**CITATION:** Whittemore v. Open Text Corporation, 2013 ONSC 2339
**COURT FILE NO.:** CV-11-437731
**DATE:** 20130422

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | ) | |
| | ) | |
| PAUL WHITTEMORE | ) | *Kevin Fox*, solicitor for the Plaintiff |
| | ) | |
| Plaintiff | ) | |
| | ) | |
| **– and –** | ) | |
| | ) | |
| OPEN TEXT CORPORATION | ) | |
| | ) | *Evert Van Woudenberg*, solicitor for the Defendant |
| Defendant | ) | |
| | ) | |
| | ) | |
| | ) | |
| | ) | **HEARD:** April 11, 2013 |

**MADAM JUSTICE D.A. WILSON**

## REASONS FOR JUDGMENT

[1] The Plaintiff brings this action claiming damages for failure to provide reasonable notice of termination of his employment given his years of service. This is not a claim for constructive dismissal.

[2] The Defendant denies the claim, pleading that the applicable employment agreement specifically provides that the Plaintiff's employment could be terminated with the minimum notice as set out in the *Employment Standards Act* together with an additional four weeks' salary, which was done.

**Background**

[3] The Plaintiff ["Whittemore"] obtained a Bachelor of Science degree in computer science and started working in software for Bell in 1985. In 1994, he commenced employment with a small company known as SoftArc Inc. ["SoftArc"]. This corporation was owned by several men with whom the Plaintiff became acquainted while at university.

[4] At SoftArc, Whittemore worked as a software developer and he did not have a written employment contract.

[5] In June 1999, SoftArc was taken over by a small company based in Vancouver called MC2. The new company had the SoftArc salaried employees sign an employment agreement with it when it acquired SoftArc. On June 17, 1999 Whittemore signed an employment agreement with MC2 [Exhibit 1, tab 2] as well as a non-competition and confidentiality agreement [Exhibit 1, tab 3]. He was given a copy of the Standard Terms of Employment for full time salaried employees of MC2 [Exhibit 1, tab 1]. One of the standard terms of employment was that salaried employees were entitled to a month long paid sabbatical every five years. The agreement also provided that upon termination, an employee with more than four years' service was entitled to four weeks' salary in addition to the notice required under the *Employment Standards Act*, regardless of length of service with the company [Article 4.2(c). There were numerous other provisions included in the agreement including such items as health benefits, vacation time, harassment policies and maternity leave.

[6] After the take-over, Whittemore's salary and job function remained the same. His years of employment with SoftArc were recognized in terms of his seniority. The name of the company changed to Centrinity Inc. in March, 2000 when the company was listed on the Toronto Stock Exchange.

[7] There were financial issues with the company and Whittemore learned in October, 2002 that Centrinity was being purchased by a larger company called Open Text Corporation ["Open Text"]. There was much discussion about the new company and there were several meetings with the Centrinity employees and representatives from Open Text to discuss what was

occurring. At one of the meetings, the employees were told that their seniority would be lost and that they would no longer be entitled to a sabbatical every five years. There was a discussion between the two organizations and eventually, Whittemore was advised that the time that he had logged with SoftArc would be recognized but that the term in the employment agreement that entitled the employees to the sabbatical would not carry forward as Open Text was a much larger company and they did not offer that "perk".

[8] Whittemore continued working in his usual capacity and received the same salary over the course of the fall of 2002. He was asked by Open Text to sign the Employee Confidentiality and Non-Solicitation Agreement. Whittemore testified that he hesitated to sign the documents because he was uncertain as to whether he should take the job since the market in his area was very strong. He was not happy about losing the sabbatical option. He stated that by the beginning of 2003, he was getting daily pressure from the managers about signing the new documents from Open Text. Eventually, Whittemore decided to stay on with Open Text and determined that the loss of the sabbatical every 5 years was not worth losing his job. He signed the Confidentiality and Non-Solicitation Agreement on January 6, 2003 [Exhibit 1, Tab 9].

[9] Whittemore testified that he was advised that things would continue on pretty much as they had under Centrinity. His job remained the same and he continued to work on the Firstclass programme as he had from the time he joined SoftArc. His salary remained unchanged. He was not given any documentation from Open Text that dealt with the terms of his employment. He knew that neither he nor any other employee would be given a sabbatical.

[10] He did not make any statement to Open Text about the fact that the new company had changed at least one term of the employment contract that he had signed with MC2. He never had any discussion with Open Text about the employment contract that was in effect when he worked at MC2/Centrinity. In Mr. Whittemore's mind, the employment contract with Centrinity was over and he had a new agreement with Open Text, which was evidenced by his signing of the documents on January 6, 2003.

[11] By 2011, the Plaintiff was working with the Defendant as a team leader. In August, he heard that Open Text was going to terminate many of the employees who worked on the Firstclass programme, as he did. He understood that of the 85 people who worked with him on that programme, only 15 would be kept on. He wondered if he would be one of the workers let go.

[12] On August 25, 2011, he was called into a meeting and was advised that his employment with Open Text was being terminated and he was given a bundle of documents to take away and review. When Whittemore looked at the severance package, he thought the calculations were incorrect because he was given eight weeks' notice and then an additional eighteen weeks of salary continuance plus a lump sum payment of four weeks base pay. At that time, he had over seventeen years of service with the company, commencing with SoftArc.



**Position of the Plaintiff**

[13] Simply put, the Plaintiff argues that he did not have an employment contract with the Defendant that included a provision dealing with severance and consequently, it is the common law that governs the appropriate notice. Counsel for the Plaintiff submits that his employment agreement with MC2/Centrinity cannot be relied upon by Open Text as it was terminated when the takeover occurred. Mr. Fox submits that the employer cannot pick and choose from terms of the employment agreement Centrinity had in place with its employees because it was no longer in effect.

**Position of the Defendant**

[14] Counsel for the Defendant argues that the employment contract with MC2/Centrinity was in place following the amalgamation between the two companies and Open Text is entitled to rely on its provisions. Open Text did not have the employees of the former company sign new agreements because there was no need to since there was already one in existence that governed the relationship.

[15] Mr. Van Woudenberg submits that if the Plaintiff wished to repudiate the terms of the agreement with the Defendant the onus was on him to communicate that to Open Text, which he never did. Instead, he continued to work for almost nine years with Open Text, under the same terms that he had with Centrinity, apart from the sabbatical term, which was not carried forward.



**Analysis**

[16] There was no significant factual dispute between the parties. I found the Plaintiff to be a straight-forward, credible witness with a good recollection of the events giving rise to this litigation.

[17] The issues that must be addressed are: whether the existing employment contract was binding on the successor company; what the effect was of the takeover of MC2/Centrinity on the employment contract; and, if so, whether the Defendant can rely on the existing employment contract with respect to termination provisions.

***Was the employment agreement with MC2/Centrinity binding upon Open Text?***

[18] An issue which was not addressed by counsel but which seems to me to be of critical importance is whether the existing employment contract with MC2/Centrinity survived the takeover by Open Text and continued to govern. Article 6.7 of the employment agreement signed in June, 1999 states as follows: **Assignment: This agreement is personal to the Developer (employee) and may not be assigned by him. Upon notice to the Developer, this agreement may be assigned by the Company to any affiliate of the Company. Except as aforesaid, this agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns, including, in the case of the Developer, his heirs, executors and administrators.**

[19] The Defendant called no evidence. I anticipated hearing evidence from the Defendant concerning what the terms were upon which the employees from MC2/Centrinity continued to be employed by Open Text. This would have been of assistance in my determination of what the understanding was of the terms of the employment agreement after Open Text took over the

company. There was no evidence to suggest that the Defendant did not believe the contract was binding after the purchase of MC2/Centrinity or that there was any other agreement that governed the employment relationship. The evidence was clear that Open Text recognized the years of service of the employees and at least in the case of the Plaintiff, he continued to perform the same job function for the same salary.

[20] Mr. Whittemore continued to work for the Defendant for approximately nine years after the takeover, without signing a new employment contract with Open Text, although he signed a non-competition agreement and a confidentiality agreement. These latter documents cannot be construed as a new employment agreement.

[21] As I read section 6.7 of the agreement, it is binding upon the successors to MC2/Centrinity. The evidence at trial supports this finding.

***Did the employment contract with MC2/Centrinity continue to be in effect after the takeover by Open Text?***

[22] The principle governing takeovers is stated by The Honourable Mr. Justice John R. Sproat in *Wrongful Dismissal Handbook*, 5th ed. (Toronto: Carswell, 2009), at p. 3-37: "The general principle is that on a sale of shares there is no change in the corporate identity of the employer and, therefore, no termination of employment. "

[23] *Pattillo v. Murphy Canada Exploration Ltd.* [1], held the following with regard to how corporate changes affect an employment contract, at paras. 7-9:

> The case law is clear that the mere acquisition of a company's shares, as opposed to a sale of its assets, does not automatically terminate the company's employment relationship with its employees.

1 *Pattillo v. Murphy Canada Exploration Ltd.*, 2001 ABQB 1070.

> Similarly, the mere amalgamation of a company with another entity does not automatically amount to a termination of that company's employment contracts. The result of an amalgamation is not the death of a company but rather its continuation in a new form.
>
> The transfer of an employee from a subsidiary corporation to its parent, in this case, does not automatically constitute constructive dismissal. Under the doctrine of "common employer," two or more separate corporate entities may, but not always, be considered a single employer in relation to one employee. Therefore, the mere transfer of that employee from a subsidiary to its parent does not necessarily constitute a change in the identity of that employee's employer, which would terminate the existing employment relationship.



[24] When Open Text took over MC2/Centrinity, it was an amalgamation as is evidenced by exhibit 1, tab 6. It was not an acquisition and there was no change in the identity of the employer. It was open to the Defendant to continue on with the existing employment contract and to modify its terms if it chose to do so.

[25] In the text "*Wrongful Dismissal Handbook*"[2], it is noted, "In modern situations, businesses frequently are transferred with the new owner making known to all employees, either directly or by implication, that their jobs will continue on the same terms. In such cases, it can be said that the new owner has assumed each employee's contract, including the obligations as to dismissal. Even where there has been no definite act or agreement to assign, the courts may imply an assignment or novation where the worker continues to provide services as before which are accepted by the new owner."

[26] In the case before me, as I have indicated, it would have been preferable to have heard evidence about what transpired when Open Text informed the employees of MC2/Centrinity about their terms of employment after the takeover, since no new employment contracts were signed. I have no information as to whether Open Text adopted the other terms of the

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[22] Ellen E. Mole & Marion J. Stendon, *The Wrongful Dismissal Handbook, 3rd ed. (Markham, Ont.: LexisNexis Canada, 2004)*.

employment agreement that was in existence after they acquired MC2/Centrinity. There may have been some terms that Open Text did not agree to continue on with; I simply do not know because this was not addressed in evidence.



[27] What is clear is that the Plaintiff continued working for Open Text for 9 years, receiving salary increases and working in essentially the same manner as he had for the previous company [Exhibit 1, tab 7].Presumably, his salary was the same and he confirmed that his prior years of service were recognized by the Defendant. He never signed a new employment contract. While he asserts that he viewed the employment agreement as being terminated, if that were so, it is unclear on what basis the terms of his employment with Open Text were to be determined. In cross examination he acknowledged that he accepted the standard terms of employment offered by Open Text, as modified by the non-competition and confidentiality agreements he signed.

[28] It is conceded that the policy of MC2/Centrinity of providing employees with a sabbatical every five years was not assumed by Open Text when it took over the company. Counsel for the Plaintiff did not argue that the dropping of the sabbatical provision constituted a unilateral change to a fundamental term of the employment agreement which amounted to a repudiation of the contract. It was open to the Plaintiff to advise the Defendant that this refusal constituted a breach of the terms of his employment contract, but he did not do so. There was no evidence to suggest that he advised Open Text at any time after the acquisition that he took the position that his employment agreement with the former company no longer governed the employment relationship. The only reasonable conclusion that can be drawn from the evidence is that Open Text assumed the employment contract of the Plaintiff when it took over MC2/Centrinity.

***Can the Defendant rely on the termination provisions in the employment contract?***

[29] It is conceded that Open Text refused to continue with the sabbatical option for its employees. If the Plaintiff was of the opinion that this constituted an amendment to a fundamental term of his employment, he had several options: he could have taken the position that there was a repudiation of the employment contract, but in that scenario, he would have had to make his position clear to the employer that he was treating the contract as at an end. He could

have claimed constructive dismissal and sued for damages. Alternatively, he could have made it clear that he did not accept the new terms, continue to perform his job and insisted that Open Text adhere to the terms of the original contract of employment: *Wronko v. Western Inventory Service Ltd.*[3]



[30] In *Wronko, supra,* the Court of Appeal noted that when an employer unilaterally changes a fundamental term of an employment contract much turns of how the employee responds to the repudiation. If the employee rejects the new terms of employment, the Court noted that the employee must make it clear to the new employer that he is rejecting the new term. He cannot simply carry on and then years later say that the contract was no longer in effect.

[31] The Superior Court of Justice decision of *Rasanen v. Lisle-Metrix Ltd.*[4] discussed the significance of a plaintiff's acceptance of unilateral changes to the employment contract, at para. 54:

> [The plaintiff] says that the plaintiff was constructively dismissed when the various terms of the contract were unilaterally altered. In other words, these alterations represent fundamental breaches of the employment contract, resulting in that contract no longer governing the relationship. This strikes me as a curious argument. Unlike the constructive dismissal cases, the plaintiff did not consider that any of the changes to the terms of his employment brought that employment to an end. He did not treat the contract as wrongfully terminated, and resign. Instead he agreed to the changes and carried on. As Ball notes in Canadian Employment Law, supra, at vol. 1 s. 10:140, in respect of a change in the employment relationship amounting to constructive dismissal:
>
> > An employee may elect either to accept the change or to reject it and report to work. Condonation of the change constitutes acceptance.

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[3] *Wronko v. Western Inventory Service Ltd*. 2008 ONCA 327.

4 *Rasanen v. Lisle-Metrix Ltd*.,(2002), 17 C.C.E.L. (3d) 134 (S.C.), aff'd (2004), 33 C.C.E.L. (3d) 47 (C.A.).

[32] When Open Text purchased the shares of MC2/Centrinity the Plaintiff knew there was a change to a term of his employment contract. He continued to work in the same job and raised no objection with Open Text. This behaviour amounts to acceptance of the changes to the agreement. It was not argued by the Plaintiff that the failure to honour the sabbatical provision amounted to a fundamental breach of the employment contract and it is not necessary for me to determine this issue. While he may have thought the contract was at an end, Mr. Whittemore never communicated this to Open Text nor did he treat the contract as being over. Instead, he continued to work in the same capacity for almost 10 years, thereby condoning the change by his own conduct and accepting the modification to the term of his employment.

[33] On the evidence before me, I find that the termination provisions contained in the employment contract signed June 17, 1999 were in effect and governed the employment relationship between the parties.

**Conclusion**

[34] The Plaintiff is entitled to notice of termination in accordance with the provisions of Article 4 in the employment agreement dated June 17, 1999. If parties cannot agree on costs, I may be contacted.

D.A. Wilson J.

**Released:** April 19, 2013

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**BETWEEN:**

PAUL WHITTEMORE

Plaintiff

**– and –**

OPEN TEXT CORPORATION

Defendant

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**REASONS FOR JUDGMENT**

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D. A. Wilson J.

**Released:** April 19, 2013