SUPREME COURT OF NOVA SCOTIA
Citation: MacLeod v. W. Eric Whebby Ltd., 2014 NSSC 306

Date: 20140815
Docket: Hfx No. 279354
Registry: Halifax

Between:

John G. McLeod

Plaintiff
(Defendant by Counterclaim)

v.

W. Eric Whebby Limited

Defendant
(Plaintiff by Counterclaim)

Judge: The Honourable Justice James L. Chipman

Heard: July 21, 22, 23 and 24, 2014, in Halifax, Nova Scotia

Counsel: Anthony M. Brunt, for the Plaintiff (Defendant by Counterclaim)
Michael P. Blades and Andrew McGarva (law student), for the Defendant (Plaintiff by Counterclaim)

By the Court:

Introduction

[1] This case involves the former employment of the Plaintiff (Defendant by Counterclaim), John George McLeod ("McLeod") by the Defendant (Plaintiff by Counterclaim), W. Eric Whebby Limited ("Whebby").

[2] McLeod is a 69 year old with a lengthy background in civil construction, primarily as an estimator and project manager. Whebby is a construction company, mainly engaged in civil construction and site development construction work.

[3] McLeod was employed by Whebby between April 5, 2002 and January 29, 2007. His employment was continuous but for a 24 week layoff between October 31, 2003 and April 19, 2004.

[4] During much of his time working for Whebby, McLeod was remunerated on the basis of salary and a profit sharing formula. This formula lead to strife between the parties and ultimately, to McLeod's termination.

Issues

[5] The issues for determination are as follows:

1. Did just cause exist for McLeod's dismissal? If the answer is "no", what measure of pay in lieu of notice is owed?

2. Is McLeod entitled to bonus compensation claimed in respect of two projects; namely, the Kaizer Meadow Landfill Expansion ("KM") and/or the Bedford Walmart Development ("Walmart")?

3. Is McLeod entitled to any vacation pay?

4. Is Whebby entitled to damages for McLeod's alleged (post termination) disclosure of confidential information?

Evidence

[6] The parties relied on no written documents other than what was in evidence through a joint exhibit book (Exhibit 1), as follows:

TAB	DATE	DESCRIPTION
1	February 25, 2005	Director's Resolution – W. Eric Whebby Limited
2	September 12, 2006	Employment Contract
3	October 20, 2003	Termination Letter – Eric Whebby to John McLeod
4	February 16, 2005	Letter – Eric Whebby to John McLeod
5	Undated	Kaizer Meadow Landfill Project Profile
6	Undated	Kaizer Meadow Landfill project Tender Documents
7	Undated	Kaizer Meadow Landfill project revenue and expense summary
8	Undated	Kaizer Meadow Landfill project revenue and expense details
9	January 29, 2007	Termination Letter – Eric Whebby to John McLeod
10	Multiple dates	John McLeod employment & compensation timeline
11	Undated	List – vacation days used
12	Undated	Calculation of McLeod bonus re. Kaizer Meadow Landfill project (with job report)
13	Undated	Walmart project revenue and expense summary
14	Multiple dates	Various Trucking Services Invoices
15	March 5, 2007	Meeting Minutes – HRM Capital Works Contractors Joint Meeting #3-2007
16	March 5, 2007	Notes – March 5, 2007 HRM Contractors meeting

[7] McLeod called himself as his only witness. Whebby called their controller, Melinda Benoit ("Benoit") and former general manager, Eric Whebby.

Credibility

[8] As will be demonstrated through review of the issues, the evidence of McLeod and Eric Whebby is clearly at odds on many critical points. To compound these inconsistencies, neither side presented corroborating witnesses who might have assisted the Court in deciding which version (or something in between) to be accurate. As will be detailed below, the only additional witness, Benoit, did not provide much assistance in sorting out the discrepancies in the evidence.

[9] From their time on the witness stand, I formed the impression that both McLeod and Eric Whebby have strong personalities. At age 46, Eric Whebby is the grandson of the founder of Whebby. During the time McLeod worked for Whebby, Eric Whebby was his supervisor. Eric Whebby reported to the president of the company, his father, Wayne Whebby.

[10] In any case, as will be shown through discussion of the issues, this is not a case where I found one witness to be significantly more credible than the other. Rather, my findings are based on believing McLeod over Eric Whebby on some issues, and on others, vice versa.

Discussion of the Issues

1. Termination

Background

[11] It is Whebby's burden, on a balance of probabilities, to prove that just cause existed for McLeod's dismissal. At the time of termination, an Employment Agreement ("the Contract") was in place between the parties. Regarding termination, the Contract states as follows:

> 1. The Employee may terminate the Employee's employment pursuant to this Agreement by giving at least Two (2) weeks' advance notice in writing to the Employer. The Employer may waive such notice, in whole or in part and if it does so, the Employee's entitlement to remuneration and benefits pursuant to this Agreement will cease on the date it waives such notice;
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> 2. The Employer may terminate the Employee's employment pursuant to this Agreement without notice of pay in lieu thereof, for cause;

3. The Employer may terminate the Employee's employment at any time, without cause, by giving the Employee Two (2) weeks [weeks'] notice of termination, or, at the Employer's discretion upon payment to the Employee equivalent to such notice and severance pay equivalent to Eight (8) weeks [weeks'] salary. The period of notice stipulated herein or the payment made in lieu of such notice, is agreed by the Employee to be the full extent of the Employer's obligations to the Employee for termination without cause, whether such obligation arises by common law or statute, including, without temptation, the Labour Standard Code of Nova Scotia. The provisions of this paragraph will not apply in circumstances where the Employee resigns from employment or is terminated for cause; and

4. The Employee agrees that the Employee's entitlement to notice of termination, or pay in lieu thereof as the case may be, as set out in this Agreement is subject to the Employee's execution of an agreement and release by the Employee in favour of the Employer, provided that the terms of said agreement and release shall be consistent with the terms of this Agreement.

[12] In the lead up to termination, there is no record of any problem with McLeod's performance. Indeed, Eric Whebby generally spoke of McLeod in favourable terms saying such things as, "I valued him as an employee". Nevertheless, on account of the profit sharing formula, tension developed between the parties over McLeod's precise entitlement to bonuses.

[13] On January 29, 2007, Eric Whebby wrote McLeod as follows:

> "During a meeting, held in your office on January 25, 2007, your actions and comments were very disrespectful to the management of the company. On January 26, 2007, you told another employee of the company that the General Manager and the Controller, had stolen money from you.
>
> This behaviour is unacceptable and I have decided that effective January 29, 2007, to terminate your employment with W. Eric Whebby Limited for cause. Your record of employment and any money owed to you will be couriered to your home address by February 2, 2007."

[14] The January 25, 2007 meeting took place with McLeod, Eric Whebby and (then) controller, Jason MacAvoy ("MacAvoy") in attendance. The parties agree the meeting was convened to discuss McLeod's entitlement to a bonus on the KM job. At the meeting, Eric Whebby presented a calculation (Exhibit 1, Tab 12) to McLeod which purported to demonstrate that there was very little bonus money left owing ($1,009 of $17,009) to McLeod. Upon receipt of this information, McLeod became visibly upset, as he believed his remaining bonus entitlement was approximately $9,000 (as opposed to the $1,009).

[15] Eric Whebby and McLeod testified as to their recollections of the meeting. In this area, I find McLeod to be significantly more credible than Whebby. In this regard, McLeod spoke in terms of the "gist" of what was said, acknowledging that he said Whebby was in effect "stealing" from him (in the context of the bonus structure). As for Eric Whebby, he gave almost verbatim evidence of what he claimed each of the participants said at the meeting. Given the time lapse of 7.5 years and the fact that Eric Whebby had no notes from the meeting, I find his evidence was embellished in an overt attempt to portray McLeod's words and actions as being more than what they were.

[16] Returning to the above-quoted letter, there is reference to a January 26, 2007 encounter between McLeod and another employee. This employee was Benoit, then assistant controller with Whebby.

[17] Benoit and McLeod gave evidence regarding their discussion of January 26, 2007. They agreed that it was Benoit who asked McLeod what had been discussed in the meeting 24 hours earlier. In his evidence, McLeod again acknowledged that he could not recall precise utterances dating back 7.5 years. It was his recollection that he essentially said to Benoit that "they" (referring to Whebby management) were taking money from him (in reference to his bonus).

[18] When asked to give her recollection of their discussion, Benoit recalled, "John made the statement to me that the company had stolen from him." She went on to say she was "100%" certain that he used the word "stole". She added that because she was shocked to hear this, she immediately reported what McLeod had said to MacAvoy.

[19] On cross examination it was pointed out that Benoit said nothing about being shocked when questioned at her February 6, 2012 discovery examination. Further, she acknowledged the discussion with McLeod did not take place in the presence of any other employees.

Law

[20] There is no fixed rule for determining the degree of misconduct which justifies summary dismissal. In *McKinley v. B.C. Tel*, 2001 SCC 38, Justice Iacobucci (on behalf of an unanimous Supreme Court) held that a contextual approach which considers all aspects of the particular employment relationship at issue is appropriate. Though speaking to issue of employee dishonesty, the Court's statements at paras 48 and 57 are of application here:

> 48 In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.
>
> …
>
> 57 Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

[21] Canadian law recognizes that employment dismissal for just cause will be justified only in response to conduct that is inconsistent with an employee's express or implied conditions of service. The general rule is, as follows:

> If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial

> to the employer's business, or if he has been guilty of wilful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee. (from the dissenting reasons of Schroeder J.A. in *R. v. Arthurs; Ex parte Port Arthur Shipbuilding Co.*, [1967] 2. O.R. 49 at 55 (C.A.), *whose reasons were affirmed in (sub nom. Port Arthur Shipbuilding v. Arthurs et al.)* (1968), [1969] S.C.R. 85.).

[22] In *Cardenas v. Clock Tower Hotel Ltd.*, 1993 CanLii 4666 (NSSC), the Court reviewed wrongful dismissal legal principles. Justice Goodfellow considered a situation involving a room service captain who was involved in a verbal encounter with a superior. Inappropriate sexual and racial remarks were exchanged between the two. The Court ultimately held that Mr. Cardenas was wrongfully dismissed, finding he had provided "overall good and loyal service" and that the incident in question was isolated. At page 8, Goodfellow, J. stated as follows:

> The determination of just cause for a single incident must be clear and apparent, otherwise for such to be reasonable requires an examination of the background of the employee and a history of the employment record.

[23] *Henry v. Foxco Ltd.*, 2004 NBCA 22, dealt with a workplace confrontation. The New Brunswick Court of Appeal had cause to review a single incident of insolence and the majority decision (per Larlee J.A., Robertson J.A. concurring and Turnbull J.A. dissenting) identified three circumstances in which a single insolent act will justify summary dismissal:

> [111] A review of the jurisprudence leads me to conclude that a single incident of insolence will justify summary dismissal of an employee in one of three circumstances: (1) the employee and superior are no longer capable of maintaining a working relationship; (2) the incident undermined the supervisor's credibility in the workplace and, correlatively, his or her ability to supervise effectively; or (3) that because of the incident the employer suffered a material financial loss, a loss of reputation or its business interests were seriously prejudiced. I confess that these three possibilities do not constitute discrete tests to be applied independently of one another. They may overlap and other exceptional circumstances may

> exist: see generally Ellen E. Mole, *The Wrongful Dismissal Handbook* (Toronto: Butterworths, 1997) at pp. 75-76.

Findings

[24] I find that McLeod's behaviour on January 25 and 26, 2007, is not enough to justify dismissal with cause. I find that McLeod's comments, while inappropriate, in no way justify the decision to terminate him with cause. Though Eric Whebby attempted to characterize McLeod's comments as "stepping over the line", I find they fall far short of this. Bearing in mind the context, the parties up until this exchange, had several disagreements over profit sharing. Notwithstanding this tension, McLeod was considered a good employee and had no record of being disciplined by Whebby.

[25] It is debatable whether McLeod's words might be regarded as insolence. Even if so characterized, the overall evidence does not support any of the three circumstances set out by Justice Larlee.

[26] To my mind, McLeod's comments should have been addressed within a reasonable, progressive disciplinary approach. That is to say, an appropriate level of discipline for such an isolated circumstance should have led to a written caution or warning.

[27] Given my determination that McLeod was terminated without cause, the Contract is clear that he is entitled to two weeks' notice. Since McLeod's salary was $75,000 (with no bonus component as at the time of termination), I find he is entitled to $2,885 from Whebby for wrongful dismissal under the Contract.

2. Bonus Compensation

KM

[28] When McLeod was initially hired, he received annual pay of $45,000 along with a 20% bonus. The bonus was to be for projects where McLeod was project manager and Whebby's actual profits exceeded expected profits. For example, if Whebby anticipated a project would earn $100,000 but the actual profits were $120,000, the company would have exceeded expected profits by $20,000. Under the formula, McLeod would earn 20% of the$20,000; i.e., $4,000.

[29] As things unfolded, McLeod did not receive any bonuses under this formula in his first year of employment. Consequently, Eric Whebby arranged for McLeod to receive a discretionary bonus of $10,000 for McLeod's first 12 months employment with Whebby. On the first anniversary of McLeod's employment, the parties verbally agreed that his salary would increase by $10,000 to $55,000 per annum. Further, they agreed McLeod would receive bonuses of 10% for projects that he managed where actual profit exceeded expected profit.

[30] When McLeod was laid off at the end of October, 2003, the evidence confirms he earned just under $5,000 in bonuses for the applicable period in 2003.

[31] McLeod was rehired in April, 2004. The verbal agreement between the parties was identical to what was in place at the time of McLeod's layoff on October 31, 2003. Accordingly, he was paid a base salary of $55,000 along with a 10% bonus for projects that he managed where actual profit exceeded expected profit.

[32] There was much evidence led by both parties concerning various projects in the time leading up to KM. While it is not alleged by McLeod that he is owed any profits from these earlier jobs, he made it clear through his evidence that he did not feel he was paid on a timely basis and that he had suspicions regarding the way in which Whebby calculated the bonus formula.

[33] Contrary to McLeod's evidence, Eric Whebby spoke to how Whebby had to get to the completion of the project before they could discern the bonus amount, if any, owing. Accordingly, he explained that several of the profit payments made to McLeod were not delayed but rather, made on an advance basis.

[34] More could be said about the history surrounding the profit sharing formula. On balance, I find this is unnecessary, however, because the situation was clarified in the lead up to KM by way of a letter dated February 16, 2005 from Whebby to McLeod, which read as follows:

> As per your request, I am making formal the terms and conditions of your employment arrangement with W. Eric Whebby Limited:
>
> **Title**: Project Manager/Estimator/Safety Officer
> **Term:** January 1, 2005 – December 31, 2005
> **Annual Salary:** $55,000

Additional Items:
Use of a Company vehicle for the period of employment including; fuel, insurance and maintenance. Personal taxable benefit to be added to your employment earnings for the personal use of the vehicle.

Bonus compensation over and above annual salary is to be determined by the following formula: 10% of project profits beyond the profit that W. Eric Whebby Limited has predetermined to be the expected profit from a given project. Profit and cost is to be determined from the job records tracked by the accounting department. All costs tagged to a project are actual costs with the exception of heavy equipment costs which are determined through equipment rates set by management in advance of each fiscal year multiplied by the factor of hours employed on a particular project. All rates to be used and expected outcomes will be agreed to in writing with you at the pre-construction meeting held post contract award for the projects that are to fall under your management. Any projects that you may have involvement in but do not have a project specific agreement in place for are to be considered outside of the bonus arrangement and are to be part of your base salary.

By signing in the space provided you acknowledge that you are in agreement with the preceding terms and conditions.

[35] I find that this letter constitutes the written agreement between the parties in place as at the time of the KM project. The question now turns to whether or not McLeod was project manager for KM.

[36] As set out in paragraph 14, *supra*, Whebby paid McLeod $17,009 for his work on KM. In his evidence, Eric Whebby explained the bonus payment was "discretionary" to compensate McLeod for his assistance with KM. In support of his position that the $17,009 was a discretionary bonus, Eric Whebby noted that the company had previously paid McLeod a discretionary bonus (see para 29, *supra*) dating back to 2003.

[37] Eric Whebby was adamant in his testimony that McLeod did not have an entitlement to a bonus for KM because McLeod was not the project manager. Rather, Eric Whebby went into great detail as to his involvement with KM and how he was the designated project manager.

[38] On the surface, Benoit's testimony supported Eric Whebby's assertion he was project manager. She said she formed this impression as Eric Whebby "… arranged all the subs, equipment, employees…". On cross examination, it was pointed out that during her discovery, Benoit could not say what specific tasks Eric Whebby had performed in respect of KM.

[39] Both Benoit and Eric Whebby acknowledged that McLeod was brought in to assist with KM. Through Eric Whebby's testimony it became apparent that McLeod's role was significant. In this regard, Eric Whebby acknowledged that he did not get along with the Municipality of the District of Chester's consultant, Kent Morash ("Morash") of KVM Consultants Ltd. Importantly, Eric Whebby stated McLeod was brought in to attend the pre-construction meeting which included Morash and others.

[40] In his evidence, McLeod was unequivocal that he was the KM project manager. He provided a detailed explanation of the project, explaining his role and responsibilities. He told of how Eric Whebby asked him to project manage KM on account of Eric Whebby's inability to get along with Morash.

Findings

[41] On the evidence, I am satisfied McLeod has satisfied his burden (on a balance of probabilities) of proving his claim for any unpaid bonus on KM. In this regard, I find his evidence far more compelling than the collective evidence of Eric Whebby and Benoit. From the testimony of all three, it is apparent McLeod was brought into the project in the very early stages. He attended the pre-construction meeting and was needed on account of Eric Whebby's inability to get along with the KVM consultant assigned to KM.

[42] The fact that Whebby paid McLeod a bonus is supportive of the fact that he was project manager. Furthermore, the bonus paid by Whebby to McLeod was not a round number (such as the $10,000 paid back in 2003), but rather, $17,009. This amount corresponds with an even 10% (as at late January, 2007, based on Eric Whebby's calculations) as per the project manager bonus formula. In the result, I find this to be further evidence to support McLeod as being the KM project manager.

[43] The question remains as to the amount of the surplus bonus, if any, owing to McLeod in respect of KM. Having reviewed the *viva voce* and documentary evidence, I find that the difference between expected profits and actual profits were

$259,100. Ten percent of this figure is $25,910. Subtracting the $17,009 already paid to McLeod yields a further amount owing of $8,901 from Whebby to McLeod as bonus for KM.

Walmart

[44] Whebby bid on Walmart in May, 2006. The Bedford job then proceeded and McLeod was the project manager. In the result, McLeod argues he is entitled to a 10% bonus, consistent with the formula on KM.

[45] This argument ignores the evidence concerning a significant change in McLeod's remuneration as at January, 2006.

[46] As previously referenced, the evidence of both parties was that the bonus formula caused significant strain in their relationship. While simple on its face, the notion of when expected profits crystalized was a matter of debate. For example, returning to the February 16, 2005 letter, when did Whebby "predetermine" expected profit from a given project? On the basis of the bid or after the project was awarded (and after changes may have been incorporated into the original bid)? Additionally (and with reference to the February 16, 2005 letter), profit and cost were to be "… determined from the job records tracked by the accounting department." However, Eric Whebby explained there could be both credits and debits applied to a given project at a very late stage such that the reconciliation could not occur until the project was completed. Finally, whereas the letter speaks to "…expected outcomes agreed to in writing with you at the pre-construction meeting…", there was a paucity of written records.

[47] The upshot of this imprecision led to heated exchanges between the strong-willed McLeod and Eric Whebby. One project, in particular, the Portland Hills Transit project, was acknowledged by both McLeod and Eric Whebby as resulting in especially acrimonious exchanges. As a consequence, I accept Eric Whebby's evidence that by January, 2006, he made it clear to McLeod, and McLeod accepted, that McLeod would no longer receive any bonus compensation.

Findings

[48] In reviewing all the evidence, I find that as of January, 2006, the parties verbally agreed that McLeod's compensation would no longer include a bonus component. Accordingly, I find that although he was project manager, McLeod did not qualify for bonus compensation in respect of Walmart.

[49] I would add that even if I had found otherwise, McLeod did not prove there was any potential bonus available from the Walmart project. In this regard (and unlike the situation with KM), there was very little evidence led concerning the details of the Walmart bid. For example, Exhibit 1, Tab 13 consists of one page, an undated expense and revenue summary for Walmart. This was hardly touched in evidence and there were no other documents demonstrating that actual profits exceeded expected profits. Furthermore, the *viva voce* evidence on this point was scant.

3. Vacation Pay

Discussion/Findings

[50] McLeod bears the burden of proving his claim for vacation pay (*Newton v. W. Rodgerson's Insulators Ltd.*, [1983] N.S.J. No 2 at para. 20). McLeod claims accumulated vacation pay up to the date of termination and during the notice period.

[51] The law requires that a claim for accumulated vacation be proven with a sufficient degree of certainty and specificity. This includes proving:

(i) The entitlement to paid vacation;
(ii) The right to have unused vacation days accumulate year to year;
(iii) The amount of accumulated unused vacation days; and
(iv) The value of the accumulated unused vacation.

[52] McLeod claims entitlement to twenty days' vacation for every twelve months of his employment period. From 2002 to 2007, he alleges 87.5 vacation days owing. In this regard, McLeod gave evidence that he only took in the order of ten vacation days during his entire employment period. Exhibit 1, Tab 11 demonstrates McLeod used ten vacation days between December 27, 2002 and August 15, 2003.

[53] In any case, it is uncontroverted that when he was laid off at the end of October, 2003, McLeod was paid $1,069.24 for "gross vacation pay not taken." (Exhibit 1, Tab 10, p.1). Consequently, the question of any vacation pay owing dates back to McLeod's rehire date of April 19, 2004. This entitlement period goes until July 2, 2006 as the Contract is effective the next day; i.e., July 3, 2006.

[54] Between April 19, 2004 and July 2, 2006, McLeod's accumulated entitlement is 22 days of vacation. This figure is derived from the fact that McLeod was entitled to two weeks' vacation during any continuous twelve months employment (c. 32(1)(a) of the *Labour Standards Code*, R.S.N.S. 1989, c. 246 (as amended and applicable in January, 2007).

[55] It was Eric Whebby's evidence that Whebby had a "use it or lose it" policy in place concerning vacation days. Further, Eric Whebby said that when McLeod was rehired on April 19, 2004, it was emphasized that there would be no carry over in respect of unused vacation. In contrast, McLeod said there was never any such discussion.

[56] In his testimony, McLeod elaborated concerning his employment with Whebby and this is relevant to vacation day entitlement. I found his evidence compelling when he spoke of long days and working over weekends to achieve project goals. I accept that during the busy construction season there were times when he worked seven days a week. Having noted this, I find no basis for the claim of twenty days' vacation for every twelve months of employment period.

[57] When it came to Eric Whebby's evidence on the vacation days issue, it was on the basis of second hand information. For instance, he could point to very little of the documentation putting the "use it or lose it" policy in writing. In this respect, in the entirety of Exhibit 1, there are no letters or memoranda to this effect. The only document Eric Whebby could rely on was at page 1 of Tab 10, a handwritten note by MacAvoy. The note reads, "Re-hire 55,000, must take vacation or lose it…". Although the date of April 19, 2004 is beside the note, Eric Whebby acknowledged his belief that MacAvoy had prepared the document in the lead-up to discovery examinations. In the result, I was left with the impression that the entirety of the document at Tab 10 was prepared following the commencement of the lawsuit and well after McLeod was rehired on April 19, 2004.

[58] Vacation pay between July 3, 2006 and January 29, 2007 is governed by the Contract. On dismissal, McLeod was paid $3,335.17 gross vacation pay for his vacation not taken up until that point.

[59] Given the evidence, I find McLeod was appropriately compensated for vacation days up until October 31, 2003 and for the period of July 2, 2006 until January 29, 2007. As for the period of time between April 19, 2004 and July 2, 2006, I find on a balance of probabilities that McLeod has demonstrated entitlement. Given that McLeod was earning $55,000 per annum during this time

period, his daily salary (based on 260 work days per year) was $211.54. I find McLeod accumulated 22 days of vacation over this period. In the result, he is owed $4654 total for past vacation.

4. Counterclaim

[60] In asserting its counterclaim, Whebby relies on clause 6 of the Contract which reads:

> **CONFIDENTIALITY**
>
> The Employee acknowledges that as an employee of the Employer, the Employee will acquire information about certain matters which are confidential to the Employer which information shall remain the exclusive property of the Employer, including, without limitation:
>
> (a) Information concerning pricing policies including costing information in respect of products and services provided or to be provided by the Employer; and
>
> (b) Names and addresses of customers of the Employer.
>
> (c) The Employee acknowledges that the information referred to in the aforementioned Paragraphs 6(a) and 6(b) could be used to the detriment of the Employer. Accordingly, the Employee undertakes to treat confidentially all information and agrees not to disclose it to any third party whatsoever during the Employee's employment, except as may be necessary to perform the Employee's duties, or after termination of the Employment, for any reason, except with the written permission of the Employer.
>
> (d) The Employee agrees that upon request of the Employer or upon termination of his employment, the Employee will turn over to the Employer all documents, disks or other computer media, or other material or equipment in the possession or control of the Employee connected with or derived from the Employee's services to the Employer.

[61] Whebby alleges that at a March 5, 2007 meeting of Halifax Regional Municipality officials, McLeod (while then working for Eisner Contracting) revealed confidential information concerning Whebby's business.

[62] In his evidence, McLeod denied disclosing any confidential information pertaining to his former employer. He was not moved on cross and Whebby led no evidence to the contrary. In the result, I have no hesitation in dismissing the counterclaim in its entirety.

Conclusion

[63] The within figures ($2,885 + $8,901 + $4,654) total $16,640. Added to this amount should be prejudgment interest at a rate of 2.5% (non-compounding) for a 7.5 year period. This yields an overall figure of approximately $3,100.

[64] I wish to make it clear that given the evidence, as part of my decision I have dismissed any claims for remuneration for McLeod's last day of work along with any additional severance and any alleged damages for an issue pertaining to AJL Trucking (which McLeod conceded was not part of his claim). In the result, the only remaining matters are costs and disbursements. If the parties are unable to agree on costs and disbursements, I will accept their submissions within thirty days of this decision.

Chipman, J.