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Background check refusal grounds for dismissal

Ontario court upholds termination of employee who refused to consent to background check after being hired

BY RONALD MINKEN

BACKGROUND CHECKS are a typical part of the hiring process. But what about after the employee is hired — can an employer insist that the employee consent to a background check in that circumstance and, if the employee does not consent, can the employee be terminated?

In *Covenoho v. Pendylum Inc.*, the Ontario Superior Court of Justice tackled that issue and determined that Pendylum was entitled to terminate Joss Covenoho without cause for refusing to consent to educational and criminal background checks after she had begun work and that the termination was not an act of bad faith.

Covenoho was hired pursuant to a one-year fixed-term contract to perform services for one of Pendylum's clients, Ceridian Canada. Shortly after Covenoho was hired, Ceridian informed Pendylum that education and criminal background checks were required for Covenoho as well as others performing services for Ceridian due to the sensitive nature of the data accessible to these employees. Pendylum informed Covenoho and other staff members that if they declined to consent to either of these checks, "Ceridian has stated that it must release you from your duties there."

When informed of this new mandatory requirement, Covenoho refused to consent to the background checks, taking the position that the checks were not a term of her employment with Pendylum. Less than three months into her one-year contract and as a result of her refusal to agree to the background checks (which were a mandatory requirement for Ceridian), Pendylum terminated Covenoho in accordance with the termination provision of the fixed-term contract, which allowed for termination by either party with at least two weeks' notice. In the termination letter, Pendylum stated that Covenoho's fixed-term contract was being terminated because of "Ceridian's decision to terminate its contract with Pendylum Inc. for your services." Covenoho commenced legal proceedings seeking damages based on the balance of the fixed-term contract and bad-faith damages, among other things.

On a motion for summary judgment, the Ontario Superior Court of Justice held that the language in the fixed-term contract expressly provided for early termination by either party upon provision of at least two

weeks' notice and that Covenoho was not entitled to payment for the remainder of the term. In the court's view, the language of the early termination provision was "clear and unequivocal, and effect should be given to the reasonable expectations of the parties reflected therein. The court also determined that Pendylum's termination of Covenoho was not an act of bad faith as Pendylum explained to Covenoho prior to terminating her that she would be terminated if she refused to consent to the background checks. The court stated that

The company explained to the worker before she was fired that refusal to consent to the background check would result in termination.

there was, "nothing untruthful, misleading or unduly insensitive about (Pendylum's) actions." Accordingly, Covenoho was not entitled to any additional notice or damages and the action was dismissed.

Lessons for employees

While many employees may not wish to undergo background checks if requested after they have been hired, if these background checks are legitimately required, the employee may face termination for refusing to consent to these checks. This

may be true even where consenting to a background check is not an express term of employment at the time of hiring. If an employee has a concern regarding a request from an employer or a related third party for a background check during the course of employment, proper consideration should be given before the employee refuses to comply with the request — a refusal to consent may result in the employee being terminated, with or without cause, depending on the circumstances.

Lessons for employers

Employers should carefully consider whether background checks are required prior to hiring employees. If so, they should be conducted at the time of hiring. Further, employers should consider incorporating into employment contracts the possibility of background checks being conducted during the employment relationship. If a background check is required during the employment relationship and an employee refuses to consent to the background check, the employer may be able to terminate that employee on the basis of the employee's refusal to consent to the background check. If an explanation is provided to the employee and the employee is notified in advance that her refusal to consent may result in termination, then the termination will likely not give rise to liability for bad faith damages.

For more information see:

• *Covenoho v. Pendylum Inc.*, 2016 CarswellOnt 13667 (Ont. S.C.J.).

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