

# Court of King's Bench of Alberta

**Citation: Dell v Brookfield Residential (Alberta) LP, 2025 ABKB 403**

**Date:** 20250702  
**Docket:** 1801 14045  
**Registry:** Calgary

Between:

**Bryan Dell**

Plaintiff

- and -

**Brookfield Residential (Alberta) LP**

Defendant

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**Reasons for Decision  
of the  
Honourable Justice O. Ho**

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## **I. Introduction**

[1] This decision arises following a multi-day wrongful dismissal trial. The Plaintiff, Bryan Dell (“**Mr. Dell**”) was employed by the Defendant, Brookfield Residential (Alberta) LP (“**Brookfield**”) when he was dismissed with cause on April 24, 2018.

[2] Mr. Dell filed a Statement of Claim in this Action on October 3, 2018, alleging wrongful dismissal. Mr. Dell seeks, among other things, payment in lieu of reasonable notice; unpaid commissions; unpaid vacation pay; and punitive and aggravated damages.

[3] By way of commentary, counsel helpfully jointly entered as exhibits an Agreed Book of Documents containing 84 tabs/documents, and an Agreed Statement of Facts.

## II. Relevant Background Facts

[4] Brookfield is in the business of developing planned communities including the design and construction of new residential houses within these planned communities.

[5] Mr. Dell had been an employee of Brookfield or its predecessor Albi Homes Ltd. (“**Albi**”), since February 9, 2010. There is no dispute that Mr. Dell’s employment continued in the same capacity when Brookfield acquired Albi sometime in the fall of 2015. There is no dispute about Mr. Dell’s years of service.

[6] At the time of his dismissal, Mr. Dell held the position of Community Manager. He was responsible for the community of Riverstone Estates in Calgary, Alberta. His responsibilities included managing the sales and marketing processes at the Riverstone Estates sales office located in a show home (the “**Show Home**”).

[7] Mr. Dell reported to Brookfield’s Sales Manager. Mr. Dell had at varying times, either one or two sales associates who reported to him. Together with the one or two sales associates, Mr. Dell sold Brookfield’s products from the Show Home. His role included engaging with potential customers, persuading potential customers to purchase homes and leading customers through the design and construction processes involved in building semi-custom homes.

[8] The terms of Mr. Dell’s employment were governed by an employment agreement. The parties agree that the employment agreement dated October 1, 2014, between Albi and Mr. Dell forms the basis of the terms of his employment (the “**2014 Terms**”). Most of the 2014 Terms were adopted by Brookfield through an offer letter dated October 20, 2015, which was accepted/signed by Mr. Dell on October 26, 2015 (the “**2015 Terms**”). On December 28, 2017, the terms of Mr. Dell’s employment were further amended by way of a letter authored by Brookfield, and accepted/signed by Mr. Dell on January 2, 2018 (the “**2018 Terms**”). The 2018 Terms included two schedules: Schedule “A” titled “Compensation Plan and Employment Terms”; and Schedule “B” which was the job description for the position of Community Manager. For the remainder of this Reasons for Decision I will refer to the 2014 Terms, the 2015 Terms and the 2018 Terms collectively as the “**Agreement**”.

[9] Based in part on Brookfield forming part of a greater, more expansive global company operating in various fields and industries, Brookfield implemented a number of corporate policies including a Code of Conduct and Ethics (the “**Code of Conduct**”), and an Anti-Bribery and Corruption Policy (the “**Anti-Bribery Policy**”). Brookfield required all of its employees to participate in annual online training on both the Code of Conduct and the Anti-Bribery Policy. Mr. Dell signed a Code of Business Conduct & Ethics Compliance Acknowledgement & Sign-off Form when Albi was acquired by Brookfield. He also completed the required online training.

[10] While working at the Show Home, Mr. Dell was approached multiple times by Jeff Henderson, an individual employed by California Closets. California Closets sells, among other things, shelving systems and products that can be installed inside of home closets. Mr. Dell and Mr. Henderson were familiar with each other as they had worked together for a number of years at Albi.

[11] One of Mr. Henderson's visits to Mr. Dell occurred in March of 2018. During that visit Mr. Henderson talked about some elements of an incentive program in relation to California Closets' products. However, there is a dispute about the type of program that was discussed and whether an incentive was offered to and/or accepted by Mr. Dell. The differing evidence on this point is discussed in more detail later in this Reasons for Decision. The timing of this March 2018 discussion is significant because, as will be discussed later, two change orders were discovered to have been initiated by Mr. Dell the very next month.

[12] On or about April 14, 2018, Brookfield's VP of Business Development, Chris Richer, attended an industry event called the BILD Awards. While at the event, Mr. Richer learned of information that led him to believe California Closets was offering incentives to Brookfield's sales staff to encourage them to recommend California Closets to Brookfield's customers.

[13] In response to what Mr. Richer had learned, Brookfield initiated an investigation into the possibility that incentives were being offered and accepted contrary to the Code of Conduct and Anti-Bribery Policy. Brookfield conducted a search of emails and other records which revealed two instances of change order requests to remove closets from the scope of semi-custom home construction agreements, both in April 2018; instead, California Closets products were going to be installed in the closet spaces post-possession. Mr. Dell submitted both change order requests for two different customers identified as Kharay and Vaugeois.

[14] As a part of its investigation, Brookfield conducted three interviews with Brookfield employees whom Brookfield had identified as having potentially been offered incentives by California Closets. One of those employees was Mr. Dell.

[15] Subsequent to its investigation, Brookfield concluded that Mr. Dell violated the Code of Conduct and the Anti-Bribery Policy. It concluded that the relationship between Mr. Dell and Brookfield had broken down to such a degree that continued employment was impossible. Brookfield proceeded to dismiss Mr. Dell with cause, such dismissal occurring on April 24, 2018.

### **III. Analysis**

#### **A. Wrongful Dismissal**

[16] At the core of this dispute is whether Mr. Dell conducted himself in a manner warranting termination of his employment with cause. For his part, Mr. Dell denies having done anything wrong at all; more specifically, he denies participating in any incentive program that may have been offered by California Closets. Mr. Dell also takes the position that even if he did conduct himself as alleged by Brookfield, such conduct did not justify termination of his employment with cause.

[17] Brookfield's position is that Mr. Dell did participate in an incentive program offered by California Closets, and persuaded Brookfield customers to remove some of the closet scope from their home construction agreements in favour of California Closets. Brookfield says that this conduct had a direct and negative impact on Brookfield's profits/finances associated with those customers' contracts, constituted a breach of both the Code of Conduct and the Anti-Bribery Policy, and that the totality of Mr. Dell's conduct warranted his dismissal with cause.

[18] At the trial of this matter, there were a number of witnesses who gave evidence related to the extent to which Mr. Dell engaged with California Closets, whether Mr. Dell participated in any incentive program, and/or how Mr. Dell conducted himself during Brookfield's investigation. Mr. Dell himself and Mr. Henderson were the two witnesses called by Mr. Dell at trial; both gave evidence supporting Mr. Dell's assertion that he did not participate in any incentive program.

[19] Mr. Dell acknowledges that he did request change orders which removed closets from the Brookfield scope of work on behalf of some customers. Some of the change order documentation submitted by Mr. Dell not only noted that closet interiors were being removed from the scope of work but also that the customer was going to have California Closets supply and install the closet shelving instead. In that regard, Mr. Dell was forthright with his employer. Further, Mr. Dell advocated for the customer by requesting permission to have California Closets install the shelving pre-possession (rather than post-possession which was Brookfield's default position when customers desired third-party suppliers to perform any work). Mr. Dell even went so far as to request a meeting between Vaugeois and Mr. Richer in an effort to resolve Vaugeois' discontent about the post-possession policy.

[20] During his testimony, Mr. Dell admitted that he had multiple conversations with Mr. Henderson about California Closets. Mr. Dell's evidence was that Mr. Henderson wanted Brookfield to make California Closets one of its preferred vendors. Mr. Dell stated that Mr. Henderson explained to Mr. Dell how California Closets would provide a discount on the products installed into Brookfield customers' homes so that Brookfield would have room to mark-up and profit from California Closets' products. Mr. Dell must have been interested in California Closets' proposal at some level because he had communications with his superiors at Brookfield inquiring about whether California Closets could be added to Brookfield's preferred supplier list.

[21] Mr. Dell also acknowledged that he and Mr. Henderson talked about California Closets' incentive programs. However, Mr. Dell's evidence was that Mr. Henderson only broached the subject with Mr. Dell because Mr. Henderson wanted Mr. Dell's feedback and advice on a prospective incentive program that California Closets was considering rolling-out in relation to condominiums. Mr. Dell's evidence is that he was never under the impression that Mr. Henderson was offering him any incentive to recommend California Closets products, and in any event it wouldn't have been possible for him to accept any incentive since Mr. Dell only sold estate houses in the Riverstone Estate community, and not condominiums.

[22] Mr. Henderson was the other witness called by Mr. Dell at trial. Mr. Henderson's evidence is consistent with Mr. Dell's as it related to what was discussed between the two of them. Notably, Mr. Henderson's evidence was that he never offered any incentive to Mr. Dell, and that the only referral program that they discussed was the incentive program in relation to condominiums, which Mr. Henderson also pointed out could not even have applied to Mr. Dell since Mr. Dell was not selling condominiums.

[23] It is Mr. Dell's uncontested evidence that he never actually received anything, whether money or gift cards, from California Closets.

[24] Brookfield's characterization of events differs from Mr. Dell's; it says that California Closets did have an incentive program for salespersons selling houses, that Mr. Dell was expressly

offered an incentive, and that Mr. Dell participated in the incentive program in breach of the Code of Conduct and the Anti-Bribery Policy.

[25] The owner of California Closets, Mr. Johnson, testified at trial; his evidence was also that California Closets never made any payments of cash or gifts to Mr. Dell. However, Mr. Johnson explained that incentive payments made to a salesperson who recommended California Closets would only have occurred after installation. This is significant because installation by California Closets did not occur prior to Mr. Dell's dismissal.

[26] Kharay's and Vaugeois' respective house deals closed some time in the fall of 2018. The evidence on that subject is that the final 25% commissions payable by Brookfield to its salesperson responsible for those deals was paid on November 13, 2018, and October 25, 2018, respectively.

[27] The date of commissions paid by Brookfield is important since according to the terms of the Agreement, the closings had to have occurred no earlier than the one month prior to the calculation of commissions (calculations occurring once per month). Therefore, even if the timelines are stretched to their longest permitted length of time, the closings still occurred at their earliest in September or August of 2018, respectively. In other words, California Closets was not permitted to commence installation of their closets in Kharay's or Vaugeois' homes until September and August of 2018, respectively. Even if California Closets completed installation in one day, installation still would have occurred months after Mr. Dell had been dismissed by Brookfield in April of 2018.

[28] Put another way, while the evidence is that Mr. Dell did not receive any payment from California Closets, Mr. Dell would not have been scheduled to receive any payments prior to the date of his dismissal from Brookfield.

[29] In contrast to Mr. Dell's and Mr. Henderson's evidence, Mr. Johnson testified that California Closets did have an incentive program for salespersons selling houses. Mr. Johnson was explicit in his testimony that in 2018 he had allowed Mr. Henderson to offer incentives to salespersons with home builders. Mr. Johnson also testified that he was aware that Mr. Henderson offered such incentive program to various salespersons.

[30] Mr. Johnson noted that he did consider a potential incentive program that might be offered to condominium sales staff, but Mr. Johnson stated that a referral program relating to condominiums was never implemented.

[31] Significantly, in the course of his communications with Mr. Richer by phone and text message in April of 2018, Mr. Johnson put into writing that Mr. Dell was specifically offered an incentive by California Closets, and that Kharay, who Mr. Johnson knew was Brookfield's customer, had since become a California Closet customer.

[32] Mr. Johnson concedes that he never witnessed or heard Mr. Henderson in the act of making such an offer to Mr. Dell. However, Mr. Johnson's text message to Mr. Richer was written in direct response to Mr. Richer's request that Mr. Johnson identify all Brookfield salespersons that California Closets had offered incentives to. Not only did Mr. Johnson have no reason to falsely name Mr. Dell, but Mr. Johnson's text message response to Mr. Richer was written

contemporaneously with the questions being asked of him in the course of Brookfield's investigation.

[33] Further, there was evidence in the form of emails between Mr. Johnson and Mr. Henderson wherein Mr. Johnson reached out to Mr. Henderson to gather background information necessary to answer Mr. Richer's question. The emails between Mr. Johnson and Mr. Henderson reveal that at the time Brookfield was conducting its investigation, Mr. Johnson asked Mr. Henderson who at Brookfield had been given incentives, and Mr. Henderson's email response to Mr. Johnson identified Mr. Dell.

[34] I acknowledge that Mr. Johnson's and Mr. Henderson's evidence are contradictory as it relates to the question of whether Mr. Dell was offered any incentive. Mr. Johnson's evidence was that Mr. Dell was offered an incentive by Mr. Henderson on behalf of California Closets, while Mr. Henderson's evidence was that he did not offer Mr. Dell any incentive.

[35] Mr. Henderson testified at trial that his discussions with Mr. Dell about the proposed condominium incentive program arose organically. However, it is difficult to reconcile that evidence with the testimony of two other Brookfield salespersons, Mr. Maguet and Mr. Ritchie, both of whom testified that Mr. Henderson came to visit them separately at their respective show homes and spoke about California Closets' incentive program. Like Mr. Dell, Mr. Maguet and Mr. Ritchie sold houses, not condominiums. It would be highly coincidental that the condominium incentive program also came up organically on two further and separate occasions with each of Mr. Maguet and Mr. Ritchie. For this reason, I am not persuaded that the incentive program discussed between Mr. Dell and Mr. Henderson was limited only to a potential incentive program for condominiums.

[36] I also note that the emails between Mr. Johnson and Mr. Henderson, wherein Mr. Henderson says that Mr. Dell was offered an incentive, occurred relatively close in time to when the alleged events took place. Conversely, Mr. Henderson's recollection of his discussions, while corroborated by Mr. Dell's evidence, occurred 7 years after the alleged events took place. Given the temporal nature of the evidence, I believe that the emails made contemporaneously with the alleged events are likely to be more accurate than the recollection of events 7 years later.

[37] In a similar vein, there are documents that were created close in time to the events which call into question Mr. Henderson's and Mr. Dell's recollections of their discussions. Brookfield's investigative interview notes of April 23, 2018, set out that Mr. Dell did not mention the incentive program related to condominiums. Similarly, when Mr. Henderson wrote an email to Mr. Dell addressing his dismissal from Brookfield and the discussions they had had a few months later, Mr. Henderson did not mention that the incentive program they discussed related to condominiums.

[38] For these reasons, I prefer Mr. Johnson's evidence over Mr. Henderson's evidence on the question of whether Mr. Dell was offered an incentive by California Closets; I conclude that Mr. Dell was offered an incentive by California Closets pertaining to current houses for sale by Brookfield.

[39] The timing of some key events is significant. I note that Mr. Dell and Mr. Henderson discussed an incentive program in March of 2018. For the reasons set out above, I do not accept

that such discussion was limited only to the potential condominium incentive program. Rather, I have concluded that an incentive was offered to Mr. Dell by Mr. Henderson on behalf of California Closets. The very next month, two change order requests were initiated by Mr. Dell; the first on behalf of Kharay on April 3, 2018, and the second on behalf of Vaugeois on April 16, 2018.

[40] I also note that Vaugeois stated at trial that while he desired a higher-end closet than Brookfield was offering, he had not considered California Closets until it was suggested by Mr. Dell. Vaugeois' evidence is that he would have considered other high-end options had they been offered, but other than California Closets, no options were suggested.

[41] The relative proximity of Mr. Henderson's meeting with Mr. Dell, and the Kharay and Vaugeois change order requests, combined with Vaugeois' evidence lead me to conclude that Mr. Dell was not only offered an incentive by Mr. Henderson, but that Mr. Dell actually acted on such offer.

### **Does Mr. Dell's Conduct Warrant Dismissal With Cause?**

[42] Having concluded that Mr. Dell was offered an incentive begs the question of whether Mr. Dell participated in the incentive program. Mr. Dell's evidence is that he did not participate in an incentive program and in any event, he never received any incentive. However, even if Mr. Dell did not receive an incentive, that does not put an end to the question because Brookfield also terminated Mr. Dell's employment on the basis that he violated both the Code of Conduct and the Anti-Bribery Policy. In particular, Brookfield cited the following sections of policy as having been breached:

- Page 5 of the Code of Conduct which reads:

#### **DUTIES TO STAKEHOLDERS**

##### ***Deal fairly with the company's stakeholders.***

You must deal fairly with the company's stakeholders, such as the company's security holders, customers, suppliers, and employees. You should not take unfair advantage of anyone, even competitors, through manipulation, concealment, abuse of privileged information, misrepresentation of material facts or any other unfair-dealing practice.

- Pages 6-7 of the Code of Conduct which read:

#### **CONFLICTS OF INTEREST AND PERSONAL BEHAVIOR**

##### ***Avoid situations in which your personal interests conflict, might conflict or might appear to conflict with the interests of the company.***

As an employee, officer or a director, we expect that you will act honestly and ethically and in the best interests of the company by avoiding conflicts of interest in your personal and professional relationships. While we respect

your right to manage your personal affairs and investments and we do not wish to intrude on your personal life, employees should place the company's interest in any business transaction ahead of any personal interest or gain and avoid situations that present a potential, actual or perceived conflict between their interests and the company's interests.

Conflicts of interest are generally prohibited as a matter of company policy and a waiver of this Code will be granted only in very exceptional circumstances. Exceptions for employees may only be made after management reviews the matter and makes a recommendation to the Senior Vice President & Chief Financial Officer (in the case of employees) or the Chair of the Board (in the case of officers or directors) for their approval.

A "conflict of interest" occurs when a person's private interest interferes, or even appears to interfere, in any way with the interests of the company as a whole. As an employee, officer or director, you may have a conflict of interest if you are involved in any activity that prevents you from performing your duties to the company properly, or that may create a situation that would affect your ability to act in the best interests of the company. For example, no employee should have a significant interest in a business, whether directly, through a family member or personal acquaintance that supplies goods or services to, or secures goods or services from, the company, without receiving approval in accordance with this Code. Other examples of conflicts of interest include:

- Employee's engagement of third parties for personal purposes;
- Engaging in self-employment in competition with the Company;
- Having a direct or indirect financial interest in relationship with a competitor, customer, or supplier;
- Holding a position with a competitor, customer or supplier, whether as a director, employee or agent;
- Using Company assets for personal use;
- Engagement of subordinates for personal purposes;
- Hiring of related parties (including family members); and
- Acquiring any interest in property or assets of any kind for the purpose of selling or leasing it to the Company.

Conflicts of interest can exist in many other situations and the foregoing guidance is not intended to represent the only activities that could constitute such a conflict. The best way to judge whether you have a conflict of interest

is to ask yourself if a well-informed person would reasonably conclude that your interest in a matter could in any way influence your decision in carrying out a duty on behalf of the Company.

To avoid conflicts of interest, you should identify potential conflicts when they arise and contact the company's Senior Vice President & Chief Financial Officer if you are unsure whether a relationship or transaction poses a conflict or appears to pose a conflict. Directors should consult with the Chair of the Board.

If you become aware of any material transaction, agreement or relationship that reasonably could be expected to give rise to a conflict of interest for a director, officer or employee, it should be reported in accordance with the "Reports and Complaints" section of this Code.

- Page 3 of the Anti-Bribery Policy which reads:

#### **GIFTS AND ENTERTAINMENT**

*The giving or receiving of gifts and entertainment should be proportionate and reasonable for the circumstances.*

A critical part of the Company's reputation is dependent upon its integrity in dealing with its customers and suppliers. Therefore, a director, officer or employee or a member of his or her family may not solicit or receive payments, gifts, or other benefits from vendors, suppliers or other third parties as an inducement to do business. Generally, no gift should be given and no gift accepted, unless the giver or recipient is prepared for the matter to become public knowledge.

Employees who do not comply with the requirements set out in this Policy may be required to reimburse the Company for the value of any gifts or benefits they receive on behalf of the Company. In addition, violations of the Company's policies or legal and regulatory requirements in this regard could result in disciplinary action up to and including termination.

[43] The law as it relates to dismissal for just cause was summarized by the Court in *McDonald v Sproule Management GP Limited*, 2023 ABKB 587, at paras 64-69. For convenience, I reproduce those paragraphs here:

[64] A finding of misconduct does not, in and of itself, give rise to just cause for termination of employment - the employee's behaviour must be such that gave rise to the breakdown of the employment relationship so that the employment relationship could no longer viably subsist: [*Baker v Weyerhaeuser Company Limited*, 2022 ABCA 83] at para 28, citing *McKinley v BC Tel*, 2001 SCC 38 (CanLII), [2001] 2 SCR 161 at paras 29, 48-49. The core question is whether the employee has engaged in

sufficiently serious misconduct that is incompatible with the fundamental terms of, that strikes at the heart of, or is a repudiatory breach of, the employment relationship: *Baker* at para 28, citing *Dowling v Ontario (Workplace Safety and Insurance Board) (2004)*, 2004 CanLII 43692 (ON CA), 192 OAC 126; *Haack* at para 409; *Smith v Vauxhall Co-op Petroleum Limited*, 2017 ABQB at para 12.

[65] The *McKinley* framework involves a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct: *Baker* at para 28; *Dowling* at para 49. It involves consideration of (1) the nature and extent of the misconduct; (2) the surrounding circumstances; and (3) whether dismissal is a proportional response: *Baker* at para 28.

[66] At the first step, an employer is entitled to rely on after-discovered wrongdoing: *Baker* at para 28; *Lake Ontario Portland Cement Co v Groner*, 1961 CanLII 1 (SCC), [1961] SCR 553, at 563-64; *Haack* at para 414. However, the employer cannot rely on the employee's conduct *after* the termination: *Baker* at para 28; *Haack* at para 415; *Underhill v Shell Canada Limited*, 2020 ABQB 341 at para 48; *Gillespie v 1200333 Alberta Ltd*, 2012 ABQB 105 at para 29.

[67] The second step considers the particular circumstances of the employee (including age, employment history, seniority, role and responsibilities) and the employer (including its type of business, relevant policies or practices, the employee's position within the organization, and the degree of trust reposed in the employee): *Baker* at para 28.

[68] The third step, proportionality, is an assessment of whether the misconduct is reconcilable with sustaining the employment relationship, which requires a consideration of the proved conduct, within the employment context, to determine whether the misconduct is sufficiently serious that it would give rise to a breakdown in the employment relationship: *Baker* at para 28; *Vauxhall* at paras 119-20; *Jegou v Canadian Natural Resources Limited*, 2021 ABQB 401 at para 255.

[69] Given the identity and self-worth individuals frequently derive from their employment, an effective balance must be struck between the severity of an employee's conduct and the sanction imposed: *McKinley* at 52-53. Except for the most serious circumstances, an employer should use progressive discipline or alternative sanctions before terminating an employee for misconduct: *Mack v Universal Dental Laboratories*, 2020 ABQB 738 at para 101; *Underhill* at paras 100-01; *OWL (Orphaned Wildlife) Rehabilitation Society v Day*, 2018 BCSC 1724 at para 144; *Henson v Champion Feed Services Ltd*, 2005 ABQB 215 at paras 34, 56; *Cumberland v Maritime College of Forest Technology*, 2023 NBKB 65 at para 69.

## Nature and Extent of Misconduct

[44] The first step in an analysis of just cause is to consider the nature and extent of the alleged misconduct. In this case, the parties do not agree whether Mr. Dell participated in an incentive program.

[45] As noted, and for the reasons set out above, I prefer Mr. Johnson's evidence over Mr. Henderson's evidence insofar as Mr. Johnson's evidence is that Mr. Dell was offered an incentive by California Closets, whereas both Mr. Dell's and Mr. Henderson's evidence is that Mr. Dell was never offered any incentive.

[46] I acknowledge that the evidence is that Mr. Dell never actually received any money or gift cards. However, Mr. Johnson's evidence was that the payments would have occurred after installation of the closets. In any event, the obligations imposed on Mr. Dell by the Code of Conduct and the Anti-Bribery Policy were not limited to his refraining from accepting incentives, it also included his avoiding situations which might appear to conflict with the Brookfield's interests.

[47] Evidence was tendered by Brookfield that the context of Brookfield's position on conflicts of interest and anti-bribery stem from Brookfield's global presence and involvement in international industries and organizations, including foreign governments. For this reason, Brookfield takes a very stringent stance on bribery. The starting point for Brookfield and its employees is set out in the Anti-Bribery Policy which is very clear in saying that an "employee or a member of his or her family may not solicit or receive payments, gifts, or other benefits from vendors, suppliers or other third parties as an inducement to do business". This is in addition to the bolded, capitalized, and italicized words appearing at the beginning of the Anti-Bribery Policy which read "**ZERO TOLERANCE APPROACH TO BRIBERY. *Do not give or receive bribes, including 'facilitation payments'***".

[48] Brookfield's Anti-Bribery Policy reflects its objective to maintain its reputation for conducting business with honesty and integrity. Brookfield dismissed Mr. Dell prior to any payment Brookfield believed that California Closets might have made or was going to make to Mr. Dell. This action is consistent with its objective to maintain its reputation.

[49] The Code of Conduct requires employees to identify potential conflicts when they arise, and in the event an employee is unsure of whether a relationship or transaction poses a conflict or appears to pose a conflict, they are directed to contact the company's Senior Vice President & Chief Financial Officer.

[50] The Code of Conduct further requires employees to report in accordance with the "Reports and Complaints" section of the Code of Conduct any relationship that reasonably could be expected to give rise to a conflict of interest.

[51] These obligations must be read with the bolded instruction appearing at the beginning of the Conflicts of Interests section in the Code of Conduct, which reads "Avoid situations in which your personal interests conflict, might conflict or might appear to conflict with the interests of the company". [emphasis added].

[52] Mr. Dell was well aware that California Closets desired to build some relationship with Brookfield. Mr. Dell acknowledges that Mr. Henderson came to the Show Home on multiple occasions. Mr. Dell believed that California Closets was a good product at least insofar as he discussed it as a potential option with Brookfield customers. I have already expressed my conclusion that Mr. Dell did participate in an incentive program offered by California Closets, but even if that weren't my conclusion, the appearance of a relationship forming between California Closets and Mr. Dell through Mr. Henderson's multiple visits at the Show Home was significant enough to warrant Mr. Dell taking some action in order to satisfy both the identification and reporting obligations imposed on him by the Code of Conduct.

[53] Irrespective of whether Mr. Dell actually received money or gifts from California Closets, the circumstances which were allowed by Mr. Dell to be created gave rise to at least the appearance of a conflict of interest. In the circumstances, the Code of Conduct required Mr. Dell to take some steps after having been visited repeatedly by Mr. Henderson. Mr. Dell did not take steps to address those concerns.

[54] In the context of Brookfield's particular concerns about its reputation and the efforts it made to protect its reputation including its zero tolerance approach to bribery which was specifically expressed in its policies, the failure of Mr. Dell to meet his obligations set out in the Code of Conduct to report the conflict of interest, potential conflict of interest, or circumstance that might appear to give rise to a conflict of interest was a significant violation of the Code of Conduct and put Brookfield's reputation at risk. This is in addition to the finding I have made that Mr. Dell participated in an incentive program offered by California Closets.

### **Surrounding Circumstances**

[55] The second step in the analysis is to consider surrounding circumstances. Regarding the employee, factors such as age, employment history, seniority, role and responsibilities are to be considered. Regarding the employer, factors such as type of business, relevant policies or practices, the employee's position within the organization, and the degree of trust reposed in the employee, are factors to be considered.

[56] As noted, the circumstances in this case include the fact that Brookfield's global operations and sensitive international relationships are such that Brookfield concerns itself greatly with its reputation and has taken the time to implement policies addressing concerns it has not only with bribery but also the appearance of bribery. Brookfield was clear about the significance of such appearances and required all employees to confirm reading of policies and participate in annual training on policies.

[57] Mr. Dell did not have a position within Brookfield that would have been considered senior management, his position did nonetheless include some managerial and supervisory responsibilities in that he supervised one or two sales associates. The employees he supervised would have looked to him for guidance about their own conduct as it related to adherence to Brookfield policies. Together, Mr. Dell and the one or two sales associates he supervised primarily controlled the culture at the Show Home; this included how Brookfield employees interacted with vendor representatives who visited the Show Home, and how those visits would be perceived by not only Brookfield, but also by customers and other independent third parties who might also be

attending at the Show Home. Mr. Dell could not have conveyed Brookfield's zero tolerance for bribery if he himself was succumbing to California Closets' incentives.

[58] There is no evidence that Mr. Dell solicited any bribes. But that is not the minimum standard established by the Code of Conduct or the Anti-Bribery Policy. The circumstances giving rise to the relationship that formed between himself and Mr. Henderson should have caused Mr. Dell to at a minimum report the appearance of a conflict of interest in accordance with the Code of Conduct. However, instead of so reporting, Mr. Dell became a proponent for California Closets thereby increasing the appearance of a conflict of interest. Notwithstanding that Mr. Dell did not seek out California Closets' incentive program, the fact remains that Mr. Dell found himself in circumstances where objective bystanders might reasonably conclude that Mr. Dell was working with California Closets. Brookfield warned its employees against such types of circumstances and imposed obligations on its employees to avoid any improper conclusions from being drawn by third parties. Mr. Dell failed to address those circumstances which Brookfield warned him against through the annual trainings, and which Brookfield implemented policies about. It does not matter whether Mr. Dell was the instigator of such circumstances; but it does matter that Mr. Dell was warned about finding himself in such circumstances, and failed to respond as he was trained.

### **Proportional Response**

[59] Finally, the third step in an analysis about just cause is proportionality. This step includes a consideration of whether the misconduct is sufficiently serious that it would give rise to a breakdown in the employment relationship. Mr. Dell argues that his dismissal was disproportional to the misconduct he is alleged to have committed; he argues that he ought to have been given some sort of warning prior to dismissal.

[60] In *Whitford v Agrium Inc*, 2006 ABQB 726 at para 35, the Court said:

... [T]he need to provide warnings and/or progressive discipline, except in the most egregious circumstances, has been recognized for both culpable and non-culpable misconduct in both arbitral and common law jurisprudence.

[61] An example of misconduct where a warning was not necessary appears in *Wong v Lantic Inc*, 2012 ABQB 716 ("*Wong*"), where at para 62 the Court said:

... [t]he greater the wrong, the less likely the employer will be required to provide notice of the unacceptability of the misconduct or to provide progressive discipline to deal with it.

[62] Quoting the text Stacy Reginald Ball, *Canadian Employment Law* (Toronto: Thomson Reuters, 1996), the Court in *Breen v Foremost Industries Ltd*, 2023 ABKB 552, at para 334 ("*Breen*"), noted that "the reason why an employer must give such warnings or progressive discipline is 'to give the employee a reasonable opportunity to correct deficiencies before dismissal'". But the Court specifically notes that Ball expressly says that a warning is not necessary where the misconduct is of a severe nature. Ball gives the examples of *Wong*, and the case of *Mant v Buckerfield's Ltd*, 1991 CanLII 481 (BCSC), where the misconduct being considered was,

among other things, an employee who placed himself in a conflict of interest position contrary to the terms of the employer's conflict of interest policy.

[63] I have concluded my preference for Mr. Johnson's evidence that Mr. Dell did participate in the incentive program. Mr. Dell failed to comply with the Code of Conduct and the Anti-Bribery Policy by reporting events which might appear to be bribery or otherwise violate Brookfield's policies. Further, despite being confronted with Brookfield's concerns about California Closets during its investigation, Mr. Dell continued to deny any wrongdoing and continued to fail to report or otherwise address a potential conflict or appearance of a conflict. Brookfield was entitled to conclude that based on Mr. Dell's conduct, the trust relationship between Brookfield and Mr. Dell was broken and beyond repair.

[64] The Court in *Breen* at para 319, citing the Alberta Court of Appeal in *Poliquin*, commented that:

[319] In *Poliquin*, Chief Justice Fraser said:

... Employers have the right to set the ethical, professional and operational standards for their workplaces. Doing so not only falls within an employer's management rights, it also constitutes an integral component of corporate good governance.

*Poliquin* at para 45.

[320] Earlier, Chief Justice Fraser said, "certain categories of misconduct — including conflict of interest and dishonesty — have been traditionally recognized as constituting cause for an employee's discharge without notice": *Poliquin* at para 32. As well, Justice Rowbotham, as she then was, said "there may be instances where the deceit and lack of trust is sufficiently significant that one incident may amount to cause for termination": *Denhamer v RBC Dominion Securities Inc*, 2000 ABQB 651 at para 44, 273 AR 159.

[321] In *Cicalese*, the president and chief executive officer was terminated for cause because of improper funding on a per employee basis involving a ski club that the plaintiff owned, provision of free ski wear to employees and others, improper leasing arrangements for land despite a conflict of interest, paying personal expenses from the corporate account, and knowing misrepresentations in letters providing financial reporting. The plaintiff received a warning letter from his employer, and he repaid the amounts he spent against the corporate account. Justice Dario found that the plaintiff's "failure to document certain transactions and policy breaches ... [do] not warrant a finding of termination for cause": *Cicalese* at para 138. She found that some lesser form of disciplinary action was appropriate.

...

[328] In the case at bar, Mr. Breen's misconduct was serious enough that any one of the taking of the three gifts from Mr. Chernyk, his lack of forthrightness concerning the Transneft transaction, his misrepresentations to Mr. May, or his exceeding his authorizations would have been sufficient, in this Court's view, for the Foremost Group summarily to dismiss him with cause. Cumulatively, they point to conduct that is incompatible to the employment relationship. He breached the conflict of interest provision of his Employment Agreement, and he acknowledges this. As well, he was dishonest. Honesty and trustworthiness form the very foundation and is an essential condition of any employment relationship. This is especially so of a person holds *a*, if not *the*, most senior management role in the organization. The Foremost Group was entitled to have high expectations regarding the trustworthiness of its most senior officer. Mr. Breen breached those high expectations and his conduct was dishonest: *Molloy* at paras 210-11.

[329] Furthermore, Mr. Breen breached his duties of honesty and good faith with a view to the Foremost Group's best interests. To paraphrase what Justice Grace said, Mr. Breen allowed his own self-interest to prevail and ignored the sacred responsibility he owed to the Foremost Group he had served for so long: *969625 Ontario Ltd* at para 259.

[65] Mr. Dell held a position of trust; he was the senior employee at the Show Home and other employees at the Show Home would have looked to him for guidance. In the present circumstances, Mr. Dell completed the required annual training related to Brookfield's policies; it should therefore be assumed that he knew the policies and rules which he and all other employees were to abide by. It would have been unreasonable to assume that Mr. Dell would have been able to correct the conduct of the employees reporting to him if Mr. Dell himself did not abide by those same rules and policies. This line of reasoning was an approach taken by the Court in *Breen*, at para 344.

[66] Further, to have not acted on Mr. Dell's conduct would have put Brookfield in the position of condoning Mr. Dell's conduct. Brookfield was concerned about its reputation and implemented the Code of Conduct and Anti-Bribery Policy in an effort to curb any behaviour that might even have the appearance of bribery. Accepting Mr. Dell's conduct in the face of the Code of Conduct and Anti-Bribery Policy would have had the effect of suggesting to employees and the public that Brookfield no longer considered the Code of Conduct and Anti-Bribery Policy to be important.

[67] As the Court noted in *In Foerderer v Nova Chemicals Corporation*, 2007 ABQB 349, at paras 124-125:

[124] Condonation has been described as:

When an employer becomes aware of the misconduct on the part of his servant, sufficient to justify dismissal, he may adopt either of two courses. He may dismiss, or he may overlook the fault. But he cannot retain the servant in his

employment, and afterwards at any distance of time turn him away...

...

[125] Condonation may be inferred from the circumstances of the case and the omissions or commissions of the employer. Most often, courts look for evidence that the employer was aware or ought reasonably to have been aware of the misconduct and intended to forgive it. Where there has been condonation, it would be “most unjust” to penalize the employee for having relied on that forgiveness... [footnotes omitted]

[68] As noted above, I have concluded that Mr. Dell participated in California Closets’ incentive program. Participation in such an incentive program, particularly in light of the Code of Conduct and Anti-Bribery Policy, warrants dismissal with cause on the basis that Mr. Dell’s conduct was a breach of the relationship of trust between them, and was incompatible with the employment relationship. Further, given the weight Brookfield placed on its reputation, and faced with the potential that its actions might be interpreted as condonation of a breach of the Anti-Bribery Policy or the Code of Conduct, the decision to dismiss Mr. Dell in the circumstances, rather than impose some lesser consequence, was also warranted.

[69] For the reasons as set out above, I conclude that Brookfield had just cause to dismiss Mr. Dell.

### **B. Earning of Commissions**

[70] Mr. Dell alleges that Brookfield has withheld the payment of commissions already earned by him. Brookfield takes the position that it has paid to Mr. Dell all commissions owing.

[71] The disagreement of whether commissions are owing arises from the interpretation of the terms of the Agreement. The terms related to commissions earned by Mr. Dell are specifically set out in Schedule “A” of the 2018 Terms. The 2018 Terms modified the previous method of calculating Mr. Dell’s commissions; the 4-page Schedule “A” was authored by Brookfield, and Mr. Dell initialed each of the 4 pages.

[72] The disagreement between the parties is not about the quantum of commissions earned per house sale. Rather, the disagreement is about when Mr. Dell earned the commissions.

[73] The pertinent section of Schedule “A” is paragraph 1 of the “Remuneration” section which reads:

Commissions are not earned or payable until Closing. Upon Firm Sale and Staking, Brookfield Residential will pay you an advance, structured as a draw against future commission earnings (the “Advance”). At Closing, the Advance will be considered to have been earned, and any outstanding commissions will be paid.

[74] Schedule “A” also includes a term under the heading “Compensation Elements” and subheading “Payment Timing” which sets out that the payment timing of commissions occurred at three stages: 50% at Firm Sale; 25% at Staking; and 25% at Closing.

[75] There was agreement that while the timeline to build a house was different for each particular house, it would generally take many months to get from the Firm Sale stage to the Closing stage. Mr. Dell provided evidence that the range could be around 9-17 months, and Brookfield estimated 12-16 months. While not identical, the two range-estimations reveal a time period of approximately a year. A salesperson’s involvement with customers would ordinarily be for the entirety of the three stages.

[76] Mr. Dell alleges that while he was paid some commissions after his dismissal, he was not paid all of the commissions which he had earned. He agrees that the terms of Schedule “A” set out when he should have received the three tranches of commission payments, namely 50% at Firm Sale, 25% at Staking, and 25% at Closing, but he argues that the timing of commission payments is independent of whether the commissions were earned. Mr. Dell refers to both paragraph 1 of the “Remuneration” and the “Compensation Elements / Payment Timing” sections to say that he earned commissions regardless of when they were ultimately paid to him.

[77] Brookfield agrees that Schedule “A” lays out the framework for commissions. However, Brookfield says that the framework was designed to compensate salespersons for the work they put into achieving each of the three described stages (i.e. Firm Sale, Staking, and Closing). This, Brookfield says, results in the equitable division of commissions in the event a salesperson persuades a potential customer to sign a home construction contract, but is later unable to walk the client through the remainder of the home construction process. Brookfield explains that if a salesperson was paid commissions for all three stages even if they did not perform the work associated with the latter two stages, it would result in an inequity because the replacement salesperson would perform the work associated with the last two stages (i.e. working with customers and being their liaison through the construction design process) without getting the benefit of getting paid the commissions associated with those last two stages.

[78] Brookfield points specifically to Mr. Dell whose evidence at trial included the fact that he himself had to step-in to help with the Staking and Closing stages for some customers for whom he did not personally persuade to sign a home construction contract (i.e. he did not complete the Firm Sale stage). Mr. Dell acknowledged that in those circumstances he was paid the commissions for the latter two stages, being Staking and Closing.

[79] Brookfield points to the reference in paragraph 1 of the “Remuneration” section where the first two tranches of commission payments are described as being an advance “structured as a draw against future commission earnings”. They also point to paragraph 4 of the “Remuneration” section which reads in full as:

*No commission is earned on cancelled sales. If a sale is cancelled, any Advance paid with respect to that sale will be deducted from future earnings.*

[80] While Brookfield may have intended for commissions to be earned by the salesperson who performed the work for each stage, that is not what Schedule “A” says. When drafting Schedule “A”, Brookfield built in a claw-back for commissions paid to a salesperson if the sale was cancelled. But there is no clause addressing what should happen in the situation where a salesperson does not perform the work associated with one or both of the last two stages. Paragraph 1 of the “Remuneration” section clearly states that commissions are not earned or payable until Closing, but there is no condition that the salesperson continue to be working at a particular residential community or sales office, nor is there even a condition that the salesperson even continue to be employed by Brookfield. The only condition is that Closing occur, and there is no condition or limitation about when Closing needs to occur. The last sentence in Paragraph 1 of the “Remuneration” section specifically states that “At Closing, the Advance will be considered to have been earned, and any outstanding commissions will be paid”. If Brookfield’s intent was that outstanding commissions would be paid at Closing, but only to salespersons who continued to be employed, then they needed to draft Schedule “A” to that effect.

[81] I acknowledge that the strict interpretation of Schedule “A” might result in some situations where Brookfield would end up paying commissions to two salespersons, but the absence of conditions Brookfield intended to include but did not include is not a mistake that should be borne by Mr. Dell or any other salesperson.

[82] As a result, Mr. Dell is awarded the commissions for all three stages (i.e. Firm Sale, Staking, and Closing) for all of the homes/customers for which Mr. Dell had involvement. Tab 73 of Exhibit 3 includes a list of such homes/customers. Based on that list, the amount of commissions owed totals \$77,687.29. It is noted that Tab 73 of Exhibit 3 contains a \$1,000 error on each of the last three rows of data (being an inaccurate reflection of commissions being \$11,500 whereas Schedule “A” establishes that in fact the commissions for those three jobs were \$12,500), and therefore the total commissions owed to Mr. Dell is \$80,687.29.

### C. Vacation Pay

[83] Paragraph 15 of the Agreed Statement of Facts reads as follows:

*During his employment, in addition to commission payments, Mr. Dell was provided with benefits, including group insurance coverage for Health, Dental, Life, Short-Term Disability and Long-Term Disability, RRSP contributions, a Spending Account of \$2,200.00 per year; and **vacation pay in the amount of 8% of commission earnings** [emphasis added].*

[84] Paragraph 5 of the “Remuneration” section of Schedule “A” of the Agreement reads as follows:

*You are entitled to four weeks of vacation per year, increasing to five weeks’ vacation after 10 years of employment. Vacation will be approved by your direct manager. 4/52 of annual earnings will be deemed to have been earned as vacation pay and 48/52 will be deemed to have been earned as wages. After the tenth year of employment, 5/52 of annual earnings will be*

*deemed to have been earned as vacation pay, and 47/52 will be deemed to have been earned as wages.*

[85] The Commission Statement prepared by Brookfield dated April 25, 2018, which appears at Tab 72 of Exhibit 3, reveals that Mr. Dell was paid commissions for 6 projects in the amount of \$26,531.03. Brookfield takes the position that the 8% vacation pay is included in the \$26,531.03. Indeed, the Commission Statement reveals a line indicating the 8% vacation pay is \$1,965.26, and that the commissions payable “net of vacation” is \$24,565.77. The sum of those two smaller figures is \$26,531.03.

[86] Mr. Dell disagrees that the 8% vacation pay was to be included in his commissions. Rather, he takes the position that the 8% vacation pay was to be calculated in addition to his commissions. Mr. Dell relies on *RG Bissett Professional Corp v Kusick*, 2018 ABQB 406 (“*RG Bissett*”) and cites a quote appearing in para 35 of that decision that reads “the employer is not to integrate or merge vacation pay with wages, which includes commissions. The employer is obligated to remit vacation pay **in addition to** wages...” [emphasis added]: *RG Bissett* at para 35.

[87] While Mr. Dell’s reliance on *RG Bissett* provides some assistance, the parties are free to construct a contract for payment of vacation pay in any manner they desire so long as there is agreement between the employer and employee, and so long as the minimum requirements as set out in s 42 of the *Employment Standards Code* are met. In this case, the issue is not one of whether statutory minimum requirements are being met.

[88] The Agreement sets out terms dealing with vacation pay; what is at issue is the interpretation of those terms. Considering paragraph 15 of the Agreed Statement of Facts, the question becomes whether the parties intended for the 8% vacation pay to be included in the tariff of commissions payable (set out in Schedule “A” of the Agreement), or whether the 8% vacation pay was to be in addition to the tariff of commissions payable.

[89] Referring to paragraph 5 of the “Remuneration” section of the Agreement, Brookfield explains that for employees with less than 10 years of service, their vacation pay would be 4/52 of annual earnings. But for employees with 10 years or more of service, their vacation pay would be 5/52 of annual earnings.

[90] By way of commentary, I acknowledge that 4/52 is actually 7.69% (and not 8%). No submissions were made about that difference, and given the reference to 8% in paragraph 15 of the Agreed Statement of Facts together with the reference to 8% in the Commission Statement dated April 25, 2018, I assume the parties to have taken the position that the distinction between 7.69% and 8% is insignificant, and has been rounded up by agreement of the parties to 8%.

[91] What is significant is that employees with 10 or more years of service are expressly provided 5 weeks of vacation per year, and paragraph 5 of the “Remuneration” section of Schedule “A” of the Agreement even further explains that vacation pay would be 5/52 of annual earnings. These parts of the Agreement do not have any meaning if employees with 10 or more years of service were told they were given more vacation after working 10 years with the company, but the tariff of commissions were not increased. There is no evidence that commissions increased at the 10-year mark. Rather, the Agreement sets out the tariff schedule of commissions, and then provides

two different allocations of vacation; one for employees with less than 10 years of service and one for employees with 10 or more years of service.

[92] In order to give the Agreement meaning, an employee's entitlement to vacation pay would either be 7.69% if they had less than 10 years of service, or 9.62% if they had 10 or more years of service. If the commissions, as set out in the tariff of commissions listed in Schedule "A" of the Agreement, included vacation pay then there would be no benefit received by an employee when they hit the 10-year mark. That is expressly not the intention of the Agreement since paragraph 5 of the "Remuneration" section of the Agreement expressly explains that either 4/52 (for employees with less than 10 years of service) or 5/52 (for employees with 10 or more years of service) of annual earnings would be vacation pay.

[93] Therefore, I conclude that the intention was for Mr. Dell, an employee with less than 10 years of service, to have vacation pay of 8% paid to him in addition to the commissions he earned, such commissions being as set out in the tariff of commissions appearing in Schedule "A" of the Agreement. Mr. Dell is awarded vacation pay in the amount of \$6,454.98 being 8% on the \$80,687.29 commissions earned. This \$6,454.98 represents vacation pay owing to Mr. Dell on the commissions which I have concluded Mr. Dell is entitled to, but which has not yet been paid to him.

[94] However, Mr. Dell did receive payment of some commissions already, but Brookfield took the position that vacation pay was included in that payment. Therefore, Mr. Dell is also entitled to 8% vacation pay on the commissions which he has already been paid. Tab 72 of Exhibit 3 is the Commission Statement dated April 25, 2018; it reveals that Mr. Dell was paid \$26,531.03 of commissions. As noted, Brookfield did not pay Mr. Dell the 8% vacation pay to which he was entitled, and as a result, I conclude that Mr. Dell is further entitled to \$2,122.48, being 8% on the \$26,531.03 amount paid.

[95] In total, Mr. Dell is awarded vacation pay in the amount of \$8,577.46.

#### **D. Aggravated Damages**

[96] I have found that Mr. Dell was dismissed for cause. In case I am wrong in that finding, I will consider Mr. Dell's claim for aggravated damages in the amount of \$35,000.

[97] The law on aggravated damages in wrongful dismissal lawsuits is discussed in *Lau v Royal Bank of Canada*, 2017 BCCA 253 ("*Lau*"). The Alberta Court of Appeal referred to the approach described in *Lau* in *Ayalew v The Council for the Advancement of African Canadians in Alberta*, 2023 ABKB 113 at para 133. At paras 58-62 of *Lau*, the BC Court of Appeal stated that:

[58] Shifting the focus somewhat, Mr. Lau also argues that he is entitled to aggravated damages for the intangible effects of his bad-faith dismissal. Aggravated damages for wrongful dismissal must reflect "actual damages", as they are intended to be "compensatory" (*Honda* at paras. 59-60). They cannot be presumed but must be proven in the same manner as damages for other psychological injury (*Honda* at paras. 59-60).

[59] “Intangible” impacts in the nature of enhanced difficulty in obtaining new employment due to the manner of dismissal can be awarded in a wrongful dismissal action: *Wallace* at paras. 103-109; *Tipple v. Canada (Attorney General)*, 2012 FCA 158 at paras. 15-16 [*Tipple (C.A.)*], rev’g in part 2011 FC 762; *Trask* at paras. 25-33; *Rahemtulla v. Vanfed Credit Union (1984)*, 1984 CanLII 689 (BC SC), 51 B.C.L.R. 200 at paras. 27-31, 43, 54-58, [1984] 3 W.W.R. 296 (S.C.); *Truong v. British Columbia*, 1999 BCCA 513. While these damages are awarded under the same rubric as damages for mental distress, mental distress is not a prerequisite. Whether awarded for mental distress or other tangible or intangible harm arising from the manner of dismissal, these damages are awarded based on the *Hadley v. Baxendale* principle: *Honda* at para. 59.

[60] To support an award of aggravated damages for intangible effects, the evidence must demonstrate not only harm to the claimant but also a linkage between the manner of dismissal and the alleged harm: *Honda* at para. 59; Peter Neumann and Jeffrey Sack, *Wrongful Dismissal and Employment Law*, 1st ed. (Lancaster House: eText, 2012) (7th update, 2016-12-20) at 10.5.1.

[61] General difficulty in obtaining new employment as a result of dismissal is compensated through the notice period, as re-employability is one of the factors used to determine the period of reasonable notice: see *Bardal v. Globe & Mail Ltd. (1960)*, 1960 CanLII 294 (ON SC), 24 D.L.R. (2d) 140 (Ont. H.C.); *Ansari v. British Columbia Hydro & Power Authority (1986)*, 1986 CanLII 1023 (BC SC), 2 B.C.L.R. (2d) 33 (S.C.), aff’d (1986), 55 B.C.L.R. (2d) xxxiii (C.A.). Such general difficulty in obtaining re-employment is not compensable by *Honda* damages.

[62] Where the damages are sought for loss of reputation, the manner of termination must be accompanied by three additional conditions: “(a) the employee’s reputation is damaged by public knowledge of false allegations relating to the termination, (b) the employer fails to take reasonable corrective steps and offers no reasonable excuse for such failure, and (c) the damage to the employee’s reputation has impaired his ability to find new employment”: *Tipple (C.A.)* at para. 16.

[98] In *Elgert v Home Hardware Stores Limited*, 2011 ABCA 112 (“*Elgert*”), the Court said about aggravated damages:

[73] Damages resulting from the **manner** of dismissal (as opposed to the fact of dismissal) are available, however, if damages arise out of the conduct of the employer in the course of termination. To be compensable, such conduct must be unfair or in bad faith, in that it is “untruthful, misleading or unduly insensitive”: *Honda* at para 57; *Wallace v United Grain Growers Ltd*, 1997 CanLII 332 (SCC), [1997] 3 SCR 701, 152 DLR (4th) 1 at para 98. There is an “expectation by both parties to the contract

that employers will act in good faith in the manner of dismissal” and failure to do so “can lead to foreseeable, compensable damages”: *Honda* at para 58.

[74] In *Merrill Lynch Canada Inc v Soost*, 2010 ABCA 251 at para 16, 487 AR 389, this Court offered some examples of insensitive methods used by an employer during termination that could result in aggravated damages:

[A] boss who tells all the fellow employees, or the employee’s spouse and children, that the dismissed employee is stupid or incompetent. It is hard to think of circumstances where there would be any need to do that. Another example might be dismissing the employee within a day or two of a daughter’s wedding, or of the death of a parent. Another example would be insincerely alleging to others embarrassing or demeaning (but unfounded) reasons for the dismissal (whether or not they would be just cause if true), when the employer does not honestly believe those grounds exist.

[75] Aggravated damages must be grounded in proof of actual damages resulting from the unfair or bad faith conduct in the manner of dismissal. They are not “an automatic enhancement of **all** ‘wrongful dismissal’ damages” and are not “triggered by the mere fact of dismissal”: *Soost* at para 18 (emphasis in original). Thus, if actual damages are shown, a determination of whether an employee is entitled to aggravated damages arising out of the employer’s conduct during termination must focus on whether the methods used were unfair or in bad faith, by being for example, untruthful, misleading or unduly insensitive: *Honda* at para 57.

[76] In *Honda* the majority stated:

[I]f the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded **not through an arbitrary extension of the notice period, but through an award that reflects the actual damages**. Examples of conduct in dismissal resulting in compensable damages are attacking the employee’s reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right ... para 59 (emphasis added)

[77] In *Mulvihill v Ottawa (City)*, 2008 ONCA 201 at para 51, 90 OR (3d) 285, the Court held that “baseless, unfounded or fabricated allegations

of misconduct sufficient to constitute cause are, by definition, untruthful, misleading and insensitive.” However, the “mere fact that cause is alleged, but not ultimately proven, does not automatically” entitle the employee to aggravated damages. Provided that the employer has a “reasonable basis” on which to base its belief that it may dismiss an employee for cause, the employer “has the right to take that position without fear that failure to succeed on the point will automatically expose it to a finding of bad faith”: *ibid.*

[99] In the present circumstances, Mr. Dell says that the manner in which Brookfield dismissed him was devastating to him and his family; Mr. Dell also says that both the investigation and his dismissal flared some symptoms causing him to have a relapse of his medical condition. However, no medical evidence was tendered either about his medical condition post-dismissal or linking his medical condition to the actions taken by Brookfield.

[100] Mr. Dell takes issues with the manner in which Brookfield’s investigation unfolded. Mr. Dell says that Brookfield was not forthright with information about its investigation, and the reason for his termination was even withheld from him. Mr. Dell says that he was told he would have another opportunity to be interviewed, but was never actually given that additional opportunity. Mr. Dell says he felt defeated and embarrassed; he expressed feeling fearful and worried that he would not be able to provide for his children. Mr. Dell says that Brookfield had made up its mind even prior to his being interviewed, and that Brookfield went out of its way to destroy Mr. Dell’s reputation.

[101] I find that Mr. Dell was able to secure employment some months after he was dismissed by Brookfield; the only evidence about Mr. Dell’s reputation implies that in fact it was not so damaged as to make him unemployable.

[102] Mr. Dell’s argument that aggravated damages should be awarded must fail on account of the lack of evidence. As noted in in both *Lau* and *Elgert*, there must be evidence that a plaintiff suffered damages as a result of the unfair or bad faith conduct in the manner of dismissal. In the present circumstances, there is no evidence of the alleged damage to Mr. Dell’s reputation or health, or any evidence about the cause of such alleged damages. For this reason, I would not grant Mr. Dell any aggravated damages.

### **E. Punitive Damages**

[103] In case I am wrong in finding that Mr. Dell was dismissed for cause, I also consider Mr. Dell’s argument on punitive damages. Mr. Dell argues that an award of punitive damages less than \$80,000 is insufficient to affect any deterrence.

[104] In addition to commenting about aggravated damages, the Court in *Elgert* also provided guidance about punitive damages. At paras 78-80 the Court said:

[78] Unlike aggravated damages (which are compensatory) punitive damages are directed toward punishment: *Whiten v Pilot Insurance Co*, 2002 SCC 18, [2002] 1 SCR 595 at para 36. In *Whiten*, a breach of

contract case, the Supreme Court held that punitive damages are awarded in exceptional cases for malicious and high-handed misconduct that offends a court's sense of decency. Punitive damages are limited to circumstances in which the misconduct "represents a marked departure from ordinary standards of decent behavior": *ibid*. The three objectives of punitive damages are "retribution, deterrence and denunciation": *ibid* at para 43.

[79] In the context of a wrongful dismissal action, punitive damages are recoverable when the employer's conduct gives rise to an independent actionable wrong: *Honda* at para 62. In *Whiten*, the Supreme Court held that an independent actionable wrong does not require the commission of a separate tort. Rather, an independent actionable wrong can be found "in a breach of a distinct and separate contractual provision or other duty, such as a breach of a fiduciary obligation", or the breach of a contractual good faith obligation: *Whiten* at paras 82 and 83. Punitive damages "are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own": *Honda* at para 62.

[80] Punitive damages require careful consideration and the discretion to award them should be exercised sparingly. Courts should only "resort to punitive damages in exceptional cases": *Honda* at para 68. Courts "must focus on the defendant's misconduct, not on the plaintiff's loss": *Honda* at para 69.

[105] I do not find that any of Brookfield's conduct amounts to wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own, nor do I conclude that Brookfield's conduct amounts to misconduct at all. As a result, I do not grant any punitive damages.

#### **IV. Interest**

[106] Having concluded that Mr. Dell is entitled to \$80,687.29 of commissions, and \$8,577.46 of vacation pay, and that such amounts were payable to him on the date of his dismissal, Mr. Dell is also awarded interest on those amounts.

[107] Unsurprisingly, the Agreement is silent on interest rates to be applied. As a result, interest is to be calculated on the sums of both \$80,687.29 and \$8,577.46 in accordance with the rates set out in the *Judgment Interest Regulation*, Alta Reg 215/2011, on an annual compounding basis, from April 24, 2018, to the date this Reasons for Decision is issued.

#### **V. Conclusion**

[108] I have concluded that Mr. Dell was terminated for cause by Brookfield, and as such Mr. Dell's claim for wrongful dismissal is dismissed. This conclusion is based on the finding that Mr. Dell participated in California Closets' incentive program, representing a serious breach of Brookfield's Code of Conduct and Anti-Bribery Policy. I have considered the surrounding circumstances, including Mr. Dell's role as lead salesperson at the Show Home, which involved

managerial and supervisory responsibilities over others. I have also considered the importance that Brookfield placed in maintaining both its reputation and adherence to the Code of Conduct and Anti-Bribery Policy. I have determined that Brookfield's termination of Mr. Dell was a proportionate response given the breakdown in the relationship between the parties.

[109] As I have found that Mr. Dell's claim for wrongful dismissal should be dismissed, Mr. Dell's claim for aggravated damages must also fail. Even if I had found that Mr. Dell was wrongfully terminated, I would not award aggravated damages. As explained, Brookfield's conduct was not unfair or in bad faith, and Mr. Dell failed to provide evidence of any damage to his reputation, health, or other damage resulting from alleged unfair or bad faith conduct in the manner of his dismissal.

[110] Similarly, I also dismiss Mr. Dell's claim for punitive damages. Even if I had found that Mr. Dell was wrongfully terminated, punitive damages would be inappropriate. Brookfield's actions in terminating Mr. Dell did not constitute misconduct, much less misconduct that is malicious and outrageous enough to deserve punishment on its own. There is no conduct deserving of deterrence, and resultingly, Mr. Dell's claim for punitive damages of \$80,000 is dismissed

[111] I find in favour of Mr. Dell with respect to his claim for unpaid commissions earned by him during his employment with Brookfield. Having reviewed the Agreement, particularly Schedule A which sets forth the Compensation Elements, I have determined that the Agreement calls for the staggered payment of commissions according to the "Payment Timing" provision, which are fully earned and payable to the salesperson upon Closing. As the Agreement does not contain a provision requiring the salesperson be currently employed by Brookfield, I have concluded that the full balance of the commissions was earned, and payable by Brookfield to Mr. Dell upon Closing. As Closing has occurred, I find that Mr. Dell is entitled to \$80,687.29 in relation to unpaid commissions.

[112] I also conclude that Mr. Dell is entitled to \$8,577.46 for unpaid vacation pay. I find that the intention of the parties was that Mr. Dell would be entitled to vacation pay in addition to the commissions earned as set forth in the Commission Statement prepared by Brookfield. This interpretation is supported by considering paragraph 5 of the "Remuneration" section of Schedule "A" of the Agreement, alongside the absence of any corresponding increase in the Tarriff Schedule of commissions. I have determined that Mr. Dell is entitled to \$6,454.98 (being 8%) of vacation pay for the unpaid commissions of \$80,687.29. I have also determined that Mr. Dell is further entitled to \$2,122.48, being 8% of \$26,531.03 on commissions previously paid without vacation pay. The aggregate sum of the vacation pay owed to Mr. Dell is \$8,577.46.

[113] In summary:

- a) Mr. Dell's claim against Brookfield for wrongful dismissal is dismissed;
- b) Mr. Dell is granted judgment against Brookfield for unpaid commissions in the amount of \$80,687.29;
- c) Mr. Dell is granted judgment against Brookfield in the amount of \$8,577.46 for unpaid vacation pay;

- d) Mr. Dell's claims for aggravated damages and punitive damages are both dismissed; and
- e) Mr. Dell is entitled to interest on the amounts payable to him from April 24, 2018, to the date this Reasons for Decision is issued.

[114] Given that the parties have had mixed success, each party shall bear their own costs of this Action. If there are submissions on costs related to settlement offers made, those may be made in writing, limited to three pages in length, within 45 days.

Heard on February 24, 25, 26, 27, 28, March 3, 5 and 6, 2025.

**Dated** at the City of Calgary, Alberta, July 2, 2025.

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**O. Ho**  
**J.C.K.B.A.**

**Appearances:**

D. Snowdon and J. Premji, Carbert Waite LLP  
for the Plaintiff, Bryan Dell

A. Kosten, R. Jangi, and T. Mooney, student-at-law, Dentons Canada LLP  
for the Defendant, Brookfield Residential (Alberta) LP