of her leave.

353 Ms. Brown's refusal to take Mr. Wightman's "no" for an answer was characteristic of her. Despite his clear direction on these issues, she refused to give up, and repeatedly returned to them. Her stubborn refusal to give up likely accounts in part for, if it does not excuse, Mr. Wightman's angry response to her bringing the subject up again. Mr. Wightman was clearly finding it difficult to change his past practice in dealing with Ms. Brown's maternity leave due to her tenacious advocacy for her preferred result.

Relationship between Ms. Brown and Mr. Wightman at this time

354 Mr. Wightman testified, and I accept, that his relationship with Ms. Brown deteriorated in this period. Ms. Brown was particularly upset about the car allowance issue.

355 Ms. Brown complained that, unlike Ms. Klatt, PML did not put on a celebration for her when she went on maternity leave. Ms. Tibbitts testified that this was true, but that instead the contract sales department went together to a Bryan Adams concert, which was organized by Ms. Brown and paid for by Mr. Wightman. Mr. Wightman testified that this was Ms. Brown's request, and he confirmed that he paid for it, at a much higher cost than other celebrations for women going on maternity leave. I accept Ms. Tibbitts' and Mr. Wightman's evidence on this point.

11. Events during Ms. Brown's second maternity leave

356 Ms. Brown started her second maternity leave on February 2, 2006. In her absence, Mr. Wightman took over management of the contract sales department, with both Mr. Bowes and Ms. Novinc reporting directly to him. Their testimony was that they met fairly regularly. Mr. Wightman testified that he found that the workload for him in assuming this responsibility even lighter than he anticipated.

357 Ms. Tibbitts, who had occupied a desk in the hallway, moved into Ms. Brown's office. Ms. Tibbitts testified, and I accept, that before doing so she discussed the move with Ms. Brown, and they agreed that it made sense. With Ms. Brown's approval, Ms. Tibbitts and Ms. Mahy packed up Ms. Brown's things, and kept them in boxes behind the chair in the office.

No-contact directive

358 On February 8, 2006, Mr. Angelini distributed an interoffice memo to all PML service employees. He wrote that:

> Camilla Brown is officially on Maternity Leave. She is entitled to a one year Leave. If you have any questions related to her Accounts or Customers please direct them to me. Maternity Leave is for Camilla to be with her Family, a time for her to relax and not be bothered with PML issues. You are not to contact her with respect to PML work and any other issue related to PML business. Your cooperation and respect for her privacy is required ....

359 Mr. Angelini testified that he wrote this memo at Mr. Wightman's request. Mr. Wightman was not sure if he specifically requested Mr. Angelini to write it, but agreed that the words used mirrored those he used in delivering the same message orally. Mr. Angelini's evidence was somewhat equivocal as to the reasons why the memo was written. He referred to it becoming apparent that Ms. Brown was being bothered by people calling her while on maternity leave, and to "we deciding", "with Don's approval", to cease all contact with her while she was on maternity leave. Overall, his evidence indicated that, while Mr. Wightman asked him to write the memo, he agreed that the intention was to keep employees from bothering Ms. Brown with PML issues while she was on leave, and that this was, in his opinion, appropriate.

360 Mr. Wightman testified that, at about this time, he gathered the employees in the office and gave essentially the same message about not contacting Ms. Brown while she was on leave. He testified that the intention was to be compassionate. He denied that, as alleged by Ms. Brown in her complaint, the real purpose was related to his concern over the situation with Ms. Snalam. In cross-examination, he testified that he thought it was his duty as an employer. Ms. Davie testified that she heard Mr. Wightman give this message to a group of people outside her office. She thought it was very kind. Ms. Tibbitts confirmed that Mr. Wightman asked employees to refrain from contacting Ms. Brown during her maternity leave, which she thought made sense.

361 Ms. Brown learned of the memo and directive from Ms. Novinc.

362 While both Mr. Wightman's message and Mr. Angelini's memo were phrased in terms of respecting Ms. Brown's privacy and time, I find that the no-contact directive was issued, not at her request or for her benefit, but at Mr. Wightman's direction. In fact, it was contrary to her express wishes. It was not, however, as alleged by Ms. Brown in her complaint, a directive not to speak to

her while she was on maternity leave, but rather a directive not to contact her with respect to PML work and other issues related to PML business. Ms. Brown has not established, on a balance of probabilities, that it had anything to do with the situation with Ms. Snalam. I find it was more likely directed to keeping Ms. Brown isolated from the workplace and knowledge of the changes which Mr. Wightman soon started implementing. It likely was also directed to trying to forestall any claim on Ms. Brown's part that she performed work for PML during her leave.

363 The evidence was somewhat inconsistent about the effects of the memo. Ms. Brown testified that, as a result, no one was allowed to talk to her. But as discussed in further detail below, Ms. Brown testified she had several conversations with Ms. Novinc about work-related matters while she was on leave. She also testified that she restricted their conversations because Ms. Novinc was worried about being caught talking to her.

364 While she attempted to minimize the extent of their contact, suggesting that she and Mr. Angelini avoided each other for the year because he was worried about his job, Ms. Brown mentioned several pieces of work-related information that Mr. Angelini relayed to her while she was on leave, including about the June 2006 company newsletter and the circumstances surrounding Ms. Klatt's pending maternity leave late in 2006. Both Mr. Angelini and Ms. Brown also referred to discussions they had about their supposed excitement about her upcoming return to work.

365 Overall, while the respondents' intention in issuing the no-contact directive was to ensure that Ms. Brown did not have any work-related communications with anyone at PML, that intention was not fully realized, as some PML employees, especially Mr. Angelini and Ms. Novinc, continued to discuss some PML-related issues with her while she was on leave.

Ms. Snalam leaves and Ms. Davie becomes permanent

366 I deal below with the circumstances surrounding Ms. Snalam leaving PML in March 2006. Ms. Davie continued, both before and immediately after Ms. Snalam's departure, to be in charge of the accounting department on a temporary basis.

367 Just before Ms. Snalam's employment was severed, Mr. Wightman asked Ms. Davie if she would stay on a permanent basis. Ms. Davie testified that she considered the matter for awhile, and agreed. On May 1, 2006, Ms. Davie began her permanent employment as PML's Controller.

Tax forms and ensuing e-mails

368 Starting in February 2006, Ms. Brown and Ms. Davie were in e-mail and telephone contact with respect to various tax and benefits issues, the details of which are unimportant for the purposes of this decision, except as discussed below.

369 In April 2006, issues arose with respect to certain income tax forms which Ms. Brown wanted Mr. Wightman to sign. Ms. Brown gave the two forms to Mr. Angelini to take into the office to give to Ms. Davie, who reviewed them. Ms. Brown testified, and I accept, that she submitted these forms on the advice of her accountant, and filled out in the same manner as they had been filled out by her and signed by Mr. Wightman in previous years. Mr. Wightman testified that, in the past, she had simply put the forms in front of him and he had signed them.

370 One was a T2200(05) Declaration of Conditions of Employment. The primary issue with respect to this form was whether Mr. Wightman would confirm, as he had in past years, that Ms. Brown was required under a contract of employment to rent an office or use a portion of her home as an office. There was also an issue with respect to whether Mr. Wightman would confirm that Ms.

Brown was required to pay for expenses for which she was not repaid. Mr. Wightman refused to do both.

371 The other was a GST 370E Employee and Partner GST/HST Rebate Application. The issue with respect to this form was that, while it indicates on its face that it is two pages in length, Ms. Brown only provided the first page to Mr. Wightman for his signature. Mr. Wightman refused to sign it without seeing the second page.

372 The evidence does not reveal precisely how and when Mr. Wightman initially communicated to Ms. Brown that he would not complete these documents in the form submitted by her. It is clear, however, that he did so, as on April 27, 2006, Ms. Brown wrote Mr. Wightman an e-mail, which she wrote was "to confirm that you have altered the T2200 and have returned the GST 370 form unsigned". She wrote that she had tried to contact Mr. Wightman to discuss these issues, and had received a return phone call from Ms. Davie instead. She wrote that a response was not necessary; she was just writing to confirm her understanding. Ms. Davie did not recall actually speaking to Ms. Brown, but recalled that Mr. Wightman asked her to call her, and that she did so, but may have just left a message. Mr. Wightman recalled Ms. Brown calling him, and asking Ms. Davie to call her back.

373 Ms. Davie testified that she reviewed these two forms, and advised Mr. Wightman about them. In her opinion, it was not true, as indicated by Ms. Brown in box 6 of the T2200(05), that PML required Ms. Brown to pay for expenses for which she did not receive any allowance or repayment, as in her opinion PML repaid Ms. Brown and all employees for all expenses incurred by them. Also in her opinion, Ms. Brown had not filled out box 9 of the same form accurately, as no one at PML was required to have a home office. She advised Mr. Wightman that to sign this form with this information included would be to make a false statement, and advised him to make the changes which he made to this form. Ms. Davie also advised Mr. Wightman not to sign the GST 370E form without seeing the second page, which Ms. Brown had not provided.

374 Mr. Wightman also testified about the advice Ms. Davie gave him about these forms. He emphasized, in relation to the office issue, that he had never required any employee to have a home office. Yet in cross-examination, he also testified that, when he had signed these forms in the past, he had believed that what he was certifying was true. He testified that he relied on Ms. Brown and that he would sign the blank forms that she put in front of him. When challenged about Ms. Brown bringing in blank forms, he resiled from that particular allegation. He asked the rhetorical question, "Why would Ms. Brown lie to me or the government?". He said that, in the past, he did not review the forms before signing them.

375 I accept that Ms. Davie, in good faith, formed, and communicated to Mr. Wightman, the opinions and advice about which she testified. This is one of the occasions, however, in which Mr. Wightman failed to provide Ms. Davie with full and accurate information on which to form an opinion and provide advice. In particular, Ms. Davie was not informed by Mr. Wightman of the full history of Ms. Brown's home office, including the facts that: her requirement for a home office formed part of the negotiation of her employment contract; that he provided the office equipment needed to set it up in the first place; that he had taken the steps necessary to provide her with remote access to PML e-mails at the start of her first PML maternity leave; and that she had, with his knowledge and, at the very least, acquiescence, consistently worked at least some of the time from her home office throughout her employment with PML. According to Ms. Davie, Mr. Wightman told her that he had never required Ms. Brown to have a home office, and that it was just for her

convenience. Ms. Davie did not review any relevant documentation, such as the hiring correspondence, and did not discuss the matter with Ms. Brown. In hindsight, Ms. Davie testified that it would have been appropriate to get Ms. Brown's input, but she did not think of it at the time. She agreed that she could have called Ms. Brown, but chose not to do so, other than to ask her for the second page of the GST370E.

376 Had Mr. Wightman provided Ms. Davie with full information, it may have changed her opinion and advice about whether box 9 of the T2200 (05) had been filled out accurately by Ms. Brown. The same is not true of signing the GST370 without the second page, as it would not have been prudent for Mr. Wightman to sign that form without seeing it in its entirety. That page also appears to have contained the information necessary to evaluate Ms. Brown's claim that she was required to pay for expenses without repayment.

377 I express no opinion on whether, as a matter of tax law, the respondents could be said to have required Ms. Brown to use a portion of her home as an office. Neither party provided me with the submissions necessary to reach a conclusion on this issue. I do find that Ms. Brown's ability to work from home was a positive benefit to both parties, as it enabled Ms. Brown to complete her employment responsibilities in a timely and convenient way. The respondents facilitated her use of a home office through the provision of office equipment and setting up e-mail access. The provision of the essential constituents of a home office by PML, and Ms. Brown's willingness and ability to work from home, were terms and conditions of the contract of employment between Ms. Brown and PML.

378 On April 28, 2006, Mr. Wightman responded by an e-mail that both he and Ms. Davie testified he wrote with Ms. Davie's assistance. In it, he denied that he had "altered" the T2200(05), but stated that he had corrected it to reflect Ms. Brown's employment requirement. He stated that it was not true that PML required her to have a home office, and that PML had "NEVER" required her to do so. He stated that "you have requested the opportunity to have a flexible work schedule to suit your day care needs and PML ... allowed this to happen solely for your benefit not for the benefit of PML ...."

379 In testifying about this matter, Mr. Wightman was adamant that he will not sign a form that is incorrect. Of course, his own evidence about signing similar forms in past years, and agreeing to bank Ms. Brown's hours when he knew it was wrong, puts the lie to this assertion. It is noteworthy that Ms. Davie testified that, on the information she was aware of, she was of the view that Mr. Wightman had made false declarations in past years. She testified that she lectured him on the matter, but took no other action.

380 In fact, Mr. Wightman has been quite prepared to make inaccurate declarations when it suits his purposes.

381 In relation to the GST 370E, Mr. Wightman admitted in his e-mail that he had not signed it, which he said was solely because of Ms. Brown's refusal to provide the second page. According to Mr. Wightman, Ms. Davie had requested the second page, but Ms. Brown had stated that her accountant did not give it to her. Mr. Wightman stated that he would be happy to sign the GST 370E once the complete document was provided.

382 Mr. Wightman went on to write:

> So that there is no misunderstanding in any future year on the flexible work schedule to suit your day care needs any and all flexible hours are here by cancelled. Upon your return you will be required (the same as every other employee of PML ...) to be at the office at 8:00 a.m. pacific standard time and remain there until 4:30 p.m. pacific standard time with two (2), fifteen (15) minute breaks and one (1), half (1/2) hour break for lunch. When you leave the office to meet with clients of PML ... to complete your job duties, you will fill in your expected destination and return time in the new employee log which is being developed and implemented for our sales team within the next 30 days. Although in the past our agreement was to let you work three (3) days per week, PML ... will continue to honour this, but the employer has the right to set the hours of work and the days you are required to work. Upon your return, PML ... will set a standard working schedule to accommodate our requirements.

383 In his testimony, Mr. Wightman acknowledged that, while his intention was to be incredibly clear about Ms. Brown's schedule on her return, he failed to state the days of the week she was to work. He testified that his intention was that she would work Mondays, Wednesdays and Fridays, like she had "always" done, except when she altered her schedule. In cross-examination, his evidence varied, as he testified that he was waiting to see what days the company would require her to work.

384 In terms of the requirement that Ms. Brown work from the office, he testified that that was what everyone does, and that he had had requests from others to work from home as Ms. Brown had been doing. He wanted to treat everyone the same. While Mr. Wightman testified that Mr. Bowes wanted to work from home because Ms. Brown was doing so, this is not a matter about which Mr. Bowes testified, and there is no evidence that corroborates that anyone else asked to be able to work from home.

385 In cross-examination, it was put to Mr. Wightman that, in writing this part of the e-mail, he broke the permanent commitment to flexibility that he had made to Ms. Brown in his January 18, 2000 letter. He denied that he had, stating that the commitment had always been the same, that she would be able to work three days a week.

386 I do not accept this evidence. On the face of this e-mail, Mr. Wightman was unilaterally cancelling any and all flexible hours. The permanent commitment of flexibility encompassed more than part-time hours. It also encompassed the flexibility to work those hours in a way that allowed Ms. Brown to fulfill her childcare obligations, as they might change from time to time. As Mr. Wightman acknowledged, Ms. Brown had changed her hours and days of work from time to time in the past without any concern being expressed by him.

387 Also in cross-examination, Mr. Wightman was forced to acknowledge that not all PML employees work the hours stated in his e-mail - some start earlier than the stated 8:00 a.m. start time. He also could not state that Mr. Bowes and Ms. Novinc always worked those hours, as he did not watch them, and they might be on the road. Clearly, Mr. Wightman was evincing an intention to hold Ms. Brown to a stricter standard than other employees.

388 Mr. Wightman was asked in cross-examination why it was important to give Ms. Brown this information now. He stated that it was so she would have time to arrange her daycare. The difficulty with this explanation is that he did not indicate the days of the week she was to work, which

would be crucial information in making daycare arrangements. Further, the tone in which the information was conveyed does not suggest that it was intended to be helpful in her planning.

389 In cross-examination, Mr. Wightman denied that he had, by this point, already decided that Ms. Brown would not be a manager on her return to work. He said that he did not do so until late 2006. I do not accept this evidence. This is not the kind of communication an employer would send to a trusted member of management.

390 Mr. Wightman closed by saying:

> From this time forward, please put all questions and requests in writing by email to my direct personal attention. There have been suggestions and allegations from your direct co-workers that you are preparing to take PML ... to the Labour Standards Board for loss of wages and lack of car allowance, which we both know the allowance is to be paid solely for the reimbursement of using your personal vehicle while engaged in employment activities. I would certainly hope these are unfounded rumours. I will be questioning each of these employees to clarify the roumers and accusations.
>
> In future do not call my personal residence.

391 Mr. Wightman testified that the requirement that future communications be in writing was born out of Ms. Brown's tendency to take things he had said, and repeat them back to him in future, in a different context or with different words.

392 Ms. Davie testified that she agreed with the content of Mr. Wightman's e-mail. With respect to the directions about Ms. Brown's future schedule, she testified that she understood that Mr. Wightman included this information so Ms. Brown would have plenty of time to make childcare arrangements. She also testified that she thought that by this time Ms. Novinc and Mr. Bowes were reporting directly to Mr. Wightman, and he was aware about complaints about their ability to reach Ms. Brown.

393 In this area again, Mr. Wightman failed to provide Ms. Davie with complete or accurate information. Ms. Davie was not aware of the correspondence leading up to Ms. Brown working for PML, and in particular Mr. Wightman's January 18, 2000 letter committing to a "permanent condition of flexibility". Had she been aware of that "lasting commitment", Ms. Davie may have taken a different view of Mr. Wightman's unilateral statement that "the flexible work schedule to suit your day care needs any and all flexible hours are here by cancelled". Similarly, as I have already found, Ms. Novinc and Mr. Bowes did not, in fact, have any problems reaching Ms. Brown. Clearly, this is not something of which Ms. Davie was aware, relying as she did on what Mr. Wightman told her.

394 Ms. Davie and Mr. Wightman testified about the "new employee log" referred to in Mr. Wightman's e-mail. Ms. Davie said that this log was to be a Microsoft product, but they have not been able to implement it to date. I accept her evidence that PML did intend to implement such a log for all employees, but has been unable to do so due to computer difficulties. Both of them testified that all salespeople were required to "log-in" with Ms. Tibbitts, even in the absence of the intended computer log. I accept this evidence, but do not accept Mr. Wightman's evidence that, in telling Ms. Brown about the as yet unimplemented employee log, he was not sending her the message that he would be keeping tabs on her. I find that was exactly the message he intended to send.

395 While Ms. Davie disagreed that the tone of the letter was quite harsh, especially for a person on maternity leave, she did say that it was "formal for sure". I find that Mr. Wightman's e-mail was not only formal; it was harsh. Ultimately, Mr. Wightman agreed in cross-examination that he was "laying down the law". He was reluctant to admit that he was thereby making a number of changes, but he, in fact, was: to her hours, work location, ability to change her hours to suit her needs, and means of communication with him. It was also clearly an attempt by Mr. Wightman, just as Ms. Brown's April 27 e-mail had been, to create a paper trail in what was becoming an increasingly adversarial relationship.

396 The communications about the tax forms ended with Ms. Brown's April 28 e-mail to Mr. Wightman, in which she stated:

> It has been my understanding that no PML employee was to speak to me about work while I have been off, they have honoured that agreement other that when customers have called me specifically which have been redirected to your staff or to deal with mistakes that have been made by PML on my paycheques, failure to submit RRSP amounts that have been deducted, and record of employment.
>
> Thank you for your clear response in writing as I had requested. In future please continue to direct all further employment conditions in writing.

397 Ms. Brown testified that her "understanding" came from a conversation she had with Ms. Novinc. In terms of the specifics referred to in the e-mail, Ms. Brown testified that she had received a telephone call from a customer at home, and called Ms. Klatt at home to have her deal with the customer's issue. In terms of the discrepancy between the amounts contributed and deducted for her RRSP, Ms. Brown testified that she contacted Ms. Davie a few times by e-mail to get her to look into that issue.

398 Ms. Brown did not pursue the tax form issues further. In particular, she did not provide Mr. Wightman with the second page of the GST 370E. Nor did she, until January 2007, shortly before her return to work, communicate further with Mr. Wightman or Ms. Davie about the hours of work and other conditions set out in Mr. Wightman's e-mail.

399 Ms. Brown testified that the only discussion she had with any PML employee about going to "Labour Standards" (the witnesses consistently referred to "Labour Standards", but in fact they were referring to "Employment Standards") was with Ms. Davie prior to going on maternity leave, when she told her that she would have to go there to ask about the car allowance issue. Ms. Davie also testified that Ms. Brown talked to her about the possibility of going to Labour Standards, but she recalled it being about lost wages. She had no concerns about Ms. Brown doing so, as she was confident that PML was not obligated to pay. Ms. Davie's evidence was somewhat inconsistent about whether Ms. Brown used the word "sue" in this connection, but I find nothing turns on this.

400 Ms. Brown testified that she went to Labour Standards to ask for an investigation. When told that she would have to lodge a formal complaint for that to happen, she decided not to do so, as she knew how Mr. Wightman would react and did not want to appear antagonistic.

401 Only in cross-examination did Mr. Wightman identify that the other person to whom Ms. Brown allegedly spoke about going to Labour Standards was Mr. Angelini. In cross-examination, Mr. Angelini denied that Ms. Brown told him she would sue for the car allowance.

402 I find that the only PML employee Ms. Brown ever talked to about going to Labour Standards was Ms. Davie. It is not clear, and nothing turns on, whether she told Ms. Davie it was about the car allowance, lost wages, or both. Ms. Brown did go to Labour Standards, but chose not to pursue a complaint in that venue. Mr. Wightman's e-mail overstated the matter in saying "there have been suggestions and allegations from your direct co-workers that you are preparing to take PML ... to the Labour Standards Board for loss of wages and lack of car allowance", as Ms. Brown spoke to only one co-worker, Ms. Davie, about the possibility of doing so.

403 Mr. Wightman testified that he knew Ms. Brown had the right to explore if he had done something wrong, "so by all means go!" to Labour Standards. He testified that he was not concerned about her doing so. In cross-examination, he denied that he had stated in direct that he did not have a problem with it or that that would be a fair interpretation of his testimony. When asked if he did or did not have a problem with it, Mr. Wightman said that, if anyone had an allegation made against them, they would have a problem with it, but he did not try and stop her.

404 Mr. Wightman denied in cross-examination that this was something he took into account in deciding to make the changes to Ms. Brown's job. When it was put to him that it was one of the factors listed as having been taken into account by him in the respondents' Response to Complaint and his affidavit, he had no explanation for why he had just given completely contradictory evidence. He testified that he did not take it into account, so his affidavit and the Response to Complaint were incorrect.

405 Also in cross-examination, Mr. Wightman testified that he needed to do further questioning because he needed to be absolutely sure that no one else was involved. He testified that he was concerned that rumours might be damaging to Ms. Brown, and he wanted to put at stop to them. That testimony was unbelievable.

406 I do not accept that Mr. Wightman viewed the possibility of Ms. Brown going to Labour Standards with the equanimity he attempted to project. Further, while both Mr. Wightman and Ms. Davie denied that it was retaliatory, I find that this portion of the e-mail could be taken as somewhat threatening, in light of Mr. Wightman's statements that he "would certainly hope these are unfounded rumours" and "I will be questioning each of these employees to clarify the roumers and accusations". Ms. Brown had every right to go to Labour Standards if she believed she was owed wages by PML, and Mr. Wightman ought not to have implied the contrary.

407 In terms of Mr. Wightman's direction not to call his home, Ms. Brown testified that she had called him at home from time to time in the past when she needed to contact him. She also testified that she was personal friends with his wife, something Mr. Wightman denied to be true. Ms. Brown testified that she had recently left a message with Mr. Wightman's wife about the tax forms issue.

408 Overall, Ms. Brown testified that she was upset by Mr. Wightman's e-mail. She thought there was a misunderstanding, and did not understand why there was so much hostility being expressed about her hours of work and the other matters addressed in it.

409 Ms. Brown testified that she telephoned Mr. Wightman about his e-mail. She testified that he told her to "stop fucking pestering my employees and the people who used to work for you". She asked him if he was accusing her of something, and he said he did not know and would find out. He hung up on her. Ms. Davie was not aware of this conversation.

410 Mr. Wightman did not testify specifically about this allegation in direct, other than to state that the paragraph in Ms. Brown's complaint in which it was stated was not true. He testified that he was not consciously avoiding taking Ms. Brown's calls. He testified that he just did not want her to call him at home.

411 In cross-examination, by contrast, Mr. Wightman testified that Ms. Brown did call him after this e-mail exchange. He testified that Ms. Brown was a very assertive woman, and was agitated and aggressive about him signing the tax forms. He testified that she was badgering him, and that he ended the conversation by slamming the phone down. He denied that he told her to "stop fucking pestering my employees and the people who used to work for you".

412 It is significant that this evidence only came out in Mr. Wightman's cross-examination. He was clearly very upset with Ms. Brown and her conduct on this occasion. I find that, not only did he hang up on Ms. Brown, as he admitted; he also made the remark alleged by her.

Company newsletter

413 In June 2006, Francis Lucero, a PML construction manager, produced the company's first, and only, newsletter. Congratulations were offered to two employees who had recently had a new baby; the birth of Ms. Brown's baby was not noted. Ms. Brown was not included in the list of the "management team". Nor was Mr. Angelini.

414 In her complaint, Ms. Brown referred to these omissions, relying on them as evidence of discrimination. She also referred to them in her affidavit filed in response to the respondents' application to dismiss the complaint. In cross-examination, Ms. Brown testified that she attributed these omissions to Mr. Wightman. She testified that Mr. Angelini brought the newsletter and the omissions to her attention, and he told her they were an oversight, and that he was hurt that he was not included either. She testified that she was very upset by the omissions.

415 The evidence before me established that this newsletter was produced by a construction manager unfamiliar with the contract sales and service elements of the company, and that, with the exception of the "President's Corner" message, Mr. Wightman had no involvement in its production. The evidence further showed that the two omissions referred to by Ms. Brown were not the only errors in the newsletter. Among others were the misspelling of both Mr. Bowes' and Ms. Tibbitts' surnames.

416 Mr. Angelini testified he was upset about being omitted from the management team until Ms. Davie explained to him it was Mr. Lucero's mistake, and not intentional, and that Mr. Lucero had apologized to him. Ms. Davie testified that Mr. Angelini came to her, saying that "the writing's on the wall isn't it? He's going to shut down the Service Department". Ms. Davie assured him that was not true, and noted that Ms. Novinc had written a piece that appeared in the newsletter. She told him that she thought it was just an oversight.

417 Ms. Brown testified in cross-examination that either Mr. Angelini or his wife told her that Mr. Lucero had been responsible for the newsletter, and that they had done so before she swore her affidavit in which she repeated this allegation. She acknowledged that she knew that Mr. Wightman did not compose the newsletter, and may not have been responsible for its content. In final argument, Ms. Brown's counsel advised that this allegation was not being pursued.

418 On the whole of the evidence, I find that the two omissions of Ms. Brown from the newsletter were but two of a number of innocent oversights in which Mr. Wightman played no part. The

maintenance of this allegation by Ms. Brown through these proceedings, up to and including her cross-examination, illustrates her tendency to exaggerate and maintain allegations against the respondents regardless of her knowledge of evidence to the contrary.

Ms. Brown's alleged directive to staff not to speak to Mr. Wightman

419 In their Response to Complaint, and Mr. Wightman's affidavit, the respondents asserted that, shortly after Ms. Brown went on leave, Ms. Novinc told Mr. Wightman that Ms. Brown had directed her, in no uncertain terms, that she was not speak to him about business matters. Mr. Wightman called this "segregating her staff from me", contrary to his "open-door policy".

420 Ms. Brown initially denied giving such a direction to Ms. Novinc. She testified that she had spoken with all the sales staff, including Ms. Novinc, about not wanting to involve Mr. Wightman in small details, which she wanted them to bring to her. In cross-examination, she altered this testimony slightly, stating that she would have told both Ms. Novinc and Mr. Bowes not to communicate with Mr. Wightman about work matters, because she would do so. She denied, however, the suggestion that she told them that this was because Mr. Wightman "gets in moods". Later in cross-examination, Ms. Brown agreed that she told Ms. Novinc that she told Mr. Wightman "what he needed to know".

421 Ms. Novinc testified that Ms. Brown told her not to speak to Mr. Wightman, that nothing should go to him, and that she knew just the right time to speak to him so he would not get upset and you would get what you wanted. She testified that, because of what Ms. Brown had said about him, she was scared of Mr. Wightman.

422 Ms. Novinc testified that she was incredibly nervous the first time she had to speak to Mr. Wightman about something after Ms. Brown went on maternity, and shaking with fear. He asked her why, and she told him she had been directed not to speak to him, and that she was scared. Ms. Novinc described Mr. Wightman as shocked, and telling her that he had an open-door policy, and did not understand why it would be any different for her.

423 In cross-examination, Ms. Novinc ultimately acknowledged that Ms. Brown did not tell her never to speak to Mr. Wightman, but rather not to talk to him about sales or anything to do with the department. She admitted that she could and did engage in social conversation with him. She also acknowledged that it was her job to deal with the website, and that if Ms. Brown was unavailable, she might go to Mr. Wightman to get direction about it.

424 Mr. Wightman testified that he saw Ms. Novinc pacing back and forth in front of his office and finally stick her head in the door to ask if she could speak to him. He said yes, to which she responded that she knew she was not allowed to speak to him. He questioned her about this, and Ms. Novinc told her that she was under a directive from Ms. Brown not to do so. Mr. Wightman described himself as dumbfounded. He testified that Ms. Novinc's eyes welled up, and she was physically shaking, she was so scared. He told her she had the full right to speak to him anytime about anything. Since that time, she has spoken to him regularly.

425 Ms. Tibbitts was asked in direct examination whether Ms. Brown talked to her about whether she should talk to Mr. Wightman. She said that Ms. Brown's connotation was more that she should go through the chain of command, and speak to Ms. Brown, as her supervisor, which made sense to her.

426 Further, Mr. Wightman testified that he tries not to get involved with issues with staff unless they are serious.

427 While I found that Ms. Novinc generally sought to tell the truth to the best of her ability, I note that she gave the entirety of her testimony, including about this incident, in the presence of her employer, Mr. Wightman. While I saw no signs of it in the hearing room while others were testifying, the evidence before me satisfies me that Mr. Wightman can be an intimidating person. Ms. Novinc had known Ms. Brown for years before she hired her at PML, they were friends while both were employed at PML, and she likely felt some loyalty to her. Further, Ms. Novinc struck me as a somewhat timid person, who would be eager to please. All in all, she was in a difficult position in testifying.

428 I accept that Ms. Novinc was nervous to speak to Mr. Wightman. I also find that she likely misinterpreted Ms. Brown's direction about coming to her with work-related matters as a blanket direction not to speak to Mr. Wightman.

429 While it goes too far to say that Ms. Brown segregated her staff from Mr. Wightman, or told them never to speak to him, I find that she did seek to limit the flow of information between her staff and Mr. Wightman, seeking thereby to maintain both an appropriate chain of command, and as much control as possible.

Discussions with Ms. Novinc

430 Over the course of her maternity leave, Ms. Brown testified that she had many discussions with Ms. Novinc. She recalled two particular occasions on which Ms. Novinc called her.

431 In the first, which Ms. Brown thought was in May 2006, Ms. Novinc told Ms. Brown that she was upset about some things going on in the office. She vented about Mr. Bowes' performance. Ms. Novinc also told her that Mr. Bowes was not her friend, and that she should not hang out with him because he was relaying information to Mr. Wightman behind her back. Ms. Novinc told her that they were planning to do something which was, in her opinion, wrong, and that she was not going to be a manager anymore. In response, Ms. Brown told her not to worry about her, as she was a big girl and could look after herself, and just to do her job.

432 The second conversation, in November 2006, was to similar effect. Ms. Novinc was again upset with Mr. Bowes. She asked Ms. Brown if she was coming back, because "they" were saying that she was not, and would no longer be her boss, but would be in sales. Ms. Brown told her that she was coming back. When asked who "they" were, Ms. Brown testified that Ms. Novinc told her that she, Mr. Wightman, Mr. Bowes and Ms. Tibbitts were having meetings, and that Mr. Wightman told them Ms. Brown would not be coming back as their boss.

433 In cross-examination, Ms. Brown denied that, through her conversations with Ms. Novinc, she learned that Ms. Novinc and Mr. Bowes were discussing the unfairness of the current compensation structure and were working on a new one. She did admit that she was aware of one issue with respect to the River Rock Casino project, where both Ms. Novinc and Mr. Bowes thought they were not being paid sufficient commission by her. I have already addressed the evidence about Mr. Bowes' concerns with respect to his commission on this project.

434 Also in cross-examination, Ms. Brown denied that Ms. Novinc told her, while she was on maternity leave, that she (Ms. Novinc) learned while reporting to Mr. Wightman that Ms. Brown

did not split things up equally, that she felt that it was unfair, or that Ms. Brown was not giving Mr. Wightman the full picture.

435 Also in cross-examination, Ms. Brown initially denied that she had a conversation with Ms. Novinc in which she told Ms. Novinc that she had heard things about the office, and, in particular, that if she came back, both Ms. Novinc and Mr. Bowes would quit. When it was further suggested to her that Ms. Novinc replied that she would not say so for herself, but that she could not speak for Mr. Bowes, Ms. Brown became less certain, saying that it did not sound unfamiliar to her. It was then put to Ms. Brown that she told Ms. Novinc that she took what Ms. Novinc had said to her about Mr. Bowes to heart, and had taken him out of her will as her children's guardian. Ms. Brown agreed with that suggestion.

436 In cross-examination, Ms. Novinc testified that she spoke with Ms. Brown a few times while the latter was on maternity leave. In particular, she remembered a telephone call from Ms. Brown in August while she was at work, and that she returned that call.

437 When asked if she expressed concern to Ms. Brown about the changes that were taking place, Ms. Novinc said that she could not remember exactly. She did remember Ms. Brown saying that she had heard that, if she returned, both she and Mr. Bowes would quit, in response to which she said that was not true for her, but she could not speak for Mr. Bowes. She admitted that this conversation might have led Ms. Brown to believe that she had concerns. Ms. Novinc did not remember telling Ms. Brown that there were changes going on, and that they were not right.

438 Ms. Novinc did remember a later conversation in which Ms. Brown asked her if she knew where Mr. Bowes was on a certain day because she had seen him at Harrison Hot Springs. Ms. Novinc told her she did not know, and remarked that she and Mr. Bowes have different work ethics. She accepted that Ms. Brown might have taken it that she was concerned that Mr. Bowes was not working very hard.

439 Later in cross-examination, Ms. Novinc testified that Mr. Wightman told her and Mr. Bowes in a meeting that they were not to speak to Ms. Brown about work while she was on maternity leave. When asked if she followed this directive, she flushed visibly, and admitted she did not, and testified that she spoke to Ms. Brown throughout, and while it was not her intention to talk about work, inevitably they did.

440 This evidence indicates that, despite Ms. Novinc's attempts to suggest she and Ms. Brown were merely friendly, and not friends, they were, at this time, friends. When asked why, given her criticisms of Ms. Brown, discussed in greater length below, she would want to maintain a friendship with Ms. Brown, Ms. Novinc said that she was coming back and she had to do so. I do not accept this evidence. Like Mr. Angelini, Ms. Novinc found herself in a difficult position during Ms. Brown's maternity leave, with conflicting senses of obligation to her employer and Ms. Brown, who was both her direct supervisor and her friend. I find that, after Ms. Brown did not return to PML, Ms. Novinc re-evaluated her experience of working with Ms. Brown, and now portrays it in a more negative light than was her experience at the time.

441 Considering the evidence overall, I find that Ms. Novinc conveyed some concerns to Ms. Brown while the latter was on maternity leave, including about: Mr. Bowes relaying information to Mr. Wightman; Mr. Bowes' work ethic; and Mr. Wightman's plan to eliminate Ms. Brown's management responsibilities on her return to work.

Mr. Angelini

442 Ms. Brown testified that she had various conversations with Mr. Angelini during her leave. She was friends with his wife, and would see him at their home. According to Ms. Brown, Mr. Angelini was "not able to talk to me" because of the no-contact memo, but would say things like "there's some issues". Despite this, according to Ms. Brown, Mr. Angelini talked to her about what was happening with Ms. Klatt, and also told her that he had discussions with Mr. Wightman about her return to work. He told her that he had asked Mr. Wightman to contact her.

443 In direct examination, Mr. Angelini was asked if Mr. Wightman, at some unspecified point in Ms. Brown's maternity leave, talked to him about getting rid of Ms. Brown. He testified that Mr. Wightman did, and referred to how, in order to get rid of anyone, three incidents had to be "filed". According to Mr. Angelini, Mr. Wightman asked "us" to observe Ms. Brown, and if anything was noted, to let Mr. Wightman know so that he could "write her up".

444 In cross-examination, it was put to Mr. Angelini that Mr. Wightman's comment about needing three incidents to get rid of someone was made to him in the context of managing the unionized service technicians under his supervision. Mr. Angelini initially responded that he did not entirely agree. While he agreed that comments to that effect had been made in the management-labour context, he maintained that Mr. Wightman had also said it, not only to him, but also to Mr. Bowes, Ms. Novinc and Mr. Rilling in relation to Ms. Brown. It was not clear from his evidence whether he was saying that he heard Mr. Wightman say this to the other named persons, or that they told him that Mr. Wightman had given them the direction to write up Ms. Brown.

445 Ms. Brown testified that the basis for the allegation in her complaint that Mr. Wightman instructed her former subordinates to discipline her on her return, allegedly telling them to "write her up for anything she does wrong, three times and she's out", was information she obtained from Mr. Angelini.

446 In cross-examination, Mr. Bowes was asked if he remembered Mr. Wightman talking to him about writing up Ms. Brown for performance issues. He did not. Nor did Ms. Novinc when asked about it in direct.

447 Mr. Wightman denied giving this direction.

448 I find, on a balance of probabilities, that Mr. Wightman did not give any direction to Ms. Brown's former subordinates to "write up" Ms. Brown. Mr. Angelini was the only witness to provide any evidence in support of such an allegation, and his evidence on this point was vague and inconsistent. Even if Mr. Wightman was contemplating embarking on a campaign of progressive discipline with Ms. Brown, it is unlikely that he would have told all the persons named by Mr. Angelini about it.

449 Mr. Angelini testified that, in January 2007, Ms. Brown told him that she wanted to return to PML, which he passed on to Mr. Wightman. Mr. Angelini testified that he thought that everything would be just great. Ms. Brown also testified that, prior to her return to work, she and Mr. Angelini had discussions in which she talked about her eagerness to return to work, and their mutual excitement at the prospect. Any discussions, she said, were happy.

450 This evidence is at odds with Mr. Angelini's evidence about Mr. Wightman talking to him about writing up Ms. Brown. It is also inconsistent with Ms. Brown's evidence that Mr. Angelini told her that Mr. Wightman told him not get involved with her, that things were going good for him,

and he should not get involved. It is also inconsistent with her evidence that Mr. Angelini told her that he asked Mr. Wightman to call her, but he refused.

451 Considering the evidence on this point as a whole, I conclude that it is improbable that Mr. Angelini and Ms. Brown had discussions about her eagerness to return to work and their mutual excitement about her doing so. To the contrary, their discussions in the months leading up to her return were negative, with Mr. Angelini telling her negative things about what was happening with Ms. Klatt, that "there were issues", and that he had asked Mr. Wightman to call her but he refused. Ms. Brown was not eager to return to work, but anxious about what she would face when she did in light of the information she was obtaining from various sources, including both Ms. Novinc and Mr. Angelini, and, as will be discussed below, the PML website.

Changes to PML website

452 In December 2006, changes were made to PML's website. Ms. Brown alleged that these changes were unilaterally made by Mr. Wightman.

453 The website had previously identified Ms. Brown as "Manager of Business Development - Service Division". After the changes, Ms. Brown was identified as an "Account Representative", the same title given to Mr. Bowes. Ms. Novinc testified that these changes reflected the new sales structure, discussed below.

454 Ms. Brown learned of these changes when she viewed the website on December 26, 2006. It was different from when she had last viewed it in November. She did not provide much evidence about the impact of seeing these changes, although I accept that it would be upsetting, and even humiliating, to any employee to learn of changes to their title and job responsibilities by reading a public website.

455 The evidence established that changes were made by Ms. Novinc at Mr. Wightman's direction.

456 Mr. Wightman testified that it was his error not to tell Ms. Novinc to wait in making these changes to the website until after Ms. Brown had returned to work. He took responsibility for that error, which he regretted and found unprofessional. He denied, however, that this would have been a humiliating way for Ms. Brown to learn of the changes to her title and functions. He emphasized that this would not be so in her case, because she is a strong and assertive person.

457 Mr. Wightman had no explanation, other than to blame his lawyer, as to why he did not acknowledge this mistake in either the Response to Complaint or his affidavit.

12. Development of the new sales structure

458 During Ms. Brown's second maternity leave, a new sales structure was developed. Mr. Wightman, Ms. Novinc and Mr. Bowes all testified about the development of this new sales structure. Key issues include: who initiated the development of the new structure and why; Mr. Wightman's role in the process; when it was finalized; and whether it was implemented.

459 For reasons given elsewhere, I do not find Mr. Bowes to be a particularly reliable witness. Nor, as stated at the outset of this decision, do I find Mr. Wightman to be a reliable witness. In what follows, while her evidence is also not without its difficulties, I place the most weight on Ms. Novinc's evidence. I address the material discrepancies in the evidence about the development of the new sales structure as necessary, providing reasons for my findings.

460 It was clear on all the evidence that, during Ms. Brown's absence, Ms. Novinc and Mr. Bowes reported directly to Mr. Wightman.

Mr. Bowes' evidence

461 Mr. Bowes testified that the development of the new sales structure was initiated by Ms. Novinc and him sitting down to look at the accounts, with a view towards making an equitable split, which was fair to all involved. He said that Ms. Novinc put together the account list; and they discussed the existing clients; the strengths of each of Ms. Novinc, Ms. Brown and himself; and created teams to deal with the clients, with a view to what was best for all going forward. Mr. Bowes mentioned several times that he thought Ms. Novinc was quite concerned about the business she had cultivated during Ms. Brown's maternity leave, and wanted to protect herself from losing it to Ms. Brown on her return. He also acknowledged that he had some of those concerns himself, although he tried to downplay them. He testified that his input had to do with the financial value of the accounts being split up, ensuring that under the new structure each salesperson would be able to make the same money as before. After that, he said they considered who was better suited to deal with particular clients. He said that the whole process took some time, going back and forth, and determining what was equitable. At various points in his evidence, Mr. Bowes said this process took two or three months.

462 Mr. Bowes said that they had to "speak on behalf of" Ms. Brown because she was on maternity leave. When asked in direct, he said that there was no desire to exclude or disadvantage Ms. Brown, and that they contemplated her continuing in sales.

463 Mr. Bowes denied that Mr. Wightman directed Ms. Novinc and him to undertake this project. Mr. Bowes testified that he thought they discussed with Mr. Wightman the fact that they working on the project, and that Mr. Wightman told them that he did not want to see it until it was in place. Mr. Bowes said that he and Ms. Novinc presented it to Mr. Wightman for his review when it was complete. Mr. Bowes testified that he did not recall what Mr. Wightman's reaction to the new structure was. He said that it was a "working document", and that everyone needed to "buy-in".

464 In cross-examination, Mr. Bowes testified that he and Ms. Novinc understood that Ms. Brown would be coming back in a sales role, which they were told by Mr. Wightman. He assumed she would be "knocking on doors", and not coming back to do what she had been doing. Despite this, he claimed he did not know if she would continue to be a manager. As a result of this understanding, he and Ms. Novinc were looking at a scenario where three people would be selling. Mr. Bowes was not sure when Mr. Wightman told them that Ms. Brown would be coming back in a changed role, except that it was sometime during her maternity leave, while they were in discussions. Mr. Wightman told them they would continue to report to him, and advise Ms. Tibbitts where they were each day. When it was put to Mr. Bowes that Mr. Wightman said that things were working better without Ms. Brown, reporting directly to him, Mr. Bowes agreed. While he continued to maintain that he did not know if Ms. Brown would retain any managerial responsibilities, he acknowledged that he knew he would not be reporting to her, but directly to Mr. Wightman. He later estimated that it was somewhere in the middle of Ms. Brown's maternity leave, perhaps two to four months into it, that Mr. Wightman told him he would continue to report to him after Ms. Brown's return.

Ms. Novinc's evidence

465 Ms. Novinc testified that, in Ms. Brown's absence, she and Mr. Bowes started to communicate with one another more. She testified that in doing so, they realized that the client base was not necessarily set up fairly. She testified that her understanding was that any expansion of existing business was to be dealt with by her, and that Mr. Bowes was to develop new business. In looking at the sales reports, she testified that it appeared that, if she or Mr. Bowes was not making budget in a given month, then that person would be given a customer to make budget. Ms. Novinc testified that she found this both very disappointing and unfair, because things were not based as they had thought they were.

466 It was difficult to understand from Ms. Novinc's evidence just what the problem was that she and Mr. Bowes allegedly discovered on reviewing the sales reports after Ms. Brown left on maternity leave. In cross-examination, Ms. Novinc stated clearly that she was not suggesting that Ms. Brown falsified documentation. Rather, she testified that she did not know what Ms. Brown did.

467 Ms. Novinc testified that there were occasions where, contrary to accepted procedure, Ms. Brown told her to input contract sales where they were sure they had the sale, but did not yet have a signed contract, but this did not appear to be the focus of Ms. Novinc's concerns, and was certainly not something she discovered after Ms. Brown went on maternity leave. The advantage of doing this could be to ensure that a monthly sales target was met. Ms. Novinc never raised it as a concern with Ms. Brown while they worked together, but she did tell Mr. Wightman about this issue after Ms. Brown went on leave. A sale was never listed that they did not, in fact, get; at worst, they were listed before the signed contract was received. Ms. Novinc testified that Ms. Brown was the one taking responsibility for the sales listed, and that it would be revealed if a sale in fact did not complete. This was not a matter raised by Ms. Novinc in her affidavit.

468 As I have already indicated, Ms. Brown testified that Ms. Novinc and Mr. Bowes each gave her monthly sales reports, which she summarized, added a cover page to, and forwarded to Mr. Wightman. She denied that she juggled the numbers depending on where she wanted quota to be allocated, or that Ms. Novinc ever complained to her that it was unfair. She also denied that she engaged in such activities to benefit herself, as the amount of commission she received was not dependent on to whom a particular sale was credited to.

469 I conclude that whatever problems Ms. Novinc may have identified in reviewing the sales reports have been exaggerated in these proceedings. At worst, Ms. Brown recorded sales in advance of a signed contract being obtained in order to ensure that monthly sales targets were made. This was not for her benefit in particular, but for the sales department in general, and no complaint was made about it by Ms. Novinc until sometime after Ms. Brown went on maternity leave, largely because it was also to her advantage.

470 According to Ms. Novinc, she and Mr. Bowes went to Mr. Wightman to discuss with him what they had found out. Mr. Wightman then set up weekly sales meetings with the three of them, in which they talked and worked things out as a team. She contrasted this with the situation under Ms. Brown, in which regular meetings were not held. Ms. Novinc could not see the need for a level of management between the sales people and Mr. Wightman.

471 According to Ms. Novinc, in those meetings, Mr. Wightman asked them what would work for them. Ms. Novinc said his only direction was that they had to make sure the new structure worked for them, Ms. Brown and anybody else who might be added. Ms. Novinc denied that Mr.

Wightman told them to exclude or disadvantage Ms. Brown. She also said that he was shocked by what they told him about what they had learned from reviewing the sales reports.

472 Ms. Novinc testified that it took Mr. Bowes and her a couple of months to come up with a proposed sale structure. Ms. Novinc testified that she and Mr. Bowes came up with the organization chart showing the three of them, including Ms. Brown, all reporting directly to Mr. Wightman.

473 In cross-examination, Ms. Novinc testified that the new sales plan was probably finalized in November when Mr. Wightman approved it and said to put it into action. She said that was why the changes were made to the website in December. She agreed that she knew by that time that Ms. Brown was no longer management. She initially denied that Mr. Wightman told them that Ms. Brown would no longer be a manager but that it later came up that the existing structure did not work. When asked whether she and Mr. Bowes decided to demote Ms. Brown, Ms. Novinc testified that there was no directive from Mr. Wightman demoting her, but he indicated they would be continuing to report to him, and Ms. Brown would no longer be their manager. This was sometime later in the year when they were working on the sales structure. Ultimately, she agreed that it was Mr. Wightman's decision that Ms. Brown would no longer manage them, and that he conveyed that to them. She also agreed in cross-examination that, while Ms. Brown was off on maternity leave, Mr. Wightman realized that he did not need her as a manager.

474 Also in cross-examination, Ms. Novinc testified that Mr. Wightman wanted to be kept abreast of what was going on and how they were progressing with the new plan. She said that they did so by e-mail and in meetings. She had no idea how many e-mails were sent between the three of them in this process. I note that only one, dated October 17, 2006, from Mr. Bowes to Ms. Novinc, and copied to Mr. Wightman, was entered into evidence.

475 In cross-examination, Ms. Novinc testified that the plan was to go into action on January 1, 2007. The only exception was the teams, which waited for Ms. Brown to return to be put into full effect. She specifically agreed that it was not the *status quo*.

476 In cross-examination, Ms. Novinc testified that it was during one of their weekly sales meetings, probably early in 2006, that Mr. Wightman told them they were to let Ms. Tibbitts know where they were at all times. She understood this was for safety reasons.

477 Ms. Novinc was asked in cross-examination if part of the purpose of the new sales plan was for her to protect her own turf from Ms. Brown upon her return, as Mr. Bowes had suggested in his evidence. Initially, she neither agreed nor disagreed, saying that both she and Mr. Bowes wanted the same advantages as the other. She could not recall having any discussion with Mr. Bowes where she used language of that kind. She disagreed that she wanted to protect herself on Ms. Brown's return, or was nervous about Ms. Brown returning.

Mr. Wightman's evidence

478 Mr. Wightman testified that the origin of the development of the new sales structure lay in Ms. Novinc's first attempt to speak to him, after Ms. Brown went on maternity leave, discussed above. He perceived some discomfort between Ms. Novinc and Mr. Bowes with respect to whether the current system was equitable. He said that he brought them in together, and they told him that the way in which the contracts were divided was unfair. He testified that he did not get really deep into it at that point, but asked them what it was going to take to make it work. He asked them to put something together, and to stop any in-fighting between the two of them. Mr. Wightman testified

that he directed them to come up with some sort of package, but gave no direction with respect to the mechanics.

479 Mr. Wightman testified that he expected Ms. Novinc and Mr. Bowes would come up with a package because it was in their best interests to do so. He testified that, months later, they came up with a proposal for his consideration. He said there was no paperwork until near the end of the process.

480 In cross-examination, Mr. Wightman testified that he had virtually no involvement in the development of the new sales structure, and that it was not discussed in their weekly sales meetings. He denied being kept in the loop by e-mail, and when the October 17, 2006 e-mail from Mr. Bowes to Ms. Novinc, copied to him, in which Mr. Bowes stated that he had reviewed the proposal put forward to Mr. Wightman to date, was put to him, said that he did not remember it.

Conclusions about the development of the new sales structure

481 I do not accept Mr. Wightman's evidence that he had virtually no involvement in the development of the new sales structure. I find that, in their evidence, all three witnesses sought to downplay Mr. Wightman's involvement. I find that he was involved at the beginning in instigating the process, directing Ms. Novinc and Mr. Bowes to undertake the project. They kept him informed of their progress in their weekly meetings, in the course of which he provided them with information essential to the project, including, crucially, that he had decided that Ms. Brown would no longer be a manager, and would be their peer as a salesperson.

482 Further, Mr. Wightman provided feedback on their progress, as shown by Mr. Bowes' October 17, 2006 e-mail, referring to Mr. Wightman's review of a previous proposal. Ms. Novinc testified that there were a number of e-mails and meetings, and that Mr. Wightman wanted to be kept abreast of their progress. While the October 17, 2006 e-mail was the only document entered into evidence about the development of the new sales structure, it is most unlikely that it was the only one that ever existed.

483 Ultimately, a document entitled "PML Sales Team 2007 Sales Year" was produced. There are two versions of this document. They both include a several page document setting out the new sales structure. Only one has a cover page addressing things like attendance, work responsibilities and confidentiality. The cover page stated:

> PML has adopted a very successful participative sales team format that has been in the planning stages for the better part of six months and was implemented January 1, 2007. Ken Bowes, Cher Novinc and their manager Donald Wightman have spent countless hours developing a sales plan that is equitable for all and profitable for PML ... Please refer to attached PML Sales Team 2007 Sales Year Structure.

484 The version given to Ms. Brown on February 5, 2007 included this cover page. Mr. Bowes was not sure if he ever saw it. I find that it was not part of the package produced by Ms. Novinc and Mr. Bowes under Mr. Wightman's direction, but was later created and appended to it by Ms. Davie later at Mr. Wightman's direction. I discuss the cover page below in addressing the events of February 5, 2007.

485 In cross-examination, Mr. Bowes testified that Ms. Novinc did the majority of the typing and layout of the main document, including the organization chart showing the three of them, including Ms. Brown, all reporting to Mr. Wightman, while he contributed the majority of the financial information. He testified that he did not know what Ms. Brown's compensation was previously, or if it would be changed under the new structure. When asked when the document was written, Mr. Bowes testified that it was put together over the course of about a month or so, but had no idea as to the date. He thought it was probably complete by November or December, and presented to Mr. Wightman in December or January.

486 Mr. Wightman placed the period when he was given the package slightly earlier, in the late third or early fourth quarter of 2006. He testified that he thought it was good. When asked if he accepted the structure, Mr. Wightman equivocated, testifying that it was the direction they were taking.

487 Mr. Bowes was asked in cross-examination if Mr. Wightman gave them any input. He said that Mr. Wightman had a couple of questions about how they had come up with certain numbers. He thought that Mr. Wightman was going to take it away to review and get back to them, but he was not certain if that ever happened. He characterized it as a "working document", with no set implementation date. He did not know what Mr. Wightman's ultimate decision with respect to implementation was.

488 A key component of the new structure was the creation of three sales teams, each to be made up of a different combination of the three current sales staff, *i.e.* Ms. Brown, Ms. Novinc and Mr. Bowes. The respondents' evidence was that the current client list was to be split up equally between the three teams to ensure a fair workload and consistent client service.

489 Crucially, under the new structure, Ms. Brown no longer had a management or supervisory role; she was treated as a peer of Ms. Novinc and Mr. Bowes, all three of whom were to report to Mr. Wightman directly.

490 Under the new sales structure, Ms. Brown's base salary of $70,000.00 for a three day week remained unchanged, and higher than those of her colleagues. It set out a commission structure based on a budget of $200,000.00 for full-time and $110,000.00 for part-time salespeople. The level of commission increased as an employee approached reaching and exceeding budget, going from 6% total (all commissions split between the two team members) on the first 70% of budget, 10% total on the next 30%, and 20% total over budget.

491 When asked about the inclusion of Ms. Brown on the three sales teams, Mr. Wightman testified that he wanted her included in the teams to take advantage of her experience and productivity. He also testified that, by this time, he did not see the need for a contract sales manager, that this was an unwarranted expense that was better put to sales. He testified that it was his expectation that Ms. Brown would return to sell contracts three days a week in 2007. He testified that he wanted her to do so, as it would be a benefit to the company for her to return in a sales role.

492 Mr. Wightman gave some inconsistent and not credible evidence in cross-examination about whether and when he told Ms. Novinc and Mr. Bowes about his decision not to have Ms. Brown be a manager any more. Several times he denied ever conveying this information to them. This cannot be true, given that they formulated a proposal under which Ms. Brown no longer had management responsibilities and was shown on organization chart as reporting, like them, to Mr. Wightman. Later, he said that he told them in late 2006.

493 Clearly, at some point prior to the completion of the new sales structure, Mr. Wightman informed Ms. Novinc and Mr. Bowes that Ms. Brown would no longer be their manager on her return to work. On all of the evidence, I find that Mr. Wightman made this decision significantly earlier in the year than he testified. I accept Mr. Bowes' evidence that Mr. Wightman told him that he would continue to report to him after Ms. Brown returned to work only two to four months into her maternity leave. This places the decision at about the same time that Mr. Wightman sent Ms. Brown his April 28, 2006 e-mail unilaterally eliminating her flexible working conditions, an e-mail which is consistent with an intention to demote Ms. Brown from a management role.

494 The evidence was inconsistent as to whether the new sales structure was ever implemented. Mr. Bowes testified that it was not, because Ms. Brown did not join them. He said that it sort of remained *status quo* in terms of remuneration, with them continuing to try different systems to improve fairness.

495 Ms. Novinc's evidence was diametrically opposed, being that the new sales structure was actually put in place on January 1, 2007, and that it was not the *status quo*. This was why, for example, the changes were made to the website to reflect those changes in December. Ms. Novinc testified that she assumed that Ms. Brown would return to work part-time, performing sales. She said that she was willing to work with her in that capacity. She said that they had the sales teams set up, ready for her to join them.

496 Mr. Wightman stated that that was the plan, and later testified that it was implemented, consistent with Ms. Novinc's evidence. He later gave inconsistent evidence that it was not implemented because Ms. Brown was not there yet to complete the teams. He said that the first sentence of the cover letter prepared at his direction by Ms. Davie, and given to Ms. Brown on February 5, that said the plan was implemented January 1, 2007, was wrong.

497 I find that the new sales structure was implemented on January 1, 2007. In coming to this conclusion, I rely on Ms. Novinc's evidence and the cover letter written by Ms. Davie.

498 Mr. Bowes testified that, at the time, he was not concerned about how Ms. Brown might react to the changes. In retrospect, he acknowledged that it could be upsetting to her, depending on her value system and ambitions. He was not aware of anything positive in the changes for Ms. Brown; to his understanding, there was not supposed to be any impact on her financial situation. He testified that he and Ms. Novinc did talk about how Ms. Brown might perceive things, and the importance of making things fair so that she would not perceive things in a negative light. Mr. Bowes acknowledged that, whereas before it had been Ms. Brown's job to determine how work was distributed, he and Ms. Novinc were now making that determination.

499 Mr. Wightman was asked if his decision not to have Ms. Brown return as a manager was motivated by her maternity leave. He testified that no, it was strictly business.

500 I find that the maternity leave gave Mr. Wightman the opportunity to demote Ms. Brown, and make the other changes, and to do so without consulting Ms. Brown. Mr. Wightman acknowledged this in cross-examination, when he testified that Ms. Brown was not involved in discussions about the changes because she was on maternity leave. When asked why he did not consult with her, he said that it was because he believed he was not supposed to bother her on her maternity leave. This is not believable, as any requirement not to "bother" Ms. Brown on her maternity leave was imposed by him, not her or the law. And he had already "bothered" her on her maternity leave

in sending his harsh e-mail of April 28, 2006. Mr. Wightman used Ms. Brown being on maternity leave as an excuse not to consult with her; it was not a reason not to do so.

13. Financial information about performance of sales department

501 In their Response to Complaint and Mr. Wightman's affidavit, the respondents referred to Mr. Wightman allegedly noting the department's significantly improved financial performance in 2006 under his direct management, and asserted that this was one of the factors he took into account in deciding to eliminate Ms. Brown's managerial role.

502 There was some evidence about the performance of the sales department in 2005, when Ms. Brown was managing it, as compared to 2006, in her absence. For the reasons that follow, I do not find it necessary to consider this evidence at length.

503 Mr. Wightman testified that his experience during Ms. Brown's leave led him to believe that he did not need a contract sales manager, and that paying one was an unwarranted expense that would be better put to direct sales. He did not, however, testify that the sales department performed better financially under his direct supervision or that this was one of the reasons he chose to eliminate Ms. Brown's management responsibilities.

504 Ms. Davie testified about a document she created, for the purposes of this proceeding, comparing the financial statements for the sales department in 2005 and 2006. It shows the department having a $254,942.00 net loss in 2005, and net earnings of $9,288.00 in 2006. In cross-examination, she testified that this was the only official financial document disclosed by the respondents in these proceedings. She was unaware that Ms. Brown's counsel had written to the respondents' counsel on October 19, 2007, seeking further financial documentation, or that respondents' counsel had, on February 26, 2008, declined to produce the documents requested on two bases: that they were not relevant and PML is not a public company.

505 It is true that it was open to Ms. Brown to seek an order from the Tribunal requiring production of these and other potentially relevant documents from the respondents, and that she did not do so. However, given the respondents' defence that they made the changes they did to Ms. Brown's position for legitimate business reasons, including Mr. Wightman's conclusion that the sales division performed better under his management than Ms. Brown's, these documents were clearly relevant, and ought to have been produced by the respondents without Ms. Brown being forced to take such additional steps.

506 In cross-examination, Ms. Davie agreed that the fact that there were increased revenues in 2006 did not necessarily mean that it was a better sales year than 2005 because revenues for each year reflect sales not only in that year but also sales in previous years where the contract has continued. This was reflected in a document entitled "2005 Contract Revenue (Breakdown)", which Ms. Tibbitts prepared in the course of her employment at PML, which shows that there was a very large contract sold in November 2005, worth $215,008.00, the revenues for which would have been received in 2006. This was the service contract for the River Rock Casino project to which I have already referred.

507 On the evidence before me, I am unable to conclude that the sales department performed better financially in Ms. Brown's absence than under her management, or that this was one of the reasons for Mr. Wightman's decision to eliminate her management responsibilities.

14. E-mail exchange prior to return to work

508 In late January 2007, Ms. Brown and Mr. Wightman exchanged e-mails about her upcoming return to work. She initiated the exchange on January 28, writing that she would be returning on February 1, "assuming my previous work schedule". Mr. Wightman responded on January 29, stating that it was "nice to hear from you!". He stated that, "as in the past the days of work will be Monday, Wednesday & Friday (8:00 a.m. through 4:30 p.m.)". He gave her the option of starting on either Friday, February 2, or Monday, February 5, and asked her to let him know her preference so that he could make arrangements.

509 In his evidence, Mr. Wightman denied that he had chosen these days of work, saying that they were her choice and he just applied them.

510 Ms. Brown replied on January 30:

> In your email you referenced my original hours of January 2005. These hours were changed in September 2005. Before going on leave, I was working Monday 8 - 4:30, Tuesday - Thursday 8 - 1:30 or 2 pm depending on my clients and employees needs and appointments. My arrangements for my return to work are based on these hours.
>
> I am looking forward to returning to my position as Manager of Business Development for the Service Division. I would like to return on Monday, February 5th. See you then.

511 In stating the hours she intended to work on her return, Ms. Brown seemingly ignored Mr. Wightman's April 28, 2006 e-mail, in which, while he had not stated the particular days she was to work, he had stated in no uncertain terms that she would be working three days a week, from 8:00 to 4:30. She testified that she wrote her initial January 28 e-mail on the basis of the daycare arrangements she had made, that she had not heard anything since the April e-mail exchange, and did not have any clarity, so she assumed her previous schedule. In cross-examination, Ms. Brown admitted that she did not contact her daycare to inquire about the possibility of changing her arrangements to suit the hours of work, or later the days of work, indicated by Mr. Wightman. She also testified that she thought there was simply a misunderstanding.

512 I find Ms. Brown's explanation for her conduct with respect to her daycare arrangements somewhat disingenuous. There was no lack of clarity in Mr. Wightman's April 28, 2006 e-mail about Ms. Brown's hours of work. If Ms. Brown lacked clarity, it seems odd that she would make an assumption about her days and hours of work, and make daycare arrangements on the basis of that assumption, without contacting Mr. Wightman to seek the clarification she claimed she lacked. I find that Ms. Brown decided simply to ignore the direction given by Mr. Wightman about her hours in his April 28, 2006 e-mail because she did not agree with it. This is particularly so in light of the fact, as Ms. Brown testified, that daycare arrangements need to be made well in advance.

513 On the other hand, in directing Ms. Brown to work Mondays, Wednesdays and Fridays, Mr. Wightman ignored the days she had been working prior to going on maternity leave. Ms. Brown would have had no way to predict that Mr. Wightman intended her to revert to her earlier days of work.

15. Events of February 5, 2007

514 Ms. Brown reported for work on February 5, 2007. Ms. Brown, Mr. Wightman, Ms. Davie, Mr. Bowes, Mr. Angelini and Ms. Tibbitts all gave evidence about the events of that day. What follows are my findings about what occurred, based on the totality of the evidence. Where necessary, I refer to material disputes in the evidence and provide reasons for my findings.

515 Ms. Brown testified that, given the information she had gleaned from the website about the change to her job title, and Ms. Novinc's warnings to her, she was nervous, tense and anxious about her return to work. I accept that is true.

Interactions with Ms. Tibbitts and others

516 Ms. Brown testified that she drove in to PML's parking lot, and pulled in behind Ms. Tibbitts, whom she said failed to acknowledge her. She then went in to the building, where she saw some employees that she knew, and others who were new and she was unfamiliar with. Overall, she found the atmosphere unfriendly, with only one person acknowledging her. She was introduced, she could not recall by whom, to Ms. Mattiussi. She and Ms. Freer, who was on her first day on the job, greeted one another.

517 Ms. Brown then went upstairs. She saw Ms. Tibbitts seated in what had been her office, to the right of Mr. Wightman's. Ms. Brown had helped to set Ms. Tibbitts up in that office before she went on leave, but testified that Mr. Wightman had told her that would only be a temporary arrangement. Ms. Brown did not see her computer or a place for her to sit.

518 Ms. Brown testified she saw Mr. Wightman, and reached to shake his hand. She told him she was looking for Ms. Davie and that she did not know where to put her things. He gestured to a chair in the hallway, so she put her things there. She then went to say hello to Ms. Tibbitts, who was busy and, according to Ms. Brown, again did not acknowledge her.

519 Ms. Tibbitts was not asked about whether or not she saw Ms. Brown in the parking lot. The first interaction with Ms. Brown that Ms. Tibbitts described was when she came downstairs to talk to Ms. Freer at the reception desk. According to Ms. Tibbitts, Ms. Brown was there, but did not refer to or look at her all, and just interacted with Ms. Freer. Ms. Tibbitts testified that that was fine, and she simply excused herself. Ms. Tibbitts testified that, sometime later, Ms. Brown came to her and asked her for a calculator, and she offered Ms. Brown one that was nearby. She also testified that she observed Ms. Brown and Ms. Davie greet one another, and engage in a brief social conversation.

520 Ms. Tibbitts also testified that it was her expectation that Ms. Brown would be returning to work in contract sales, and that she was looking forward to her return. As she said, she had her boxes waiting for her. In cross-examination, Ms. Tibbitts testified that she did not remember Mr. Wightman telling her that she would continue reporting to him after Ms. Brown's return, and her assumption was that she would resume reporting to Ms. Brown. She was not aware that Ms. Brown was no longer to be managing the contract sales department. I accept Ms. Tibbitts' evidence about the state of her knowledge that day.

521 Overall, I prefer Ms. Tibbitts' recollections of the interactions between her and Ms. Brown that morning. On all of the evidence, the morning of February 5 was a tense one for Ms. Brown, who was anticipating an unpleasant meeting with Mr. Wightman. Considered in that context, it is not surprising that she might not have interacted with others in the friendly manner in she would

normally engage, or that her perception of other's demeanour or behaviour might have been coloured by her own apprehensions. I find that this was the case for Ms. Brown.

Meeting in Mr. Wightman's office

522 Mr. Wightman asked Ms. Brown to come into his office with Ms. Davie, and the three of them sat down to talk.

523 When asked why he had Ms. Davie join them, Mr. Wightman testified that he had made it his practice never to meet alone with a woman in his office with the door closed. As he knew they would be discussing sensitive subjects and would want to close the door, he asked Ms. Davie to come in.

524 I am doubtful that this is the real reason Mr. Wightman asked Ms. Davie to join them. Mr. Wightman and Ms. Brown had had closed door discussions in the past. I find that, on this occasion, Mr. Wightman, quite understandably, wanted a witness.

525 Mr. Wightman, Ms. Brown, Ms. Davie, and Mr. Bowes, whom I find joined the meeting later, all testified about what was said. Ms. Brown's evidence was the most detailed of the three, yet she failed to recall that Mr. Bowes came into the meeting. In what follows, I discuss each participant's evidence about the meeting, making findings as necessary.

526 According to Ms. Brown, Mr. Wightman began by talking about the business, how things had changed over the course of her leave, and his pride in the construction projects he had been working on. He told her that things had not changed much in the contract service department except for some in-fighting.

527 Mr. Wightman denied saying that things had not changed much. I accept his evidence that, as he was going to be proposing an awfully big change to Ms. Brown, he would not have said that.

528 Ms. Davie testified that things began with some friendly banter, which she felt was fairly light-hearted and cordial. She said that both Ms. Brown and Mr. Wightman appeared to her to be happy.

529 Mr. Wightman also testified that they began with some casual talk about family, and then moved towards work.

530 Overall, it is clear that the conversation began reasonably enough. While I doubt that either Mr. Wightman or Ms. Brown was happy or light-hearted, they were being professional and civil.

531 Mr. Wightman then presented Ms. Brown with the "PML Sales Team 2007 Sales Year Structure" document, consisting of the cover page, and attached multi-page document, already described.

532 The cover page repeated Ms. Brown's days and hours of work, as indicated by Mr. Wightman in his e-mails of April 28, 2006 (so far as the hours are concerned) and January 29, 2007 (in relation to the days of work), and not as indicated by her in her January 30, 2007 e-mail. It went on state conditions about advising a manager if late or absent, and completing Absence Forms. There was a clause about maintaining confidential information.

533 Ms. Davie testified, and I accept, that she had no role in, and little knowledge of, the development of the new sales structure. She testified that, very shortly before Ms. Brown returned to work, Mr. Wightman asked her to write the cover page, which she did. She testified that she wrote it

for Ms. Brown to fill her in on what they were trying to do in terms of creating a more formal approach with employees. Ms. Davie testified that she wrote it to be like the letters of employment they were now requiring new employees to sign, which contained things like confidentiality agreements. She testified that Ms. Novinc and Mr. Bowes were not given similar documents, but were told the same information verbally. She disagreed that, in being given something in writing, Ms. Brown was being treated like a new employee. She said that it was given to Ms. Brown in writing because Ms. Brown "likes things in writing".

534 Ms. Davie testified that she did not know that the days of work indicated in the cover letter were not the days Ms. Brown was working prior to her maternity leave. She did acknowledge, however, that Ms. Brown frequently changed her days by e-mail and that she did not keep tabs on it. Ms. Davie was also not aware that there was any change to Ms. Brown's hours of work. She was aware that the requirement that Ms. Brown work in the office was a change from what she had observed. She agreed that it was "quite a big one". She did not know if that change was designed to keep tabs on Ms. Brown, or why it was made.

535 Ms. Davie testified that she understood the implementation date for the new sales structure was, as indicated in the cover letter, January 1, 2007. She also testified that the phrase "countless hours" reflected her understanding of the time spent by all of Mr. Wightman, Ms. Novinc and Mr. Bowes in the development of the new sales structure.

536 Ms. Davie said that the Absence Form referred to on the cover page is one which all employees are required to complete when absent, including Ms. Brown before she went on maternity leave. She explained that the information was included because it was part of the package for all new employees, and Ms. Brown had not been consistently doing it in the past.

537 Mr. Wightman testified that his involvement in the cover page was limited to telling Ms. Davie Ms. Brown's days of work. He testified that the reference to the plan having been implemented on January 1 was wrong, and he had no explanation as to why that was stated or why he did not correct it before giving it to Ms. Brown. I do not accept this evidence. Ms. Davie had to obtain the information included in the cover page from someone, and I find it was Mr. Wightman.

538 Ms. Davie testified that she thought it was "more friendly" not to tell Ms. Brown about the changes to her position in advance. When challenged on this statement in cross-examination, she said that it was not her job to tell employees not under her supervision about changes. She also stated that it was "more friendly" in that it was face-to-face, rather than a cold and unfriendly e-mail.

539 I agree with Ms. Davie that it is better to discuss such matters face-to-face, but the respondents provided no valid explanation as to why that could not have been done with Ms. Brown prior to her scheduled return to work.

540 Ms. Davie testified that, in the context of preparing the cover page, Mr. Wightman told her that his expectation was that Ms. Brown was going to return to work selling, and that she was the best salesperson he had ever met in his life. She was also told that there would be no change to Ms. Brown's base salary and benefits. Ms. Davie expected Ms. Brown to return to work, and was happy she would be doing so.

541 In cross-examination, Ms. Davie was asked whether she knew that Ms. Brown had been demoted. She initially tried to sidestep the question, saying that she knew her position was going to

be in sales. When the question was asked again, Ms. Davie nodded her head yes, and said that, "If you want to put it that way, yes". She then agreed that it was a demotion, and that she knew that Ms. Brown would no longer be the manager of a department, but would be focusing exclusively on sales, and that her commission structure was going to change.

542 I find that, as reluctant as she was to admit it, Ms. Davie knew that Ms. Brown was being demoted.

543 In cross-examination, Mr. Wightman denied that Ms. Brown was demoted. He said that he did not see her returning to a sales position as a demotion. I do not accept this evidence. I find that Mr. Wightman well knew that the changes he was making to Ms. Brown's position constituted a demotion.

544 Ms. Davie also agreed in cross-examination that, had Ms. Brown not been on maternity leave, she would have been included in the discussions about the changes to her position, all of which had been considered and implemented while she was away on maternity leave.

545 According to Ms. Brown, Mr. Wightman also pointed out the hours of work she was expected to work, as he wanted there to be no misunderstanding. She asked him if that was flexible, and he told her no. Mr. Wightman testified that that exchange probably happened. She told him that she was not prepared for those hours and had organized her daycare around the hours she had been working prior to going on leave. Mr. Wightman testified that she probably said that. She asked him how long she had to transition to those hours, to which he replied that he had already warned her in April. She told him that you need at least a month to make arrangements with daycare, but he did not reply. Mr. Wightman remembered Ms. Brown saying that.

546 In cross-examination, Ms. Brown denied that Mr. Wightman told her she could have the time she needed to make her daycare arrangements. She also denied the contradictory suggestion that there was no discussion of needing time to make daycare arrangements in this meeting. Neither Ms. Davie nor Mr. Wightman testified that Ms. Brown was told she could have time to make daycare arrangements, and I find she was not.

547 According to Ms. Brown, Mr. Wightman continued to go through the document, including telling her that she would have to call into Ms. Tibbitts every day, telling her where she was going, what she was doing, and when she was leaving. In his evidence, Mr. Wightman agreed that he said this. Ms. Brown testified that she noticed that the document said she was to advise a manager if she was late or absent, and assumed that this was a reference to Ms. Tibbitts. There was no evidence that Mr. Wightman told Ms. Brown that Ms. Tibbitts would be her manager.

548 In cross-examination, Ms. Brown denied that there was any reference to safety or customer service concerns in connection with the requirement to report to Ms. Tibbitts. She agreed, however, that she was told that other sales representatives were required to report to Ms. Tibbitts. She continued to maintain that she inferred that Ms. Tibbitts was, as a result, now her manager.

549 This was not a reasonable inference. Ms. Brown had always let Ms. Tibbitts know where she was and what she was doing. Further, Ms. Brown was told in this meeting that other salespeople were also required to let Ms. Tibbitts know their whereabouts. There is ample evidence before me that all salespeople were told, prior to this time, that they must let Ms. Tibbitts know their wherea-

bouts, and that the primary reason was to ensure their safety when offsite. I accept that Ms. Brown likely was not told the reasons for that requirement. However, regardless of what Ms. Brown was told about other salespeople or safety reasons for a reporting requirement, the requirement that Ms. Brown report her whereabouts to Ms. Tibbitts could not reasonably be interpreted as meaning that Ms. Tibbitts was now her manager. The information provided to Ms. Brown during this meeting, including the organization chart, made it abundantly clear that Mr. Wightman was to be her manager, not Ms. Tibbitts.

550 Continuing through the document, Ms. Brown testified that Mr. Wightman talked about confidentiality. He talked about a former PML manager that he felt may have been using confidential information, and whom he would sue if he was. Mr. Wightman agreed that he talked about confidentiality. In the context of this meeting, Mr. Wightman's reference to suing another employee could reasonably be seen as intimidating.

551 Ms. Brown testified that she was upset about the lack of flexibility in her hours of work, and asked again to make sure there was none. She testified that, in response, Mr. Wightman asked her if she was getting aggressive with him. She told him no, that she was listening to what he was saying. It was put to Ms. Brown in cross-examination that she became aggressive in the meeting, which she denied. Ms. Davie testified that she recalled Ms. Brown, and not Mr. Wightman, being aggressive in this meeting. Mr. Wightman also testified that Ms. Brown was becoming increasingly agitated as she read through the cover page. He also testified that, at some point, she sat on the edge of her seat, quite anxious and wringing her hands, and said in a loud voice, "let's get it out", with her hands on the table, in response to which he told her they were happy to have her back. This last piece of evidence was not put to Ms. Brown in cross-examination, and I place no weight on it.

552 Overall, I accept that what had began as a professional business meeting became increasingly tense. While I doubt that Ms. Brown could fairly be characterized as aggressive, she likely did become increasingly agitated.

553 Attached to the cover page was the PML Sales Team 2007 Sales Year multi-page document. Mr. Wightman talked to Ms. Brown about this document. Ms. Davie testified that Ms. Brown took some time to read it.

554 According to Ms. Brown, Mr. Wightman told her that he had determined that it was too much for one sales representative to look after a client on their own, and had reorganized the sales department into teams of two. He told her that this is why this document had been developed over the course of numerous meetings, over some months, with Ms. Novinc and Mr. Bowes. Ms. Brown denied in cross-examination that it was made clear to her that the genesis of the new sales structure was Ms. Novinc and Mr. Bowes.

555 Ms. Brown testified that Mr. Wightman told her her job had changed, and that she no longer needed to manage anybody. She could return to a sales role. Mr. Wightman agreed in his evidence that he probably told her she was no longer a manager and would now be doing sales.

556 Ms. Brown testified that she asked Mr. Wightman if she was on probation, and he said no. According to Ms. Brown, Mr. Wightman explained the organization chart, which showed the three teams of two salespeople reporting to him. Mr. Wightman agreed that he did so.

557 They also talked about the website. According to Ms. Brown, Mr. Wightman knew that she already knew that her position had been changed. She asked him if that "wasn't a bit of a kick in the

teeth?" He disagreed. Ms. Davie's evidence on this point was largely consistent with Ms. Brown's - she testified that Ms. Brown relayed that she was upset about the website, and said words to the effect of "it's a fine way to find out about changes to your job". In her evidence, Ms. Davie agreed that it was not a good way to find out about such things, and would certainly cause some concern. For his part, Mr. Wightman recalled Ms. Brown calling it a "slap in the face". Nothing turns on the difference in idiom.

558 According to Ms. Brown, she asked if the document had been given to anyone else. Both Ms. Brown and Ms. Davie testified that she was told no, but according to Ms. Brown, Ms. Davie said that they knew about it. Ms. Brown testified that she asked how they were going to announce the changes, and Mr. Wightman said that they did not have to, as it was a pretty small office and everyone knew what had gone on. Mr. Wightman testified that that was probably pretty accurate.

559 Ms. Brown testified that she asked if there was a job description. Ms. Davie told her that there were none for the department. Ms. Brown disagreed, saying she had made them for Ms. Tibbitts, Ms. Mahy and Ms. Novinc, to which Ms. Davie said Ms. Tibbitts' would not apply because her job had changed so much.

560 Ms. Brown testified that she said that she supposed that her allocation of tasks allowed them to conclude they did not need a manager, and Mr. Wightman agreed, saying that "it's given me a year to organize it all". In cross-examination, she maintained that Mr. Wightman said that. Also in cross-examination, Ms. Brown testified that Mr. Wightman said that Mr. Bowes and Ms. Novinc had worked on it with him for a number of months. Ms. Davie testified that she did not hear Mr. Wightman say anything about being given a year to organize it all.

561 In direct, Mr. Wightman adamantly denied making any comment about having a year to organize it all, and asked rhetorically, "a year to organize what?". In cross-examination, he acknowledged that he had, in fact, had a year to organize changes, but continued to maintain he did not tell Ms. Brown that. When it was put to him that the respondents' Response to Complaint and his affidavit both stated that he told Ms. Brown that he had taken the past year to organize changes to the service contract division, Mr. Wightman initially testified that that was wrong and maintained that he did not remember using words like that. He then changed his evidence to state that he "maybe, must have" used them. He had no explanation for why he had given evidence in direct examination that was directly at odds with that contained in his affidavit.

562 I find that Mr. Wightman did say words to the effect that he had a year to organize it all. In fact, Mr. Wightman did take the year that Ms. Brown was on maternity leave to organize the changes to the company.

563 Ms. Brown was asked in direct if any comments were made about Ms. Snalam in the meeting. She said that there were, and that Mr. Wightman said that people seemed to have the perception that he could not change anything in Ms. Snalam's job, but that while he could not change her wages, or make her change filters, he could change her job. He told Ms. Brown that he had met with Ms. Snalam and offered her a lesser position, but that she had decided to take a buy-out package. In cross-examination, Ms. Brown maintained that Ms. Snalam was discussed.

564 Ms. Davie testified that she never heard any discussion of Ms. Snalam in this meeting. Mr. Wightman denied that this conversation occurred.

565 I prefer Ms. Davie's and Mr. Wightman's evidence on this point. Given the adversarial context of this meeting, and their relationship at this point, it is implausible that Mr. Wightman would have chosen to talk to Ms. Brown about confidential information pertaining to Ms. Snalam.

Mr. Bowes' participation

566 Ms. Davie testified that, in general, the meeting consisted of Ms. Brown and Mr. Wightman talking about the sales plan, with which she was unfamiliar. Ms. Brown was asking questions, and Mr. Wightman said that he would get Mr. Bowes to come and fill her in. Mr. Bowes came in, and stood at the end of Mr. Wightman's desk, and explained the sales plan, including how they had divided the contracts, and tried to be fair and equitable. Ms. Davie was not sure if anyone said it, but she had the sense that it was not etched in stone, and was a working document, with room for flexibility. In cross-examination, Ms. Davie explained that the new structure had already been implemented, but there was flexibility in terms of which team would be responsible for which clients. Mr. Bowes then left the meeting, leaving the three of them there.

567 Mr. Bowes testified that he was unexpectedly called into Mr. Wightman's office to speak with the three of them about the new sales plan. According to Mr. Bowes, Ms. Brown asked about bringing in new customers. He said that he tried to explain the program, but he was caught a little off guard and had not reviewed the new plan in awhile. He felt uncomfortable, and Ms. Brown did not look very happy. He did not feel fully versed to be answering questions, and felt that he was put in a difficult position. Mr. Bowes guessed that he left when he was excused from the meeting.

568 In direct, Mr. Bowes was asked if he tried to address fairness in the meeting. He said that he tried to, but in hindsight, it was probably neither the time nor the place for it. According to Mr. Bowes, Ms. Brown was not receptive, and he referred to the fact that she was just coming back from maternity leave.

569 Mr. Wightman testified that Ms. Brown was asking him questions which he was trying to answer about the new sales structure, but that he did not know it in depth. He testified that he saw Mr. Bowes walking by, and asked him to come in, which he did.

570 Mr. Wightman testified that Mr. Bowes came in, shut the door, and stood to his left. He did his best to describe the sales structure. He thought Mr. Bowes probably spoke for three or four minutes. He recalled Ms. Brown asking very few or no questions of Mr. Bowes. Mr. Bowes then left, and closed the door behind him. Mr. Wightman testified that he guessed he caught Mr. Bowes off guard, and that he maybe did not explain the new structure completely.

571 Ms. Brown testified in remarkable detail about the events of February 5. Despite the apparent detail of her recall about the events of that day, she failed to remember that Mr. Bowes attended part of the meeting in Mr. Wightman's office. When it was put to her in cross-examination that that was a significant detail, she testified that she did not deem it significant. When it was suggested to her that it was Mr. Bowes, and not Mr. Wightman, who went over the new sales structure with her, she denied that that was so, saying that she was sure that it was Mr. Wightman. She said that Mr. Bowes was only there "for a moment", and then said that she recalled that Mr. Wightman called "someone" in, but she was not sure that it was Mr. Bowes. She then said that she did remember it was Mr. Bowes. Later, she said that Mr. Bowes did not speak to her, but spoke to Mr. Wightman, who relayed his comments to her, and failed to make eye contact with her.

572 Ms. Brown's evidence on Mr. Bowes' participation in this meeting was inconsistent, and at times, evasive. At times she recalled minute details about his participation, such as his alleged failure to make eye contact with her, and at others was unable to recall if he had even been present.

573 I find, on all of the evidence, that Mr. Bowes was present for part of the meeting at Mr. Wightman's request, and participated by taking Ms. Brown through the new sales structure. Ms. Brown did not "deem it significant" because she wanted to emphasize Mr. Wightman's role in the development of the new sales structure, and its communication to her.

574 Because Ms. Brown failed to mention Mr. Bowes' participation in her direct evidence, it is difficult to ascertain which parts of the conversations she described occurred before, during, or after Mr. Bowes was in the room. Fortunately, nothing significant turns on the precise chronology. It is likely that Mr. Bowes came in towards the end of the meeting.

End of the meeting

575 After Mr. Bowes left, Ms. Davie testified that the mood in the room was much tenser. She said that Ms. Brown leaned forward, and looked at Mr. Wightman and said, "This is it, I'm going back in sales, and you're going to pay me $100,000.00 for three days a week?". Mr. Wightman said yes. According to Ms. Brown, they then went through the sales teams and PML's current customers, and the new two person sales teams. Ms. Brown testified that Mr. Wightman told her that he had split up the client list with Ms. Novinc and Mr. Bowes, who had helped him put the document together. According to Ms. Brown, Ms. Novinc was given 18 clients, Mr. Bowes 15, while she was given 12. Mr. Wightman also described the new commission structure. Ms. Brown testified that she later calculated that she would make just over $18,000.00 less per year under the new structure. She disagreed with the suggestion in cross-examination that she had the potential to make as much or more than before.

576 Mr. Wightman denied in his evidence that he described the new structure in any depth. He did recall telling Ms. Brown that nothing would change, she would work three days a week at a base salary of $70,000.00 a year, with car allowance, a gas card, a computer and a cell phone. He testified that, as the day progressed, there was no opportunity to do any calculations to see if Ms. Brown was correct in her belief that she would make less money under the new structure. He admitted in cross-examination that he had only "rough guessed" what her compensation would be under the new scheme.

577 In cross-examination, Ms. Davie testified that Ms. Brown asked her if she had crunched any numbers, but she told her it was not her focus and it had not even crossed her mind to do so. To the best of her knowledge, no one had done so.

578 The respondents' failure to determine the actual financial impact on Ms. Brown of the changes in her compensation structure before proposing it to her leads me to question the genuineness of the offer.

579 In cross-examination, Ms. Brown denied that it was clear from the meeting that the new sales structure was not finalized, and that finalization awaited her input. She thought it was possible that she said words to the effect of "so you're going to pay me $70,000.00 plus commission to sell?". There is some inconsistency in the evidence about whether she said $70,000.00 or $100,000.00 in this comment, but nothing turns on this. She agreed that that was a significant amount to earn for a three day week. Mr. Wightman confirmed in his evidence that that Ms. Brown

said words to that effect, and I accept she did. In cross-examination, Mr. Wightman admitted that he never told Ms. Brown that he wanted her input. He claimed she walked out before he had the chance. I find that Ms. Brown was not told that the structure was not finalized or awaited her input. The only element of it which might have been open to discussion was the client split; the basic elements of it were not.

580 Ms. Brown testified that she was upset, because, in her view, she no longer held her job. She asked Mr. Wightman if she was another sales representative, and he agreed. She asked him if she was going to do performance reviews, to which the answer was no.

581 Several times in cross-examination, Ms. Brown testified that she could not recall it being said that the new sales structure had been developed with the intention of being fair or splitting the existing customers up fairly. Little turns on whether this was stated, as the fairness of the customer split is not important for the purposes of this case. What is important are the changes to Ms. Brown's job duties and other terms and conditions of employment.

Ms. Brown's workstation

582 At this point, according to Ms. Davie, Mr. Wightman started to talk about the new building, and stood up and got the plans, which he wanted to show Ms. Brown. Ms. Davie described Mr. Wightman at this point as being very proud of the plans. Mr. Wightman agreed that he showed Ms. Brown the plans, and in doing so, showed her the cubicles for the sales staff. She would have a brand new cubicle, the same as the other sales staff.

583 For her part, Ms. Brown testified that she asked Mr. Wightman where she would be sitting. He told her that in the new office there would be a bunch of cubicles, and she would be sitting with the other staff. Ms. Davie agreed in cross-examination that Mr. Wightman told Ms. Brown that, in the new building, Ms. Tibbitts would have an office, and she would not.

584 Ms. Davie was asked in cross-examination whether this did not strike her as a bit humiliating. She answered that she had not thought of it. She then added that she had now. When again asked if it would be humiliating, she agreed that it could be.

585 At the end of the meeting, Ms. Brown and Ms. Davie both testified that Mr. Wightman asked Ms. Brown if she would like to be introduced to the new employees who had been hired in her absence. She said yes, and he took her around and introduced her to the construction employees. In cross-examination, Ms. Brown revised this to say that it was she who asked to be introduced to the other employees. I think it more probable that, as he testified, it was Mr. Wightman who made the offer.

586 Ms. Brown testified that she asked where she was to sit, and was told it would be at a desk outside Mr. Wightman's office. She said this was the desk at which Ms. Tibbitts used to sit. She noted that it had a mismatched phone and desk from the shop, there was a bookcase positioned to block her line of sight, and there were two other desks in close proximity. Mr. Wightman agreed with her description of the furniture, but not about a bookcase blocking her line of sight.

587 In cross-examination, Ms. Brown agreed that she said "you've taken my office away from me". She testified that Mr. Wightman said she had a cubicle like Mr. Bowes and Ms. Novinc (an apparent reference to the planned set up in the new building), and that she then pointed to Ms. Tibbitts, to which he replied that she was there five days a week and Ms. Brown was out of luck.

588 Ms. Tibbitts testified that she was unaware of any plan for her to continue to occupy Ms. Brown's former office. She expected that, on Ms. Brown's return, she would have to find room somewhere in the crowded PML premises. That said, as she testified in cross-examination, she had not been asked to move out of Ms. Brown's former office in preparation for her return to work.

589 In cross-examination, Ms. Davie was asked whether she knew that Ms. Brown would not be returning to her old desk. She answered that she did not think she knew that until that day. At least implicit in her answer was that Ms. Davie learned that day that Ms. Brown would not be returning to her old desk. Later in cross-examination, Ms. Davie said that the first time she learned that Ms. Brown would not be returning to her old desk was when Mr. Wightman told her to put her things on the desk outside his office. She testified that she did not know it was meant to be permanent, and knew that Ms. Tibbitts had Ms. Brown's boxes. She thought it was only temporary during the meeting, and that Ms. Tibbitts would be moving. She acknowledged that no one told Ms. Brown that it would be only temporary.

590 Mr. Wightman testified that Ms. Tibbitts was indeed sitting at Ms. Brown's old desk. He testified that Ms. Mahy was now sitting where Ms. Tibbitts used to sit, and that he had moved someone else to allow Ms. Brown to sit at a desk outside his office. He testified that he told Ms. Brown he had made a spot for her there, that they would be moving soon, and she would have to make do. Mr. Wightman denied that this situation would be humiliating for Ms. Brown. Interesting, in light of Mr. Wightman's insistence on Ms. Brown working from the office, he minimized the significance of the office set-up, saying that she was supposed to be on the road servicing clients, and that this would just be a place to do paperwork and organize things.

591 On all the evidence before me, it is clear that PML's offices were cramped at this time, and space was at a premium. I find that Mr. Wightman intended to have Ms. Brown sit at the desk outside his office and failed to inform either Ms. Tibbitts or Ms. Davie of this fact in advance. I find that a reasonable person in Ms. Brown's position would have felt humiliated by being required to sit at a desk in the corridor outside her boss's office rather than her former, comparatively spacious office, which her former assistant was now occupying. I also find that a reasonable person in Mr. Wightman's position, particularly knowing Ms. Brown as he did, would appreciate that this arrangement would be perceived as humiliating by her. I find it impossible to escape the conclusion that it was done for that very reason.

Ms. Brown obtains office equipment and supplies

592 Once outside of Mr. Wightman's office, Ms. Brown took steps to obtain office equipment and supplies. Nothing turns on the exact sequence in which the following events occurred.

593 Ms. Brown testified that she mentioned that she did not have a phone or a computer, and that Mr. Wightman said that Ms. Davie had them for her. Mr. Wightman agreed that this occurred. In cross-examination, Ms. Brown disagreed that, as he later testified, someone grabbed Mr. Wightman at this point and took him away; rather, she testified that he told her to see Ms. Davie, so she did. Ms. Davie testified that she thought Mr. Wightman asked her to get Ms. Brown's cell phone and computer, which she had locked in a cabinet in her office. She also testified that someone grabbed her to assist Ms. Freer in getting set up on the computer, and that she left to attend to that. Ms. Brown went into the accounting office where she made small talk with Gina Do and another employee while waiting for her phone and computer, which she was given. Neither of them seemed to have been touched in the year she was away.

594 Ms. Brown testified that she asked about business cards, and Ms. Davie said that there were not any yet because of a mix-up with the telephone locals. Ms. Davie testified that she had no knowledge of the business cards, and that it was Ms. Novinc's responsibility to order them.

595 Ms. Brown testified that she asked Ms. Tibbitts for a binder containing a list of all the contracts PML had. According to Ms. Brown, Ms. Tibbitts still failed to acknowledge her, simply waving her hand in the direction of the binder. Ms. Brown tried to talk to her, but while she acknowledged the fact she had spoken, she would not look at her.

Ms. Brown informs Mr. Wightman of her refusal to accept the new terms and conditions of employment

596 Ms. Brown testified that she then went downstairs and outside, where she sat in her vehicle for a minute. In cross-examination, she testified that, while there, she spoke on her cell phone with her legal counsel for a few minutes. Mr. Wightman testified that he asked someone where Ms. Brown was at this point, and it was pointed out to him that she was outside talking on her cell phone. He assumed it was a personal call, and went into his office.

597 Ms. Brown testified that she then came back in, looking for Mr. Wightman, but could not find him. Both Ms. Brown and Ms. Davie testified that Ms. Brown saw Ms. Davie, and told her that she could not find Mr. Wightman, and asked Ms. Davie to tell him that "I am not accepting the new terms and conditions of employment". Ms. Davie did not think that Ms. Brown finished the statement. According to Ms. Brown, Ms. Davie simply replied "oh". Ms. Davie characterized Ms. Brown at this point as appearing very firm, strong and confident.

598 Ms. Brown then saw Mr. Wightman, and followed him upstairs to his office, where she told him that she was not accepting the new terms and conditions of employment. No one else was present. Mr. Wightman testified that she looked him right in the face, and, using a very shrill tone, he imitated her, saying, "I'm not accepting your terms and conditions of employment". They both testified that she turned to walk away, and Mr. Wightman said "Camilla, wait!". Ms. Brown replied "I'm done!" or "we're done!", once or twice, and walked out. Mr. Wightman testified that she stomped down the stairs. He found the terminology she used very strange for her. Clearly, it was the product of her conversation with her lawyer.

599 Ms. Brown testified that she felt completely humiliated. While she denied that she was angry, she said that she was upset. Everything had gone on behind her back, and no one thought to call and talk to her about it. She testified that she knew there were issues from talking to Ms. Novinc and Mr. Angelini, but did not expect this.

600 I cannot accept that the events of February 5, 2007 came to Ms. Brown as as much of a surprise as she testified. She had been speaking with Ms. Novinc and Mr. Angelini, and through them she was aware that there were significant changes afoot. She also was aware of the changes to the PML website, indicating that she was no longer a manager, but was now a sales representative. She had also received Mr. Wightman's April 28, 2006 e-mail, from which she knew that there were significant changes to the terms and conditions of her employment, including her hours of work, and the requirement that she work from PML's office, and not from home. As discussed in further detail below, Ms. Brown had already contacted two recruiting agencies and drafted her résumé. Further, Ms. Brown had already consulted with counsel, and while she testified that she hoped not to have to take legal action, I find she clearly contemplated the possibility of doing so in anticipation of February 5.

601 While some details of what she was presented with on February 5 may have been news to Ms. Brown, the major elements were not. It was for that reason that Ms. Brown was prepared, after only a few minutes spent in conversation with her counsel on her cell phone in the parking lot, to unequivocally inform Mr. Wightman that she was not accepting the new terms and conditions of employment.

602 Because the major elements of what Mr. Wightman told her that day were not a surprise, I do not accept that Ms. Brown was as humiliated as she testified she was. I do accept that being told she would sit at a desk in the hallway outside Mr. Wightman's office was humiliating. The day cannot have been a pleasant experience for her.

16. Subsequent events

The alleged bet

603 According to Mr. Angelini, the day Ms. Brown left PML there was a bet between Mr. Wightman and Ms. Davie as to whether she would come back, with Mr. Wightman saying she would not, and Ms. Davie saying she would. Under cross-examination, Mr. Angelini continued to maintain that this was actually a bet, and not merely a discussion about the likelihood of Ms. Brown returning. He said that Ms. Davie told him about it in a joking manner, while he found it sad that Ms. Brown left.

604 Ms. Davie testified that she spoke to Mr. Angelini soon after Ms. Brown left, and did so because he was Ms. Brown's friend. Ms. Davie testified that she was flabbergasted that Ms. Brown had left, and said to Mr. Angelini that she bet she would be back that afternoon. She then talked to Mr. Wightman, although she did not say what about in her direct evidence. When asked in cross-examination, she testified that she believed that Mr. Wightman expressed the view that he did not think Ms. Brown would be back.

605 Ms. Davie denied that there was any bet, and testified that her reference to one was merely a figure of speech. Ms. Davie testified that it was her genuine expectation that Ms. Brown would return, for a number of reasons, including that: she was a part of the company; was being given a great opportunity; was a great saleslady; had good earning potential; a great client base; and worked very well together with Mr. Angelini. She testified that she was pretty certain Ms. Brown would return. I accept that this was Ms. Davie's honest view of the matter at the time.

606 Mr. Wightman testified in cross-examination that Ms. Davie said to him that Ms. Brown had a great opportunity and that she bet she would be back. He responded that he did not think so.

607 I do not find that Mr. Wightman and Ms. Davie actually had a bet about whether Ms. Brown would return. This was more in the nature of a discussion about whether each of them thought she would return. Mr. Angelini likely overreacted to what he saw as inappropriate jocularity with respect to the question of whether his friend, Ms. Brown, would return to PML.

608 In response to the suggestion in cross-examination that he knew that Mr. Wightman wanted Ms. Brown back, Mr. Angelini testified that he did not know that. He also said that he had no discussions with Ms. Davie about whether she wanted Ms. Brown to return.

609 Mr. Angelini was asked in cross-examination whether the context for Mr. Wightman saying that he did not think Ms. Brown was likely to return was her alleged earlier threat to sue him over the car allowance she was not paid while on her second maternity leave. He disagreed.

610 I find the fact that Mr. Wightman did not believe Ms. Brown would return significant. I find that Mr. Wightman knew full well that Ms. Brown was unlikely to accept the changes that he told her had been and would be made to her position. From his perspective, it mattered little if she did or not: if she did not, he was rid of an employee who had grown troublesome to him; if she did, he had his best salesperson back in a sales position.

Letter purportedly accepting Ms. Brown's resignation

611 On February 8, 2007, Mr. Wightman allegedly signed a letter to Ms. Brown in which he stated that "we regretfully accept your resignation". In it, he briefly reviewed, from his perspective, the events of February 5. He went on to state that:

> I was personally saddened when you stated to both Janet Davie and myself that you are not willing to accept the terms and conditions of your employment at PML ... you then closed our meeting with the statement "we are done" which I regretfully accept as your verbal resignation. This was confirmed to me by your absence from work on scheduled workday of Wednesday February 7, 2007.
>
> PML ... and myself will truly miss your contribution, and wish you all the best in your future endeavors. We have enclosed your record of employment.

612 This letter was written without Ms. Davie's assistance, who testified that she did not see it until sometime after it was purportedly sent out. She believed that it was written with the assistance of legal counsel. Mr. Wightman testified in cross-examination that it was written by his lawyer.

613 Ms. Davie testified that the letter is inaccurate in some respects.

614 In particular, Ms. Davie testified that she did not hear Ms. Brown say "we are done". This is in contradiction to what she stated in her affidavit filed in support of the application to dismiss, where she swore that she twice heard Ms. Brown say "we are done". When asked about that contradiction, Ms. Davie did not attempt to offer any explanation. She did not know how she had come to swear to such an incorrect statement.

615 I have no doubt that the evidence Ms. Davie gave before me, and not her evidence in her affidavit, is accurate. The fact that she accepted the inaccuracy of her affidavit, without attempting to construct an explanation or excuse, bolstered her credibility before me. I find that Ms. Davie was honestly unable to explain how she came to swear an inaccurate affidavit, and was rather ashamed for having done so.

616 Further, Ms. Brown's ROE was not enclosed with the letter. Ms. Davie testified that the preparation of ROEs is her responsibility, and that she checked with Canada Employment, which told her that, because Ms. Brown had not actually returned to work, no ROE was required. As a result, she did not prepare one.

617 In addition, Ms. Davie testified that she would not have said that Mr. Wightman was "saddened" by this turn of events. She would have described him as disappointed. She said they had no discussions about him missing Ms. Brown's contributions or wishing her the best.

618 Significantly, Ms. Brown did not receive this letter, or her ROE, after she left PML. Ms. Brown testified that she never received her ROE, and only received a copy of this letter in pre-hearing document production. Mr. Wightman testified that the letter was sent to Ms. Brown, but

did not know how. He agreed that her ROE was not included, and testified that he knew this before he sent the letter without it. I accept Ms. Brown's evidence that she did not receive either the letter or the ROE at the time they were allegedly sent; only received the letter in pre-hearing document production; and never received an ROE.

619 This letter is nothing but an after-the-fact construction on the respondents' part to buttress their version of events. In it, Mr. Wightman purports to accept Ms. Brown's resignation. The question of whether Ms. Brown resigned, or was constructively dismissed, is an important issue in this complaint, to which I return in my analysis below. For now, I note Mr. Wightman's evidence completely denying that he engaged in a course of conduct which made Ms. Brown's situation so untenable that she was forced to leave her employment on February 5.

Filing of complaint

620 Ms. Brown filed this human rights complaint on April 16, 2007. The Tribunal notified the respondents of the complaint by letter dated May 17, 2007, enclosing a copy of the Complaint Form.

621 Ms. Davie testified that she was surprised to receive the complaint, as she did not think that the conversation about Ms. Brown's return to work was ever completed. There were no discussions or negotiations. Things, she said, kind of dropped. For his part, Mr. Wightman said that he had never been involved in this kind of dispute before, although he had been involved in one labour and several small claims matters.

Mr. Wightman's subsequent comments about Ms. Brown and this litigation

622 Mr. Angelini testified that, at some point, Mr. Wightman told him that "he would never give that bitch a dime and will spend up to $250,000.00 of his money before he does". According to Mr. Angelini, Mr. Wightman then took out a calculator and figured out Ms. Brown's legal costs, and stated that she would eventually settle for about $50,000.00. Mr. Angelini was then asked if Mr. Wightman made comments about dragging the case out, and answered that he did, saying that he would make it go as long as he could, and spend money before "he'd give that bitch a dime". In cross-examination, he agreed that Mr. Wightman's defence was that he had not done anything wrong, and acknowledged that Mr. Wightman appeared to be upset because he did not feel that he had done anything wrong. Mr. Angelini took from Mr. Wightman's statements that money was not an issue for him.

623 Mr. Wightman did not address Mr. Angelini's evidence about these comments in his evidence. I accept Mr. Angelini's evidence on this point.

624 This comment was remarkably similar to one which I find below that Mr. Wightman made to Ms. Klatt about Ms. Brown in the context of asking her to swear an affidavit in these proceedings, namely, that "that fucking bitch will never get a dime out of me".

625 Mr. Angelini also testified about an advertisement for the home-building company owned by Ms. Brown and her husband that was circulated around PML sometime after she left. According to Mr. Angelini the word "masterbuilder", referring to Ms. Brown's husband, was altered to "masturbator". He said the alteration was done by Mr. Bowes, and that he believed Mr. Wightman saw it. In cross-examination, he said that Mr. Bowes told him he brought the ad in and passed it around. He testified that he asked Mr. Wightman about it, and that Mr. Wightman "blew it off". He ultimately agreed that he did not know for certain if Mr. Wightman saw the ad.

626 Mr. Bowes was asked about this allegation in cross-examination. He initially denied any recollection of such an ad or of altering it in any way. When more details were given to him, his recollection improved somewhat. Ultimately, he did not deny, and said it could very well be, that he made the alteration to the ad that Mr. Angelini testified about. He thought it was probably inappropriate and juvenile. He could not recall if Mr. Wightman saw the altered ad, but thought he would remember it if Mr. Wightman had reprimanded him for it.

627 I found Mr. Bowes' evidence on this point unimpressive. I find that he feigned a lack of recollection, and intentionally hedged his evidence, so as to avoid making the direct admission that he altered and passed around the ad, which he knew would reflect poorly on him. I have taken this and other difficulties I have already discussed into account in assessing the entirety of Mr. Bowes' evidence.

628 Mr. Wightman did not address this issue in his evidence.

629 I find that Mr. Bowes did alter and pass around the ad making the rude reference to Ms. Brown's husband. I also find that Mr. Wightman was aware of it, and did not take any steps to deal with it.

630 Mr. Angelini also testified that Mr. Wightman told him after Ms. Brown left that he liked to fly his plane over her house because she knew the sound and it would "piss her off". In cross-examination, he agreed that it was not uncommon for planes, including Mr. Wightman's, to fly over the area in which he and Ms. Brown both lived. I am unable to place any significant weight on Mr. Angelini's evidence about Mr. Wightman flying over Ms. Brown's house.

631 The reliability of Mr. Angelini's evidence on these and other points is in issue, with the respondents arguing that he framed his evidence to assist his friend, Ms. Brown.

632 To this end Mr. Angelini was asked in cross-examination whether he had ever made derogatory comments about Ms. Brown to Mr. Wightman. In response, he referred to a disagreement he and his wife had with Ms. Brown and her husband about a problematic building venture. He recalled speaking to Mr. Wightman about this, but denied recalling the exact words used. He denied telling people at PML that he did not like Ms. Brown, or that she lies, or that his wife was angry with him because he was helping PML and not Ms. Brown. He admitted saying to both Ms. Brown and Mr. Wightman that he wished she would just stop her human rights complaint (although Ms. Brown did not recall him saying that to her), and added that he suggested to Mr. Wightman that he call Ms. Brown and resolve the matter, but that Mr. Wightman refused.

633 Overall, the impression left by Mr. Angelini's evidence is that, while he remained employed by PML, he found himself in a difficult position, caught between his friend, Ms. Brown, and his employer, Mr. Wightman. Ms. Brown testified that, even after she left PML in February 2007, her relationship with Mr. Angelini remained somewhat standoffish until he left PML in or about January 2008. While I find that Ms. Brown exaggerated the degree to which her relationship with Mr. Angelini was strained, both before and after her departure from PML, I accept that Mr. Angelini's continuing employment relationship with PML, and his desire to appear loyal to his employer, complicated it.

634 This is consistent with Mr. Rilling's evidence, who testified that he had a conversation with Mr. Angelini, after the complaint had been filed and shortly before Mr. Angelini left PML, in which Mr. Angelini said he had been going to be testifying for Mr. Wightman, and now was going to be

doing so for Ms. Brown, and he was probably going to be sleeping on the couch, the inference being that his wife was unhappy with him.

635 Having since left PML, Mr. Angelini's loyalties, when he testified, were clearly with Ms. Brown. On certain points, I found him somewhat evasive, as for example when he denied recalling the exact words of any derogatory comments he might have made about Ms. Brown. I also found his evidence that he never talked to Ms. Brown about her human rights complaint, other than to find out when he would have to appear, improbable, given their close friendship. I also did not rely on Mr. Angelini's evidence about Mr. Wightman telling him to "write up" Ms. Brown, discussed above.

636 On other points, Mr. Angelini appeared to be honestly trying to remember what happened, and to be prepared to admit the limits of his memory. He also readily admitted to certain conduct which put him in a bad light, particularly the "screw girl" running joke discussed below.

637 Overall, while I have not accepted Mr. Angelini's evidence without question, I have been prepared to rely on it except as noted in the course of my findings.

The sales department since February 2007

638 Since February 2007, and to the dates of hearing, PML's sales department has continued to operate without a dedicated manager. For some time the sales staff continued to report directly to Mr. Wightman. More recently, in April 2009, in addition to his other duties, Mr. Lundquist assumed responsibility for the department. Ms. Tibbitts has taken on additional duties, and the new title of Contract Administrator. While some of the additional duties were previously performed by Ms. Brown, none of them are managerial in nature. Nor does Ms. Tibbitts have any sales responsibilities. Her responsibilities are administrative in nature. Ms. Novinc remains in sales, although Mr. Bowes has left. Ms. Mahy has been promoted into a sales role.

17. Ms. Brown's relationship with the some of the witnesses in this case

639 One of the allegations in Ms. Brown's complaint was that, since leaving PML, her "former friends and colleagues at PML have severed their relationship with her because they are afraid to communicate with her." She alleged that this significantly affected her personal life, and referred to former colleagues who are neighbours of hers. In her complaint, Ms. Brown did not identify the former friends and colleagues who had severed the relationships with her because of their fear of communicating with her. In cross-examination, she identified Ms. Tibbitts, Ms. Novinc, Ms. Freer, Mr. Angelini (until he quit), Ken and Erica Bowes, and another couple, whose surnames she did not know, who were friends of the Bowes.

640 But for this allegation, I would not have dealt with this evidence at any length in this decision. Given the allegation made by Ms. Brown, I must do so, albeit with some reluctance given the personal nature of the evidence.

641 It was apparent, on all of the evidence, that many personal relationships were fractured in the wake of the breakdown in the relationship between Ms. Brown and Mr. Wightman. The evidence did not bear out, however, Ms. Brown's allegation that this was because her former friends and colleagues were afraid to speak to her.

Ron Angelini

642 I have already addressed Mr. Angelini's situation, and find that while their relationship was complicated while he remained employed at PML, it was never as distant as Ms. Brown attempted to maintain, and has since been entirely restored.

Ms. Tibbitts, Ms. Novinc and Ms. Freer

643 Ms. Novinc and Ms. Freer are sisters, and knew Ms. Brown before Ms. Brown hired Ms. Novinc to work at PML in October 2004. Despite Ms. Novinc's attempts to minimize it, she and Ms. Brown were clearly friends while both were employed at PML. Ms. Novinc retained some loyalty to Ms. Brown while the latter was on maternity leave, as shown by her covert communications to her about the changes happening in Ms. Brown's absence. The evidence did not reveal a particularly close relationship between Ms. Brown and Ms. Freer, whose first day of work was February 5, 2007, meaning that they never worked together at PML.

644 Both Ms. Tibbitts and Ms. Brown described a friendly relationship before and during their work together at PML, including Ms. Tibbitts attending social events at Ms. Brown's home.

645 There was no direct evidence about the current state of Ms. Brown's relationship with Ms. Novinc, Ms. Freer and Ms. Tibbitts, beyond Ms. Brown's identification of them as among the group that had severed their relationships with her because they were afraid to communicate with her. In the context of this case, given that they continue to work at PML and testified for the respondents in these proceedings, it is reasonable to infer that their relationships with Ms. Brown have been damaged, probably irreparably.

646 I am unable to find, however, on the evidence before me, that the breakdown in Ms. Brown's relationship with these three women was because they were afraid to speak to her. I accept that it would, in the circumstances, have been impossible for any of them to maintain a friendship with her.

The Bowes

647 Ms. Brown, Ms. Bowes and Mr. Bowes all testified about their previously close friendship, and the reasons for its complete breakdown. Of the three, I found Ms. Bowes to be the most credible witness, who testified with obvious reluctance about matters that were personally difficult for her. I note that both Bowes testified that they were present under an order to attend.

648 Ms. Brown and Ms. Bowes met each other in 2000 as part of a mother-baby group, and became very close friends, as did their respective families. The two families lived close to one another in Maple Ridge, and saw much of each other. That continued to be the case when Mr. Bowes was hired by Ms. Brown to work at PML in January 2005.

649 Both Ms. Brown and Ms. Bowes testified that they continued to see a great deal of each other at the beginning of the former's maternity leave in February 2006. The dispute as to when, and why, the relationships between Ms. Brown and Ms. Bowes in particular, and the two families more generally, broke down begins at that point.

650 Ms. Brown testified in cross-examination that the Bowes no longer speak to her, and that that started after she filed this complaint in April 2007. She linked the Bowes' decision to no longer speak to her directly to Mr. Wightman's negative influence. She absolutely denied that their friendship had disintegrated long before she filed the complaint.

651 It was the respondents' position that the relationships broke down as a result of Ms. Bowes withdrawing from Ms. Brown for a number of reasons, none of them because Ms. Brown filed this complaint or the result of Mr. Wightman's influence.

652 Ms. Bowes testified that she gradually saw less of Ms. Brown in 2006. She testified that her perspective changed over that year, for a number of reasons. One, she felt caught in the middle of Ms. Brown's conflicts with Mr. Wightman. Because her husband worked at PML, she felt very uncomfortable listening to Ms. Brown's concerns. She felt stuck in the middle, and was tired of hearing Ms. Brown's complaints. As a result, she said, she began to withdraw. Two, she saw a conflict in their value systems, as she perceived that Ms. Brown's motivation in life was money and material gain, and that was in conflict with how she liked to live her life.

653 Among the things that Ms. Bowes said that Ms. Brown shared with her about work was her need for an increased car payment, and wanting to maintain her cell phone during her maternity leave. From Ms. Bowes' perspective, Ms. Brown seemed to be constantly manipulating to get more.

654 In cross-examination, Ms. Brown denied that Ms. Bowes was uncomfortable with her sharing information and concerns about her employment while she was on maternity leave.

655 In this connection, Ms. Brown recounted a conversation that she said happened in a coffee shop in May 2006. Ms. Brown was very upset, and after saying that she probably should not talk to her, told Ms. Bowes about Mr. Wightman's April 28 e-mail and their subsequent conversation, as well as the buy-out she understood Ms. Snalam to have received. According to Ms. Brown, Ms. Bowes encouraged her to tell her about these things. While she initially denied it, Ms. Brown later conceded that it was possible she also talked about her concerns about her car allowance in this conversation. In direct, Ms. Brown denied that she told Ms. Bowes she wanted a buy-out in this conversation; to the contrary, she was worried that she was going down the same road as Ms. Snalam. In cross-examination, she denied ever having told Ms. Bowes she wanted a buy-out.

656 Ms. Brown said that this conversation was the only time she talked to Ms. Bowes about her employment-related concerns while on leave. She added in re-examination that Ms. Bowes also shared with her her husband's boredom at work.

657 In cross-examination, Ms. Brown testified that she also spoke to Ms. Bowes about a position available at Johnston Controls, suggesting that Mr. Bowes could apply for it. In her testimony, Ms. Bowes agreed that she did so. Ms. Brown did not pursue this opportunity herself, as she was on maternity leave at the time.

658 For her part, Ms. Bowes testified that Ms. Brown was not sure what her status would be at the end of her maternity leave, and said that maybe she would get a buy-out like Ms. Snalam did. Ms. Bowes did not provide a date for this conversation, but it appears to be the same one referred to by Ms. Brown.

659 Ms. Bowes denied telling Ms. Brown that her husband was bored at work. She testified that, by this time, she no longer trusted Ms. Brown and would not say anything to her about how her husband was feeling. In cross-examination, she also said that she did not recall her husband telling her he was bored at work.

660 Mr. Bowes denied being bored at work or telling his wife that he was. He might have told her if he was not having a good day. It was on one such bad day that he received a telephone call from a head-hunter that led to him leaving PML for Johnston Controls in 2007.

661 Ms. Bowes testified that this was only one of many conversations in which Ms. Brown shared with her her concerns about work and her interactions with Mr. Wightman. In cross-examination, she acknowledged that she never asked Ms. Brown to stop sharing these concerns with her, and accepted that it would have been a good thing to do had she thought of it.

662 I find that, in May 2006, Ms. Brown shared with Ms. Bowes her anxiety about what her status would be on her eventual return to work, and in that context raised the possibility that she would receive a buy-out like she understood Ms. Snalam had received. The evidence does not support the conclusion that Ms. Brown told Ms. Bowes that she wanted a buy-out; even on Ms. Bowes' evidence all Ms. Brown did was raise the possibility that she might receive one. Given the uncertainty around what Ms. Brown's status would be on her return to work, the April 28 e-mail, and Ms. Snalam's recent experience, this is not surprising.

663 I also find that this was not the only occasion on which Ms. Brown raised concerns about her employment with Ms. Bowes. Ms. Bowes encouraged her to share such concerns, and also shared her own confidences, as one would expect in a close friendship such as they enjoyed to that point.

664 Ms. Brown denied that Ms. Bowes withdrew from her because of a conflict over values, saying that it was her choice to pull back because she was finding out about things being relayed back to PML.

665 It was in this context that all three testified about an incident that occurred when Ms. Brown and her husband picked up their child from the Bowes' home. In cross-examination, Ms. Brown was asked about such an incident, and initially said they had picked up their child from the Bowes' home many times, but after further questioning, identified an incident in December 2006 when she said they were dropping off a gift. It was put to Ms. Brown that she was driving, did not leave the car, and when Ms. Bowes said hello, she did not respond. She denied this, in particular, that she was driving the car.

666 Ms. Brown agreed, however, that at the time they were driving a new Volvo, and testified that her husband told Ms. Bowes that Ms. Brown was exploring employment opportunities with a Volvo dealership because she was not sure what was happening at PML. Ms. Brown testified, however, that her husband only told Ms. Bowes this to test their suspicion that whatever they told the Bowes was getting back to Mr. Wightman. According to Ms. Brown, she heard Ms. Bowes' daughter ask about the car, but did not hear her husband's response. Ms. Bowes' daughter was standing at the door to the Bowes' home, and Ms. Brown's husband was standing nearby, perhaps 20 feet from where Ms. Brown was sitting in the car. Ms. Brown did not speak with the Bowes' daughter, but said she smiled and waved at her.

667 According to Ms. Brown, this was not a planned ruse, and Ms. Brown did not hear her husband say the story about the car being an inducement from the dealership at the time, but only told her about it afterwards. She testified that she was concerned that her husband had been untruthful, and told him she would not have done it that way.

668 According to Ms. Brown, within 24 hours her husband's story about the Volvo was back to Mr. Wightman, and then back to her door, which she found out about through Mr. Angelini. I note that this gainsays Ms. Brown's other evidence about the limited nature of her relationship and communications with Mr. Angelini while she was on leave.

669 Ms. Bowes testified that she came outside to chat when Ms. Brown and her husband came to pick up their daughter. On her account, she came to the passenger side, where Mr. Schmohl was sitting, and asked him about the new car. He told her that, because they were not sure of Ms. Brown's status with respect to returning to PML, she was pursuing employment with the Volvo dealership. She did not remember him saying anything about why they had the car. Ms. Bowes testified that Ms. Brown was in the driver's seat, and in a position to hear this conversation, but did not speak to her or acknowledge her in any way.

670 Mr. Bowes also testified about this incident. He said that Ms. Brown stayed in the car while her husband spoke to them. They were driving a new vehicle, and Mr. Schmohl told Ms. Bowes that it was an enticement for Ms. Brown to take a job at the dealership. He recalled nothing else about it.

671 Mr. Bowes was asked in cross-examination if his wife relayed to him things Ms. Brown told her while she was on maternity leave. His initial answer was that "you'll have to ask her". He then said that she would talk about her day and engage in "normal husband-wife conversation". When the question was repeated, Mr. Bowes said that "verbatim, no, but as a matter of her day, yes". When asked if he ever relayed what his wife said Ms. Brown told her to Mr. Wightman, he said yes. In particular, Mr. Bowes testified that he told Mr. Wightman about the conversation about the Volvo and being offered a job at the dealership. Mr. Bowes denied that Mr. Wightman asked him to relay information of that kind, and said that he simply passed it on as an interesting side note, and the kind of thing Mr. Wightman should be aware of about a returning employee. He denied any malice. He could not recall any other information that he relayed to Mr. Wightman about Ms. Brown, "other than information heard through the grapevine". When asked, he said that that included information about Ms. Brown telling his wife that she wanted a buy-out. Later, he said he was not sure if he relayed that information to Mr. Wightman.

672 Ms. Bowes was not asked in direct examination about conversations with her husband. In cross-examination, she was not sure if her husband shared with her the changes that were being discussed at work while Ms. Brown was on maternity leave. She said he may have, but she had little interest in such matters.

673 Ms. Bowes agreed that Ms. Brown viewed her as her confidante and would expect her to keep what she said confidential. She said, however, that she shared some things with her husband, including the position at Johnston Controls, the Volvo conversation and the buy-out comment. She testified that, at the time, she did not know that he took any of that information back to Mr. Wightman, but did know that at the time she testified. Ms. Bowes testified that she would assume that a wife might share such information with her husband.

674 The details of the exchange about the Volvo are unimportant for the purposes of this complaint. I do not believe Mr. Bowes was actually present for the conversation, as his wife did not mention him being there in her testimony, and instead referred to telling him about it, and he in turn relaying it to Mr. Wightman. I find that Mr. Schmohl concocted and told a story to Ms. Bowes about Ms. Brown driving the Volvo and seeking employment at the dealership for the purposes of seeing if the story would be repeated to Mr. Wightman, which it was. I doubt that Ms. Brown was the innocent bystander in this ruse as she claimed, but little turns on that for present purposes.

675 Further, I find that, throughout Ms. Brown's maternity leave, Mr. Bowes was relaying to Mr. Wightman information received by his wife from or about Ms. Brown that he thought signifi-

cant. Telling Mr. Wightman about the Volvo incident was not relaying "an interesting side note". In this connection, it is relevant to note Ms. Brown's evidence that, in May 2006, Ms. Novinc warned her that Mr. Bowes was relaying information to Mr. Wightman. Whether Ms. Bowes knew that her husband was doing so or not is not relevant to the matters at issue in this complaint.

676 By late 2006, the relationships were coming to an end. Ms. Bowes placed the cooling down even earlier, in the summer of that year. Ms. Brown testified that, although their relationship had already disintegrated, as late as November 2006, Ms. Bowes initiated contact with her, when she called her because she was upset about some bad news about her husband's health. Ms. Bowes thought this conversation occurred somewhat earlier, in September. Given the subject matter, I prefer Ms. Bowes' recollection of the timing. Further, they continued to have some contact through their daughters, who would sleep-over at one another's homes. For example, Ms. Brown testified about an incident in January 2007, during which Ms. Bowes picked up her child from Ms. Brown's home, where she had been to a birthday party. Ms. Brown testified that she was surprised Ms. Bowes stayed for the length of time she did, as she (Ms. Brown) had already pulled back by this time.

677 By 2007, the relationships were at an end. Ms. Bowes referred to an incident sometime thereafter when they ran into one another in a store. She said she greeted Ms. Brown, but Ms. Brown did not respond. They had reached the point where they could not even be polite to one another.

678 Ms. Brown and Ms. Bowes disagreed about who pulled back from whom, with each one claiming that they were the one to pull back from the other, for the reasons already given.

679 So far as Mr. Bowes was concerned, it was Ms. Brown's evidence that their relationship disintegrated before she went on her maternity leave. She did not know why, but speculated it was because she was his manager and they did not see eye-to-eye on issues at work. Although not specifically referred to by Ms. Brown in this connection, one such issue appears to have been with respect to a service contract with Inex Pharmaceuticals. Mr. Bowes performed some work on the contract, and wanted the full commission. Ms. Brown told Mr. Wightman this would not be fair, but Mr. Wightman allowed Mr. Bowes to receive full commission on the contract. Another incident was the disagreement over the commission split for the River Rock Casino project.

680 Mr. Bowes testified that the relationship broke down slowly over time, cooling off over the course of Ms. Brown's maternity leave. He testified that the families moved in different directions, with the Bowes spending more time in a different social circle. He denied that the end of the relationship had anything to do with work or PML. Mr. Bowes attributed the breakdown of their relationship to his wife becoming tired of hearing Ms. Brown complain, and talking about trying to get ahead. According to Mr. Bowes, his wife found Ms. Brown too materialistic, and they had less and less in common.

681 In cross-examination, Mr. Bowes testified that he continued to communicate socially with Ms. Brown and saw her pretty regularly in 2006 while she was on maternity leave, but did not really discuss work at all. In particular, he never told her anything about the impending changes in the sales structure and her job. He did not think it was for him to say, and at any rate, the friendship was winding down.

682 On all of the evidence, I find that Ms. Brown's and Mr. Bowes' relationship was already suffering in 2005, with Mr. Bowes chafing under Ms. Brown's management. This must have com-

plicated Ms. Bowes' relationship with her friend, Ms. Brown, even before the latter left on maternity leave. Further, it cannot be ignored that Mr. Bowes was actively at work on the project to change the sales structure while Ms. Brown was on leave, a project that saw Ms. Brown demoted, and about which he never spoke to her. Ms. Brown must have felt betrayed by Mr. Bowes' conduct in this regard.

683 Mr. Bowes found the suggestion that he was afraid to communicate with Ms. Brown, or was instructed not to do so by anyone, including Mr. Wightman, laughable. Ms. Bowes had a similar reaction to this suggestion. Ms. Bowes also denied that the end of the relationship was caused by what happened at the end of Ms. Brown's maternity leave, although she did say that, once she became involved in the human rights process, there could "of course" be no communication.

684 Both Bowes testified that part of the reason for the breakdown in their relationship with Ms. Brown was a conflict over value systems, the suggestion being that Ms. Brown was overly materialistic as compared to them. While Ms. Brown is certainly ambitious, I found this evidence self-serving, and disregard it.

685 I find that Ms. Brown's relationship with both Bowes was over long before the filing of this human rights complaint. Ms. Brown admitted as much in her testimony, referring to having pulled back in 2006.

686 The primary relationship was between the two women, who were best friends. The reasons for the breakdown of their relationship are complicated, and include: Ms. Bowes feeling caught in the middle between Ms. Brown and PML, by virtue of her husband's employment at PML; Ms. Bowes feeling caught in the middle between Ms. Brown and her husband, by virtue of the difficulties in their business relationship; and Ms. Brown losing her sense of trust in Ms. Bowes because of Mr. Bowes repeating information obtained from Ms. Bowes to Mr. Wightman. Likely both women pulled back.

687 At the same time, the relationship between Ms. Brown and Mr. Bowes also broke down. At a social level, the primary reason was the breakdown in the relationship between Ms. Brown and Ms. Bowes. There were also business reasons, including: Mr. Bowes' unhappiness with his income and some of Ms. Brown's decisions about commissions; Ms. Brown becoming aware, via Ms. Novinc and Mr. Angelini, of Mr. Bowes' involvement in the restructuring of the sales department; and Ms. Brown's accurate belief that Mr. Bowes was talking about her behind her back to Mr. Wightman.

688 By the time of Ms. Brown's abortive return to work on February 5, 2007, the relationships had ended. Neither the events of February 5, nor Ms. Brown's subsequent filing of the human rights complaint, were the cause of their breakdown. While it is reasonable to infer that Mr. Wightman would have welcomed the breakdown in the relationship between Ms. Brown and Mr. Bowes, and took advantage of it so far as it suited his interests, I am unable to conclude that he instigated it, or that either Bowes withdrew from their relationship with Ms. Brown because they were afraid to communicate with her.

18. Use of inappropriate language in the workplace

689 Evidence was led about the use of inappropriate language in the workplace. The potential relevance of this evidence sprang from the following allegations contained in Ms. Brown's complaint:

23. In a subsequent meeting [subsequent to the July 2005 meeting in which Ms. Brown and Ms. Snalam disclosed their pregnancies] between Ms. Brown and Mr. Wightman prior to Ms. Brown's leave, Mr. Wightman questioned Ms. Brown regarding whether her pregnancy was planned, stating words to the effect, "I thought you were done with kids after the last one". Mr. Wightman gave Ms. Brown a card for one Dr. Pollock, a specialist in vasectomies, and told her to give the card to her husband. Mr. Wightman's conduct was embarrassing and upsetting to Ms. Brown.

26. During late December 2005 and early 2006, at the time when Ms. Brown prepared to take her maternity leave, Mr. Wightman told Ms. Brown he thought Ms. Snalam was as a "fuck up" ...

32. While Ms. Brown was on her maternity leave, Mr. Wightman also treated another pregnant employee, Rhonda Klatt, poorly during the months preceding her maternity leave ... Shortly after Ms. Klatt went on maternity leave, Mr. Wightman referred to Ms. Klatt as a "cunt" in front of other employees.

690 In this part of my decision, I address the evidence relating to these three allegations, and the other evidence led about inappropriate language in the workplace. The other evidence was led, in part, in an attempt to show that Ms. Brown herself participated in similar inappropriate conversation or language usage, and, in the case of the vasectomy conversation, could not have been embarrassed or upset by it.

Vasectomy conversation

691 Ms. Brown testified that Mr. Wightman never made negative remarks to her about her being pregnant. She testified, however, about a conversation in which he said to her that he thought she was done with all this, *i.e.*, done with having kids. According to Ms. Brown, Mr. Wightman then gave her a business card for Dr. Pollock, a doctor who performs vasectomies, to give to her husband. Ms. Brown testified that this event happened in Mr. Wightman's office, and that she felt embarrassed, as she was visibly pregnant at the time, and felt it was inappropriate. I refer to this as the "vasectomy conversation".

692 The respondents admitted that Mr. Wightman had such a conversation with Ms. Brown, but submitted that it was done casually, and that the context of the conversation was important. In particular, they submitted that Ms. Brown commonly discussed matters relating to getting pregnant, whether she wanted to have more children, and vasectomies, and generally promoted banter and joking in the workplace, such that she could not have been embarrassed by what Mr. Wightman said on this occasion.

693 This allegation and defence require discussing a body of evidence which must be awkward for all concerned, but cannot be avoided.

694 Ms. Brown testified that she had, at some point, told Mr. Wightman that she was done with having kids after her first two children were born. She could not say how long before the vasectomy conversation this was. She maintained that she was very uncomfortable when Mr. Wightman brought the subject up in the vasectomy conversation.

695 Ms. Brown was asked in direct if she had ever talked to Mr. Wightman about vasectomies prior to this conversation. She said that she had done so at a social event with Mr. Wightman and some of his friends at a vacation home at Green Lake. Among those present was Ms. Lundquist. According to Ms. Brown, Ms. Lundquist and Mr. Wightman's wife were joking about making their husbands have vasectomies. In cross-examination, she said that she did not remember whether she told Ms. Lundquist that she thought her husband should be "fixed". She also testified in cross-examination that, while she was there, and did not leave, she did not remember participating in the conversation.

696 In his affidavit, Mr. Wightman recounted a conversation about difficulties conceiving, in which he alleged that Ms. Brown had told him, in "colourful detail", about performing oral sex on her husband in a parking lot in order to obtain a sperm sample.

697 In her affidavit in response, Ms. Brown provided a different description of both the underlying incident and her conversation about it with Mr. Wightman. In her direct evidence, Ms. Brown denied ever having told Mr. Wightman that she had performed oral sex on her husband in a parking lot. In cross-examination, Ms. Brown testified that she told Mr. Wightman, whom she then considered to be her friend, about difficulties she had had conceiving. She agreed that she told him in some detail about the incident involving her husband providing a sperm sample. She denied telling him, however, how she helped her husband provide the sample, or that a man saw her doing so, or that she was amused by the incident. She testified that she was uncomfortable, but nonetheless chose to tell Mr. Wightman about this incident.

698 Mr. Angelini testified that he never heard Ms. Brown discuss vasectomies or whether her third pregnancy was unplanned. He also said that, while he never heard her discuss her sex life at work, he heard from Mr. Wightman that she had done so.

699 Ms. Novinc testified that Ms. Brown told her that it was probably time for her husband to get a vasectomy after the birth of their third child. She also talked to her about difficulties they had conceiving their first. Ms. Novinc testified she was very uncomfortable with these conversations. I am doubtful that Ms. Novinc was particularly uncomfortable with these conversations at the time they occurred. She did nothing to indicate to Ms. Brown that she was uncomfortable with them, and they clearly enjoyed a friendship while they both worked at PML in which the sharing of such confidences would be neither surprising nor inappropriate.

700 Ms. Tibbitts testified that Ms. Brown told her a story about her husband and trying to get pregnant that she thought was inappropriate. Like Ms. Novinc, Ms. Tibbitts enjoyed a friendly relationship with Ms. Brown, both before and during their work together at PML, in which the sharing of confidences would be expected. While I accept that Ms. Tibbitts may have felt that what Ms. Brown shared with her on this occasion was inappropriate, that would not necessarily have been apparent to Ms. Brown, given the context of their relationship.

701 In cross-examination, Ms. Brown testified that she did promote banter and joking in the workplace, and was aware that joking in the office sometimes included sexual innuendo, in which she said she participated "within limits".

702 For his part, Mr. Wightman testified about having chosen to have a vasectomy in or about 2004. PML was a close-knit office, and he took some ribbing about this. Vasectomies became a common joke around the office, especially among the women. He said that both Ms. Tibbitts and Ms. Brown were part of this joking.

703 Mr. Wightman testified that Ms. Brown came to him, probably in 2005, to ask him for Dr. Pollock's card. She had previously told him she was done with having children, and he repeated those words to her, and gave her the card.

704 On the whole of the evidence, I find that Ms. Brown and Mr. Wightman had a conversation about Dr. Pollock and vasectomies some time after she disclosed to him she was pregnant. The background to this vasectomy conversation included Ms. Brown's earlier comment to Mr. Wightman that she was done with having kids; her recounting, on any version, of the incident involving her husband; and her participation in the earlier vasectomy conversation at Green Lake.

705 It is not clear on the evidence who initiated this particular conversation. Each one said the other was the initiator. Given the circumstances, I find it more probable that it was Ms. Brown who initiated the conversation, rather than Mr. Wightman doing so unprompted, as alleged by her. Even if it was Mr. Wightman, I do not accept that Ms. Brown would have been embarrassed or uncomfortable as a result of Mr. Wightman bringing up the issue of vasectomies and Dr. Pollock in the office. She had initiated or participated in similar conversations with Mr. Wightman and other close co-workers in the past. Doing so was consistent with the nature of the friendship they enjoyed to this point. I find that Ms. Brown has taken this conversation out of context and exaggerated its impact upon her in an attempt to buttress her allegations of discrimination.

"Fuck-up" remark about Ms. Snalam

706 As already indicated, Ms. Brown alleged that, in a conversation in late 2005, Mr. Wightman referred to Ms. Snalam as a "fuck-up". This was in the context of a discussion about how Mr. Wightman wanted to get rid of Ms. Snalam and replace her with Ms. Davie, but complained that Ms. Snalam would get free lawyers, while he would have to pay thousands of dollars to get rid of her. Then, Mr. Wightman allegedly said "wait - I've got a new attitude, dealing with Harris and Company, I've got a good attitude against pregnant employees". Ms. Brown characterized this as a laugh or a joke on Mr. Wightman's part.

707 In his affidavit and the respondents' Response to Complaint, Mr. Wightman did not specifically address the "fuck-up" allegation, but did swear that he had obtained legal advice because he wanted to retain Ms. Davie as permanent, full-time Controller. He denied making any comment about a "new attitude" or paying thousands of dollars to "get rid of" Ms. Snalam.

708 In his testimony, Mr. Wightman denied ever saying that he did not want Ms. Snalam to return to work, or calling her a "fuck-up". He also denied telling Ms. Brown that he had retained counsel to provide advice on how to deal with Ms. Snalam, or that Ms. Snalam would have free counsel, while he would have to pay thousands to get rid of her. In cross-examination, he testified that he had received legal advice about Ms. Snalam, but was not receiving advice when he later issued the no-contact directive about Ms. Brown. He also denied in cross-examination that this was part of his "new attitude" towards pregnant employees.

709 This is difficult allegation to make findings about in light of the problems with the reliability of both Ms. Brown's and Mr. Wightman's evidence. Considering the evidence as a whole, however, I find that it is more probable than not that Mr. Wightman called Ms. Snalam a "fuck-up".

710 I find that, by this point, Mr. Wightman had come to the conclusion that, not only did he want Ms. Davie to be PML's Controller on a full-time, permanent basis, he also did not want Ms. Snalam to return to work.

711 Mr. Wightman had been very unhappy with the way in which Ms. Snalam had handled finding a replacement for herself for her first maternity leave, and the problems that arose with the company's finances during that leave. He had told her, in no uncertain terms, that that situation was not going to happen again, both on her return from that leave and when she told him about her second pregnancy. Then, problems had arisen with respect to vital matters related to the company, in particular payroll, when Ms. Snalam had to go on leave for a second time unexpectedly in August 2005.

712 Ms. Davie was now in place, and Mr. Wightman was already appreciating the superior skills which she, as a CMA, brought to the job. While Mr. Wightman testified that the notion was ridiculous in cross-examination, in his affidavit, he stated that he had come to the conclusion that he wanted to keep Ms. Davie as a full-time permanent controller. Certainly, not long after this, in March 2006, I find below that Mr. Wightman took steps to ensure that Ms. Snalam did not return to work.

713 While Mr. Wightman and Ms. Brown's relationship was beginning to show some strains by this point, they were old friends and colleagues, and I find it probable that he would have felt free to confide in her at this time about his desire not to have Ms. Snalam return. He had sought legal advice by this point, for which he cannot be faulted. He may have believed that Ms. Snalam would have a free lawyer while he would have to pay thousands of dollars. I have found that Mr. Wightman was quite free in talking about how much he anticipated litigation would cost on other occasions. He did so even with Mr. Angelini, whom he knew to be Ms. Brown's friend. It would therefore be in character for Mr. Wightman to, quite imprudently, talk to Ms. Brown about his desire not to have Ms. Snalam return, and the costs of the litigation he anticipated.

714 While the respondents sought through other evidence, to cast Mr. Wightman as the type of a person who rarely if ever swore, and certainly did not use language of this type, I find that evidence unpersuasive. In particular, I have already found that Mr. Wightman referred to Ms. Brown as a "bitch" on two occasions, to both Mr. Angelini and Ms. Klatt. Further, I find below that Mr. Wightman called both Ms. Brown and Ms. Klatt a "cunt". Calling Ms. Snalam a "fuck-up" is conduct of a similar nature. I find that Mr. Wightman did use that term to refer to Ms. Snalam.

"Cunt" remark about Ms. Klatt

715 This allegation, as opposed to the one made by Ms. Klatt in her testimony about Mr. Wightman calling Ms. Brown a cunt, was contained in Ms. Brown's complaint. Ms. Brown did not discuss this or any of her allegations about Ms. Klatt's treatment with Ms. Klatt before including them in her complaint. From Ms. Klatt's testimony, it appeared likely Ms. Brown learned of them through Ms. Snalam, in whom Ms. Klatt had confided. On Ms. Brown's evidence, she received this information from Mr. Angelini. I find that he was the likely source for this allegation. It is not clear, on the evidence, when Ms. Klatt first learned that Mr. Wightman had allegedly called her a cunt; certainly, it was sometime after the complaint was filed. They clearly discussed it when he asked her to swear an affidavit in support of the respondents' application to dismiss.

716 Mr. Angelini testified that, while Ms. Klatt was on maternity leave, Mr. Wightman called her a "cunt". He said that, on another occasion, Mr. Wightman told him and others, including Ms. Klatt and Mr. Rilling, that "cunt" stood for "can't understand normal thinking" (I'll refer to this acronym as "CUNT"). He did not recall any other comments by Mr. Wightman about Ms. Klatt or her maternity leave.

717 In cross-examination, it was put to Mr. Angelini that Mr. Wightman did not actually call Ms. Klatt a "cunt", but rather was only using the acronym CUNT. Mr. Angelini disagreed. He said that the word "cunt" was used, and that it was only afterwards that Mr. Wightman told them about the acronym. He was adamant that Mr. Wightman called Ms. Klatt a "cunt".

718 In re-examination, Mr. Angelini was asked if Mr. Wightman used another acronym, "WOZ". He said that he did, and that it meant "white only zone".

719 In cross-examination, Ms. Brown was denied that, when Mr. Angelini told her about Mr. Wightman calling Ms. Klatt a cunt, Mr. Angelini said anything about the acronym. According to Ms. Brown, Mr. Angelini told her he was appalled by Mr. Wightman using such language in front of another woman, although he could not remember who that woman was.

720 Mr. Rilling did not testify about this matter in direct. In cross-examination, he testified that he was aware of the CUNT acronym, but never heard it used in the office. He was not familiar with WOZ. He did not remember any discussions about either term with Mr. Wightman.

721 When Mr. Wightman first testified about this issue, he simply denied calling Ms. Klatt a "cunt". However, at the end of his direct evidence, Mr. Wightman returned to this issue. At that time he spoke at length about how he used to perform work for a manager at GCC, about whom he made a number of highly critical comments. Mr. Wightman testified that it was from the GCC manager that he learned both CUNT and WOZ. He testified that he discussed these terms with Mr. Angelini. Mr. Wightman testified that he was shocked and appalled by the GCC manager's use of these terms, especially WOZ, because GCC had so many Asian employees. When he came back from a meeting with the GCC manager sometime in 2004 - 05, he went to Mr. Angelini's office, closed the door, and with shock and disbelief told Mr. Angelini about what the manager had said. Mr. Wightman said the terms were never repeated outside Mr. Angelini's office, that he never used the CUNT acronym, and that Mr. Angelini was the only person he ever spoke to about it.

722 This was the first time in these proceedings that Mr. Wightman offered this story in explanation for use of the term CUNT. In his affidavit, he had said only that he did not refer to Ms. Klatt as a "cunt" in front of other employees.

723 This story was not put to Mr. Angelini in cross-examination. To the contrary, what was put to Mr. Angelini was that Mr. Wightman called Ms. Klatt a CUNT, not a "cunt", the implication being that that was somehow better. I fail to see how referring to a woman as someone who "can't understand normal thinking", by using the acronym CUNT, is less objectionable than simply calling her a "cunt". In any event, I do not accept that this story happened as related by Mr. Wightman. It is a self-serving, after-the-fact, construction on his part.

724 I find that Mr. Wightman did call Ms. Klatt a "cunt", and that the CUNT acronym was only explained by him at a later date. Both Mr. Angelini and Mr. Rilling were familiar with the acronym, and it is likely that he told both of them about the acronym, but not the story involving the GCC manager, which I find was concocted by him specifically for use in this hearing. While Mr. Angelini testified that Mr. Wightman also told Ms. Klatt about the acronym, she did not testify about it, and I find it unlikely that he did.

725 The highly offensive term "cunt" was outside the norms of the PML workplace, although it was one used by Mr. Wightman, on at least two occasions, in reference to Ms. Klatt and Ms. Brown.

Mr. Wightman calls Ms. Brown a "cunt"

726 Ms. Klatt testified about an incident she said occurred at some point during Ms. Brown's leave, perhaps two to three months before she was scheduled to return. She testified that Mr. Wightman said to her that "that cunt won't be returning and operating in the same way. She'll be here at 8:00 a.m." According to Ms. Klatt, Mr. Wightman tapped his watch and said he'd be there to meet her, and she'd be leaving at the same time as everyone else. Ms. Klatt testified that she said a "few things" in response, including that Ms. Brown was a "bitch", and agreeing with Mr. Wightman about how Ms. Brown behaved in the office. That was Ms. Klatt's view of Ms. Brown at that time. She did not find Mr. Wightman's statement unusual or offensive, taking it as normal conversation about Ms. Brown, with which she agreed at the time.

727 It was put to Ms. Klatt in cross-examination that, while Mr. Wightman was upset, he did not call Ms. Brown a cunt. She did not agree.

728 This allegation did not appear in Ms. Brown's complaint, because Ms. Klatt had not told her or anyone else about it. It was only later that she told Ms. Brown's lawyer about it.

729 Mr. Wightman did not directly address this allegation in his testimony.

730 I find that Mr. Wightman did make the remark about Ms. Brown testified to by Ms. Klatt. At the time, the two clearly had a relationship where they felt free to be frank. Ms. Klatt had a low opinion of Ms. Brown, and was only too happy to hear Mr. Wightman's comments, and agree with them. Mr. Wightman's alleged comments are consistent with his comments on other occasions. In his April 28, 2006 e-mail he had explicitly told Ms. Brown she would be at the office at 8:00 a.m., supposedly like everyone else, and had done so in what can only be described as hostile terms. Further, as I found above, Mr. Wightman used the term "cunt" to refer to another female employee on another occasion - somewhat ironically perhaps, Ms. Klatt. This was a term which was in Mr. Wightman's vocabulary to describe a female employee with derision.

Other inappropriate workplace language and its significance to the complaint

731 Mr. Angelini testified that both he and Ms. Brown sometimes used profanity in the workplace, but that in most cases, it was confined to one or the other of their offices. It might involve referring to a customer as "stupid", "dumb", an "ass", or a "bitch". When asked in cross-examination if one of Ms. Brown's most common expressions was "fucking asshole", he said not in the office, but that it was something he had heard her say outside the office. After I limited this line of cross-examination to language used at work, Mr. Angelini testified that he had never heard Ms. Brown refer to something as "fucked up", but had heard others use the phrase at PML, although such language, he said, was uncommon there.

732 Ms. Snalam's evidence was to similar effect. While she thought she had heard Ms. Brown use profanity at work, it was minor and occasional.

733 Mr. Angelini was asked in cross-examination whether he had ever seen Ms. Brown lose her composure at work. He said that he had on one occasion involving Mr. Rilling. While Mr. Angelini was unsure of the details, it involved Ms. Brown needing to use a digital camera which Mr. Rilling had in his possession. She slammed a door and went upstairs. Ms. Klatt recalled Ms. Brown slamming the door and a light falling down as a result.

734 Ms. Brown was also asked in cross-examination about losing her composure at work. She testified that she was sure she had more than once over the years. She volunteered the incident with

Mr. Rilling about which Mr. Angelini had testified, in which she said that she called him a "fucking asshole". She said that there was a disagreement about her wanting to use the camera, with Mr. Rilling calling her names, and her closing the door, none too gently. She was not aware what happened as a result of her slamming the door.

735 Mr. Rilling also testified about this incident. He said that Ms. Brown came to his office quite upset. He was not sure if she demanded that he sign the camera out, but he crumpled up a piece of paper and threw it in the garbage.

736 There is no significant difference in the various accounts of this incident, in which Ms. Brown became angry and swore at Mr. Rilling over his possession of a camera.

737 In re-examination, Mr. Angelini testified that he had also seen Mr. Wightman lose his composure at work. He gave an example of Mr. Wightman breaking the window of a truck because the keys had been locked inside. Mr. Wightman also testified about this incident, which he said Mr. Angelini got 80% correct. The differences between their accounts need not be addressed. Mr. Angelini also said that Mr. Wightman had thrown things at work, and kicked in office doors.

738 Ms. Klatt testified that she had once seen Ms. Brown lose her composure at work, telling Mr. Wightman to "fucking hurry up" when he was taking a long time in the bathroom. This was the only time she could recall Ms. Brown using this sort of language at work.

739 Ms. Klatt testified that she and the technicians she dispatched would sometimes use profanity in the workplace. She characterized it as a "man environment", where such language was not unusual. The term "fucking", while used, was not common.

740 Mr. Bowes testified that he had heard Mr. Wightman swear, but that it was not usual for him. Ms. Freer and Ms. Mahy both testified that they found Mr. Wightman courteous and respectful. They had not heard him use terms such as "bitch", "fuck-up" or "cunt". Ms. Novinc testified that she never heard Mr. Wightman use language of this kind. Mr. Rilling testified that he had never heard Mr. Wightman swear in the office.

741 Ms. Tibbitts initially testified that she had never heard Mr. Wightman or anyone else in the office use language of this sort. She testified that she found Mr. Wightman to have a very good sense of humour, and like Ms. Brown, to be very direct in telling you what he wants. In cross-examination, she referred to Mr. Wightman using the word "bastard", and, in a telephone conversation, asking, "how does this shit even happen?".

742 Ms. Davie testified that she never heard words like "fuck-up" or "cunt" at PML. She related that "any new girl had to have 'the talk'" from Mr. Wightman about how technicians can lose control, and profane language would not be directed at them, but that if they had concerns about language used, they should tell Mr. Wightman and he would deal with it. She called it the "uncle speech", and said that she heard it many times.

743 In cross-examination, Mr. Angelini testified about engaging in an ongoing joke with Ms. Mahy, a young PML employee, in which a screw was passed back and forth between them. He identified a note, dated October 24, 2006, in which he called Ms. Mahy his "screw girl". Mr. Angelini acknowledged the sexual innuendo involved, and that it was very inappropriate, especially for him as a manager.

744 Ms. Mahy also testified about this matter. She testified that she found a tiny screw, gave it to him, and he gave it back. She referred to the note, and said that she just laughed it off. It was clear that she did not consider the matter significant or troubling.

745 Overall, I found the evidence about both the use of profanity, with the exception of the slurs I have found Mr. Wightman to have used about Ms. Brown, Ms. Klatt and Ms. Snalam, and of people losing their composure at work, of little assistance. While not admirable, there is nothing surprising about the occasional use of profane language at work, nor of people losing their temper on occasion. Nor is it surprising that a person, such as Mr. Wightman, might be more careful in his use of profanity around comparatively junior female employees such as Ms. Mahy and Ms. Freer, and less cautious with more senior employees with whom he might feel more comfortable, such as Ms. Brown, Mr. Angelini and Ms. Klatt. I accept that both Ms. Brown and Mr. Wightman used profanity and lost their tempers at work on occasion. Those facts are not probative of whether Mr. Wightman discriminated against Ms. Brown.

19. The effect of the alleged discrimination on Ms. Brown and her mitigation efforts

Ms. Brown's attempts to find alternative employment

746 Ms. Brown testified about her efforts to find other employment, both before and after leaving PML. She testified that, even before February 5, 2007, after she saw the changes on PML's website in December 2006 and spoke with Ms. Novinc and Mr. Angelini about the pending changes at PML, she contacted two recruitment companies, Goldbeck and PeopleFirst Solutions, to inquire about part-time positions. She initially said that she had telephone interviews with both, but testified specifically only about an interview with Goldbeck, to whom she sent an e-mail on January 7, 2007. She also prepared her résumé at about that time. She told Goldbeck she was interested in part-time sales positions. After February 5, she contacted them again to follow-up, but testified that she was told that there were no part-time positions available.

747 Respondents' counsel took Ms. Brown through her résumé and e-mail to Goldbeck with a view to showing that, in them, she exaggerated her role in PML's growth. I find that Ms. Brown engaged in what might be considered typical sales hyperbole in representing her role in the company's increased sales, but did not knowingly misrepresent that role or the impact of her efforts. In this regard, it must be kept in mind that no one, including the respondents, questions Ms. Brown's abilities as a salesperson.

748 Ms. Brown obtained no job offers through Goldbeck or PeopleFirst.

749 Ms. Brown testified that she needed to start work right away after February 5, so she spoke with Pam Waddell, an architect who performed some work for her husband. Ms. Waddell operated Stone Ridge Home Designs. According to Ms. Brown, Ms. Waddell immediately retained her to perform interior design work, which she had performed for her husband on the side in the past. She was therefore able to start earning an income right away as a self-employed person under the operating name West Coast Installation. Invoices entered into evidence show Ms. Brown billing West Coast Installation for her time, and West Coast Installation in turn billing Stone Ridge Home Designs, and other companies and individuals, for work performed by her through West Coast Installation.

750 The first such set of invoices was dated March 16, 2007, for work Ms. Brown testified that she performed between February 5 and March 16.

751 Ms. Brown testified that she performed this work as much as time allowed, which she estimated at about 24 hours a week, and continued to do so through to the date of her testimony on this issue, February 19, 2009. In cross-examination, she said that she worked five days a week, from 8:00 a.m. to 1:00 or 2:00 p.m. While this estimate was given in relation to work performed for Ms. Waddell, it seems clear it was intended to encompass all work performed by Ms. Brown through West Coast Installation for all clients.

752 Ms. Brown was asked in direct why she had chosen to focus on her own business. In response, she testified that she needed a very flexible, part-time schedule. She testified that "I didn't want this to happen to me again". She felt that, if she worked for herself, "no one could treat me like this again".

753 In cross-examination, Ms. Brown testified that she had no further need of her résumé after February 5, 2007 because she had work with Ms. Waddell. Also in cross-examination, she agreed that it was her choice to continue with that work, and not to seek other employment. Ms. Brown said it was therapeutic, and she enjoyed it. She said that she saw no need to seek out more lucrative employment, as she was billing out at $65-$75 an hour, and was "giving it my all". She testified that she therefore stopped actively searching for other work. At the same time, she said that she continued searching on-line, and was constantly getting notifications from Goldbeck; she did not, however, make any applications or send out any résumés.

754 As of the date of her testimony, Ms. Brown said that her only work since leaving PML had been the design business with Ms. Waddell. Ms. Brown was asked if she had applied to any employers other than Ms. Waddell. She said that she had done so "recently", applying to the District of Maple Ridge. In cross-examination, she stated she applied on October 19, 2008, and this was her first and only job application since leaving PML. She applied because it was a part-time job, close to her home, which paid "decently. She said that this was the first part-time job she had found that paid a comparable salary. She also testified that she was only interested in part-time work, and would not apply for positions advertised as full-time. Ms. Brown said that she applied to the District of Maple Ridge because the design business was slowing down and was not successful. Ms. Brown was interviewed and short-listed, but was told in December 2008 that she was not the successful candidate.

755 On the evidence, it is clear that, after obtaining work with Ms. Waddell immediately after leaving PML, Ms. Brown made no further efforts to find alternative employment until October 2008, when she made a single, unsuccessful application for work with the District of Maple Ridge. She admitted in cross-examination that this was the only application she made to the time of testifying, in late February 2009.

Ms. Brown does not seek employment in the HVAC industry

756 Ms. Brown testified that she has made no applications for positions in the HVAC field. When asked why not, she testified that it was because she felt enough people knew what had happened to her. In cross-examination, she agreed that she could have made some calls in the HVAC industry, but chose not to.

757 Ms. Brown testified that she could not deal with the HVAC industry without having physical signs of stress. She testified that she "didn't want anyone to know that I wasn't who I used to be". Tearfully, she described the physical signs of stress as shaking, teeth chattering, and being unable to talk. Ms. Brown testified that, absent the use of medication (propanolol), these symptoms

would occur. I deal separately below with the medical evidence about Ms. Brown's symptoms, HVAC-related triggers, and use of propanolol.

758 Ms. Brown described a number of "triggers" for her symptoms, including: the HVAC industry generally; certain people, in particular Ken and Erica Bowes; and PML employees, trucks and logos. In relation to the Bowes, she referred to an incident when she picked up her daughter at school and saw Mr. Bowes, who by this point was with another HVAC company, Johnston Controls. She said that she was "sure it was all over there", and "couldn't deal with it". In relation to PML employees and trucks, she referred to being unable to go in a particular building due to fear of seeing them.

759 Ms. Brown testified that she had similar physical reactions when dealing with the human rights proceedings, *e.g.* when she had to do research, or received an e-mail from her lawyer.

760 Ms. Brown testified that she would take propanolol whenever she started to feel shaky or if she was preparing to do something which could trigger that reaction. For example, she testified that she takes propanolol when she goes to school to pick up her daughter, lest she see the Bowes. She would also do so if she was going to meet an old friend from the HVAC industry, as when she went to see Clive Yule's new shop.

761 Ms. Brown testified about going to Mr. Yule's shop. She said that she took propanolol in advance, so that while she felt sick and shaky, she did not look shaky. She described the effect of propanolol as feeling the same feelings inside, but not looking the same externally. She testified that she took propanolol before testifying, at least on some days that she gave evidence.

762 Ms. Brown testified that, as a result of these reactions, she had made no efforts to return to the HVAC industry.

763 I do not accept the alleged strength of Ms. Brown's adverse physical reaction to reminders of the HVAC industry. In the hearing, she was able to review materials referring to PML and bearing its logo, including her own résumé, without difficulty. On one occasion, an employee of Hytec, a HVAC company, came into the hearing room in uniform, to which she had no adverse physical reaction. When asked about this in cross-examination, she explained it on the basis that the individual in question was a friend of hers. This of course begs the question of why she would have an adverse reaction to going to Mr. Yule's shop, given that he too is a friend of hers.

764 It was apparent on the evidence that, had she sought to do so, Ms. Brown could have obtained employment in the HVAC industry.

765 For example, since leaving PML in January 2008, Mr. Angelini has worked for Hytec as a Service Account Manager. Mr. Angelini testified that he spoke to Vic Cedar, his boss at Hytec, about the possibility of Ms. Brown coming to work there, and that Mr. Cedar called Ms. Brown at his request. He said that he made this suggestion because "she is the best in the business". Mr. Cedar expressed some interest in Ms. Brown, and said that he would call her. Mr. Angelini did not talk to Ms. Brown about the opportunity at Hytec in advance, but spoke to her later to find out if Mr. Cedar had called her. She told him that Mr. Cedar had, but that she had declined to talk to him at that point. Mr. Angelini testified that Ms. Brown told him that she did not want to go back into the industry at that time. He denied that Ms. Brown had ever said that she did not want to return to work until the human rights complaint was completed because it might affect the financial compensation to which she was entitled.

766 Mr. Angelini testified on February 17 and 18, 2009, and said that the conversation in which Mr. Cedar said he called Ms. Brown had occurred a few months prior, towards late 2008.

767 Ms. Brown also testified about Hytec. She said that Mr. Cedar contacted her several times in December 2008, wanting to meet with her. She testified that she would see his phone number on her call display and take medication before she called back. She made an appointment to see Mr. Cedar at a restaurant in January 2009. She testified that she took medication in advance of their meeting, but had to call Mr. Cedar after she left home because she could not stop crying. She cancelled the meeting, telling him that she was not in a proper state of mind at that point.

768 Ms. Brown testified that she set the meeting up with Mr. Cedar because she had recently received Dr. McFadden's report, dated December 8, 2008. I deal with Dr. McFadden's report below. Ms. Brown testified that she felt like Dr. McFadden and "everyone" were accusing her of "faking it", so she thought she would see for herself. She testified that that is why she agreed to the interview, and that she had no other reason for doing so.

769 Ms. Brown also testified in cross-examination that she did not look at Dr. McFadden's report until late December, because she had been away on holidays in Maui from December 6 to December 28, and only reviewed it on her return. She made the appointment to see Mr. Cedar between January 10 and 14.

770 In explaining her decision to cancel the interview at Hytec, Ms. Brown referred to wanting make a good first impression, which she did not think she could do in her state at that time. She testified that she was not closing any doors, and might want someday to return to the HVAC industry. If the severity of her alleged physical reactions to HVAC-associated triggers were accepted, it is difficult to see how that could be possible. I find that Ms. Brown exaggerated her reactions to HVAC-related triggers in an attempt to justify her choice not to seek employment in the field in which she has worked her whole adult life.

771 Similarly, at the time she testified, also in February 2009, Ms. Snalam had several part-time book-keeping jobs, including one in the HVAC industry, with a company called Total Energy, which is owned by a former PML employee, Mr. Yule. A number of other former PML employees also work there, including Ms. Klatt, who helped Ms. Snalam to get her job there. Ms. Klatt had not offered similar assistance to Ms. Brown, although she testified that she would recommend her because she did her job well. Ms. Snalam testified that she was aware that Mr. Yule had had discussions with Ms. Brown about the possibility of her coming to work at Total Energy.

772 Ms. Brown testified that, while she did not receive a formal offer of employment from Mr. Yule, they discussed the possibility, and she knew that he wanted her to work for him. She did not pursue the opportunity because "I'm not going to take medication every single day to go to work".

773 The respondents submitted a brief of documents containing a number of job advertisements. A number of these were put to Ms. Brown in cross-examination. Ms. Brown had earlier testified that she continued, despite performing the design work, to look at ads, both on the internet and in newspapers. It was notable that, despite this, Ms. Brown did not recall seeing any of the ads to which her attention was drawn. Ms. Brown's counsel objected to my relying on the ads contained in this brief as evidence that the jobs advertised were actually available. I need not rely on them for that purpose, and make no ruling on this issue. On all of the evidence, I do not accept that Ms. Brown continued to look at job ads on a regular basis in the period between February 5, 2007 and her testimony in February 2009.

774 In the course of cross-examination on this brief, Ms. Brown also revealed that she was approached by another HVAC company, ESC Automation, but she was not prepared to work in the HVAC industry. ESC Automation advertised for a Mechanical Service Sales Representative in February 2009, which is one of the ads that Ms. Brown testified she was not aware of.

775 As I indicated at the outset of these reasons, I find that Ms. Brown exaggerated the severity of whatever distress she may feel in response to triggers associated with PML and the HVAC industry more broadly. There are a number of reasons for this finding.

776 For example, Ms. Brown claimed that she began to experience the symptoms of shaking and teeth chattering after she saw the changes to PML's website in December 2006. She also testified that the PML logo was itself a trigger. Yet in preparing her résumé in January 2007, she chose to put the PML logo on it. Ms. Brown was cross-examined at some length on this point, and her evidence was inconsistent and evasive with respect to whether this meant she had an emotional reaction every time she saw or dealt with her own résumé.

777 It was put to Ms. Brown in cross-examination that the fact she was approached by a number of HVAC companies meant that she was viewed positively in the industry, and that she was not, in fact, in the humiliating position she claimed. Ms. Brown disagreed, saying that humiliation is something one takes upon oneself.

778 While I accept that humiliation is a subjective experience, the evidence was clear that Ms. Brown's reputation in the HVAC industry was not adversely affected by her experience at PML. A reasonable person in Ms. Brown's position would have taken this into account in assessing whether to seek employment in the HVAC industry. Ms. Brown did not.

779 When asked in cross-examination, Ms. Brown testified that the work with West Coast Installation was the job she wanted to do. I accept that evidence. Ms. Brown chose to focus her energies on that work, "giving it her all", to the exclusion of any other meaningful job search.

Ms. Brown's earnings post-PML

780 Ms. Brown's Statement of Business Activities for 2007 shows a gross income of $54,268.18 and a net income of $27,969.54. She testified that she was self-employed as a sole proprietor in 2007.

781 On October 11, 2007, Ms. Brown and her husband incorporated a company, West Coast Dream Homes Ltd. Ms. Brown introduced into evidence a T4 which showed her earning employment income from West Coast in the amount of $20,000.00 in 2008. She testified that, in addition, she received a car allowance of $800.00 a month from West Coast, although this amount was not reflected on her T4. Ms. Brown testified that the income and car allowance were paid out in two instalments. Ms. Brown testified that she and her husband just decided on these amounts, although the company has made no money and is in debt. Her husband took the same amounts in income, which Ms. Brown testified was, together with hers, the minimum necessary to pay their bills.

782 An income statement for West Coast for the period October 11, 2007 to December 21, 2008 was introduced. It showed total revenue for the period in the amount of $1,890,843.51, and total expenses, including salaries, in the amount of $2,001,013.54, for a net income of -$110,170.03. Ms. Brown testified that the total compensation she had taken from this company was $29,600.00. The company is also her husband's source of income.

783 There was no evidence that the income statement was audited. Ms. Brown testified that a similar document was produced by Simply Accounting, which I understand to be a computer accounting program. Given that Ms. Brown and her husband took a two week vacation in Maui in December 2008, I find it unlikely that West Coast's and their financial circumstances were as bleak as presented.

20. Medical evidence and findings

Dr. Zubek's evidence about Ms. Brown's reaction to HVAC-related triggers

784 In support of her position that she could not return to work in the HVAC industry, Ms. Brown relied on the evidence of Dr. Zubek, her family physician since in or about 2002. In what follows, I summarize Dr. Zubek's clinical records, so far as they relate to matters in issue in the complaint, followed by a consideration of other evidence relevant to each entry in the clinical records. I have noted every visit recorded by Dr. Zubek between December 29, 2006, the first visit in which any matter related to this complaint was discussed, and January 20, 2009, the last visit before both Dr. Zubek and Ms. Brown testified in these proceedings.

1. December 29, 2006

785 This is the first of Dr. Zubek's clinical notes to record any information directly related to this complaint, and Dr. Zubek testified that it was the first time Ms. Brown raised any issue with her with respect to her employment at PML. In this note, Dr. Zubek stated:

> ICBC - sleepless nights & headaches re work stress, is to return Feb 1 then [note unclear] she learned on www that she is being replaced.

786 The remainder of the entry discusses matters associated with an ICBC claim related to a motor vehicle accident in which Ms. Brown was involved while employed by PML. In cross-examination, Ms. Brown indicated that it was sometime after she saw the changes to PML's website in December 2006 that she started to experience the shaking and teeth chattering which led her to consult Dr. Zubek. Nonetheless, Ms. Brown testified that the ICBC claim, and not the stress resulting from viewing PML's website, was the main reason for the visit. Ms. Brown was not sure under cross-examination if she actually told Dr. Zubek that she had been "replaced". In any event, the website alterations in question did not show Ms. Brown being replaced; rather, they showed her title and functions being altered.

2. January 23, 2007

787 Dr. Zubek's note indicates that Ms. Brown had "worries re: teeth chattering when confront boss". For the first time, Dr. Zubek prescribed propanolol to address this worry. As explained by Dr. Zubek in her evidence, propanolol is a beta blocker which counteracts the effects of excess adrenalin, with the result that one does not have the physical manifestations of stress. It is not a treatment and does not eliminate the underlying stress, but rather merely masks the external symptoms of stress.

788 Dr. Zubek's note also refers to a prescription for medication for an underactive thyroid condition for which Ms. Brown had been taking supplements for some time. In Dr. Zubek's opinion, that condition and medication were unrelated to Ms. Brown's work-related issues.

789 Ms. Brown testified in cross-examination that she was concerned that she would appear weak, and that Mr. Wightman would take advantage of any signs of anxiety, which she thought could lead to a terrible confrontation.

790 I accept that Ms. Brown was fearful of her upcoming meeting with Mr. Wightman, and saw Dr. Zubek about this fear.

3. February 26, 2007

791 Dr. Zubek's note indicated that they discussed "current stress from lawsuit with former boss. She is in tears in office, appears completely stressed". Dr. Zubek testified that Ms. Brown came in because of elevated blood pressure, and that it was in that context that they had this discussion.

792 At this point, no lawsuit had been initiated, but given that Ms. Brown had only left PML a couple of weeks before on February 5, 2007, Dr. Zubek's description of Ms. Brown's demeanour, as tearful and appearing stressed, is probably accurate.

4. March 12, 2007

793 Ms. Brown saw Dr. Zubek for unrelated matters. According to Dr. Zubek's note, there was no discussion of anything related to Ms. Brown's employment situation, pending litigation with the respondents, or emotional state.

5. April 19, 2007

794 Dr. Zubek gave Ms. Brown a refill for the propanolol prescription. While the note is somewhat difficult to decipher, it appears to refer to "stress - now went to human rights tribunal ... also going to tribunal causes stress, will do massage therapy to help relieve stress & muscle spasm". The note also refers to other conditions and concerns.

795 Dr. Zubek testified that she prescribed the propanolol for Ms. Brown to use before she would go to the human rights tribunal or speak to someone about issues on a preventative basis to make her look calm and confident.

796 At this point, Ms. Brown had just filed her human rights complaint. As she admitted in cross-examination, she was not "going to tribunal" at this point, but said that the whole process caused her stress. I accept that dealing with legal processes, including proceedings before the Human Rights Tribunal, can be stressful, and that Ms. Brown experienced them as such. It appears however, that either Ms. Brown did not accurately describe to Dr. Zubek why she felt she needed the propanolol, or that Dr. Zubek did not fully understand Ms. Brown's circumstances and why she felt she needed the propanolol.

6. June 14, 2007

797 Dr. Zubek's notes address, in the main, matters related to Ms. Brown's ICBC claim. They also refer to again refilling the propanolol prescription to "control teeth chattering in ongoing work matters".

798 Again, Dr. Zubek testified that her understanding was that Ms. Brown required the propanolol in order to appear in courts or tribunals, which could not have been accurate at this time, as Ms. Brown was not appearing in any legal proceedings.

799 Ms. Brown agreed in cross-examination that, to this point, Dr. Zubek's notes contain no reference to the HVAC industry, or to any difficulties seeking work in that field.

7. July 19, 2007

800 Ms. Brown saw Dr. Zubek for matters unrelated to this complaint.

8. August 16, 2007

801 Dr. Zubek's notes refer to a referral to a cardiac specialist, Dr. McLeod. The referral arose out of Ms. Brown's concern that she might be subject to a hereditary cardiac problem.

802 Dr. McLeod saw Ms. Brown on September 21, 2007, and his letter of that date to Dr. Zubek indicates that Ms. Brown did not have any cardiac problems. He did refer to her "getting a sense of palpitations", which seemed to be related to stress, in particular stress related to "some legal battles" she was having. He referred to her intermittent use of propanolol to deal with this problem, which he noted seemed to help. He thought it reasonable for her to continue to use the propanolol to deal with her stress-related issues.

9. January 23, 2008

803 Ms. Brown saw Dr. Zubek for matters unrelated to this complaint.

10. February 13, 2008

804 Under the heading "Legal", Dr. Zubek recorded the following:

> Discussion re: HVAC sales management, it was 6 figure income, but if walks into environment gets shaky, panicky. Every time she talks about it to me is shaky, looks jittery & anxious.
>
> Propanolol gets her through.
>
> I have seen her both talking about it & not talking about it, & her sense of calm/anxiety states is completely different.
>
> In a new field she is able to be who she was; in that field reacts "like I'm a mess".

805 Dr. Zubek's note also includes interstitial references to "PML Professional Mechanical Ltd." and "Heating & Ventilation & air conditioning industry". Dr. Zubek testified that the heading "Legal" was written by her staff, and not her, and she did not think it was appropriate.

806 This is the first reference in Dr. Zubek's notes to HVAC or any problems experienced by Ms. Brown in dealing with that industry. In cross-examination, Ms. Brown refused to admit that it was also the first visit on which she had mentioned the HVAC industry, or that industry as a trigger for being shaky and jittery. Ms. Brown did accept that, before February 13, 2008, Dr. Zubek interpreted her concerns as being related to the human rights proceedings, but disagreed that that was, in fact, the nature of the concerns she had related to Dr. Zubek prior to this time.

807 I find that, consistent with the contents of Dr. Zubek's notes, this was the first occasion on which Ms. Brown raised the HVAC industry as a trigger for her physical reactions.

808 Ms. Brown testified that she went to see Dr. Zubek on this occasion because her legal counsel was going to be contacting her to obtain her opinion. At this time, the hearing of the complaint was scheduled for April 2008. Ms. Brown testified that, during their visit, Dr. Zubek asked her for more details. Ms. Brown testified that she had recently been to see Mr. Yule's new operation at this point, and relayed her experience doing so to Dr. Zubek.

809 The next day, February 14, 2008, Dr. Zubek wrote an unaddressed letter about Ms. Brown. I address that letter, and the circumstances surrounding it, in greater detail below.

11. February 19, 2008

810 During a visit for an unrelated matter, Dr. Zubek noted that Ms. Brown was using the propanolol more often lately. Dr. Zubek testified that she assumed that that was because of more court involvement. She prescribed another refill.

12. March 31, 2008

811 Dr. Zubek's clinical note indicates that she was again called by Ms. Brown's lawyer, this time to ensure the accuracy of her earlier statement that Ms. Brown had no past emotional or psychiatric history. Dr. Zubek reviewed the file, and stated that Ms. Brown "has handled stressors well, this is a very isolated issue and she was not predisposed".

13. April 23, 2008

812 Dr. Zubek's note states only that Ms. Brown attended for a "talk" and refers to a "disability form". The form referred to appears to be one for Watermark, an insurance company, that was requesting Dr. Zubek to provide information related to "depression/psych; cardiovascular".

813 On April 24, 2008, Dr. Zubek filled out the Watermark form, stating that "Camilla Brown is healthy." She stated that there was no cardiovascular disease, and

> she had some palpitations related to a human rights tribunal she is testifying in. She does not have depression and never has had depression. Her symptoms of anxiety are solely related to issues surrounding the human rights case she is testifying for and do not affect other areas of her life that are unrelated to the case!

814 In cross-examination, Ms. Brown maintained that she did not know that Dr. Zubek was filling out this form, and did not give her permission to provide information to Watermark. She testified that she was applying for life insurance at the time.

815 I do not accept Ms. Brown's evidence that she knew nothing about this form and did not give Dr. Zubek permission to provide information to Watermark. Dr. Zubek's April 23 note refers to talking to Ms. Brown and a disability form. It is most probable that, in that talk, Ms. Brown gave her consent to Dr. Zubek providing this information to Watermark. I find that Ms. Brown, in claiming a complete lack of knowledge about this form and its contents, was attempting to distance herself from the opinion given by Dr. Zubek in it, namely that she was healthy, did not and never had depression, and had anxiety symptoms solely related to testifying in a human rights case. It is notable that, to this point, Ms. Brown had never testified in relation to these proceedings.

14. August 7, 2008

816 Ms. Brown saw Dr. Zubek for unrelated issues. Although Dr. Zubek's notes are not entirely clear, it appears that either she or another physician also saw, or at least prescribed medication, for Ms. Brown for unrelated matters on July 8 and 25, 2008.

15. December 3, 2008

817 Under the heading "Anxiety/Depression", Dr. Zubek recorded that Ms. Brown required a refill of propanolol "for use specifically with court issues". Dr. Zubek recorded that Ms. Brown stated that "she makes it though the court with the appearance of calm thanks to the propanolol calming the bodily effects, then on the train coming home is in tears". Dr. Zubek wrote that "she holds to the knowledge that she is going through all this for women in general, to set a precedent so that other won't be in similar circumstances." In this connection, Ms. Brown referred to her own daughters, "and realizes there is a good chance they will end up in a male-dominated field in their own future, so feels she needs to keep up the court proceedings as stressful as they are, to set a precedent for their generation". Dr. Zubek refilled the propanolol prescription.

818 In cross-examination, Ms. Brown testified that the "court proceedings" referred to was the judicial review of the Tribunal's decision dismissing the application to dismiss the complaint, which was heard sometime on or before the date of the decision, November 26, 2008. Ms. Brown denied telling Dr. Zubek that she required the propanolol refill "specifically for court issues". She also denied saying that she made the remarks cited about holding on for the sake of her daughters or to set a precedent for women. She recalled telling Dr. Zubek that she did so because it was "what's right". She admitted not saying anything to Dr. Zubek about needing the propanolol to deal with HVAC-related triggers on this occasion.

819 I consider it most unlikely that Dr. Zubek would have made notes about Ms. Brown pursuing her case for the sake of her daughters and women generally had Ms. Brown not in fact made those remarks. I find Ms. Brown made the remarks attributed to her by Dr. Zubek.

16. January 20, 2009

820 Under the heading "Acquired hypothyroidism", Dr. Zubek noted that the appointment had been booked because Ms. Brown was running out of medication for that condition, although her hormone levels were "perfect". Dr. Zubek went on to note the following:

> However, she appears very shaky, her lower lip quivering, talking rapidly, right foot jittery/jiggling. I was concerned, and she told me that this morning she had booked an interview for an HVAC job because she felt that it had been two years and she hoped she could try to return to it, since they needed the money (husband is in construction and business is very slow in construction at present), and she was not able to make as much money in other fields aas she could in HVAC. She told me that in preparation for the interview she had taken her propanolol at 6am and the appointment was to be at 9:30 but in the morning she felt progressively worse and called to cancel the interview, feeling she just couldn't do it. She said she felt defeated, was in tears in my office.
>
> We discussed her concerns and she told me that she got similarly agitated when she even got a call from a potential HVAC employer, she felt unable to answer

> the phone and had to let them leave a message and calm herself down enough to then return the call herself.
>
> It was noted that while thinking/talking about anything in the HVAC line, she appeared very jittery and not at all composed. At the end of our visit the talk diverted towards my own current pregnancy, and within five minutes of discussion around this totally separate topic, her jitteriness had calmed by at least 60%, her speech slowed to a normal rate, and she was able to converse much more calmly.
>
> I note this particularly as the legal side against her has tried to say that her symptoms could be attributable to hyperthyroidism, but their proposal does not fit with the actual data of checking her laboratory status on supplementation, nor does it fit with the change in her status depending on whether she is discussing HVAC vs. another topic.

821 There are several aspects of this visit and note which must be addressed. For clarity, I note that the HVAC interview referred to was the one with Mr. Cedar at Hytec, addressed above.

822 First, the timing of the visit, and the information Ms. Brown chose to impart to Dr. Zubek on this occasion, are suspicious, given the fact that the Tribunal hearing was, at this time, rapidly approaching. I find that Ms. Brown was attempting to buttress her claim for damages by telling Dr. Zubek about her alleged reactions to HVAC-related stimuli.

823 Second, Ms. Brown was not forthright with Dr. Zubek. She did not tell her that the real reason she agreed to the interview with Mr. Cedar was her reaction to Dr. McFadden's report, and the perceived suggestion that she was "faking it", and not a real and genuine interest in returning to the HVAC field. Further, the information Ms. Brown conveyed to Dr. Zubek about her financial circumstances must be taken with a grain of salt. Ms. Brown and her family had just returned from a two week holiday in Maui, so their financial circumstances are unlikely to have been as precarious as she told Dr. Zubek.

824 Third, the description of Ms. Brown's demeanour, with the rapid change from the jittery state to a calm one depending on the subject matter under discussion, is remarkably similar to her demeanour in the hearing. It is at least equally consistent with an intentional or staged change of demeanour as a genuine physical response to the various topics under discussion.

17. Summary of Dr. Zubek's opinions

825 In direct examination, Dr. Zubek summed up her opinion with respect to Ms. Brown. She testified that there was not a one word diagnosis for Ms. Brown, and she did not fit into any DSM-IV category. Although her condition bore some similarities to both post-traumatic stress disorder ("PTSD") and acute stress reaction, she did not fulfil all of the diagnostic criteria for either diagnosis.

826 Dr. Zubek said that Ms. Brown went through a stressful period, with her livelihood and sense of self threatened. Anything related to HVAC triggered the arousal of her sympathetic nervous system, resulting in jitteriness, teeth chattering and the other noted physical manifestations.

827 Dr. Zubek opined that Ms. Brown did not have any other diagnosis which could account for her symptoms. In particular, her thyroid condition could not account for the situational nature of her reactions.

828 Dr. Zubek testified that she eventually reached the opinion, having watched Ms. Brown for over a year, and seeing how completely different Ms. Brown was when triggered by HVAC, that she should look at another field of employment. When asked what her opinion was about Ms. Brown working in HVAC in the future, Dr. Zubek said that, over the course of two years, she did not observe the triggers lessening, and was not overly optimistic that Ms. Brown would be better in a year's time.

18. Cross-examination of Dr. Zubek

829 Dr. Zubek was subjected to a lengthy and rigorous cross-examination. In this part of my decision, I summarize the most important aspects of that cross-examination not already addressed in dealing with Dr. Zubek's clinical notes.

830 Dr. Zubek admitted that she never referred Ms. Brown for counselling or to a psychologist or psychiatrist. She was unable to say with any degree of certainty whether she had ever put her mind to doing so; certainly, she had no note of considering making such a referral. In explaining why she had not made such a referral, she testified that, at the start, the need for medication was limited to dealing with hearings and court issues, and later was so situation specific to HVAC triggers, and that Ms. Brown did not have psychological elements in the rest of her life. She thought that she had considered it in the last six months before she testified in February 2009.

831 When asked whether, when she considered it, she concluded that counselling or therapy with a psychologist would not be necessary or beneficial for Ms. Brown, Dr. Zubek testified that Ms. Brown was going through therapy, namely, by going through the court case. She testified that she considered that it would not be psychologically helpful to Ms. Brown to return to work in HVAC until the legal issues were resolved. She later admitted that referral to a psychologist could possibly have been helpful.

832 In terms of referral to a psychiatrist, Dr. Zubek testified that she never referred or considered making such a referral for Ms. Brown. She admitted that she had not done a formal psychiatric history of Ms. Brown herself, but merely gathered information along the way. She testified that, while taking a formal history might have been helpful to the respondents' case, it would not have been helpful for her clinical decision-making. She did not think that Ms. Brown required medication, such as anti-depressants or anti-psychotics, to deal with her issues, and maintained her opinion that Ms. Brown does not have a psychiatric diagnosis.

833 In terms of when she formed the opinion that there were medical limits on Ms. Brown seeking work in the HVAC field, Dr. Zubek testified that she could not say when she thought about it except by reference to her February 13, 2008 note in which the issue was raised for the first time. Dr. Zubek testified that, prior to that time, her focus was on getting Ms. Brown through her court appearances. She said that, prior to that, they did not discuss her vocational plans. She also said, however, that they discussed a great many things which did not make their way into her notes, so she could not say that the issue of Ms. Brown's vocational plans was not discussed prior to February 13, 2008. She was sure that February 13 was the first time Ms. Brown asked her about whether she should be looking for work in the HVAC field.

834 There was a good deal of cross-examination about the adequacy of Dr. Zubek's clinical record-keeping practices and the piecemeal manner in which she disclosed Ms. Brown's clinical records to Ms. Brown's counsel, and through counsel, to the respondents. Disclosure of some of Dr. Zubek's clinical records, including her February 14, 2008 letter, continued even while she was under cross-examination. Dr. Zubek expressed how upset she was about some aspects of the state of her clinical records, and some of the problems with their disclosure. She apologized, because she thought that her failure to disclose everything she should have done when first requested to do so hurt Ms. Brown.

835 Dr. Zubek's memory was tested in cross-examination on a number of occasions. Overall, it was clear that she had no clear independent recall of her conversations with, and observations of, Ms. Brown. As she testified when asked about the circumstances surrounding the February 14, 2008 letter, written about one year prior to her testimony, "I don't remember what I discussed a month ago if no chart notes were taken".

836 There were questions raised as to the completeness of Dr. Zubek's chart notes, and whether they complied in all respects with the requirements of the College of Physicians and Surgeons. Their compliance with the requirements of the College is not the issue before me. While Dr. Zubek's chart notes were likely not a complete record of everything she and Ms. Brown discussed, they are the most reliable evidence of those discussions, and the information conveyed by Ms. Brown to Dr. Zubek. I am not prepared to give any weight to Dr. Zubek's testimony about additional matters discussed and not noted. Nor am I prepared to give any weight to Ms. Brown's testimony about various alleged inaccuracies about what Dr. Zubek recorded.

837 Dr. Zubek testified that she had been in practice for 17 years, but that this was the first time she had ever testified. Dr. Zubek's testimony made it clear that she had little understanding of the nature of Ms. Brown's complaint, the matters in issue in the proceeding, or the nature of the Tribunal and the proceedings before it. As she testified, "I'm only in the last couple of days asking what the Tribunal does", and "I've been confused about what this is throughout". Her opinion that participating in these proceedings constituted therapy for Ms. Brown reflects this lack of understanding. This lack of understanding likely accounts for some of Dr. Zubek's notes in which she refers to Ms. Brown appearing or testifying at courts and tribunals, when Ms. Brown, while she may have been dealing with matters related to the complaint, was not testifying or making any kind of appearance.

838 Dr. Zubek testified that she does not have a personal relationship or friendship with Ms. Brown. Dr. Zubek was asked if she was at the hearing to be an advocate, or to help Ms. Brown. She responded that she was trying to tell the truth.

839 Nonetheless, Dr. Zubek was somewhat partisan in Ms. Brown's cause. This was illustrated by her evidence in response to a question about the nature of their discussions prior to February 2008 that, "if she didn't feel her human rights were violated, she wouldn't be shaking going into HVAC ...."

840 Dr. Zubek admitted that she never offered the opinion that Ms. Brown was medically incapable of working in the HVAC field.

841 Dr. Zubek testified that she never considered the possibility that she was being manipulated by Ms. Brown or was being told things by her for the purposes of strengthening her claim. She also testified, in relation to her letter of February 14, 2008, that she did not consider whether other stres-

sors, which she testified she was aware Ms. Brown was exposed to, could be responsible for her symptoms.

842 Dr. Zubek's failure to be vigilant in considering whether Ms. Brown was a reliable reporter, and to consider other possible causes of her symptoms, weakens her evidence.

843 Dr. Zubek swore an affidavit in support of Ms. Brown's judicial review of the Tribunal's preliminary decision ordering Ms. Brown to disclose her complete medical file with Dr. Zubek to the respondents: *Brown v. PML and Wightman (No. 3)*. Despite this order, Ms. Brown's complete medical file was not disclosed at that time, but, as stated in Dr. Zubek's affidavit, only those portions which she considered relevant.

844 The subsequent disclosure of more of Dr. Zubek's records reveals that not all relevant parts were disclosed at that time. However, it should be said that it was not Dr. Zubek's responsibility to ensure that all legally relevant documents from her file were produced. In light of Dr. Zubek's lack of understanding of the Tribunal's processes or the matters at issue in this proceeding, she was in no position to determine legal relevance. The assessment of legal relevance is the responsibility of counsel.

845 Dr. Zubek testified that her affidavit was accurate. Initially, she stated that the sole exception was that her February 14, 2008 letter was not included in the materials attached to it as exhibits, when she had sworn that she had attached all clinical records which she believed were relevant to the medical issues in the complaint. She then added that the form she filled out for Watermark was not included, and she supposed that it could have been.

846 When asked to confirm that the paragraph of her affidavit in which she swore that she attached all clinical records she thought were relevant was accurate, subject to those two exceptions, she said that she would think so, but added that "right now I'm so overwhelmed". I then gave Dr. Zubek some time to review the affidavit, which she did. Upon further review, Dr. Zubek said that, "now that she looked at it", "things that you may have found pertinent are now in court, and I'm realizing that you guys need every little thing ... now I am seeing the nitty gritty I understand why you would want to see the whole chart." Later, she testified that she attached the clinical records she thought were medically relevant, but not those she considered legally relevant, which she now understood to be a much broader concept.

847 In discussing Dr. Zubek's February 13, 2008 clinical note, I referred to the unaddressed letter she wrote the next day, February 14, in which she wrote:

> I have been Mrs. Brown's physician since 2002. She has always come across as a confident and poised woman until the onset of the human rights issues that arose from her workplace. On January 23, 2007 I prescribed propanolol, a beta blocker that was to be used for the specific situation of stopping her teeth from chattering and her body from shaking when she went in to confront her employer. On February 26, 2007 this usually composed individual was in tears in my office and appeared completely stressed. Her blood pressure was elevated for the first time ever, which I felt that was situation-specific from the human rights issue stresses. On April 19, 2007 I gave her another prescription for propanolol to calm the physically obvious effects the stress had on her body, so that she could get

through tribunals. I also prescribed massage therapy specifically as the stress was contributing to muscle spasm.

I will note that there is a remarkable difference in the physical appearance of Mrs. Brown when she is discussing any other issue, compared to when she is asked about the tribunal issues. At the latter time she becomes jittery and looks harried and anxious. This continues even to my most recent visit on February 13, 2008. I would not advise her to seek employment in the field of heating/ventilation/air conditioning since it is specifically that environment with triggers her stress reaction. She herself has acknowledged that "in a new field I am able to be who I was, but in the HVAC field it's like I'm a mess". This certainly correlates with what I have seen in my office, and I will continue to give her propanolol for the specific times that she must confront the human rights issues that arose from her work in the HVAC field.

I attest that the above is true to the best of my knowledge.

848 This letter was produced by Dr. Zubek when she found it in her file while she was under cross-examination. Dr. Zubek was unable to locate any written request for this letter, or to say whether it was Ms. Brown or her counsel who asked her to provide it or told her the questions to be answered. Dr. Zubek testified that she knew what a medical-legal report was, having prepared many of them, and this was not one.

849 Ms. Brown's counsel subsequently advised the Tribunal and respondents' counsel that Dr. Zubek had earlier disclosed the February 14 letter to him, but that he had concluded it was a privileged document, and on that basis had not disclosed it to the respondents. He conceded that that privilege was waived once Dr. Zubek took the stand.

850 At the time this letter was written, counsel for the parties were corresponding about various issues related to the hearing, then scheduled for April 14 to 18, 2008, including Dr. Zubek's expected evidence. The details of all of the matters in issue between the parties at that time need not be recounted at length for the purposes of this decision. What is important for present purposes are the aspects of those issues which bear upon Dr. Zubek's evidence.

851 On February 14, Ms. Brown's counsel wrote to respondents' counsel indicating that Dr. Zubek would testify about "her treatment of Ms. Brown for medical conditions relating to this Complaint, and about the limitations arising from these medical conditions on her ability to seek work in her field."

852 Dr. Zubek testified in cross-examination that she would not have worded her anticipated testimony quite this way. She testified that she would have said that she treated Ms. Brown for stress reactions related to the complaint and seeking work, and that those stress reactions were a limitation resulting from a medical condition. She would not have said that Ms. Brown was medically incapable of seeking work in her field, but would question her effectiveness. She was not sure if she was asked to review this portion of counsel's letter, and was not sure if she would have sought to have it remedied if she were. She characterized it as "so loose, ambiguous".

853 Dr. Zubek's February 26, 2008 clinical note indicates that Ms. Brown's lawyer called her to clarify the contents of her letter. Then, on February 27, 2008, Ms. Brown's counsel wrote the res-

pondents' counsel, providing further information about Dr. Zubek's anticipated evidence, indicating that she would testify that "she treated Ms. Brown on several occasions for medical issues relating to this Complaint; Ms. Brown, who is normally calm and composed, becomes a different person and suffers from stress and panic attacks when recalling or dealing with the issues related to this Complaint; ... and that Ms. Brown should not seek employment in the HVAC field because of these medical issues". Counsel went on to state Ms. Brown's position that the respondents were not entitled to an independent medical examination ("IME"), but that she would be willing to undergo one at their expense. No IME was ever undertaken.

854 Dr. Zubek was not sure if she had seen counsel's letter of February 27 before testifying. She said that, if she had seen it, she would have again disagreed with the wording. In particular, she would not have referred to "medical conditions relating to this Complaint"; would not have said that Ms. Brown "becomes a different person", but rather that she presents herself completely differently; would not have said she suffers from "stress and panic attacks"; and would have preferred to state that Ms. Brown was limited with respect to seeking employment in the HVAC field or that she would not advise Ms. Brown to seek employment in that field.

855 At about this point, Dr. Zubek's cross-examination adjourned for the evening. When she appeared for the resumption of her cross-examination the next morning, she advised that she had found some further previously undisclosed documents which she believed might be relevant. The documents included an April 1, 2008 letter from Ms. Brown's counsel to Dr. Zubek, which included excerpts from their February 27, 2008 letter to counsel for the respondents stating the nature of Dr. Zubek's anticipated evidence. In their letter to Dr. Zubek, counsel stated that, "as we discussed, it is important that we ensure that you in agreement with the statements we have made regarding your evidence", and asked Dr. Zubek to let them know as soon as possible if she had any concerns regarding those statements. Also included was a fax cover sheet, on which Dr. Zubek identified her hand-written note, dated April 8, 2008, stating "yes I agree with all".

856 Dr. Zubek had no adequate explanation for the contradiction between her testimony that she would have worded her anticipated evidence differently than as stated in counsel's February 27 letter, and her April 8 note that she agreed with that very wording. She testified that she had never been in court, and never anticipated having to testify in this proceeding. She testified that, the previous day, she was "so focussed on playing your game word by word, [but] I'm here as a family doctor". Overall, it was apparent that Dr. Zubek failed to give the matter of her testimony in this proceeding, and ensuring its accuracy, the care and attention it deserved.

857 Overall, I find that Dr. Zubek tried to tell the truth. But as Ms. Brown's counsel conceded in final argument, she was not an impressive witness. Her evidence was weakened by a number of factors, including tendencies: to act as her patient's advocate, rather than give her evidence in a neutral manner; to reconstruct her rather shaky memory and makes assumptions rather than rely on her notes, which while lacking in some respects, were still the best evidence of her interactions with and observations of Ms. Brown; at times to be argumentative, defensive or non-responsive in her answers; and uncritically to accept as accurate her patient's self-reporting of symptoms and triggers.

Dr. McFadden's report and evidence

858 In this part of my decision, I summarize the matters addressed in Dr. McFadden's expert report, dated December 8, 2008. I have not found it necessary to refer specifically to his direct evi-

dence, as it merely summarized and explained his expert report. I have, after summarizing Dr. McFadden's report, discussed the key issues coming out of his cross-examination.

859 By way of background, Dr. McFadden reviewed the portions of Dr. Zubek's clinical records disclosed to the respondents in three instalments prior to the hearing of this complaint: (1) the "First Clinical Notes" provided sometime prior to February 14, 2008, consisting of three heavily redacted pages; (2) the "Second Clinical Notes", consisting of eight redacted pages, provided on April 8, 2008; and what was asserted to be Dr. Zubek's full unredacted medical records about Ms. Brown, provided on November 3, 2008 (the "Medical Records"). As already discussed, it was revealed during the cross-examination of Dr. Zubek that the Medical Records were not quite complete, as Dr. Zubek produced some further documents during cross-examination. Dr. McFadden also reviewed some other materials related to the complaint, which are listed in his expert report.

860 In their letter to Dr. McFadden, counsel for the respondents requested his opinion on the following issues:

1. Whether Dr. Zubek's opinion that PML and Mr. Wightman caused Ms. Brown's medical problems is a medically sound conclusion; and
2. Whether Dr. Zubek's opinion that Ms. Brown can never work in the HVAC field is a medically sound opinion.

861 It is not apparent how the respondents came to the conclusion that these were Dr. Zubek's opinions. At the time Dr. McFadden's opinion was sought, the respondents had been advised of the following about Dr. Zubek's anticipated evidence:

1. Dr. Zubek will testify about her treatment of Ms. Brown for medical conditions relating to this Complaint, and about the limitations arising from these medical conditions on her ability to seek work in the field. (counsel's letter of February 14, 2008);
2. Dr. Zubek will testify that: she has been Ms. Brown's physician since 2002; she treated Ms. Brown on several occasions for medical issues relating to this Complaint; and that Ms. Brown, who is normally calm and composed, becomes a different person and suffers from stress and panic attacks when recalling or dealing with the issues related to this Complaint; that she has been prescribed Propanolol; and that Ms. Brown should not seek employment in the HVAC field because of these medical issues. (counsel's letter of February 27, 2008); and
3. [In responding to an affidavit sworn by Dr. McFadden in response to Ms. Brown's application of judicial review of the Tribunal's order that she produce her complete medical record, Dr. Zubek denied that she would] be testifying that the Complainant's personality changed. That is not accurate. My evidence will be that Ms. Brown's demeanour changes and she "becomes a different person" in that she loses her composure and confident demeanour, when she recalls or deals with the issues relating to the human rights complaint. (Dr. Zubek's affidavit of June 5, 2008)

862 I am unaware of anywhere, either before or after Dr. McFadden's opinion was sought, in which Dr. Zubek states the opinion that the respondents caused Ms. Brown's medical problems.

Rather, as indicated in counsel's February 27, 2008 letter, Dr. Zubek's anticipated evidence was about her treatment of Ms. Brown for "medical issues related to this Complaint", and her opinion "that Ms. Brown, who is normally calm and composed, becomes a different person and suffers from stress and panic attacks when recalling or dealing with the issues related to this Complaint".

863 Similarly, I am unaware of anywhere, either before or after Dr. McFadden's opinion was sought, in which Dr. Zubek states the opinion that Ms. Brown can never work in the HVAC field. Rather, as also indicated in counsel's February 27, 2008 letter, Dr. Zubek's anticipated opinion was that "Ms. Brown should not seek employment in the HVAC field because of these medical issues".

864 Accordingly, in forming his opinion, Dr. McFadden may have been influenced by a statement of Dr. Zubek's opinions which did not accurately capture her actual opinions.

865 I note, that while Dr. Zubek has never offered the opinion that the respondents' conduct made Ms. Brown ill, this is an allegation made by Ms. Brown in her complaint form, in which she specifically alleges that "Mr. Wightman's discriminatory conduct towards Ms. Brown ... has made her ill and forced her to seek medical treatment".

866 In what follows, I reproduce the questions posed to Dr. McFadden by respondents' counsel in letter requesting his opinion, and summarize his responses.

1. Assuming that Dr. Zubek based her opinion on the First Clinical Notes, is her opinion that:

> *Ms. Brown, who is normally calm and composed, becomes a different person and suffers from stress and panic attacks when recalling or dealing with the issues related to this Complaint; that she has been prescribed Propanolol; and that Ms. Brown should not seek employment in the HVAC field because of these medical issues. [the "Anticipated Opinion"]*

supported by the information contained in those records? If the opinion is not supported by those records please provide a detailed explanation as to why it is not supported.

867 This question, and those that follow it, accurately reflect Dr. Zubek's anticipated evidence as stated in counsel's February 27, 2008 letter. In response, Dr. McFadden noted that the four entries included in the First Clinical Notes refer to Ms. Brown being prescribed propanolol for teeth chattering, and that she had stress from legal problems. He also noted the absence of any comments regarding being unable to work in the HVAC field. Not noted by Dr. McFadden are references in the First Clinical Notes to being worried about teeth chattering when going to confront her boss, or stress related to ongoing work matter.

2. Assuming that Dr. Zubek based her opinion on the Second Clinical Notes, is her opinion that:

> *[the Anticipated Opinion is restated]*

supported by the information contained in those records? If the opinion is not supported by those records please provide a detailed explanation as to why it is not supported.

868 Dr. McFadden noted that the Second Clinical Notes include a total of nine entries and a consultation, and that additional information is provided about sleeplessness, headaches, concerns about hereditary cardiac illness, and a discussion about HVAC sales management. This is a reference to the February 13, 2008 entry. Dr. McFadden states that there was no information explaining the alleged inability to work in the HVAC field.

3. Assuming that Dr. Zubek based her opinion on the Medical Records, is her opinion that:

[the Anticipated Opinion is restated]

supported by the information contained in those records? If the opinion is not supported by those records please provide a detailed explanation as to why it is not supported.

869 In response, Dr. McFadden stated the following opinion:

> The information provided suggests that there may have been some work-related issues, which have given rise to tension symptoms, anxiety, apparent panic attacks, sleeping problems and teeth chattering. On the other hand, there are other circumstances, which can give similar symptoms, such as hyperthyroidism - a condition which can exist with the treatment of her purported hypothyroidism. The difficulty in coming to a conclusion is that there does not appear to be a formal evaluation of the patient's symptoms. There are some notations of symptoms but no formal psychiatric interview or documentation regarding the circumstances under which her symptoms occur, the extent of her symptoms, whether there were pre-morbid circumstances that could be playing a role and no documentation of the severity of her symptoms, such as the Global Assessment of Function (GAF).

4. Is there a clinical definition of "treatment"?

870 Dr. McFadden says that "treatment" could be defined as "a way of treating" or "something done or used to treat something else, especially a disease ...." He goes on to state that a treatment that could be discerned from the clinical records is the prescription for propanolol, which he says relieves the "outward appearances of tension or anxiety" and "is often used to diminish shaking". The only other discernable treatment was massage therapy.

5. Based on the Medical Records, what steps did Dr. Zubek take with respect to Ms. Brown as a result of the complaints made by Ms. Brown about the treatment she received from the Respondents? Do those steps constitute treatment?

871 Dr. McFadden states that the steps noted above could be considered treatment, but "in general, though, if the patient has severe symptoms, one would anticipate the use of anxiolytics, psychotherapy, cognitive behavioural therapy, etc ...." He states that the treatment given suggests that Ms. Brown's symptoms were "not of marked severity".

6. What are the clinical definitions of stress and anxiety?

872 Dr. McFadden explains that "stress is not a psychiatric diagnosis but a description of how an individual or organism responds to circumstances", and "is considered to be normal". He said that "distress" is probably a better description of what happens when a person has difficulty handling stress. The DSM-IV does not have a category for stress, but does for acute stress disorder. He went on to note that a person may have symptoms without those symptoms being sufficiently severe to constitute a mental illness. Anxiety, he said "is a response to thoughts and fears of what might happen".

7. Do the Medical Records show that Dr. Zubek diagnosed Ms. Brown with stress and/or anxiety?

873 The short answer is "no". "Stress" and "anxiety" are used as descriptors of Ms. Brown's symptoms rather than diagnoses, the severity of which is only hinted at.

8. Does Ms. Brown suffer from stress and/or anxiety?

874 She has these symptoms.

9. What are the treatment protocols that a doctor would usually use if the doctor diagnosed a patient with stress and/or anxiety?

875 Dr. McFadden stated that "a patient presenting with symptoms of significant severity which are interfering with their life to a significant degree usually require a reasonably thorough evaluation in order to determine all of the factors which may be playing a role in developing" those symptoms. If the symptoms were severe enough, treatment could include office counselling, lifestyle modification, anxiolytics, or referral to a psychologist.

10. What if any treatment did Dr. Zubek prescribe for Ms. Brown to treat stress and/or anxiety?

876 Propanolol, "which would mask the obvious signs of hyperactivity", and massage.

11. Are there any events to which reference is made in the Medical Records other than the alleged discrimination that might have caused Ms. Brown to experience stress or anxiety comparable to that which she alleges she suffered as a result of the discrimination?

877 Dr. McFadden opined that there are three circumstances in the Medical Records which "may be germane to the discussion of the cause of her symptoms". The first is hypothyroidism. Excessive doses of the thyroid hormone prescribed for that condition "can give rise to shaking, anxiety, tremor, palpitations and psychiatric symptoms somewhat similar to an anxiety state".

878 The second is the possibility of a cardiac condition, for which Ms. Brown was referred to a specialist.

879 While he stated that there were three circumstances, I am able to only identify these two as having been referred to by Dr. McFadden.

12. When would difficulty sleeping be considered a clinical problem? What treatment would usually be prescribed for a person with a clinical sleep problem?

880 Dr. McFadden noted that sleep patterns are extremely variable, and difficulty sleeping would be considered normal in some circumstances. There are many other causes of sleep disturbances, and diagnosis requires evaluation in a sleep clinic. He noted a number of things which a person can do to address a sleep disorder related to a life event. In the short-term, or if severe, hypnotics may be prescribed.

13. Did Dr. Zubek diagnose Ms. Brown with a clinical sleep problem?

881 No. The comment that she was having difficulty sleeping would be within the range of normal.

14. What, if any, treatment did Dr. Zubek describe for Ms. Brown?

882 None.

15. If Dr. Zubek prescribed the treatment, describe the treatment and provide your opinion regarding the effectiveness of the treatment and the duration of Ms. Brown's alleged sleep problem.

883 Dr. McFadden listed a number of potential treatments of a sleep disorder, none of which was prescribed for Ms. Brown.

16. Is a doctor required to document every prescription issued to a patient? If yes, where is this requirement found and why does this requirement exist?

884 Yes. Dr. McFadden did not state where this requirement is found, but stated that there are a number of purposes, three of which he named. First, it demonstrates that the physician is aware of the medication. Second, it acts as an "aide memoire" for the physician to discuss the medication. Third, it is legally required.

17. Are there any requirements that a doctor must follow in determining whether to prescribe a drug to a patient? If so, what are they?

885 The physician should have a working diagnosis, as well as an understanding of the clinical problem and medication. They should discuss with the patient the risks and benefits of the medication.

18. Did Dr. Zubek follow these requirements when prescribing Propanolol to Ms. Brown?

886 She documented the amount. There is no documentation of discussions about risks and benefits or alternatives.

19. What is Propanolol used for?

887 It is a beta blocker that has multiple effects. It is usually used for the treatment of heart rhythm disorders and high blood pressure. It has also been noted to be effective in treating migraines, and is occasionally used in patients with tremors or shaking.

20. Based on the Medical Records, could Propanolol have been prescribed to treat other medication condition(s) that Ms. Brown suffers from? If yes, describe the medical condition(s) any why Propanolol might be used to treat them.

888 Propanolol blocks part of the central nervous system. Hyperthyroidism is frequently associated with shaking, tremor and rapid heart rate, and propanolol will reduce these symptoms.

21. If a person was suffering from clinical stress and anxiety and was prescribed Propanolol for these conditions, how long would a doctor have the person take Propanolol and what would the dosage instructions for the Propanolol be?

889 Propanolol only masks symptoms, and would be used only when the patient was aware of, and wanted to treat, them. It would be uncommon to use it regularly. Dosage would depend on patient response. There is no specific amount of time for which it should be used.

22. How much Propanolol did Dr. Zubek prescribe for Ms. Brown? Was the amount of Propanolol prescribed for Ms. Brown consistent with the amount that would have been prescribed for a person who was suffering from stress and/or anxiety that was so significant that it prevented the person from working in certain fields?

890 In essence, Dr. McFadden did not answer this question. He did say that there was no information put forward that Ms. Brown's symptoms were related to a specific field - the distress and anxiety were related to specific events.

23. Please compare the Second Clinical Notes with the Medical Records and provide your opinion as to whether any information that is contained in the Medical Records but was not included in the Second Clinical Notes could be relevant to determination of the cause of Ms. Brown's alleged health problems including stress, anxiety and loss of sleep.

891 Yes.

24. Ms. Brown has alleged that her ability to work has been impacted by the illness which, she alleged, was caused by her treatment by the Respondents. What if any medical condition would a person need to have before that person would be medically incapable of working?

892 Dr. McFadden stated that this was similar to total disability. A specific clinical condition, of sufficient severity that the person is rendered incapable of functioning at their work, which is resistant or only partially amenable to treatment, and with some likelihood of permanence, would be required. In this case, he said, there is no diagnosis, minimal treatment and no information regarding severity or permanence.

25. Does Ms. Brown have a medical condition that would prevent her from working in the HVAC field?

893 No information in the Medical Records would allow Dr. McFadden to reach this conclusion.

26. In the February 27, 2008 Letter, Dr. Zubek's evidence is stated to be that "that Ms. Brown, who is normally calm and composed, becomes a different person when recalling or dealing with the issues related to the Complaint" and "Ms. Brown should not seek employment in the HVAC field because of these medical issues". Is there any information in the Medical Records that would have allowed Dr. Zubek to compare Ms. Brown's demeanour prior to the alleged discrimination with her demeanour after the alleged discrimination?

894 The documentation is inadequate so no conclusion can be drawn from the records.

27. Are doctors in the province of British Columbia required to follow standards for patient record keeping? If so, who sets the standards, what are the standards and where are the standards found?

895 Dr. McFadden discusses at some length the standards for record keeping established by the College of Physicians and Surgeons.

28. Are there standards that apply when doctors are required to disclose medical information in the course of a legal process such as a civil lawsuit or human rights complaint? If so, who set the standards and where are the standards found?

896 Dr. McFadden outlines the applicable standards.

29. Are there rules or standards about when a doctor can change a note that has already been made in a file? If so, who set the standards, what are the standards and where are the standards found?

897 Dr. McFadden sets out the applicable standards.

30. Summary of opinion

898 Dr. McFadden summarized his opinion as follows:

In summary, the documents provided to substantiate Ms. Brown's contention that she is unable to work in a specific field are inadequate to support this contention.

1. The Clinical Records of Dr. Zubek in regard to the issue of Ms. Brown's work-related problems would be considered inadequate, using the standards for documentation of Clinical Records of the College of Physicians and Surgeons of British Columbia.
2. Specifically, there is no formal evaluation of a psychiatric or behavioural condition, using the DSM-IV guidelines.
3. There is insufficient information to determine the severity of her symptoms.
4. There is no formal diagnosis.
5. The provision of the Clinical Records was problematic, owing to its sparse content and deletion of potentially relevant information as demonstrated by the expansion of the information on subsequent requests.
6. Physicians have expertise in various areas based on their training and experience. Dr. Zubek's training and experience is unknown to the reviewer. It is uncommon for a physician to recommend avoidance of an entire area of employment. No reason for this specific recommendation was found in the records. A physician may recommend leaving a job if there were negative events associated with the specific job. On the other hand, leaving an entire field is unusual and unsupported.
7. As noted earlier, the recommendation is similar to a request for total disability. There is no documentation in the records to justify total disability from a specific field.

31. Cross-examination of Dr. McFadden

899 In cross-examination, Dr. McFadden agreed that his opinion with respect to Ms. Brown's ability to work in the HVAC field could be summarized as being that there was insufficient information contained in Dr. Zubek's clinical records to allow him to decide whether Ms. Brown was capable of doing so.

900 It was put to Dr. McFadden that an IME would be the best way to obtain an independent assessment of a patient. He agreed that it would certainly be one way to do that. Dr. McFadden's testimony in this area revealed that he mistakenly believed that Ms. Brown had refused to undergo an IME when, in fact, while she had taken the position she was not obliged to undergo an IME, she had indicated a willingness to do so provided the respondents paid. He suggested that, if an IME were to be performed in this case, it would be better performed by an occupational health specialist than a general practitioner such as himself.

901 It was revealed in cross-examination that Mr. Wightman had called Dr. McFadden. According to Dr. McFadden, Mr. Wightman told him how distraught he was over what has happening, and that he had known Ms. Brown previously. When it was suggested to him, Dr. McFadden thought it was reasonable to suppose that Mr. Wightman told him his view, *i.e.*, that Ms. Brown was making it up and making false allegations. Dr. McFadden testified that he "really didn't want to know most of that". When asked why he had the conversation, Dr. McFadden said that Mr. Wightman was upset. He did not stop Mr. Wightman, but just let him vent, because, Dr. McFadden

said, it did not matter what Mr. Wightman said to him. Dr. McFadden made no notes of this conversation.

902 In cross-examination, Mr. Wightman confirmed that he called Dr. McFadden. He said that he wanted to ask what his role would be and what he was doing because he had been invoiced for lots of things. He denied trying to influence Dr. McFadden's opinion. He agreed that he may have told him that Ms. Brown was making false allegations, but again denied, with much feigned outrage, that he did so to influence Dr. McFadden. He could not say why else he would have called Dr. McFadden, but said that he was quite angry at the time about the whole thing. He denied that he knew it was improper to make the call, and said that he did not seek legal advice before doing so.

903 I found the evidence about Mr. Wightman's telephone call to Dr. McFadden troubling. Mr. Wightman ought not to have made the call, as it could have had no proper purpose. While Dr. McFadden cannot be faulted for Mr. Wightman calling him, he ought to have put a quick stop to the conversation. He ought also to have disclosed the conversation without waiting to have it be revealed in cross-examination.

904 Not only in relation to the telephone call from Mr. Wightman, but also with respect to some other issues, I found Dr. McFadden occasionally both argumentative and defensive in cross-examination.

905 Dr. McFadden was under the inaccurate impression that Ms. Brown was not working at all in the period covered by Dr. Zubek's records. There is nothing in Dr. Zubek's records which indicate one way or another whether Ms. Brown was working. If the matter was of any importance to Dr. McFadden's opinion, he ought to have sought clarification on this point.

906 Dr. McFadden testified that it was not that important whether Ms. Brown met the diagnostic criteria for any particular disorder listed in the DSM-IV, as a person can have symptoms or anxiety or stress amounting to a mental illness and requiring treatment without meeting a DSM-IV diagnosis for a mental disorder.

Conclusions with respect to the medical evidence

907 I make the following findings with respect to the medical evidence about Ms. Brown.

908 The evidence does not substantiate the Ms. Brown was or is medically incapable of seeking work in the HVAC industry. Nor does it substantiate that she is medically limited in doing so, or that it would be medically inadvisable for her to do so.

909 While I have considered Dr. McFadden's report and evidence in reaching these conclusions, his report and evidence were of limited use to me in doing so. Rather, the most important factors in reaching these conclusions were the weaknesses in Dr. Zubek's evidence, as revealed in cross-examination; the lack of objective evidence in Dr. Zubek's clinical records or elsewhere to substantiate any medical limitation on Ms. Brown seeking work in the HVAC industry; and my findings with respect to the unreliability of Ms. Brown's own evidence about her reactions to HVAC-related triggers.

910 Ms. Brown reported to her doctor certain things which triggered anxiety symptoms, such as chattering teeth and shakiness, for which Dr. Zubek prescribed propanolol. For the first year after she left PML, the only triggers reported by Ms. Brown to her physician related to legal proceedings. Only in February 2008, in preparation for the originally scheduled hearing dates, did Ms. Brown first tell Dr. Zubek that she also had HVAC-related triggers.

911 I find that Ms. Brown has consistently exaggerated, both to her doctor and in these proceedings, the extent of her anxiety symptoms, related both to these proceedings and the HVAC industry. In this regard, her reporting of her experience on January 20, 2009 in cancelling her appointment with Mr. Cedar at Hytec is particularly suspect. On her own account, Ms. Brown's purpose in setting up the meeting with Mr. Cedar was solely to test Dr. McFadden's supposed opinion that she was "faking it", not a genuine interest in seeking employment with his company. That she scheduled an appointment with Dr. Zubek for that same day, a month before this hearing was to proceed, in which she gave Dr. Zubek a particularly detailed account of her supposed symptoms, leads me to doubt the credibility of everything Ms. Brown told Dr. Zubek, and this Tribunal, about what happened that day.

912 The symptoms described, and at times displayed, by Ms. Brown in this hearing are of a severity which, if genuine, would call for effective treatment. Propanolol does not treat the causes of anxiety symptoms; it merely masks them. The fact that Dr. Zubek never suggested counselling or psychological or psychiatric therapy, and did not diagnose Ms. Brown with any psychiatric condition, also leads me to doubt the severity of Ms. Brown's symptoms.

V SIMILAR FACT EVIDENCE AND ANALYSIS

913 Ms. Brown led evidence relating to Ms. Snalam and Ms. Klatt, which she relied upon as similar fact evidence. She submitted that this evidence was relevant and admissible as: evidence of a pattern of conduct on Mr. Wightman's part, including his attitude towards pregnant women; relevant to the credibility of Ms. Brown and Mr. Wightman; a response to Mr. Wightman putting his character in issue; and to rebut the respondents' defence that the changes to Ms. Brown's terms and conditions of employment were made for legitimate business purposes.

914 There was no disagreement between the parties that some of the evidence about and from Ms. Snalam and Ms. Klatt was relevant and admissible as it related directly to Ms. Brown's experiences and complaint. To the extent it is possible to separate out the evidence about and from Ms. Snalam and Ms. Klatt that related more or less directly to Ms. Brown, I have already addressed that evidence in making my findings of fact.

915 The respondents objected, however, to any evidence about and from Ms. Snalam and Ms. Klatt being admitted as similar fact evidence. Notwithstanding their objection, the respondents also led evidence in response to the alleged similar fact evidence, relating to their alleged treatment of other employees, in particular, women going on maternity leave and employees with child-care responsibilities.

916 The parties agreed that all of this evidence would be heard, with the opportunity to make submissions about its admissibility and use in final argument.

917 In this part of my decision, I first consider the principles applicable to the admission of similar fact evidence, and then decide whether any of this evidence is properly admissible as such.

918 Having decided to admit all of this evidence, I then consider the evidence and make my findings about and from Ms. Snalam and Ms. Klatt relating to their individual circumstances. I then consider and make my findings about the general evidence about the respondents' treatment of other employees.

1. Legal principles with respect to similar fact evidence

919 In *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717, McLachlin J., as she then was, reviewed the law applicable to similar fact evidence in criminal cases:

> The analysis of whether the evidence in question is admissible must begin with the recognition of the general exclusionary rule against evidence going merely to disposition ... evidence which is adduced solely to show that the accused is the sort of person likely to have committed an offence is, as a rule, inadmissible. Whether the evidence in question constitutes an exception to this general rule depends on whether the probative value of the proposed evidence outweighs its prejudicial effect. In a case such as the present, where the similar fact evidence sought to be adduced is prosecution evidence of a morally repugnant act committed by the accused, the potential prejudice is great and the probative value must be high indeed to permit its reception. The judge must consider factors such as the degree of distinctiveness or uniqueness between the similar fact evidence and the offences alleged against the accused, as well as the connection, if any, of the evidence to issues other than propensity, to the end of determining whether, in the context of the case before him, the probative value of the evidence outweighs its potential prejudice and justified its reception. (para. 31)

920 The same general principles apply in civil cases. However, as a general rule, the potential prejudice will be less in civil cases, where the conduct alleged is generally less morally blameworthy than in criminal cases: *J.R.I.G. v. Tyhurst*, 2003 BCCA 224, para. 54.

921 Section 27.2(1) of the *Code* provides the Tribunal with discretion to admit evidence it considers necessary and appropriate, whether or not the evidence would be admissible in a court of law. As a result, the rules of evidence applied by the courts in determining the admissibility of similar fact evidence in criminal and civil cases are not necessarily applicable by the Tribunal.

922 Despite this broad discretion, the Tribunal has consistently applied the principles underlying the modern similar fact evidence rule. The principles generally applied by the Tribunal were summarized in *Haynes v. Coltart* (1998), 33 C.H.R.R.D/428:

> Similar fact evidence, which goes solely to show that the accused or respondent is the sort of person who is likely to have committed an offence, is generally inadmissible. However, once it has been decided that the evidence does not go merely to disposition, the tribunal must determine first, whether the evidence is relevant and material to an issue, and second, whether it would be oppressive or unfair to admit it: Sopinka and Lederman, *The Law of Evidence in Canada* (1992) at pp. 512-13 ...
>
> In balancing the probative value of the evidence with its potential to have an oppressive or unfair effect, consideration must be given to the degree of distinctiveness or uniqueness of the similar fact evidence and its similarity with the other evidence. There need not exist a "striking similarity" for the evidence to be admitted. (paras. 43-44)
>
> See also *Neumann v. Lafarge Canada (No. 4)*, 2008 BCHRT 303.

2. Application to this case

923 As emphasized by McLachlin J. in *R. v. B. (C.R.),* "the effect of similar fact evidence must be considered in the context of other evidence in the case": para. 30. An important contextual factor in this case is the intertwined nature of the evidence relating to Ms. Brown, Ms. Snalam and Ms. Klatt. They were all employed by PML in senior positions of some responsibility at the same time. They all became pregnant, and did not return to employment with PML at the conclusion of their maternity leaves. Each testified, not only about their own circumstances, but also about matters relevant to the experience of one or both of the others. In particular, both Ms. Snalam and Ms. Klatt testified not only about their own experience, but also about facts directly relevant to Ms. Brown's complaint.

924 The intertwined nature of their experiences and evidence must have entered into the parties' agreement to hear all of the evidence proffered as or in response to the similar fact evidence, leaving its admissibility and use to final argument. It would have been extremely difficult, if not impossible, to separate out the different aspects of Ms. Snalam's and Ms. Klatt's evidence, and the evidence about them, to determine if it was directly relevant to Ms. Brown's complaint or only potentially relevant as similar fact evidence.

925 Similarly, it would be difficult, not to speak of wholly artificial, to attempt now to separate out of the factual matrix the different aspects of the evidence. This is a factor which I take into account in considering the admissibility and use of the evidence now under consideration.

926 Ms. Brown submits that the evidence of and relating to Ms. Snalam and Ms. Klatt is tendered as evidence of a pattern of behaviour which is consistent with and similar to her allegations. She also submits that it is material to the issue of credibility, which is central given how at odds the key evidence of Ms. Brown and Mr. Wightman is. She also submits that Mr. Wightman has put his good character in issue by raising the issue of his attitude towards accommodating other employees' family and personal needs, and his feelings towards such issues, including his own personal experience. Finally, she submits that it is relevant as rebuttal to the respondents' defence that the changes to her terms and conditions of employment were made for legitimate business purposes.

927 More specifically, Ms. Brown submits that the similar fact evidence demonstrates a unique and distinctive pattern of conduct in that each woman experienced:

* A noticeable deterioration in their treatment by Mr. Wightman after informing him of their respective pregnancies;
* Some form of shunning or exclusion in the workplace just prior to or during the maternity leaves;
* A requirement to recruit and hire a replacement or delegate their duties during their leaves;
* Disrespectful comments about them by Mr. Wightman, calling them a "cunt", a "bitch" or a "fuck-up"; and
* A significant change in their duties or elimination of their position upon return from their maternity leave.

928 In addition, Ms. Brown alleges that her experience, and that of Ms. Snalam, were similar in that they had both taken a previous maternity leave after which Mr. Wightman blamed them for deterioration in their area of the business while they were on leave.

929 I accept that the evidence of and about Ms. Snalam and Ms. Klatt may be probative of at least some of the issues identified by Ms. Brown. The credibility of both Ms. Brown and Mr. Wightman is problematic. As in *Tyhurst*, where there were also difficulties with the credibility and reliability of both the plaintiff and defendant, similar fact evidence may be of assistance in resolving some of the factual issues which would otherwise depend solely upon an assessment of the evidence of Ms. Brown and Mr. Wightman: paras. 3-4, 81; see also *Haynes, supra*, para. 43. An example is resolving the question of whether Mr. Wightman called Ms. Snalam a "fuck-up" to Ms. Brown, in which a consideration of Mr. Wightman's language about women on maternity leave on other occasions is of assistance in assessing the evidence of Ms. Brown and Mr. Wightman. Another example is determining the role, if any, which Ms. Brown's maternity leave played in the deterioration of her relationship with Mr. Wightman and the diminution in her duties and responsibilities upon her return from that leave.

930 The context in which the matters testified to by each woman occurred is very similar, as each was in a long-term employment relationship with the respondents in a position of significant responsibility. Each alleges that her relationship with Mr. Wightman deteriorated after she disclosed her pregnancy to him. Each alleges that the terms and conditions of her employment were changed, for the worse. None of them returned after the conclusion of their maternity leave. All of this happened within a period of just over two years - from July 2005 when Ms. Brown and Ms. Snalam disclosed their pregnancies; to August 2005 when Ms. Snalam lost her baby and went on leave; to February 2006 when Ms. Brown went on leave; to March 2006, when Ms. Snalam's employment with PML was terminated; to December 2006, when Ms. Klatt went on leave; to February 2007, when Ms. Brown was to return to work from her maternity leave; to October 2007, when Ms. Klatt submitted her resignation.

931 Of the two, Ms. Snalam's experience is clearly more similar than Ms. Klatt's is to Ms. Brown, and Ms. Brown placed relatively greater reliance on its probative value. That said, certain aspects of the evidence relating to Ms. Klatt, may also have some probative value, particularly in relation to the "cunt" comments.

932 Having determined that the evidence of and about Ms. Snalam and Ms. Klatt may have some probative value in determining some of the facts in issue, the next question which must be considered is whether that probative value outweighs its prejudicial effect. In this connection, it must be kept in mind that this is a human rights case, with the result that the prejudicial effect is less than it would be in a criminal case. Further, while the respondents are alleged to have breached the *Code*, the conduct in issue does not have the morally blameworthy nature of the conduct in issue in *Tyhurst*, which serves to further reduce the prejudicial effect of the admission of the similar fact evidence: para. 49.

933 A frequently expressed concern with respect to the admission of similar fact evidence is the application of the collateral issue rule. The strict application of that rule would prevent a respondent from leading evidence of conduct dissimilar from that alleged, *i.e.* evidence of a positive disposition or propensity: *Tyhurst*, para. 50.

934 In the present case, that potentially prejudicial effect is absent. The respondents led a significant body of evidence, addressed below, about circumstances in which they asserted that they responded positively to employees requiring accommodation for maternity or child-care related obligations. They were therefore able to attempt to rebut the similar fact evidence led by Ms. Brown by leading evidence that could lead to the contrary conclusion.

935 In addition, the respondents were given sufficient notice of the similar fact evidence proffered by Ms. Brown, as Ms. Brown alleged the material facts relied upon in her April 13, 2007 complaint. Further, those facts were in issue in the respondents' application to dismiss the complaint, with Ms. Snalam swearing an affidavit which was filed in those proceedings by Ms. Brown, and Ms. Klatt being asked, but declining, to do the same by the respondents.

936 Finally, Ms. Snalam and Ms. Klatt testified about the similar fact evidence. This is not a case, such as *Neumann* or *Clarke v. Frenchies Montreal Smoked Meats and Blais (No. 2)*, 2007 BCHRT 153, in which the similar fact evidence offered was hearsay. Ms. Snalam and Ms. Klatt provided first-hand evidence about their experiences, and were subject to full cross-examination by counsel for the respondents. Further, the matters about which they testified were within the personal knowledge of Mr. Wightman, who had every opportunity to testify about them.

937 Ms. Snalam and Ms. Klatt are not complainants in this case, and there is no evidence before me that they have initiated, or are contemplating taking, any legal action against the respondents. They have no direct interest in the outcome of these proceedings, and have moved on with their lives since leaving PML.

938 This is not a case in which there is any realistic chance of collusion between the complainant and the witnesses providing similar fact evidence. Neither Ms. Snalam nor Ms. Klatt was a friend or confidant of Ms. Brown, and there is no evidence that either spoke with her about the substance of her evidence before testifying.

939 For these reasons, I conclude that the probative value of the evidence from and about Ms. Snalam and Ms. Klatt about their individual circumstances outweighs the prejudicial effect of the evidence on the respondents. I therefore conclude that that evidence is admissible as similar fact evidence, and consider it as such. The evidence is necessary and appropriate, within the meaning of s. 27.2(1) of the *Code*. Further, I will consider the evidence proffered by the respondents about their treatment of pregnant employees and those with family obligations to rebut the similar fact evidence.

3. Carrie Snalam

940 To this point, I have addressed the evidence relating to Ms. Snalam only as it relates directly to Ms. Brown's employment and complaint. In this part of my decision, I set out my findings of fact relating to Ms. Snalam's employment with PML.

941 Overall, the evidence indicated that Ms. Snalam and Ms. Brown were not friends either while working at PML or thereafter. While Ms. Snalam testified that Ms. Brown was not "her kind of person", and could be rather abrasive, they had a civil, professional relationship. I find that Ms. Snalam testified in these proceedings, not out of any loyalty to Ms. Brown, nor any antipathy to Mr. Wightman, but in a sincere and disinterested desire to tell the truth.

942 Overall, the evidence indicated that Ms. Snalam and Ms. Klatt, while they may have had their workplace disputes, were friends at PML, and later became even closer. They travelled to the hearing together to testify. While I accept that they spoke to one another to some extent about their experiences, I do not find that that discussion materially affected their testimony.

943 In making my findings of fact about Ms. Snalam, I have relied with confidence on her evidence, as I found her to be a credible and reliable witness, who testified truthfully about very difficult personal circumstances.

944 As indicated previously, Ms. Snalam was employed by PML between 1997 and 2006 in positions of increasing responsibility, dealing with financial matters. Both the company, and the corresponding scope of Ms. Snalam's duties, expanded considerably over this period. Ms. Snalam has no accounting designation, although she did take some CGA courses, while employed by PML, and at its expense. Ms. Snalam testified, and I accept, that, during the course of her employment, Mr. Wightman never told her that he was concerned about her ability to perform her duties. The only criticism levelled against her in the evidence had to do with finding a replacement for her first maternity leave, discussed below.

Inaccuracy in Mr. Wightman's affidavit concerning Ms. Snalam's first maternity leave

945 Ms. Snalam became pregnant for the first time while at PML in December 2000. She testified that she told Mr. Wightman about it almost immediately because she had had difficulty conceiving and had been undergoing fertility treatments which she had discussed with him and for which she had to take some time off work.

946 This contradicted what Mr. Wightman swore to in his July 12, 2007 affidavit filed in support of the respondents' application to dismiss Ms. Brown's complaint. In that affidavit, Mr. Wightman swore that, during Ms. Snalam's first pregnancy, she only told him of her pregnancy at seven months, leaving the company inadequate time to find a replacement. He made this statement to explain why he reacted badly to Ms. Snalam's July 2005 announcement of her second pregnancy.

947 Ms. Snalam swore an affidavit that was filed by Ms. Brown in response to the respondents' application to dismiss. As noted by counsel for the respondents, Ms. Snalam's affidavit was misdated as having been sworn on July 9, 2007; in fact, it must have been sworn sometime between the date of Mr. Wightman's first affidavit, July 12, 2007, to which it responded, and his second affidavit, dated August 24, 2007, which replied to it. This misdating is of no importance for the purposes of this decision.

948 In her affidavit, Ms. Snalam noted that she had been questioned by the respondents' lawyer, but did not swear an affidavit for them. She said that she had tried to move on from PML, and was reluctant to get involved, but had read Mr. Wightman's affidavit, which she said contained a number of inaccurate statements about his dealings with her, which she wished to correct. One of those statements was the one just noted, about her supposedly not telling Mr. Wightman about her first pregnancy until the seventh month.

949 Despite responding to some aspects of Ms. Snalam's affidavit in his second affidavit, Mr. Wightman did not correct his evidence or otherwise address the question of when Ms. Snalam told him about her first pregnancy. This was despite the fact that he testified that he realized his affidavit was wrong when he read Ms. Snalam's.

950 As Mr. Wightman acknowledged in his direct testimony, the statement in his affidavit that Ms. Snalam failed to tell him about her first pregnancy until her seventh month, thus leaving PML with insufficient time to find a replacement, was not true. He also testified that, while the affidavit states that he was concerned about Ms. Snalam's announcement, in fact his concern was about finding a replacement, not her announcement itself.

951 In fact, Ms. Snalam did tell Mr. Wightman about her first pregnancy almost immediately upon learning of it herself. As he testified in direct, Mr. Wightman was one of the first to know.

952 When asked in direct about this incorrect information in his affidavit, Mr. Wightman sought to place the blame for the inclusion of the incorrect information on the lawyer to whom he said he "dictated" this information. Mr. Wightman testified that somehow, a couple of facts were missed, yet he signed the affidavit. In cross-examination, he sought to lay the blame even more squarely at the lawyer's feet, saying that he did not make a mistake, the lawyer or the person who typed it did.

953 Mr. Wightman sought further to lay the blame for his errors on his lawyer when he stated that he raised the inaccuracy with him after reading Ms. Snalam's affidavit, but that he failed to address it in his second affidavit. He said he did not know why his lawyer failed to address the error. He similarly blamed his lawyer for the same inaccurate information appearing in the respondents' Response to Complaint, which he said he read before it was filed, but probably too quickly.

954 Mr. Wightman's attempts to blame his lawyer or the typist for this and other inaccuracies in his affidavits and the respondents' Response were troubling. Even if the lawyer or typist made a mistake, it was Mr. Wightman's responsibility, as the person swearing the information contained in his affidavit to be true, to ensure that it was. He failed to do so, despite that and intending that the Tribunal would rely on his affidavits in deciding whether to dismiss Ms. Brown's complaint. This leads me to question the veracity of all his evidence under oath or solemn promise to tell the truth.

955 The inaccurate information contained in Mr. Wightman's first affidavit, coupled with his failure to correct that information until he gave his evidence in this hearing, and his wholly unpersuasive explanation for how that inaccurate information came to be in his affidavit, are factors, among others, which have led me to view all his evidence with considerable caution.

Ms. Snalam's first pregnancy and maternity leave

956 Returning to Ms. Snalam's first pregnancy, Mr. Wightman directed her to find a replacement for her during her upcoming maternity leave. Ms. Snalam testified that she did so. She did not find this to be an unreasonable request, although she testified that it was a difficult task given that the replacement needed to both fit in with the company and be someone Mr. Wightman could feel comfortable with. She testified that Mr. Wightman was anxious to have a replacement, and asked her about it several times. Mr. Wightman referred to being "on her" constantly to get a replacement.

957 In cross-examination, it was put to Ms. Snalam that it was only a week before her first maternity leave was due to start that she called an agency to find a replacement. She disagreed, saying that she had called the agency months before, but they had been unsuccessful in finding an appropriate candidate. I accept this evidence.

958 In cross-examination, Ms. Brown testified that Mr. Wightman complained to her about a number of things related to Ms. Snalam's first maternity leave, including the lack of a replacement. He made it clear that he did not want that to happen again.

959 Mr. Rilling testified that it was a bit of a scramble to get a replacement for Ms. Snalam, and that PML went to a head-hunter. He was unaware of any other issues related to Ms. Snalam's first maternity leave.

960 Mr. Wightman testified at some length about Ms. Snalam's importance to the company and how essential it was to get a replacement for her. He testified that it was only two to three weeks before Ms. Snalam went on maternity leave that a replacement was found through a placement agency. He described "outright pandemonium" in Ms. Snalam's absence as the replacement was

completely inadequate. He said the effect on the company was an "absolute disaster", for which it was apparent he blamed Ms. Snalam.

961 Ms. Snalam testified that she dealt with financial matters for PML by telephone for the first three months of her first leave.

962 Mr. Wightman testified that Ms. Snalam initially told him she would only be gone about six months. Therefore, starting at about five months, he started calling Ms. Snalam to see if she would come back from her leave the next month. She did not agree to return the next month, and he called her several more times during her maternity leave to see if she was ready to return to work. Finally, at about the eight or nine month point, Ms. Snalam told him "no", she was entitled to a year and would be taking a year, which is what happened. This was not put to Ms. Snalam in cross-examination, but I accept that Mr. Wightman likely did try to get Ms. Snalam to return to work early given his evident dissatisfaction with her replacement.

963 Ms. Snalam agreed that her replacement was inadequate, although she emphasized her opinion that her replacement had taken advantage of the situation, and back-stabbed her in her absence.

964 Ms. Snalam noticed that things were tense when she returned to work after the completion of her maternity leave and for about six months thereafter. She said that she was held responsible for things that had happened while she was away. Mr. Wightman told her it had been a "gong show", and that her replacement had not been good enough. Mr. Wightman testified that he told Ms. Snalam on her return that "that will never happen again", and that "I am never being put in that position again". He also testified that it took months and months after Ms. Snalam returned for her to fix the mistakes the replacement had made in her absence. He complained a great deal about having to deal with various banks, other creditors and bonding companies during both Ms. Snalam's maternity leave and thereafter.

965 Overall, I conclude that the respondents placed sole responsibility on Ms. Snalam to find a replacement for her maternity leave. While I find she tried to find one in a timely way, she was unsuccessful, and the replacement she did find was inadequate. Ms. Snalam tried to assist her replacement during the first three months of her maternity leave, a testament to her dedication to PML. Mr. Wightman blamed Ms. Snalam for the inadequacy of her replacement, and the problems with the company's finances during her leave, and repeatedly told her, in no uncertain terms, that that would never happen again.

966 In or about 2004, Ms. Snalam became pregnant again. Unhappily, she miscarried shortly after informing Mr. Wightman. There is no evidence of any employment-related difficulties associated with this pregnancy.

Second pregnancy and leave

967 Ms. Snalam became pregnant again in 2005. She testified that she was hesitant to tell Mr. Wightman because of the way she had been treated when she returned from her first maternity leave. Ms. Tibbitts' evidence, that she urged Ms. Snalam on several occasions to tell Mr. Wightman about her second pregnancy sooner than she did, but that Ms. Snalam was reluctant to do so, tends to confirm this.

968 I have already made my findings of fact with respect to Ms. Snalam's and Ms. Brown's July 2005 meeting in which they disclosed their respective pregnancies to Mr. Wightman, and do not repeat those findings here.

969 After the July 2005 meeting in which she and Ms. Brown disclosed their pregnancies, Ms. Snalam testified that Mr. Wightman was very tense and rarely talked to her except to ask her if she had found a replacement yet, and to tell her that she had better get on it or he would do something about it. I accept this evidence.

970 Ms. Snalam continued to work at PML until early August 2005, when she had complications and was hospitalized. Sadly, she lost her baby.

971 Ms. Snalam was in hospital for about a week and a half at this time. Despite her very unhappy personal circumstances, she performed work for PML from her hospital bed, ensuring that payroll was completed. No one else at PML was able to complete payroll, because, Ms. Snalam testified, Mr. Wightman had forbidden her from training anyone else to do this work due to confidentiality concerns. While Mr. Wightman did not testify that he had forbidden Ms. Snalam to teach anyone else how to do payroll, testifying about his surprise when a junior accounting employee told him she had never done it, he did agree that Ms. Snalam helped get payroll completed from her hospital bed. This again speaks to Ms. Snalam's remarkable dedication to her work.

972 After Ms. Snalam was discharged from hospital, she went into PML's offices for a couple of days to sort things out, and then went on leave. Ms. Snalam testified that PML paid her for the first couple of weeks, and then she went on Employment Insurance leave.

973 Ms. Snalam and Mr. Rilling both testified about Ms. Snalam having a hard time getting a hold of Mr. Wightman at this time. Mr. Rilling testified that Ms. Snalam asked him to try to do so for her, but was unable to because Mr. Wightman was on holiday in Osoyoos. He let Ms. Snalam know he tried. Mr. Wightman testified that he tries to avoid checking his telephone messages while on holiday, but was not trying to avoid Ms. Snalam's calls in particular. He said that he found out shortly before returning to Vancouver that Ms. Snalam was in a bad state in hospital. He said that he did not pry, but found out some details of her condition. There was no evidence that he attempted to contact Ms. Snalam at this time.

974 Ms. Snalam testified that, at this time, she was not sure how long she would be off work. She thought she might have told Mr. Wightman that she would be off for three to six months for medical reasons. Mr. Wightman testified in cross-examination that he had no idea how long Ms. Snalam would be off. He testified that they had a conversation where she got irritated with him because he was being insensitive in how he talked about her pregnancy. In that conversation, he testified that she told him she was entitled to maternity leave.

975 In light of this evidence, Mr. Wightman had no explanation for why it was stated in the respondents' Response to Complaint that Ms. Snalam told him she would take a full year off and that he agreed. He agreed in cross-examination that the Response was misleading.

Events of March 2006

976 Ms. Snalam testified that, while on leave, Mr. Wightman never contacted her about a return to work. She said that she unsuccessfully attempted to contact him on several occasions, including while she was in hospital. Later, she attempted to get him to contact her through other employees, and finally sent him an e-mail telling him she was ready to return March 27, 2006. That e-mail was not introduced into evidence. Mr. Wightman finally responded to Ms. Snalam by way of a voice mail message asking her to meet him at a Tim Horton's close to her house. To put this in chronological context, this was about a month after Ms. Brown went on her second maternity leave.

977 In his testimony, Mr. Wightman did not refer to any of Ms. Snalam's earlier attempts to contact him. I find they occurred as testified to by Ms. Snalam. He did testify that she contacted him in 2006, at which point he talked to her. He said that she wanted to meet at a Tim Horton's, and he agreed to meet her there.

978 Sometime in early March 2006, Ms. Snalam and Mr. Wightman met at the Tim Horton's. Both of them testified about their meeting. To the extent of any inconsistency, I prefer Ms. Snalam's evidence about what happened.

979 According to Ms. Snalam, Mr. Wightman told her that she did not have a job to come back to because he had reorganized things in her absence. He talked a little about the company in general, such as hiring and projects which had been done in her absence. This was the first indication Ms. Snalam had that she did not have a job to return to. Until this time, it had been her intention to return to work. He gave her no options.

980 In cross-examination, Ms. Snalam denied that Mr. Wightman offered her a position under Ms. Davie's supervision or a position when she was ready to come back. She testified that he said that "there was no place for me". At best, he said that "maybe in the future our paths will meet". She denied the suggestion that she left of her own accord, and testified that Mr. Wightman let her go.

981 Ms. Snalam testified that she felt that all the time and hard work she had put into the company had no value. She believed that she was pushed aside because Mr. Wightman did not want to have to deal with pregnancy issues.

982 In both direct and cross-examination, Ms. Snalam was asked whether Mr. Wightman asked her in their meeting, "to tell the truth, you can't handle a $25 million company?". She denied that he had asked such a question.

983 Ms. Snalam was also asked in direct whether, in the meeting, she asked for a "buy-out". She denied that she had, but said that she asked if she was going to get what she was entitled to by "Labour Standards". According to Ms. Snalam, Mr. Wightman told her that he would pay her what he owed her, without hostility. In cross-examination, it was put to her that she agreed to a settlement to end her employment. She denied this, saying that all she received was what was owing to her under Labour Standards.

984 Overall, Ms. Snalam characterized this meeting as short and tense, but cordial.

985 Mr. Wightman testified that Ms. Snalam asked how things were going at PML, and that he filled her in on what was going on. When asked in direct examination whether she said anything about her plans, Mr. Wightman testified that they talked about her return or what position she would return to. He told her that the advice he had received from a CA was that, if he was going to run a company of this size, he needed someone with a designation in charge of accounting. Ms. Snalam asked what position she would be in, and the conversation went around for a bit. Mr. Wightman testified that he told her that it would not be the same position as before as he needed someone with increased skills. He testified that he said "Carrie, tell me the truth, you can't run a $25 million company, can you?". According to Mr. Wightman, Ms. Snalam looked down at the floor and said "no".

986 Mr. Wightman was asked whether he intended to continue to employ Ms. Snalam in accounting, in response to which he testified that he gave her the opportunity to be under a higher skilled individual, but she did not want to do that. According to Mr. Wightman, Ms. Snalam asked

what she would get, and he told her whatever's fair, and to put it together. Mr. Wightman denied that he told Ms. Snalam that he had no job for her to come back to.

987 In cross-examination, Mr. Wightman testified that this would not have been a demotion for Ms. Snalam. He also testified that he had no return to work plan for her.

988 Mr. Wightman was then asked whether Ms. Snalam's ultimate departure was resolved. He testified that it was, and that she brought forward an amount she had calculated. In cross-examination, he testified that the amount was solely Ms. Snalam's doing, and her "exact figures". He was not sure if she gave it to him or Ms. Davie. If it was to him, he said fine and forwarded it to Ms. Davie.

989 Ms. Davie testified in cross-examination, that, before this time, she was not aware of much about Ms. Snalam's return to work, except that she was considering not returning. She testified that Mr. Wightman told her this. She also testified that she knew that Ms. Snalam did not want to return to work and report to her. Ms. Davie testified that she had also heard this from Mr. Wightman, she guessed in early March 2006. He told her that he had had a conversation with Ms. Snalam in which he had asked her if she would work for her, and that she was considering it. Ms. Davie testified that Mr. Wightman had not previously discussed the matter with her, and that this was the first time Mr. Wightman had discussed with her the possibility of her remaining in a permanent position.

990 Ms. Davie denied that the position Ms. Snalam could have returned to would have been a lesser position, referring to the company's considerable growth and the need for someone with a professional designation to be responsible for the company's finances. She agreed that Ms. Snalam's position would have been different insofar as she would have reported to her, and that that would be a fairly significant change from reporting directly to Mr. Wightman.

991 While I find that Ms. Snalam was not offered the option of returning to PML under Ms. Davie's supervision, such an offer, if it had been made, would have been a demotion.

992 Ms. Davie testified that the next thing she learned from Mr. Wightman was that Ms. Snalam was not returning to work. He told her to prepare a final pay cheque and to present her with a release for her signature. The pay cheque was to include the compensation Ms. Snalam and Mr. Wightman had agreed upon. Mr. Wightman conveyed to Ms. Davie that this was Ms. Snalam's choice. He also told her that she could not give Ms. Snalam the cheque until she had obtained her signature on the release. He agreed in cross-examination that this was a new procedure in 2006, undertaken on legal advice. He also testified in cross-examination that he had not said anything to Ms. Snalam about a release when they had met earlier.

993 The respondents did not enter into evidence any document created by Ms. Snalam in which she allegedly put forward the amount she was to be paid. I find that there was no such document.

994 I find that Mr. Wightman misrepresented to Ms. Davie what had been discussed between him and Ms. Snalam. It was not Ms. Snalam's choice to leave PML. She was not given the option of returning to work at PML in a position under Ms. Davie. Nor did she agree to a settlement or put forward, as Mr. Wightman testified, a financial amount she would accept. Mr. Wightman terminated Ms. Snalam's employment, and told her that she would be paid what she was entitled to under the *Employment Standards Act*. Mr. Wightman told Ms. Davie the basis for the amount to be paid to Ms. Snalam, and Ms. Davie made the calculations on that basis.

995 Ms. Snalam returned to PML's premises on March 31, 2006 to pick up her pay, ROE and personal things. At that time, she spoke with Ms. Davie. Both Ms. Snalam and Ms. Davie testified about what occurred that day, Ms. Davie only in cross-examination.

996 According to Ms. Snalam, Ms. Davie told her that she had a document Ms. Snalam had to sign or she would not be allowed to pick up her cheque or ROE. Ms. Snalam testified that she was surprised by this document, but eventually signed it that day. The document, which was a general release, was entered into evidence. Ms. Snalam had refused to disclose the release to Ms. Brown's counsel prior to the hearing and a ruling by me that it could be disclosed, because it was, by its terms, stated to be confidential. Her meticulousness in this regard speaks well to her character and the reliability of her testimony.

997 Under the terms of the release, Ms. Snalam was paid $13,616.42, made up of eight weeks of regular pay, vacation pay calculated on severance, previous accrued vacation pay, an RRSP contribution, and medical premiums, in return for which released PML from any and all legal claims she might have, included a complaint under the *Human Rights Code*. Ms. Davie testified that she performed the calculations to arrive at these figures on the basis of Mr. Wightman's instruction that Ms. Snalam was to receive eight weeks pay, whatever vacation pay she was owed, and certain other benefits. Ms. Davie testified that these were the amounts Mr. Wightman told her Ms. Snalam was to be paid. The release was given to Ms. Davie by Mr. Wightman. He told her that, before she gave Ms. Snalam the cheque, she must have her sign the release.

998 In cross-examination, it was suggested to Ms. Snalam that she took the release away. She denied this, explaining that she went downstairs to talk for a couple of minutes to her husband who was waiting for her, and that she did not believe she took the release with her when she did so. Ms. Davie confirmed that Ms. Snalam talked to her husband about the release in the parking lot.

999 Ms. Snalam testified that she felt pressured and stressed out. She talked to Ms. Davie for a while, but their conversation "went in circles". She testified that she read, but did not understand, the release, in particular the reference to it being a "settlement", which it was not. She felt she had no choice but to sign it. She acknowledged that she could have taken it away, but that would have meant not receiving her ROE or cheque. No other employees at PML had, in her experience dealing with such matters, been required to sign such a document.

1000 Ms. Davie was very clear in her evidence that she told Ms. Snalam she would have to sign the release before she could be given the cheque. She testified that Ms. Snalam could have taken the release away or sought legal advice. She also testified that Ms. Snalam told her there had been no discussion of a release between her and Mr. Wightman, which surprised her.

1001 It was put to Ms. Davie in cross-examination that it was not proper to withhold an employee's final pay cheque pending the execution of a release. She initially disagreed. She then stated that the vacation and severance pay should have been separated out. When asked if Ms. Snalam quit or was terminated, Ms. Davie said that she quit. She did not remember if she prepared Ms. Snalam's ROE. She was then asked if it was improper to withhold at least some items in exchange for a release. She agreed, then asked if she could say she was confused, and said that it was a double-edged sword. She said that she would stand by the decisions she made at the time, namely, that she needed to have a release signed before she would turn over the cheque.

1002 Ms. Snalam testified that she asked to speak to Mr. Wightman, but was told he was not available. She felt that, contrary to what Mr. Wightman had told her in their earlier meeting, this

was hostile. Ms. Davie testified that Mr. Wightman was there when Ms. Snalam and her family arrived. She did not testify about whether Ms. Snalam asked to see him. I find Ms. Snalam did ask to see Mr. Wightman, but that he avoided seeing her.

1003 Ms. Snalam's ROE was not entered into evidence, so I do not know if PML represented to the government that she quit or was terminated. The release does not refer to her having quit, but does refer to releasing any claim "arising out of the contractual relationship that I had with Professional Mechanical Ltd., or the termination of such relationship". The Appendix refers to "Severance Calculations", and eight weeks pay as severance, together with vacation pay calculated on severance. Had Ms. Snalam quit, she would have had no legal entitlement to any severance pay or vacation pay on severance.

1004 I find that Ms. Snalam's employment was terminated, and she did not quit. Given that her employment was terminated, she was entitled, at a minimum, to compensation for length of service under the *Employment Standards Act*. Under s. 63(2)(b) of the *Act*, with her length of service, she was entitled to eight weeks wages, the amount she was paid. It was improper for the respondents to withhold these, or any other amounts to which she was entitled by statute, from Ms. Snalam until she signed a release.

1005 Ms. Davie testified in direct that she was aware that Mr. Wightman subsequently offered Ms. Snalam the opportunity to fill in for Ms. Klatt while the latter was on maternity leave. It was not put to Ms. Snalam in cross-examination that Mr. Wightman offered her this position, and Mr. Wightman did not testify that he did. I put no weight on Ms. Davie's evidence that Mr. Wightman offered Ms. Snalam such a position, and find that this is likely one of those occasions upon which Mr. Wightman misled Ms. Davie about circumstances to put himself in a better light.

4. Rhonda Klatt

1006 As with Ms. Snalam, to this point I have only addressed the evidence relating to Ms. Klatt as it relates directly to Ms. Brown's situation. In this part of my decision, I set out my findings of fact relating to Ms. Klatt's employment with PML.

1007 I found Ms. Klatt to be an honest witness who told the truth to the best of her ability, even when it was contrary to the allegations of Ms. Brown, the party who called her. I have, however, exercised some caution in dealing with some aspects of Ms. Klatt's evidence. That caution arises from the strength of Ms. Klatt's emotions about some of the matters discussed in her evidence, in particular the direction she says she received not to talk to the technicians in the months leading up to her maternity leave. Ms. Klatt was clearly angry at Mr. Wightman, for reasons that were not entirely clear on the evidence. She testified that, at one time, she felt that Mr. Wightman was a wonderful man, and her friend, and clearly feels both disillusioned and betrayed by him. Thus, while I have relied on aspects of Ms. Klatt's testimony, I have been careful to consider the effects of these strong emotions on her perceptions of some events.

1008 The evidence was clear that Ms. Brown and Ms. Klatt did not care for one another while both worked at PML. That was reflected in Ms. Klatt's conversation with Mr. Wightman in which he called Ms. Brown a cunt, about which I have already made my findings. Ms. Klatt testified that Ms. Brown tended to belittle employees, including her, that she saw as below her. She found Ms. Brown brusque. Ms. Brown, while agreeing she could be brusque, denied belittling other employees. Ms. Brown also testified that they neither liked not disliked one another, but she did not agree with how Ms. Klatt handled some tasks. This was reflected in her evidence about not wanting

Ms. Klatt to do the payroll when Ms. Snalam was hospitalized. Ms. Brown denied that she ever referred to Ms. Klatt in a derogatory way, and there was no evidence that she did.

1009 Clearly, Ms. Klatt did not testify in these proceedings out of any loyalty to Ms. Brown.

1010 Ms. Klatt worked for PML between 1998 and 2007 as Service Coordinator. A key component of this position was dispatching service technicians. As dispatcher, Ms. Klatt worked under Mr. Angelini's supervision. By all reports, Ms. Klatt was an outspoken person, who was not afraid to voice her opinions.

1011 On December 4, 2006, Ms. Klatt went on maternity leave. To put this in chronological context, Ms. Klatt left on maternity leave two months before Ms. Brown was due to return from hers. In preparation for her departure, PML hired Michelle Mattiussi to replace her while she was on leave. Ms. Klatt assisted in the process of hiring Ms. Mattiussi.

1012 In her complaint, Ms. Brown alleged that:

> 32. While Ms. Brown was on her maternity leave, Mr. Wightman also treated another pregnant employee, Rhonda Klatt, poorly during the months preceding her maternity leave. Ms. Klatt was put in an office by herself and told not to communicate with her replacement.

1013 Ms. Klatt testified that neither Ms. Brown nor her counsel spoke with her prior to this allegation about her being including in the complaint. Ms. Brown's evidence on whether, or when, or about what she spoke to Ms. Klatt was inconsistent. She admitted she did not speak to Ms. Klatt about the allegations or the complaint, but said she talked to her to get her phone number to give to her lawyer. The timing of this was unclear. Overall, it is clear that Ms. Brown based the allegations about Ms. Klatt on what she had heard from other sources. She eventually named Mr. Angelini as her source for this information.

1014 A substantial amount of evidence was led regarding the circumstances surrounding Ms. Klatt's leave, and the events leading up to it.

1015 On the whole of the evidence, it is clear that Ms. Klatt and Ms. Mattiussi did not get on well in the period leading up to Ms. Klatt going on leave. Ms. Klatt herself admitted as much. According to Ms. Klatt, Ms. Mattiussi did not listen to her when she gave her instructions.

1016 They were working in very close proximity, and, according to Mr. Angelini, Ms. Klatt did not think that Ms. Mattiussi was doing a good job, and told Ms. Mattiussi as much. Ms. Tibbitts observed them not getting along, which she attributed to Ms. Klatt not being very skilled as a trainer. She said there was a lot of conflict, and Ms. Klatt was getting frustrated. Ms. Mahy's, Ms. Novinc's and Mr. Rilling's evidence was to similar effect.

1017 Ms. Klatt testified that it was her suggestion that she move to another office. In cross-examination, she said that she made the suggestion because "they" told her not to talk to the technicians any more. Only in cross-examination did Ms. Klatt indicate that she took anything negative out of the move, saying that she had no choice. She said she had no choice both because she was not getting along with Ms. Mattiussi and because "they" told her "not to talk to people I cared about". "They" appeared, on Ms. Klatt's evidence, to be Mr. Angelini and, especially, Ms. Davie. Ms. Davie testified that it was Mr. Angelini who told Ms. Klatt not to talk to the technicians because she was knocking Ms. Mattiussi's capabilities in front of Ms. Mattiussi.

1018 Mr. Angelini also testified that Ms. Klatt chose to move to another work area to get away from Ms. Mattiussi. He believed that he, together with Mr. Wightman and Ms. Davie, came up with the idea of Ms. Klatt moving in order to diffuse the tension between her and Ms. Mattiussi. He thought it was a good idea given the constant differences between them, which could have an impact on the technicians it was their job to dispatch.

1019 Ms. Davie was not sure if Ms. Klatt spoke to her or Mr. Angelini first, but recalled Ms. Klatt telling her that she might like to leave early if she could not be moved away from Ms. Mattiussi. Ms. Davie told her they would do whatever she wanted. Ms. Davie testified that Ms. Klatt was a fabulous worker. Ms. Davie spoke to Mr. Hamilton, to see about moving Ms. Klatt into his office, and he agreed. She also testified that she believed she and Mr. Angelini sought Mr. Wightman's approval of the plan to separate Ms. Mattiussi and Ms. Klatt.

1020 Mr. Rilling testified that, at this time, Ms. Klatt was not dispatching, but was making estimates for his retrofit department, which she could do from any computer, and that, while he did not initiate it, he agreed with this move.

1021 In the result, Ms. Klatt moved to another office, which she shared with Mr. Hamilton and another employee, one of whom was usually on the road. Given the cramped quarters in PML's premises at this time, it was not unusual for employees to share offices. Ms. Novinc testified that Ms. Klatt told her the new location was quieter and less distracting.

1022 On the evidence as a whole, I find that Ms. Klatt herself chose to move to another office, and did not take strong exception to the office move in and of itself. However, she did complain in direct that, in the couple of months before she left for her maternity leave, Mr. Wightman did not talk to her and basically ignored her. In cross-examination, Ms. Klatt recalled a single incident in which Mr. Wightman failed to say hello to her. She also complained that other people ignored her. In cross-examination, she also complained about the direction not to talk to the technicians about work. Her testimony indicated that she had strong feelings about these matters, which likely affected her perception of the nature of the direction not to talk to the technicians and the motivation behind it.

1023 I find that it is unlikely that either Mr. Wightman or other PML employees were intentionally ignoring Ms. Klatt in the months leading up to her maternity leave. The office move meant that she was in a relatively secluded location as compared to the dispatch desk, which would have led to reduced interaction. So far as Mr. Wightman is concerned, I find that he is a busy man, who is unlikely to go out of his way to speak to employees. The single incident in which he failed to say "hello" recalled by Ms. Klatt was likely nothing more than an isolated incident arising from him being preoccupied. I also find that Ms. Klatt was not directed not to talk to the technicians. Rather, she was directed not to talk to the technicians about work, or to make negative statements to them about Ms. Mattiussi, in order to give Ms. Mattiussi an opportunity to establish herself as their dispatcher, and to reduce tensions between the two women.

1024 Ms. Klatt testified that she spoke to Mr. Wightman on the last day before she left on leave, and he told her that, if she was not the one leaving, "this" wouldn't be happening. It was not entirely clear, on Ms. Klatt's evidence, what "this" referred to. I find it likely referred to her having moved to another office.

1025 In this meeting, Mr. Wightman also showed Ms. Klatt an office plan indicating where her office would be in the new building PML would be occupying by the time she returned. From this,

she took it that Mr. Wightman hoped she would come back. She knew that he thought she was a good dispatcher. She left on a positive note.

1026 The week before Ms. Klatt went on leave, some of the women in the office organized a celebration for her with a cake and a gift. It was "put on" by PML. She thought it was a nice, congratulatory thing to do.

1027 In re-examination, Ms. Klatt testified that, before she left on her leave, Mr. Rilling told her that, if he was her, he would not return, because Mr. Wightman did not deserve her. In cross-examination, Mr. Rilling denied saying this. He testified that the only conversation he had with her was to ask her to come back and work with him. While little turns on it, I prefer Mr. Rilling's evidence on this point.

1028 Ms. Klatt did not return to PML at the conclusion of her maternity leave. She testified that she could not do so given the way she was treated before she went on leave, with everyone ignoring her. She wrote a letter of resignation, dated October 3, 2007. In it, she did not raise any concerns about how she had been treated. Rather, she wrote that she had decided to accept a position elsewhere, that it was not an easy decision, and wished Mr. Wightman and PML every good fortune. When asked why, she said that HVAC is a small industry, and she thought it was the professional thing to do. In cross-examination, she said it was sincere.

1029 In cross-examination, however, Ms. Klatt agreed that she did not return to PML because she did not want to work under Mr. Angelini's supervision, as she had lost respect for him, in part because of his friendship with Ms. Brown. She indicated that her opinion was commonly held, and that Mr. Wightman had written Mr. Angelini up numerous times to get rid of him for performance problems. Mr. Angelini acknowledged in cross-examination that performance issues had been raised with him. I accept that Ms. Klatt did not want to work under Mr. Angelini's supervision.

1030 Ms. Klatt testified in cross-examination that Mr. Rilling called her while she was on maternity leave and offered her a position working under his supervision in retrofit. She thought this would have been in or about April 2007. According to Ms. Klatt, Mr. Rilling told her she would earn more money, although he did not say how much. Ms. Klatt testified that she believed that this offer arose after Ms. Brown's court case came up, and that, while she took it as a real offer, she did not think it was sincere. She thought they were trying to make sure she came back for the purposes of the case. It was not clear on Mr. Klatt's evidence if the case to which she was referring was this complaint or some other legal proceeding, but nothing turns on this, as there is no evidence before me of Ms. Brown initiating any other legal proceedings against the respondents. While she said she would have no problem working with Mr. Rilling, and even brought her baby into the office while she was on leave to talk to him, Ms. Klatt did not accept the offer.

1031 Ms. Klatt also stated in cross-examination that Mr. Wightman called her while she was on leave to ask her if it was alright for him to fill her position because she would be moving to the new position with Mr. Rilling.

1032 Mr. Rilling testified that, as Ms. Klatt was doing estimating before she left on her maternity leave, "we" offered her a job in the retrofit division doing the same kind of work on her return. He thought this was a natural progression. He said that he talked to Ms. Klatt about this a couple of times, and that to his knowledge, she was looking forward to it. He testified that Ms. Klatt was really good at estimating, and he thought she would have done well in it. She would have earned commissions, so she would have made more money. When asked if these discussions were prior to

Ms. Klatt leaving on maternity leave, he said that it was his understanding she was coming back in that role.

1033 Mr. Rilling was asked in cross-examination if Ms. Klatt's old job was available to her, and he said he was not sure, and did not run the service department where she had formerly been employed. He did say that both dispatcher positions were filled, and he just offered the position in retrofit. When asked, he agreed that he offered Ms. Klatt the position while she was on maternity leave without discussing the matter first with anyone else, including Ms. Davie. He said that he talked to Mr. Wightman about the possibility. He did not remember if he talked to Mr. Angelini, to whom Ms. Klatt had reported to in the past. He said that he never discussed compensation with anyone either within PML management or Ms. Klatt herself. He just knew it would be increased. He testified that he had the authority to offer the position, but would have had to discuss compensation with Mr. Wightman before offering a particular compensation rate. Mr. Rilling testified that Ms. Klatt was leaning towards accepting his offer, but told him she had to look at other options. She told him she did not want to come back and work with Mr. Angelini, but said nothing about Mr. Wightman. She never accepted the offer, and he never had any discussions with either Mr. Wightman or Ms. Davie about what she said.

1034 Ms. Davie testified that it was Ms. Klatt's decision not to return to work after her maternity leave. She had no firsthand knowledge of the offer made to her to move to a position under Mr. Rilling's supervision, but said that she was requested, she believed by Mr. Wightman, to set up a work station for Ms. Klatt in the new building in the retrofit department. She testified that she was not involved in any discussions about a salary increase for Ms. Klatt. She also testified that she was surprised by Mr. Rilling's evidence that it was not open to Ms. Klatt to return to her former position in dispatch - she believed that Ms. Klatt had the choice of which position to return to.

1035 Ms. Davie was asked in cross-examination about a paragraph in her affidavit, sworn on July 12, 2007 in support of the respondents' application to dismiss the complaint, in which she stated that Ms. Klatt would be returning to work at PML after her maternity leave in late 2007 or early 2008, and had been offered a promotion to a project manager position in the retrofit division, which would involve a significant salary increase, and which Ms. Klatt had accepted. It was put to her that this paragraph was not true. She disagreed, and said that if she swore then that Ms. Klatt had been offered a promotion and salary increase, she must have known that to be true at the time. She denied several times that she would have lied, but acknowledged there was no paper to substantiate an offer with a promotion and salary increase. She acknowledged Mr. Rilling's evidence that there had been no formal offer and acceptance. She was certain that her information about the matter came to her from Mr. Wightman.

1036 I find that Ms. Klatt could have, had she chosen to do so, returned to work at PML. Had she done so, it would have been in a different position in retrofit under Mr. Rilling's supervision, rather than in her old dispatch position under Mr. Angelini. Matters had not reached the point of certainty described in Ms. Davie's affidavit. While Ms. Davie did not state it in her affidavit, as she acknowledged she ought to have done, the information was based on what she had been told by Mr. Wightman. It was in the respondents' interests to present Ms. Klatt's circumstances in as positive a light as possible order to meet the allegations made about her mistreatment by Ms. Brown, and I find that they did so. I do not find that Ms. Davie was a knowing party to that overstatement.

1037 Ms. Klatt testified that she was contacted by Mr. Wightman about swearing an affidavit for the respondents in these proceedings. She testified that, in that conversation, he told her that Ms.

Brown was coming after him, and was accusing him of calling Ms. Klatt a cunt to another employee. They had a lengthy conversation, in which she explained "all the stuff" she had gone through, which she did not want to believe he was behind. At the end of their conversation, Ms. Klatt testified that Mr. Wightman said "that fucking bitch will never get a dime out of me." Mr. Wightman did not testify about this conversation, and I accept Ms. Klatt's evidence about it.

1038 Ms. Klatt agreed to provide an affidavit if Mr. Wightman told the truth about everything. She testified that she spoke to Mr. Wightman's counsel, and was given a draft affidavit, but did not sign it because it was not true. The draft affidavit which Ms. Klatt refused to sign was entered into evidence. Ms. Klatt identified some parts of it which she disagreed with, in particular that she had accepted an offer from Mr. Wightman of a promotion with PML to assume on her return from her maternity leave.

1039 I accept that Ms. Klatt could have returned to work at PML in the retrofit division. Given that Ms. Klatt did not want to work under Mr. Angelini's supervision any longer, appears both to have had a good relationship with Mr. Rilling, and to have been made a good offer for the new position, it is significant that she did not accept it. The reasons for Ms. Klatt's decision are likely complex, but include: her continuing unhappiness about what she perceived as a directive not to speak to the technicians prior to her maternity leave; being offered a promotion which she did not believe was sincere; and being requested to swear an affidavit which she believed was inaccurate. Whatever the reasons, she came to the conclusion that she did not want to return to work at PML, and sought and obtained work elsewhere in the HVAC industry.

5. Evidence about Mr. Wightman's treatment of other employees

1040 The respondents sought to meet Ms. Brown's allegations about their alleged mistreatment of her, Ms. Snalam and Ms. Klatt, through leading a considerable body of evidence that PML and Mr. Wightman were caring, accommodating employers, especially in relation to pregnancy, childcare and other family-related needs. Specific examples included employees being allowed to leave work early to care for sick children, being allowed to bring children to the office if they were left unexpectedly without childcare, given time off to attend family funerals, and other similar matters.

1041 Employees testified that they were permitted to take time off for such matters without loss of pay, although they sometimes referred to working extra time to make up for time taken off on such occasions. Ms. Davie, who would be in a position to know, testified that employees were not docked pay on such occasions. She testified that she had discussed the matter with Mr. Wightman, who expressed the view that you have to have some give and take, and when you give a little, you get ten-fold back.

1042 In this connection, Mr. Wightman testified about his own upbringing and experiences raising children. He said that, as a result of his own experiences, he tried to cut people as much slack as possible. While somewhat self-serving, I accept this evidence.

1043 Ms. Do, who is a single mother, testified about her own experiences, such as being allowed on occasion to leave work early when her child was sick without loss of pay. She said that she would work extra hours on occasion, and that she was, in general, treated fairly during her employment with PML between October 2005 and July 2009. I note that Ms. Do was confused in her evidence about Ms. Brown and Ms. Snalam, giving a description of an interaction with Ms. Brown while Ms. Brown was on maternity leave that could not, in fact, have been with her. While I accept

Ms. Do's evidence about her own experiences, I place no weight on her evidence about anyone else, given her confusion about the identity of Ms. Snalam and Ms. Brown.

1044 Ms. Freer is a young mother who testified she sought work at PML because she understood they had been accommodating of the childcare needs of her sister, Ms. Novinc. Her first day of work at PML was February 5, 2007; she therefore never worked with Ms. Brown. During her interviews with Mr. Angelini, Ms. Davie and Mr. Wightman, Ms. Freer raised her need to work only four days a week, and was hired on that basis, and continued to work on that schedule until her recent return from her August 2008 - August 2009 maternity leave, when she went to a three day week. She originally worked as Mr. Angelini's assistant, and then moved into dispatch, working alongside Ms. Mattiussi.

1045 Ms. Freer testified that she has occasionally had to leave work early to pick up her children, and it has never been a problem for her to do so, nor has she lost compensation as a result. She has observed others treated in a similar manner.

1046 Ms. Freer has a good relationship with Mr. Wightman, and has never heard him make negative comments about other employees. She recalled him assisting her and a technician, with whom she had a quarrel, to work through their problem. She also recalled him directing technicians to be respectful when dealing with office staff.

1047 Evidence was also led about some other employees, in particular Ms. Novinc and Ms. Tibbitts, being allowed to work part-time or flexible schedules which suited their childcare arrangements. There was also evidence of office celebrations being held and gifts given to some female employees who were going on maternity leave.

1048 In the main, this evidence went unchallenged by Ms. Brown, who stipulated through counsel that there was a body of evidence of employees being permitted to take time off for childcare and other family-related obligations. Her counsel asked me to note that much of the evidence related to events after Ms. Brown left PML, which is an accurate observation. Nonetheless, I accept the evidence about the respondents accommodating employees' family obligations. I also accept Ms. Snalam's evidence, which was that the respondents were more compassionate towards people's problems in the early days of her employment when, in order to keep the company going, Mr. Wightman was more willing to make concessions.

1049 In this connection, I note Mr. Wightman's evidence that he has never discriminated against any employee, male or female. The ultimate issue before me in this complaint is whether Mr. Wightman, and though him, PML, discriminated against a particular employee, Ms. Brown. I return to that issue later in my analysis.

1050 Mr. Angelini testified that Mr. Wightman made derogatory comments about female employees getting pregnant, referring to "fucking women, all they do is get pregnant and leave us to fix it." While Mr. Angelini was cross-examined in a general way about Mr. Wightman's attitudes towards female employees requiring accommodation for pregnancy and family-related reasons, he was not cross-examined about this comment. Further, Mr. Wightman did not address this alleged comment in his evidence, although he denied that he found female employees going on maternity leave inconvenient, and testified that he always welcomed it and tried to assist where he could. I accept Mr. Angelini's evidence about this comment, and find that Mr. Wightman said to him "fucking women, all they do is get pregnant and leave us to fix it."

1051 I accept that, in most cases, and in particular, with more junior, and thus more readily replaced, employees, Mr. Wightman did not find women taking maternity leave to be a significant inconvenience to his business.

1052 On all of the evidence before me, however it is clear that in some cases, and in particular in the cases of Ms. Snalam and Ms. Brown, and to a lesser extent, Ms. Klatt, he did. In the case of senior employees such as these, on whom his business relied, Mr. Wightman did find that their taking maternity leave posed problems. In Ms. Klatt's case, PML had to deal with a personality conflict between her and her replacement. In Ms. Snalam's case, PML twice had a difficulties finding an adequate replacement on short notice; the first time resulting in what Mr. Wightman testified were significant problems for his business. In Ms. Brown's case, he twice had to decide how to cover her job functions while she was on leave. The first time, he was unhappy with the result when he allowed her to remain involved during her leave; the second time he did it himself, but had significant conflict with Ms. Brown in deciding to take that course.

1053 I do not accept Mr. Wightman's statement that he always welcomed women taking maternity leaves, and never found it to be an inconvenience. To the contrary, I find that he found the maternity leaves of senior female staff, in particular Ms. Snalam and Ms. Brown, highly inconvenient for his business. It was for this reason that he reacted so negatively when they disclosed their second PML pregnancies to him in July 2005. It was also a factor in the deterioration of his relationship with Ms. Brown in the period leading up to her second PML maternity leave, as he was forced to deal with questions relating to what her role, if any, would be during her leave.

VI ANALYSIS

1054 Ms. Brown alleges discrimination in employment on two grounds: sex (pregnancy) and family status.

1055 While factually intertwined, the legal bases for the two grounds of alleged discrimination are conceptually distinct, and I will deal with them separately.

1056 In respect of both grounds, there is no requirement that the discrimination have been intentional: s. 2 of the *Code*. The focus is on the effects of the allegedly discriminatory conduct on the complainant, who must show that there was a connection between the ground relied upon and the adverse treatment experienced.

1. Discrimination on the basis of pregnancy

1057 In *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, the Supreme Court of Canada established that discrimination on the basis of pregnancy is discrimination on the basis of sex. In reaching this conclusion, the Court stated that:

> One of the purposes of anti-discrimination legislation is ... the removal of unfair disadvantages which have been imposed on individuals or groups in society. Such an unfair disadvantage may result when the costs of an activity from which all of society benefits are placed upon a single group of persons ... Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation ....

> Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can become pregnant. (paras. 29 and 40)

1058 There is no dispute about what Ms. Brown must prove, on a balance of probabilities, in order to establish a *prima facie* case of discrimination on the basis of pregnancy. In the factual circumstances of this case, Ms. Brown must prove that:

a. She was pregnant or went on a pregnancy-related leave of absence;
b. She was treated adversely in regard to her employment; and
c. It is reasonable to infer from the evidence that her pregnancy or pregnancy-related leave was a factor in the adverse treatment. She need not show that the pregnancy or leave was the sole factor in the adverse treatment.

Parry v. Vanwest College, 2005 BCHRT 310, para. 61.

Vestad v. Seashell Ventures Inc. 2001 BCHRT 39, para. 39.

1059 I note that, in her final submissions, Ms. Brown alleged discrimination on the basis of pregnancy only in relation to her second pregnancy and maternity leave at PML. I therefore need not consider whether the respondents discriminated against her in relation to her first pregnancy and maternity leave, although the facts found with respect to that earlier period may be relevant in considering whether they discriminated against her in the latter period.

Was Ms. Brown pregnant or did she take a pregnancy-related leave?

1060 These facts are not in issue. Ms. Brown was pregnant. She told Mr. Wightman about her pregnancy in July 2005. She went on maternity leave in February 2006, and sought to return to work from that leave in February 2007.

Was Ms. Brown treated adversely in her employment?

1061 Ms. Brown submitted that was treated adversely in her employment in a number of respects.

1062 In argument, the respondents conceded that Ms. Brown was treated adversely, in the sense that she was treated differently, but submitted that that adverse treatment must be considered in the context of the valid business reasons for it.

1063 I agree with the respondents that any adverse treatment must be considered in context, with regard to any valid business reasons for it. However, the context for the adverse treatment, and the reasons for it, are more properly considered in the third stage of the *prima facie* analysis, and the respondents' rebuttal to it, not at this stage in the analysis.

1064 For now, the question is whether, and how, Ms. Brown was treated adversely in her employment.

1065 I find that Ms. Brown was treated adversely in the following respects potentially related to her pregnancy or leave. Whether any of these forms of adverse treatment are related to her preg-

nancy or leave, and thus are *prima facie* discriminatory, or are justified for valid business reasons, and thus are not ultimately discriminatory, will be considered separately below.

1066 First, Ms. Brown was subjected to adverse treatment when she disclosed her pregnancy to Mr. Wightman in July 2005. His reaction to her announcement was negative and angry. He told her, in essence, that he could do without her. Together with his even more negative reaction to Ms. Snalam's announcement of her pregnancy, Mr. Wightman's reaction in the meeting left Ms. Brown shaken and upset.

1067 Second, the respondents asserted in these proceedings that Mr. Wightman developed a number of concerns about Ms. Brown's performance in or around the summer of 2005, but did not raise them with her because he decided to wait until after her return from her maternity leave to do so. In my findings of fact, I have concluded that the various performance problems relied upon by the respondents were not substantiated. To the extent, however, that Mr. Wightman actually had concerns about any of the alleged performance problems, Ms. Brown was subjected to adverse treatment insofar as he failed to give her timely notice of them or allow her an opportunity to respond to them.

1068 Third, Ms. Brown was subjected to adverse treatment in the deterioration of her relationship with Mr. Wightman in the months leading up to her second maternity leave. Ms. Brown had been a friend, and trusted manager, of Mr. Wightman for years. She had been a key component in the growth of PML's business. As conflicts arose between them in December 2005 and January 2006 about her upcoming maternity leave, that changed, culminating in their hostile meeting of January 24, 2006.

1069 During this period, Mr. Wightman also spoke to Ms. Brown about Ms. Snalam in disparaging terms, calling her a "fuck-up", and telling Ms. Brown that he did not want Ms. Snalam to return to work at PML. Being subjected to such comments about another employee on maternity leave would cause a reasonable person in Ms. Brown's circumstances to be concerned about how Mr. Wightman would view her when she went on maternity leave. It likely heightened Ms. Brown's desire to remain actively involved with PML during her maternity leave, so as to be able to protect her position.

1070 Fourth, Ms. Brown was subjected to adverse treatment, as compared with her first maternity leave, in relation to her request to be permitted to perform work and bank her earnings, and continue to receive her car allowance, during her pregnancy leave. Being allowed to work and bank her earnings and to receive her car allowance were of benefit to Ms. Brown, and were elements of her employment relationship which she wished to be able to continue while on leave, as she had done in the past, but Mr. Wightman refused to agree to allow her to do so.

1071 Fifth, Ms. Brown was subjected to adverse treatment, again as compared with her first maternity leave, in being excluded from any involvement with PML while on leave. It was important to Ms. Brown to be able to stay involved, and Mr. Wightman refused to permit her to do so, including through issuing the no contact directive.

1072 Sixth, Ms. Brown was subjected to adverse treatment, as compared with the previous years of her employment, when Mr. Wightman refused to sign the tax forms she submitted to him in April 2006. While the precise nature of the tax advantage Ms. Brown would have received had Mr. Wightman signed those forms was not established in the evidence, there clearly would have been

some. This was a benefit Ms. Brown enjoyed in the past, and which was denied to her while she was on maternity leave.

1073 At the same time, Mr. Wightman sent Ms. Brown the harsh April 28, 2006 e-mail, in which he unilaterally cancelled her flexible working conditions, referred in threatening terms to the suggestion she might make a complaint to the Employment Standards Branch, and told her not to call his home again. When she telephoned Mr. Wightman about the e-mail, her swore at her, and hung up the phone. This is clearly adverse treatment.

1074 Seventh, Ms. Brown was subjected to adverse treatment, as compared to her fellow employees, in being excluded from any consultation about the development of the new sales structure while she was on maternity leave. The mere fact of that exclusion is, in and of itself, adverse treatment, as the changes to the sales structure were significant, and had a very significant potential impact on Ms. Brown's job duties and earning potential.

1075 Eighth, Ms. Brown was subjected to adverse treatment in the changes made to her job and the sales structure while she was on leave. Her management duties were entirely eliminated. Those management duties were important to her, as they had been part of her job since Mr. Wightman's January 18, 2000 letter, offering her the position of "Contract Sales Manager". The management aspect of her job had only increased over time, such that, by January 2005, she was employed in an exclusively managerial capacity.

1076 I accept that the elimination of Ms. Brown's management duties, and unilateral reassignment to direct sales, constituted a demotion.

1077 Further, while some elements of Ms. Brown's compensation package remained the same, the move to a direct sales position meant that the commission structure changed. While the respondents' evidence was that they had not done any "number-crunching" to determine what Ms. Brown's earnings would likely be under the new structure, she testified that she would earn approximately $18,000.00 less per year.

1078 In addition, there were significant changes made to other terms and conditions of Ms. Brown's employment. These include being required to work exclusively from the office rather than from home, and having no flexibility with respect to the days and hours of her work. This was contrary to her previous situation, under which she determined where and when she would work, informing the respondents and her co-workers of her work schedule, and being available by phone, fax and e-mail as required.

1079 Ninth, Ms. Brown was subjected to adverse treatment in learning of the changes to her job title and functions through viewing PML's website, rather than being personally informed by Mr. Wightman. Learning of such significant changes through such means would be humiliating to any employee.

1080 Tenth, Ms. Brown was subjected to adverse treatment on February 5, 2007. While I do not accept that many of the changes she was told of that day were a surprise to her, given the information she had obtained from the website, Mr. Angelini and Ms. Novinc, some were. Further, while I also do not accept that Ms. Brown was as humiliated that day as she would have had the Tribunal believe, I do accept that some events of that day were humiliating. In particular, I accept that a reasonable person in Ms. Brown's position would have found being told that she would be sitting at a

desk in the hallway outside Mr. Wightman's office, while her former assistant, Ms. Tibbitts, occupied her former office, humiliating.

1081 Ms. Brown submits that the changes to her position and duties upon her return to work, summarized at points eight through ten, constituted a constructive dismissal. The respondents made few submissions on this point, other than to suggest that, if she wanted to pursue a claim of constructive dismissal, she ought to have sued in court.

1082 While a complainant need not necessarily establish a constructive dismissal in order to establish adverse treatment, the Tribunal has, as explained in *Vestad*, *supra*, para. 52, applied the concept of constructive dismissal in appropriate cases:

> Constructive dismissal is a concept that has been imported into human rights from employment law. Where there is a "significant alteration" in a complainant's job duties and a complainant can establish a nexus between the change in duties and the prohibited ground of discrimination, a complainant will be found to have been constructively dismissed: see *Rachwalski v. E.C.S. Electrical Cable Supply Ltd.* (1996), 30 C.H.R.R. D/315 (B.C.C.H.R.) at paras. 110-113; upheld on other grounds *E.C.S. Electrical Cable Supply Ltd. v. British Columbia (Council of Human Rights)* (1996), 30 C.H.R.R. D/328 (B.C.S.C.); *Jones v. C.H.E. Pharmacy Inc. et al.*, 2001 BCHRT 1 at paras. 33-45.

1083 I agree with Ms. Brown that the unilateral demotion from a management role, coupled with the other significant changes to the terms and conditions of her employment on her return from her maternity leave, constituted a constructive dismissal. However, whether Ms. Brown was constructively dismissed or not, she was clearly subjected to an array of adverse treatment in her employment, which is sufficient to satisfy the second stage of the *prima facie* analysis.

Is there a nexus between Ms. Brown's pregnancy or leave and the adverse treatment?

1084 As stated above, the onus is on Ms. Brown to show that it may reasonably be inferred that her pregnancy or pregnancy-related leave was a factor in the adverse treatment she experienced. To put it another way, she must show that there is a nexus or link between her pregnancy or leave and any adverse treatment she may have experienced: *Armstrong v. British Columbia (Ministry of Health)*, 2010 BCCA 56, paras. 24-27.

1085 If Ms. Brown establishes this third element, then the burden shifts to the respondents. The case law is less clear and consistent than one might wish with respect to what the shifting burden means. This was not a point on which the parties focussed in their submissions. What is clear is that the respondents have both the opportunity, and the burden, of establishing a defence to *prima facie* discriminatory conduct, leading to the ultimate conclusion that there was no violation of the *Code*.

1086 In some cases, that may be done by establishing the statutory defence that the *prima facie* discriminatory conduct is justified as a *bona fide* occupational requirement. That is not what the respondents sought to do in this case. Rather, they sought to show that Ms. Brown's pregnancy or maternity leave was not, in fact, a factor in any adverse treatment, because any adverse treatment was the result of valid business reasons.

1087 In a case such as this, it is artificial to attempt to analyze separately Ms. Brown's initial burden of showing that it is reasonable to infer that her pregnancy or leave was a factor, and then

the respondents' evidentiary burden of negating that inference by reference to valid business reasons. In their submissions, the parties did not engage in these two processes separately, but rather made their submissions on a global basis: was Ms. Brown's pregnancy or leave a factor in the adverse treatment or not? The respondents may negate an inference that it was by showing that they had legitimate business reasons for their conduct. The ultimate burden, however, remains on Ms. Brown to show, on a balance of probabilities, that her pregnancy or pregnancy-related leave was a factor.

1088 I propose to proceed on the same basis as the parties, and consider the facts which could give rise to an inference that Ms. Brown's pregnancy or leave was a factor, as well as the facts which could negate that inference, together.

1089 In considering the second element of the *prima facie* case analysis, I identified ten ways in which Ms. Brown experienced adverse treatment following her July 2005 announcement to Mr. Wightman that she was pregnant and would be taking maternity leave. There are several considerations which apply with respect to all ten examples of adverse treatment in terms of whether there is a link between them and Ms. Brown's pregnancy or leave. There are also some which relate only to some of them. In what follows, I first consider the considerations which apply in common, and then go on to consider the ten instances of adverse treatment separately, before finally considering whether the adverse treatment experienced by Ms. Brown, considered as a whole, was discrimination on the basis of sex (pregnancy).

1090 In relation to all ten examples of adverse treatment, timing is a consideration which tends to strengthen the possible inference that Ms. Brown's pregnancy or maternity leave was a factor in the adverse treatment: *Parry*, paras. 63-65. As I have indicated, in the period after she disclosed her pregnancy, Ms. Brown went from a being a trusted friend and manager, to a distrusted person whom Mr. Wightman isolated from the workplace while on leave, treated with hostility, and demoted to a non-managerial sales position on her return. While the timing of these events is not determinative, it is a factor which may be taken into account in considering whether there is a nexus between the pregnancy or leave and the adverse changes in Ms. Brown's employment.

1091 Also relevant to all ten instances of adverse treatment are the derogatory comments which I have found that Mr. Wightman made, not only about Ms. Brown, but also about Ms. Snalam and Ms. Klatt, both while they were on maternity leave and thereafter. To recap, Mr. Wightman called: Ms. Brown a "cunt" to Ms. Klatt in telling her about his new requirement, to take effect following her return from maternity leave, that Ms. Brown work from the office at particular times; Ms. Klatt a "cunt" to Mr. Angelini sometime during her maternity leave; Ms. Snalam a "fuck-up" to Ms. Brown while Ms. Snalam was on maternity leave; Ms. Brown a "bitch" to both Mr. Angelini and Ms. Klatt after she had left her employment with PML; and said to Mr. Angelini that, "fucking women, all they do is get pregnant and leave us to fix it."

1092 Leaving the comments about Ms. Brown being a "bitch" after she left PML to one side, as it is arguable that they were motivated by anger in response to her filing this complaint and not by any discriminatory animus, the others were all highly derogatory comments about women who were on maternity leave. The two "cunt" comments were not only derogatory, but gendered, sexist comments of the grossest kind. It is reasonable to infer from these comments that Mr. Wightman's conduct with respect to all three women, and Ms. Brown in particular, was negatively affected by his view of the fact that they were women who were on maternity leave, and were thereby inconveniencing his business operations.

1093 I now turn to an examination of each of the ten instances of adverse treatment already identified, to determine if Ms. Brown's pregnancy or leave was a factor.

1094 First, I consider the adverse treatment to which Ms. Brown was subjected when she disclosed her pregnancy to Mr. Wightman in July 2005. Mr. Wightman's negative and angry response was directly responsive to Ms. Brown's and Ms. Snalam's announcement of their pregnancies and resulting maternity leaves. There is a clear and obvious link between Ms. Brown's pregnancy and impending maternity leave and Mr. Wightman' reaction. There is no valid business reason for expressing such a negative reaction to an employee who informs her employer that she is pregnant.

1095 Second, I consider the respondents' failure to raise with Ms. Brown any of their asserted concerns with respect to her performance in 2005. Mr. Wightman's evidence was that he decided not to address any of these concerns with Ms. Brown during the summer of 2005, because she would be going on maternity leave in February 2006, and he decided he would deal with them thereafter.

1096 An employer is obliged to treat a pregnant employee like any other when it comes to concerns about her performance: *Vestad, supra*, para. 50. The only exception would be if the performance concerns were the result of the pregnancy, in which case accommodation would have to be considered, but those are not the facts in this case. Mr. Wightman's decision not to address any performance-related concerns he says he had about Ms. Brown during 2005, thereby preventing her from responding to those concerns, because she would be going on maternity leave in some months, is clearly and directly related to her pregnancy and maternity leave.

1097 Mr. Wightman's failure to do so is not justified by any valid business reasons, as there was plenty of time between the summer of 2005 and the start of Ms. Brown's leave in February 2006 to raise these concerns with her, provide her the opportunity to respond, and to take any action Mr. Wightman deemed appropriate in light of her response.

1098 Third, Ms. Brown's relationship with Mr. Wightman deteriorated in the months leading up to her February 2006 maternity leave. The deterioration reached its culmination in their January 24, 2006 meeting in which Mr. Wightman asked her if he wanted her to get angry. This instance of adverse treatment is related, at least in part, to the fourth, which is Mr. Wightman's decision not to allow Ms. Brown to perform work for PML and bank her earnings, and continue to receive her car allowance, during her upcoming maternity leave, as these topics were bones of contention between them during this period.

1099 I accept that the respondents had valid business reasons for the decision not to allow Ms. Brown to perform work and bank her earnings and continue to receive her car allowance during her maternity leave. I accept that Ms. Davie, in good faith and for legitimate reasons, advised Mr. Wightman that it would not be appropriate to allow these things to occur during Ms. Brown's maternity leave, and that Mr. Wightman acted on her advice in making his decision. There was no discriminatory nexus between this decision and Ms. Brown's pregnancy and maternity leave. Insofar as the deterioration in Ms. Brown's and Mr. Wightman's relationship in this period was related to the conflict over these issues, or to Ms. Brown's own dogged pursuit of her desired resolution to those issues, there is also no nexus between her pregnancy and maternity leave and the deterioration.

1100 However, the prohibited ground, in this case pregnancy, need not be the sole reason for the adverse treatment for a discriminatory nexus to be made out. I find that, in addition to the non-discriminatory issue about working and earning her car allowance during the leave, there were also other factors at play in the deterioration of the relationship between Ms. Brown and Mr. Wightman in the period leading up to her maternity leave.

1101 I have found that, while the respondents often accommodated the child-bearing and family obligations of their employees, Mr. Wightman found the maternity leaves of certain key female employees, especially Ms. Brown and Ms. Snalam, highly inconvenient. Mr. Wightman had been very unhappy about Ms. Snalam's first maternity leave, due to the difficulties associated with her replacement's performance. Ms. Snalam, through no fault of her own, had had to go on her second maternity leave, with no notice, leaving PML again in a difficult situation, especially as regards the completion of payroll. Mr. Wightman's response to this situation can be inferred from his failure to contact Ms. Snalam in response to her repeated efforts to reach him, even after he returned from vacation, and his reference to her as a "fuck-up" to Ms. Brown.

1102 Mr. Wightman had also been unhappy about Ms. Brown's first maternity leave, given the poor performance of the sales division in her absence. His unhappiness with the business consequences of the maternity leaves of his key female personnel was reflected in the derogatory comments he made about Ms. Brown, Ms. Snalam and Ms. Klatt while they were on leave, and his general comment to Mr. Angelini about "fucking women, all they do is get pregnant and leave us to fix it".

1103 I find that Mr. Wightman's dissatisfaction with having to deal with the issues raised by Ms. Brown's impending maternity leave, including planning how to manage the sales department in her absence, was a factor in the deterioration of his relationship with Ms. Brown in this period. An example is his offer to have Ms. Brown write his lawyer about her concerns about her employment during her maternity leave, when he never had any genuine intention of having his lawyer answer her queries.

1104 While I accept that the maternity leaves of key personnel may present challenges to an employer faced with ensuring that their job functions are adequately covered in their absence, this does not justify an employer taking out his frustrations about doing so on an employee.

1105 I therefore find there is a discriminatory link with the third instance of adverse treatment, the deterioration in Ms. Brown's and Mr. Wightman's relationship, but not in the fourth, his refusal to allow her to work and bank her earnings, and to continue to receive her car allowance, during her maternity leave.

1106 The fifth instance of adverse treatment was the exclusion of Ms. Brown from any involvement with PML while on leave, as communicated in the memo written by Mr. Angelini at Mr. Wightman's direction, and Mr. Wightman's oral directive to office staff. This is related to the seventh instance, which was Ms. Brown's exclusion from any consultation about the development of the new sales structure while she was on maternity leave.

1107 I have accepted that there were valid business reasons for not allowing Ms. Brown to perform work for PML while on maternity leave. The fact that there were valid business reasons for not allowing her to perform work does not mean that there were valid business reasons for refusing to communicate with her about anything related to PML business. In particular, it does not mean

there were valid business reasons for not consulting her with respect to the significant changes made to her job and the sales division more generally during her maternity leave.

1108 As stated in *Parry, supra*:

> A workplace is not "frozen" while an employee is away on maternity or parental leave; the employer is entitled to make legitimate business-related decisions which may affect the configuration of the workplace to which the employee returns. In making those decisions, however, the employer must ensure that the employee on leave is not differentially affected by those decisions or left worse off than other employees who were not away on leave. (para. 67)

1109 Thus, the respondents were, as a matter of human rights law, entitled to consider and make changes to the business, which might affect Ms. Brown, while she was on maternity leave. But in doing so, they were obliged to ensure that Ms. Brown was not differentially affected by those changes because of her maternity leave. In circumstances such as these, where Mr. Wightman chose to involve Ms. Novinc and Mr. Bowes in the planning process for reorganizing the sales division, that obligation included, at a minimum, providing Ms. Brown with an effective opportunity to participate in that process. Mr. Wightman testified that she was not included in that process because she was on maternity leave. Being on maternity leave does not disentitle a person from being consulted about changes in the workplace, particularly those which may have a direct effect on them. There is a clear and direct link between Ms. Brown's maternity leave and her exclusion from any communication about PML, especially about the changes to her job and the sales division more generally.

1110 The sixth instance of adverse treatment was Mr. Wightman's refusal to sign the tax forms Ms. Brown submitted to him in April 2006, and his related e-mail and telephone conversation with Ms. Brown.

1111 The respondents' evidence was that Mr. Wightman relied upon Ms. Davie's advice in refusing to sign the tax forms. However, I have found that, in relation to one of the forms, the T2200(05) Declaration of Conditions of Employment, Mr. Wightman failed to provided Ms. Davie with all of the relevant information about Ms. Brown's employment with PML, which affected the advice she gave him about signing that form. I therefore do not accept that there were valid reasons for Mr. Wightman's refusal to sign this form, as he had in previous years. In the alternative, any valid reasons were not the sole reasons - Ms. Brown's pregnancy-related leave was also a factor. In relation to the other form, the GST 370E Employee and Partner GST/HST Rebate Application, I accept that there were valid reasons for refusing to sign it, namely the absence of one of the two pages.

1112 Mr. Wightman's refusal to sign the T2200(05) form was integrally related to his decision to unilaterally cancel Ms. Brown's flexible work conditions, and in particular her ability to work from home from time to time. While I find that there is a nexus between this refusal, and the cancellation of Ms. Brown's flexible work conditions, and Ms. Brown's pregnancy and leave, it is much more closely related to her family status, given the connection between the flexible work conditions and her ability to fulfil her childcare obligations. I therefore deal with this issue in considering the allegation of discrimination on the basis of family status.

1113 I deal with the eighth, ninth and tenth instances of adverse treatment together. Those were the changes made to Ms. Brown's job and the sales structure, resulting in her demotion; learning of the changes to her job and title through viewing PML's website while on leave; and being informed of the changes to her terms and conditions of employment on February 5, 2007, resulting in her constructive dismissal.

1114 The passage cited from *Parry* is again helpful in considering these instances of adverse treatment. While the respondents were, as a matter of human rights law, allowed to make changes to their business, they were obligated to ensure that, in doing so, Ms. Brown was not adversely affected as a result of being on maternity leave: see also, *Rachwalski v. E.C.S. Electrical Cable Supply Ltd.*, [1996] B.C.C.H.R.D. No. 6, aff'd on other grounds (1996), 30 C.H.R.R. D/328 (BCSC), para. 112; and *Hazelwood v. Leask Agro Services* (2004), 50 C.H.R.D. D/447, paras. 33 and 37.

1115 By failing to consult Ms. Brown about these changes, the respondents failed to ensure that she was not adversely affected as a result of being on maternity leave. While Mr. Bowes testified that they had to make sure they spoke for Ms. Brown in creating the new sales plan, the fact is that both he and Ms. Novinc were motivated, at least in part, by their own self-interest. Any efforts they may have made to "speak for" Ms. Brown, or to make the plan fair and equitable, could not make up for the exclusion of Ms. Brown from any participation in the creation of the plan.

1116 What the result would have been in terms of the changes to Ms. Brown's terms and conditions of employment had she been consulted is and can only be a matter of speculation. The lost opportunity to have input is itself adverse, and intimately connected to her being on maternity leave.

1117 What is more, I am persuaded that Ms. Brown's lost opportunity to be consulted was not inadvertent on the part of the respondents. On all of the evidence before me, I find that the respondents intentionally made these changes while Ms. Brown was on leave, and subject to their no contact directive, in order to limit her awareness of the changes under consideration, and to prevent her from having any input.

1118 Further, the manner and timing in which Ms. Brown was informed of the changes was closely connected with being on maternity leave, and the respondents' edict that she not be spoken to about PML-related business while on leave. Ms. Brown learned something of the changes afoot through covert conversations with Ms. Novinc and Mr. Angelini. She learned that her job title and functions had been changed by viewing PML's website. Neither is an appropriate way in which to learn of significant changes to one's job. Had she not been on leave, the respondents would have had no option but to advise Ms. Brown of these changes in a more appropriate manner.

1119 The respondents may have had some valid business reasons for wanting Ms. Brown to return to a sales role or to reorganize the sales structure more generally. Ms. Brown was an excellent salesperson, and Mr. Wightman may have legitimately reached the conclusion that she was more valuable to him in that role than as a manager. Any valid business reasons the respondents may have had, however, cannot justify her exclusion from the planning process and their failure to consult her about any proposed changes.

1120 Nor could there be any valid business reason for Ms. Brown being required to sit at a desk in the hallway outside Mr. Wightman's office. While I accept that space was limited, I do not accept that she could not have been permitted to return to her old office, especially in light of Ms. Tibbitts' and Ms. Davie's expectation that she would do so.

1121 There is a close nexus between Ms. Brown's maternity leave and all of these forms of adverse treatment.

1122 In summary on this point, I am persuaded that there is a link or nexus, between all of the forms of adverse treatment which I have identified that Ms. Brown experienced and her pregnancy or maternity leave, except for Mr. Wightman's refusal to permit her to work and bank her earnings and continue to receive her car allowance during her maternity leave, and his refusal to sign the GST 370E Employee and Partner GST/HST Rebate Application. Further, I am not persuaded that there were valid business reasons which would negate that link with respect to any of the adverse treatment experienced by Ms. Brown, with the exceptions of those matters already noted.

1123 This conclusion is only strengthened if one considers on a global basis the entirety of the respondents' treatment of Ms. Brown before, during and at the conclusion of her maternity leave. The respondents engaged in a pattern of negative conduct towards Ms. Brown from the time she announced she was pregnant. The inference is, on the whole of the evidence, inescapable that that negative treatment was related, in whole or in part, to her pregnancy and maternity leave. Any valid business reasons which may exist for some of the conduct do not negate that inference.

Conclusion on discrimination on the basis of pregnancy

1124 For the reasons given, Ms. Brown has established a *prima facie* case of discrimination on the basis of pregnancy. Also for the reasons given, the respondents have failed to answer that *prima facie* case, except to the extent noted. I therefore conclude that the respondents discriminated against Ms. Brown on the basis of sex (pregnancy).

2. Discrimination on the basis of family status

1125 The leading case in British Columbia with respect to discrimination on the basis of family status related to changes in the terms and conditions of employment is *Health Sciences Assoc. of B.C. v. Campbell River and North Island Transition Society*, 2004 BCCA 260, in which the Court stated:

> If the term "family status" is not elusive of definition, the definition lies somewhere between the two extremes urged by the parties. Whether particular conduct does or does not amount to *prima facie* discrimination on the basis of family status will depend on the circumstances of each case. In the usual case where there is no bad faith on the part of the employer and no governing provision in the applicable collective agreement or employment contract, it seems to me that a *prima facie* case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee. I think that in the vast majority of situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a *prima facie* case. (para. 39) (emphasis added)

1126 While, as Ms. Brown notes in her submissions, *Health Sciences* has been subject to some criticism and has not been followed in other jurisdictions, it remains binding authority in this province: *Hoyt v. Canadian National Railway*, 2006 CHRT 33, para. 120; and *Johnstone v. Canada (Attorney General)*, [2007] F.C.J. No. 43, para. 29, aff'd on other grounds, [2008] F.C.J. No. 427 (C.A.).

1127 The essential basis for Ms. Brown's complaint on the ground of family status is Mr. Wightman's unilateral cancellation of her flexible working conditions. To recap, in his January 18, 2000 letter, confirming their discussions and offering Ms. Brown employment as Contract Sales Manager, Mr. Wightman made the following promise:

> In the times that we live in now, it is a constant juggle of trying to balance work responsibilities with family life. You have requested that there be a ***permanent*** condition of flexibility in your work environment to meet the needs of your family requirements. We will make this promise a lasting ***commitment*** to you. (emphases in the original)

1128 This promise of a permanent condition of flexibility was essential to Ms. Brown's decision to resign her employment with a much larger company and accept employment with PML. Mr. Wightman knew how important it was to Ms. Brown, which is why he chose to put it, in such unequivocal terms, in writing.

1129 I have found that the promised permanent condition of flexibility included not only, as submitted by the respondents, the ability to work part-time, but also Ms. Brown's ability to change her days and hours of work, and the option of working from home.

1130 Mr. Wightman facilitated Ms. Brown's ability to work from home from time to time, initially, through providing her the equipment necessary to set up a home office, and later, by providing her with remote e-mail access.

1131 Throughout the course Ms. Brown's employment at PML, she periodically changed her hours and days of work and performed some of her work from home. Her work from home took place both within her "official" hours of work, as they changed from time to time, and outside those hours. Ms. Brown worked in this way, in large part, in order to meet her childcare obligations as the primary care-giver to her children. Mr. Wightman was, at all relevant times, aware of Ms. Brown both changing her days and hours of work, and working from home, and either agreed to her doing so, or at the very least, acquiesced in it.

1132 Ms. Brown's ability to change her days and hours of work, and to work from home from time to time, were terms and conditions of her contract of employment with PML.

1133 In his April 28, 2006 e-mail, Mr. Wightman purported to unilaterally cancel these terms and conditions of employment, stating:

> ... <u>You have requested the opportunity to have a flexible work schedule to suit your day care needs and PML ... allowed this to happen solely for your benefit not for the benefit of PML</u> ...
>
> ...
>
> <u>So that there is no misunderstanding in any future year on the flexible work schedule to suit your day care needs any and all flexible hours are hereby cancelled. Upon your return you will be required (the same as every other employee of PML ...) to be at the office</u> at 8:00 a.m. pacific standard time <u>and remain there</u> until 4:30 p.m. pacific standard time with two (2), fifteen (15) minute breaks and

> one (1), half (1/2) hour breaks for lunch. When you leave the office to meet with clients of PML ... to complete your job duties, you will fill in your expected destination and return time in the new employee log ... Although in the past our agreement was to let you work three (3) days per week, PML ... will continue to honour this, but the employer has the right to set the hours of work and the days you are required to work. Upon your return, PML ... will set a standard working schedule to accommodate our requirements. (emphasis added)

1134 These alterations in the terms and conditions of Ms. Brown's employment were, in substance, repeated, both in Mr. Wightman's January 29, 2007 e-mail, reiterating the hours of work, while adding the specific days, and in the February 5, 2007 meeting. In doing so, he breached the promise of a "permanent condition of flexibility in your work environment to meet the needs of your family requirements", which he had made as "a lasting commitment to" Ms. Brown.

1135 The respondents submitted that these changes in Ms. Brown's terms and conditions did not result in a serious interference with a substantial parental or other family duty or obligation of the employee, with the result that there was no discrimination on the basis of family status.

1136 However, I conclude that the usual test *Health Sciences*, relied upon by the respondents, does not apply. That is because this is not the "usual case", but rather one of the exceptions referred to by the Court of Appeal, where there is a governing provision in the employment contract which the respondents breached in unilaterally changing Ms. Brown's terms and conditions of employment.

1137 The respondents relied on *Evans v. University of British Columbia*, 2007 BCHRT 348; aff'd *Evans v. University of British Columbia*, 2008 BCSC 1026, in which the Tribunal dismissed a complaint of discrimination on the basis of sex and family status on a preliminary basis. In doing so, the Tribunal held that there was no reasonable prospect that the complainant would be able to succeed in her complaint that the respondent discriminated against her on the basis of family status when it denied her request for an extension to her maternity leave, in circumstances where the complainant had not made the daycare arrangements necessary for her to able to return to work as scheduled.

1138 The respondents submitted that the situation in *Evans* was very similar to Ms. Brown's complaint, and that the same result should follow. I do not agree. In *Evans*, the complainant had simply failed to make timely daycare arrangements in preparation for her return to work: para. 31. The respondent had not changed her terms and conditions of employment, resulting in a serious interference with a substantial parental or other family duty or obligation of the complainant, and was under no obligation to accommodate her request for an extended leave: para. 32. The situation in *Evans* is not similar to the complaint before me, in which Ms. Brown had a contract of employment guaranteeing her a permanent condition of flexibility, which was unilaterally withdrawn by the respondents.

1139 The respondents also submitted that there was no discrimination on the basis of family status because the only permanent condition of flexibility promised by Mr. Wightman was that Ms. Brown could work three days a week, which he did not change. I have already found that the permanent condition of flexibility encompassed more than the ability to work only three days a week, and included the ability to change her days and hours of work, and to work from home from time to

time. These elements were, as stated in Mr. Wightman's April 28, 2006 e-mail, unilaterally cancelled.

1140 I find the respondents' unilateral withdrawal of the promised permanent condition of flexibility in her work environment previously enjoyed by Ms. Brown, premised as it was on her need to meet her childcare obligations, to be *prima facie* discrimination on the basis of family status. I further find that the respondents have failed to establish any defence to the *prima facie* discrimination on the basis of family status. In particular, they have not shown that the unilateral cancellation of Ms. Brown's permanent condition of flexibility was the result of valid business reasons.

1141 I therefore conclude that Ms. Brown has established that the respondents discriminated against her on the basis of family status.

VII REMEDIES

1142 I have found that Ms. Brown was discriminated against by the respondents in her employment on the grounds of sex (pregnancy) and family status, contrary to s. 13 of the *Code*. Having done so, I turn to a consideration of the remedies to which Ms. Brown is entitled.

1143 I first list the remedies sought by Ms. Brown, as summarized by her:

1. An order pursuant to s. 37(2)(a) of the *Code* that the Respondents cease contravening the *Code* and refrain from committing the same or similar contravention of the *Code*.
2. A declaratory order pursuant to s. 37(2)(b) of the *Code* that the conduct complained of by the Complainant, or similar conduct, is discrimination contrary to the *Code*.
3. An order pursuant to s. 37(2)(d)(ii) of the *Code* for compensation wage loss for the period February 5, 2007 to February 25, 2009, totalling **$228,010.46** (2 years @ $110,808.82/yr plus 3 weeks @ $2,130.94/wk).

    * **Deduction for Mitigation:** The Complainant agrees that her earnings for the period of February 5, 2007 to February 25, 2009 should be deducted from her award. In 2007, Ms. Brown's mitigation income totalled $27,969.54 and in 2008 and 2009, Ms. Brown's income, including salary and car allowance was $29,600, which amounts she continued to receive to the date of the hearing in 2009.
    * Ms. Brown's mitigation earnings to be deducted total **$62,123.39** ($27,969.54 for 2007 plus $29,600 for 2008 plus 8 weeks @ 569.23/wk for 2009)
    * This results in a net wage loss claim of **$165,887.07**

4. An order pursuant to s. 37(2)(d)(ii) of the *Code* that the Respondents pay the employer's share of all statutory benefits, including Canada Pension Plan, from February 5, 2007 to February 25, 2009.
5. An order pursuant to s. 37(2)(d)(ii) of the *Code* for full compensation for the fees of Ms. Brown's expert witness, Dr. Zubek, in the amount of **$5,656.34**.

6. An order pursuant to s. 37(2)(d)(ii) of the *Code* for full reimbursement for the Complainant's legal fees and expenses incurred in pursuing this Complaint.
7. An order pursuant to s. 37(4) of the *Code* for costs, based on the improper conduct of the Respondents.
8. An order pursuant to s. 37(2)(d)(iii) of the *Code* that the Respondents pay the Complainant compensation for injury to dignity, feelings and self respect in the amount of $50,000.
9. An order for an amount sufficient to cover any adverse tax liability the Complainant will incur as a consequence of receiving any amounts described herein as a lump sum within one taxation year.
10. An order for pre-judgment and post-judgment interest in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

1144 I address each of these remedial requests in turn below. As will be seen, there are two matters in respect of which I have determined that the parties' further submissions are required.

1. Cease and refrain order

1145 An order under s. 37(2)(a) is mandatory upon a conclusion that a complaint is justified. Having found Ms. Brown's complaint to be justified, I therefore order the respondents to cease and refrain from discriminating on the basis of (sex) pregnancy and family status.

2. Declaratory order

1146 An order under s. 37(2)(b) is discretionary. I consider such an order appropriate in this case, and therefore declare that the respondents discriminated against Ms. Brown on the basis of sex (pregnancy) and family status.

3. Wage loss

1147 Section 37(2)(d)(ii) authorizes the Tribunal to order a respondent to "compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention."

1148 Ms. Brown seeks compensation for wages lost between February 5, 2007, the date I have found she was constructively dismissed for discriminatory reasons, and February 25, 2009, the last date of the first part of this hearing. She calculates her wage loss on the basis of her full compensation at PML for 2005, less the monies earned by her in her design business since leaving PML.

1149 The respondents submit that Ms. Brown is not entitled to any compensation for wage loss, on the basis that she failed to fulfil her duty to mitigate her damages.

1150 In reply to this submission, Ms. Brown submits that the respondents have failed to discharge the onus of proof that lies upon them to establish that she failed to fulfil her duty to mitigate, in particular by failing to show that there were other positions available which she failed to apply for. Further, she submits that, consistent with Dr. Zubek's advice, she could not return to the HVAC field, and that she fulfilled her duty to mitigate through her design business.

1151 I agree with the respondents that Ms. Brown failed to fulfil her duty to mitigate. I have already extensively reviewed the medical evidence about the alleged limitations on Ms. Brown's ability to seek work in the HVAC field, the evidence about Ms. Brown's design work, and the ab-

sence of any other efforts on her part, other than one unsuccessful job application in October 2008, to seek other employment. I do not repeat that evidence or my findings here.

1152 The obligation on a complainant is to take the steps that a reasonable person in her position would take to mitigate her damages. The burden of establishing a failure to mitigate lies on the respondent: *Vanton v. British Columbia (Council of Human Rights)*, [1994] B.C.J. No. 497, para. 81; *Bitonti v. College of Physicians and Surgeons of British Columbia*, 2002 BCHRT 29, para. 79.

1153 Ms. Brown did not take the steps that a reasonable person in her position would have taken to mitigate her damages. She did act reasonably in entering into the design business immediately upon leaving PML. But her reported earnings through that business were far less than her earnings at PML. A reasonable person would have continued to seek other employment which would more closely approximate her previous earnings. On her own evidence, Ms. Brown chose not to do so. Ms. Brown said that the design work was therapeutic, and she enjoyed it. She saw no need to seek out more lucrative employment, as she was billing out at $65-$75 an hour, and was "giving it my all".

1154 There is nothing the matter with choosing to work in a less remunerative field. Having made the voluntary decision to do so for two years, however, Ms. Brown cannot look to the respondents to make up the shortfall in her earnings. Having chosen to go into business for herself, to the exclusion of any meaningful efforts to seek other employment, Ms. Brown assumed the financial risk inherent in doing so: *Gill v. Grammy's Place Restaurant and Bakery Ltd.*, 2003 BCHRT 88, para. 159.

1155 Ms. Brown chose not to seek work in the HVAC field, where she had worked her entire adult life, enjoyed an excellent reputation, and could reasonably have expected to earn a salary comparable to that she earned at PML. There was ample evidence, even from Ms. Brown, that there were HVAC employers who were interested in hiring her, including Mr. Cedar at Hytec and Mr. Yule at Total Energy.

1156 Ms. Brown's position in final argument was that she could not seek work in the HVAC field, although even her own physician, Dr. Zubek, testified only that she would not advise Ms. Brown to seek employment in that field.

1157 As I have already indicated, I do not accept that Ms. Brown could not work in the HVAC field. Nor do I accept that it was medically inadvisable for her to do so. I find that she exaggerated any anxiety she may have felt about seeking work in the HVAC field, both in speaking with her physician, and in her testimony in this hearing, in an effort to bolster her claim for damages. This is not a situation such as *Morris v. British Columbia Railway Co.*, 2003 BCHRT 67, para. 251, in which the complainant was medically incapable due to depression of being able to look for work for some time.

1158 I find that Ms. Brown did not in fact suffer from the kind and severity of anxiety symptoms described and exhibited by her. In the alternative, if she did, then a reasonable person would have sought effective treatment for them, which she did not. A reasonable person who experienced the kind of HVAC-triggered anxiety symptoms described and exhibited by Ms. Brown, such as chattering teeth and uncontrollable shaking, would seek effective therapy, such as counselling. Ms. Brown did not, relying solely on a medication, propanolol, which does nothing to treat anxiety, but only masks the external symptoms.

1159 I therefore conclude that Ms. Brown failed to fulfil her duty to mitigate, and on this basis deny her claim for compensation for wage loss.

1160 Finally, any remedy under s. 37(2)(d)(ii) is discretionary. I have found that Ms. Brown exaggerated any anxiety she may have experienced in response to HVAC-related triggers in order to bolster her claim for compensation for lost wages. In the alternative to my finding that Ms. Brown failed to fulfil her duty to mitigation, this conscious exaggeration, taken together with Ms. Brown's failure to take any steps to find other employment after beginning work in the design business, would lead me to exercise my discretion to deny her any compensation for lost wages.

4. Statutory benefit contribution

1161 In light of my conclusion that Ms. Brown is not entitled to any compensation for lost wages, there is no basis for an order requiring the respondents to pay their share of statutory benefits.

5. Expert witness fees

6. Legal expenses

1162 I deal with these two remedial requests together. Ms. Brown sought full compensation both for the fees of her expert witness, Dr. Zubek, and for her legal expenses, both pursuant to s. 37(2)(d)(ii) of the *Code*. She submitted an invoice from Dr. Zubek in the amount of $5,656.34, and asked me to remain seized with respect to the determination of the quantum of her compensable legal expenses.

1163 The respondents' position was that Dr. Zubek's fees were compensable, if her evidence was necessary. Relying on the decision of the Federal Court of Appeal in *Canada (Attorney General) v. Mowat*, 2009 FCA 309, they submitted that the Tribunal lacks the jurisdiction to order compensation for legal expenses under s. 37(2)(d)(ii). I note that, since final argument in this complaint, an application for leave to appeal to the Supreme Court of Canada has been filed in *Mowat*: December 22, 2009, docket #33507.

1164 This is the area in which I have concluded that further submissions from the parties are required. There are two reasons for this conclusion.

1165 First, since final argument in this matter, the Tribunal issued a decision in another complaint, which draws into question the extent of the Tribunal's jurisdiction to order compensation for legal and related expenses under s. 37(2)(d)(ii): *Kerr v. Boehringer Ingelheim (Canada) (No. 5)*, 2010 BCHRT 62. In *Kerr*, the Tribunal, relying on the Court of Appeal decision in *Mowat*, disagreed with the Tribunal's earlier decision in *Senyk v. WFG Agency Network (No. 2)*, 2008 BCHRT 376, concluding that the Tribunal lacks the jurisdiction to order compensation for legal expenses incurred after the complaint was filed.

1166 The parties are entitled to an opportunity to make any submissions they may wish with respect to *Kerr* and the Tribunal's jurisdiction to order compensation for legal and related expenses, such as expert witness fees.

1167 Second, I have concluded that, with respect to the claims for compensation for expert and legal expenses under s. 37(2)(d)(ii) (assuming there is jurisdiction to order such compensation), it is appropriate to provide the parties with an opportunity to make submissions about the consequences of the findings and conclusions I have made in this decision. In particular, the parties are entitled to

make submissions about the effect, if any, of the parties' divided success in this matter, and the adverse findings I have made about the conduct in these proceedings of both Ms. Brown and the respondents, on the claims for compensation for legal expenses and expert expenses. In addition, the parties may raise any other issues which they identify arising out of these reasons which they believe are relevant to these two remedial issues.

1168 By separate letter, the Tribunal will contact the parties with respect to obtaining their submissions on these remedial issues.

7. Costs

1169 Ms. Brown seeks an award of costs in the amount of $25,000.00 for improper conduct pursuant to s. 37(4) of the *Code*.

1170 Section 37(4) states:

> (4) The member or panel may award costs
>
> (a) against a party to a complaint who has engaged in improper conduct during the course of the complaint, and
> (b) without limiting paragraph (a), against a party who contravenes a rule under section 27.3(2) or an order under section 27.3(3).

1171 Ms. Brown relies on s. 37(4)(a), arguing that the respondents engaged in improper conduct in the course of this complaint.

1172 The case law interpreting and applying s. 37(4) is quite clear. The primary purpose of an award of costs under s. 37(4) is punitive. As stated in *McLean v. British Columbia (Ministry of Public Safety and Solicitor General-Liquor Distribution Branch)*, 2006 BCHRT 103, improper conduct includes conduct which has a significant prejudicial impact on the integrity of the Tribunal's processes, including a significant prejudicial impact on another party:

> More generally, while conduct which is the result of intentional wrongdoing may certainly be "improper", in my view, improper conduct is not necessarily limited to intentional wrongdoing. Any conduct which has a significant impact on the integrity of the Tribunal's processes, including conduct which has a significant prejudicial impact on another party, may constitute improper conduct within the meaning of s. 37(4). (para. 8)

1173 I agree with Ms. Brown that the respondents engaged in improper conduct in the course of this complaint.

1174 The most serious impropriety engaged in by the respondents was filing and relying on affidavits in support of their application to dismiss the complaint which were, in material respects, inaccurate and misleading. In particular, in making my findings of fact I have found that a number of aspects of Mr. Wightman's affidavits were inaccurate and misleading.

1175 On a number of occasions, Mr. Wightman sought to lay the blame for the inaccurate and misleading aspects of his affidavits, and the respondents' Response to Complaint, on the lawyer who drafted, or the typist who typed, those documents. Those attempts to shift the blame to others were

entirely unpersuasive. In any event, a party is, as a matter of law, responsible for the actions of its lawyer in representing it: *Samuda v. Olympic Industries Inc.*, 2009 BCHRT 65, para. 56.

1176 Nor were Mr. Wightman's the only affidavits filed by the respondents and relied upon them in their application to dismiss which I have found to contain inaccurate and misleading information. I have also found inaccuracies, some of them serious, in the affidavits of Mr. Bowes, Ms. Novinc and Ms. Davie. The respondents' request to have Ms. Klatt swear an affidavit which she believed, and I have accepted, to be inaccurate, is also relevant in this connection.

1177 Swearing and filing inaccurate and misleading affidavits on an application to dismiss may have very significant prejudicial effects on both the integrity of the Tribunal's processes, and other parties. The structure of the *Code*, and the "direct access" system created by it, are such that the Tribunal deals with hundreds of applications to dismiss complaints each year. In doing so, it relies on the information provided by the parties, often in the form of affidavits. Opposing parties rarely seek leave to cross-examine affiants. Filing a misleading or inaccurate affidavit in support of an application to dismiss could lead to a complaint being unfairly dismissed, with little if any recourse available to the unsuccessful complainant. Even if a complainant is able to successfully answer the misleading or inaccurate affidavits filed by a respondent, she will be put to additional and unnecessary expense in doing so.

1178 Ms. Brown was forced to respond to the respondents' application to dismiss. Not only did she swear a lengthy affidavit in response; she also obtained an affidavit from Ms. Snalam.

1179 I also find that the respondents, and in particular Mr. Wightman, engaged in improper conduct in offering untruthful evidence in this hearing. In particular, I find that his evidence about the origin and use of the CUNT acronym was a calculated falsehood, constructed in an unsuccessful attempt to minimize the effect of evidence which put him in a bad light.

1180 I also find that Mr. Wightman engaged in improper conduct in contacting the respondents' expert, Dr. McFadden. That telephone call could have had no proper purposes.

1181 I also find that the respondents engaged in improper conduct in forcing Ms. Brown to expend the maximum resources possible in this proceeding, in the absence of any proper litigation purpose. Such a determination is normally a difficult one to make, as parties are free, within the limits of the law, to choose whatever litigation strategy they may prefer, even an uncompromising or aggressive one.

1182 However, in this case, there is the undisputed evidence that Mr. Wightman said that "he would never give that bitch a dime and will spend up to $250,000.00 of his money before he does", would make the proceedings go as long as he could, and would spend money before "he'd give that bitch a dime". It is reasonable to infer from Mr. Wightman's statements to Mr. Angelini and Ms. Klatt that he intended to make these proceedings as long and expensive as he could for Ms. Brown. The course of the litigation bears out that intention.

1183 In this regard, I note the Court's decision in dismissing the respondents' petition for judicial review of the Tribunal's decision denying their application to dismiss the complaint. In that judicial review, the respondents sought a declaration that the Tribunal had erred in denying their application to dismiss the systemic discrimination part of Ms. Brown's complaint, despite the Tribunal having offered them a rehearing of that aspect of their application, and Ms. Brown having advised them that she would not be proceeding with that aspect of her complaint. The Court held that

the respondents' refusal to avail themselves of the opportunity for a rehearing was a serious obstacle to them on judicial review: oral reasons for judgment, para. 17. Further, the Court held that the allegation of systemic discrimination was, as a result of Ms. Brown's advice that she would not be pursuing it, effectively moot: para. 24.

1184 In the result, the Court dismissed the petition. In doing so, it stated that "much time and presumably money has been spent in this court for no good or necessary juridical purpose": para. 29.

1185 The respondents' refusal to disclose certain documents to Ms. Brown in February 2008 is also relevant in this connection. I accept that parties may have legitimate disagreements about the proper scope of pre-hearing document disclosure, which may necessitate an application to the Tribunal. But some of the documents requested by Ms. Brown, which the respondents refused to disclose on the basis that they were not potentially relevant, were clearly relevant to matters in issue in this complaint, some of which were canvassed at considerable length in this hearing. Examples include financial documents necessary to test the respondents' assertions about Ms. Brown's failings as a manager, and documents about both Ms. Snalam and Ms. Klatt. In relation to such clearly relevant documents it is no answer to say, as the respondents do, that Ms. Brown could have applied for an order requiring them to disclose the documents in question. A party should not be unnecessarily put to the additional time and expense of seeking a disclosure order, nor should the Tribunal's resources be expended in dealing with unnecessary applications for disclosure.

1186 Also relevant is the length of time this hearing took to complete. The hearing was originally scheduled for five days in April 2008. The respondents unsuccessfully applied to adjourn that hearing, in part on the basis that an additional three or five days were required. That adjournment application was denied, but the April 2008 dates were later adjourned on consent to permit Ms. Brown to seek judicial review of the Tribunal's disclosure order. When the hearing was rescheduled, eight days were set in February 2009, thereby giving the respondents the additional time they said they required.

1187 The hearing proceeded in February 2009, and at the conclusion of the eight scheduled days, Ms. Brown had closed her case, and the respondents had called only their first witness, Dr. McFadden. Ms. Brown's case had taken longer than anticipated, largely due to the lengthy cross-examinations of her and Dr. Zubek. I do not fault respondents' counsel for engaging in long and rigorous cross-examinations of those two witnesses. His cross-examination was effective in revealing various weaknesses in their respective evidence. That said, the cross-examination of both went on longer than the effective presentation of the respondents' case required. Further, certain matters were raised, relating to Ms. Brown's personal life, which were both inherently embarrassing and irrelevant to any matter in issue in these proceedings.

1188 In the result, additional hearing days were required, and ten more days were set in November 2009. Seven of those days were used. Much of the evidence led by the respondents in that period was necessary to their case. Some was not, for example the repetitive questioning of each witness about what they knew about the accommodation of a long list of other employees, which I ultimately limited, after Ms. Brown stipulated that the respondents accommodated employees' family and pregnancy-related needs.

1189 None of these matters would likely be a sufficient basis alone upon which to conclude that the respondents engaged in improper conduct by unnecessarily prolonging the proceedings.

However, when the entirety of the respondents' conduct of the litigation is viewed in light of Mr. Wightman's comments about not paying Ms. Brown a dime, spending $250,000.00 of his own money before he would give her a dime, and dragging things out as long as possible, I conclude that part of the respondents' litigation strategy was to prolong these proceedings in order to make it more difficult for Ms. Brown to pursue her complaint, and not for any proper litigation purpose.

1190 Considering the matter as a whole, I am satisfied that the respondents engaged in improper conduct in the course of this complaint.

1191 The appropriate quantum for costs remains to be determined. Ms. Brown seeks $25,000.00, which is acknowledged by her to be substantial. The respondents submitted that they had not engaged in improper conduct, and that no costs should therefore be awarded. They made no alternative submissions about the appropriate quantum if costs were to be awarded. Neither party submitted any case law with respect to the appropriate quantum.

1192 While the law is clear that the primary purpose of an award of costs for improper conduct is punitive, not compensatory, the Tribunal may, in appropriate cases, consider the additional expenses to which an opposing party has been put in determining quantum: *Samuda*, para. 65.

1193 In the present case, I have no specific information about the additional resources expended by Ms. Brown as a result of the respondents' improper conduct. It is reasonable to infer, however, that she has been put to substantial additional expense as a result.

1194 While the Court's comments about the waste of resources involved in the respondents' judicial review is relevant to the determination that they engaged in improper conduct, I do not consider it appropriate to take the resources expended on that judicial review into account in assessing quantum, as the Court made a costs order against the respondents in favour of Ms. Brown in that case.

1195 Also relevant in assessing the quantum of costs is the fact that the respondents are not alone in having engaged in questionable conduct in these proceedings.

1196 In this regard, reference should be made to Ms. Brown's unsuccessful petition for judicial review of the Tribunal's disclosure order, which stood on no firmer ground than the respondents' judicial review, and in respect of which an order for costs in favour of the respondents was made. Nor did the piecemeal way in which Dr. Zubek's clinical records were disclosed to the respondents assist in the efficient resolution of this dispute.

1197 Most seriously, in terms of Ms. Brown's conduct, I have found that she consciously exaggerated the effects of the respondents' discriminatory conduct, in particular with respect to her alleged anxiety symptoms in response to HVAC-related triggers. The respondents were put to additional time and expense in addressing Ms. Brown's unsubstantiated claims that their conduct made her ill, and rendered her incapable of seeking work in the HVAC field.

1198 I have also found that Ms. Brown pursued certain allegations, such as the ones relating to the PML newsletter, and the vasectomy conversation, which were not well-founded, and served to prolong these proceedings, as the respondents were forced to respond to them.

1199 Awards of costs are discretionary, and I accept that a party's own misconduct may be such as to disentitle them to, or reduce any, costs which might otherwise be ordered against an opposing party who has been found to have engaged in improper conduct.

1200 In this case, while Ms. Brown's improper conduct is serious, it does not reach the level of that engaged in by the respondents. Regardless of Ms. Brown's conduct in making exaggerated claims and pursuing some meritless allegations, the respondents' conduct, in swearing and filing inaccurate and misleading affidavits in an effort to dismiss Ms. Brown's complaint, demands an award of costs for improper conduct. Those affidavits were filed with the intent that they be relied upon by the Tribunal to dismiss Ms. Brown's complaint without a hearing.

1201 I have found Ms. Brown's complaint to be justified, in that the respondents discriminated against her on the grounds of sex (pregnancy) and family status. In light of that finding, it is fortunate indeed that the respondents did not succeed in having her complaint dismissed on a preliminary basis. But that does not change the fact Ms. Brown was put to what must have been substantial time and resources to respond to that application, including the inaccurate aspects of the respondents' affidavits, not to speak of the uncertainty of not knowing whether her complaint would be dismissed without a hearing.

1202 Given the heavy reliance which the Tribunal places on the materials filed on preliminary applications to dismiss, it must be vigilant in ensuring that any identified impropriety in that process is met with sanctions sufficient to signal its condemnation of that conduct, and to deter others from engaging in similar conduct.

1203 The findings I have made about the reliability of certain aspects of the respondents' evidence, in particular my findings about the unreliability of Mr. Wightman's evidence, may be seen as some measure of a sanction, as the respondents have been publicly found to have attempted to mislead the Tribunal.

1204 Those findings are not, however, sufficient to signal the Tribunal's condemnation of the respondents' improper conduct. Taking into account the entirety of the matter, including: the seriousness of the respondents' impropriety; its effect, both actual and potential, on Ms. Brown and the integrity of the Tribunal's processes; and Ms. Brown's own misconduct, I conclude that an award in the amount of $10,000.00 is appropriate.

8. Injury to dignity

1205 Ms. Brown sought compensation for injury to dignity under s. 37(2)(d)(iii) in the amount of $50,000.00. In seeking this amount, she relied on the Tribunal's recent decisions in *Senyk*, where $35,000.00 was awarded, and *Kerr v. Boehringer Ingelheim (Canada) (No. 4)*, 2009 BCHRT 196, where $30,000.00 was awarded. Ms. Brown submitted that her injury to dignity was akin to, and even more egregious than, that suffered by the complainants in those cases.

1206 The respondents, in the event that the complaint was found to be justified, submitted that compensation for injury to dignity should be in the range of $5,000.00-7,500.00. In suggesting an award in this range, the respondents referred to cases including: *Bitonti, supra* ($7,500.00); *Morris, supra* ($5,000.00); and *Hashimi v. International Crowd Management (No. 2)*, 2007 BCHRT 66 ($10,000.00).

1207 I accept that Ms. Brown suffered some injury to her dignity, feelings and self-respect as a result of the respondents' discriminatory conduct. In particular, I accept that the following conduct had a negative effect on Ms. Brown's dignity, feelings and self-respect:

* Her letter to the respondents' lawyer, which Mr. Wightman told her to write, was ignored;
* Mr. Wightman was rude, unprofessional and negative in his dealings with her, including when she told him she was pregnant, at which time he told her he could do without her; in their January 24, 2006 meeting, when he asked her if she wanted him to become angry; and when she telephoned Mr. Wightman after his April 28, 2006 e-mail, at which time he swore at her, and hung up the phone on her;
* She was excluded, at Mr. Wightman's direction, from any discussion of work-related issues with her colleagues while on maternity leave;
* Her flexible work schedule, which was of crucial significance to her ability to balance her professional life and childcare responsibilities, was unilaterally cancelled by Mr. Wightman;
* Her contributions and commitment to PML were ignored or undervalued, and she was treated like a person with little to contribute, beyond her acknowledged sales ability;
* Because of her imposed isolation from the workplace during her maternity leave, she was not consulted with respect to the changes in the workplace, including to her position and the sales structure more generally;
* For the same reasons, she was not advised in a timely or appropriate manner about those changes, learning of some of them through her covert discussions with Ms. Novinc and Mr. Angelini, and of the change in her title and duties through viewing PML's public website; and
* She was told on her February 5, 2007 return to work that she would be sitting at a desk in the hallway outside Mr. Wightman's office, while her former assistant would be occupying her former office.

1208 I accept that this conduct had a negative effect on Ms. Brown's self-image as a successful businesswoman, who was able, as she put it, "to have it all" through hard work and the negotiation of an employment contract that enabled her to successfully combine the challenges of paid work and motherhood. I also accept that Mr. Wightman's conduct towards her, inconsistent as it was with their long personal and professional relationship, was hurtful.

1209 On the other hand, I have found that Ms. Brown consistently exaggerated the impact of the respondents' discriminatory conduct. In particular, I have found that she exaggerated any anxiety she may have experienced resulting from the respondents' conduct. I have also found her emotional demonstrations in the hearing to be less than genuine. I do not accept her submission that she can no longer work in the HVAC field as a result of the respondents' conduct, or that it is medically inadvisable for her to do so.

1210 In these latter respects, Ms. Brown's claim for injury to dignity stands in sharp contrast to *Senyk* and *Kerr*. Ms. Senyk had pre-existing vulnerabilities arising from serious medical issues at the time her employment was terminated, and was devastated by her employer's discriminatory conduct, which exacerbated her serious pre-existing psychiatric problems. For the full analysis of Ms. Senyk's injury to dignity, see *Senyk*, paras. 443-470.

1211 Ms. Kerr lost a significant number of years in the workforce by virtue of her employer's failure to fulfil its duty to accommodate over a lengthy period of time. She was proactive through-

out in seeking to participate in good faith in the accommodation process, but was often ignored by her employer. Her dignity and feelings were significantly negatively affected by her employer's failure to accommodate her disability. See *Kerr*, paras. 712-724.

1212 In neither *Senyk* nor *Kerr* did the Tribunal have difficulty accepting the genuineness of the complainant's emotional response to the discrimination they suffered: *Senyk*, para. 459, supported by medical evidence at paras. 460-462; *Kerr*, para. 718.

1213 In all these respects, the factors which led the Tribunal to order its two highest injury to dignity awards to date in *Senyk* and *Kerr* are notably absent in Ms. Brown's case.

1214 Despite these weaknesses in Ms. Brown's claim for compensation for injury to dignity, she is entitled to some compensation for the injury she suffered. Taking the entirety of the respondents' discriminatory conduct, and its effect on Ms. Brown, into account, I conclude that an award in the amount of $10,000.00 is appropriate.

9. Tax gross up

1215 In light of my decision declining to order compensation for wage loss, there is no basis for a tax gross up.

10. Interest

1216 The respondents are ordered to pay post-judgment interest in accordance with the *Court Order Interest Act* on the compensation ordered for injury to dignity, feelings and self-respect, and on the order for costs for improper conduct.

VIII CONCLUSION

1217 I have found that the respondents discriminated against Ms. Brown in her employment on the grounds of both sex (pregnancy) and family status. I have made two monetary orders:

(1) compensation for injury to dignity, feelings and self-respect in the amount of $10,000.00; and
(2) an order for costs for improper conduct, also in the amount of $10,000.00.

1218 I have denied Ms. Brown's claim for compensation for lost wages, and her related claims for compensation for statutory deductions and a tax gross up. The parties' further submissions will be sought with respect to her claims under s. 37(2)(d)(ii) for compensation for legal expenses and expert fees.

Lindsay M. Lyster , Tribunal Member