

**Date: 20071214**

**Docket: A-64-06**

**Citation: 2007 FCA 406**

**CORAM: DESJARDINS J.A.  
NOËL J.A.  
TRUDEL J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**DARCY LEE**

**Respondent**

Heard at Charlottetown, P.E.I., on December 6, 2007.

Judgment delivered at Ottawa, ON, on December 14, 2007.

**REASONS FOR JUDGMENT BY:**

**TRUDEL J.A.**

**CONCURRED IN BY:**

**DESJARDINS J.A.  
NOËL J.A.**

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**REASONS FOR JUDGMENT**

**TRUDEL J.A.**

[1] This is an application for judicial review by the Attorney General of Canada (the applicant) asking this Court to set aside the decision of Umpire Guy Goulard (Cub 65087) made pursuant to the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act). The Umpire dismissed the appeal of the *Canada Employment Insurance Commission* (the Commission).

[2] Darcy Lee (the respondent) worked for On-Line Support as a care customer representative between April and October 2004. She applied for benefits under the Act, but the Commission determined that Ms. Lee's employment was terminated due to her misconduct as it was found that

she disconnected calls with customers before responding to their inquiries. Therefore, she was disqualified from receiving employment insurance benefits.

[3] On appeal to the Board of Referees (the Board), Ms. Lee admitted that she was releasing calls. She knew that it was wrong, but adds that she was under great pressure, as the company required employees to answer 5.5 calls per hour. Violation of the imposed quota was ground for dismissal. The Board, affirmed by the Umpire, unanimously allowed the appeal in a one-sentence decision that states:

“The Board finds that the appellant had been singled out in the decision for dismissal and feels that the company has wrongfully dismissed the claimant and has gone against its own rules of conduct which could be considered as harassment.”

[4] Whether or not a claimant is dismissed from his or her employment due to misconduct is a question of mixed fact and law and is reviewable under the standard of reasonableness (*Budhai v. Canada (Attorney General)*, 2002 FCA 298). Umpire Goulard correctly applied the right standard but found that he had no reason to intervene. I disagree for the following reasons.

[5] The Board’s decision fails to address the issue of misconduct. The role of the Board was not to determine whether the dismissal by the employer was justified or was the appropriate sanction. The Board had to decide whether disconnecting calls with customers before responding to their inquiries amounted to misconduct under section 30 of the Act (See: *Canada (Attorney General) v. McNamara*, 2007 FCA 107; *Canada (Attorney General) v. Caul*, 2006 FCA 251; *Fleming v. Canada (Attorney General)*, 2006 FCA 16; *Canada (Attorney General) v. Marion*, 2002 FCA 185;

*Fakhari v. Canada (Attorney General)*, (1996) 197 N.R. 300 (F.C.A.), [1996] F.C.J. no. 653 (C.A.)(QL); *Canada (Attorney General) v. Langlois*, [1996] F.C.J. no. 241 (C.A.) (QL) [*Langlois*]; *Canada (Attorney General) v. Secours*, (1995) 179 N.R. 132 (F.C.A.), [1995] F.C.J. no. 210 (C.A.)(QL) [*Secours*]; *Canada (Attorney General) v. Namaro* (1983) 46 N.R. 541 (F.C.A.), [1983] F.C.J. no. 21 (C.A.)(QL) [*Namaro*]).

[6] The Umpire affirmed the Board's decision. With respect, the Umpire's decision ignores past rulings of this Court to the effect that it is sufficient, for a misconduct to occur under the Act, that the reprehensible act or omission complained of be made "wilfully", that is consciously, deliberately or intentionally (*Canada (Attorney General) v. Tucker*, [1986] 2 F.C. 329 (C.A.); *Secours, supra*; *Canada (Attorney General) v. Johnson*, 2004 FCA 100). There is no doubt, in this instance, that the act was conscious. The Umpire, on focusing on justification for the respondent's misconduct, forgot to address the fact that under the circumstances, the dropping of calls was of such a nature, for a customer care representative, that the respondent should have known, or foreseen that her act would be likely to result in her dismissal (*Langlois, supra*). Answering phone calls was an essential function of her employment that ceased to be met (*Canada (Attorney General) v. Pearson*, 2006 FCA 199; *Canada (Attorney General) v. Brissette*, [1994] 1 F.C. 684 (C.A.)).

[7] The fact that Ms. Lee was afraid to lose her job and thought that this was the only solution certainly calls for sympathy, but it does not alter the legal nature and implications of the acts committed. As well, the fact that other employees, guilty of the same misconduct, were not fired is irrelevant (*Namaro, supra*).

[8] For these reasons, I propose to allow this application for judicial review without costs, as the applicant did not seek them. The decision of the Umpire in Cub 65087 will be set aside and the matter will be referred back to the Chief Umpire or his designate, for a re-determination on the basis that the respondent lost her employment because of her misconduct.

“Johanne Trudel”

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J.A.

“I concur  
Alice Desjardins J.A.”

“I agree  
Marc Noël J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-64-06

**APPEAL FROM A DECISION OF THE UMPIRE GUY GOULARD, DATED December 9, 2005.**

**STYLE OF CAUSE:** Attorney General of Canada  
Applicant  
and  
Darcy Lee  
Respondent

**PLACE OF HEARING:** Charlottetown, P.E.I.

**DATE OF HEARING:** December 6, 2007

**REASONS FOR JUDGMENT BY:** TRUDEL, J.A.

**CONCURRED IN BY:** DESJARDINS J.A.  
NOËL J.A.

**DATED:** December 14, 2007

**APPEARANCES:**

Korinda McLaine

FOR THE APPLICANT

Darcy Lee

ON HER OWN BEHALF

**SOLICITORS OF RECORD:**

John H. Sims, Q.C.  
Deputy Attorney General of Canada

FOR THE APPLICANT