FILE: 1992/93-13

APPEAL

THE UNIVERSITY TRIBUNAL OF THE UNIVERSITY OF TORONTO

TRIAL: 1992/93-07

TRIBUNAL APPEALS BOARD

BETWEEN:	University of Toronto	Complainant (Respondent),
	- and -	
	Ms. W.	Accused (appellant),

BEFORE:	D.S. Affleck, Q.C. (Senior Chair) Brian Procter John Slater	Appeals Board

APPEARANCES:	Linda Rothstein, for the Respondent Richard Press, for the appellant
DATE:	March 26, 1993

This is an appeal by Ms. W. to the Appeals Board of the University Tribunal from the sanctions imposed by the jury in the Trial Division of the University Tribunal on November 5, 1992 immediately following the jury's unanimous finding that the appellant had committed offences under the University of Toronto Code of Behaviour on Academic Matters, 1991. The appellant was charged with the following offences:

1) that in or about April, 1992, she did intentionally forge or in any other way [sic] alter or falsify academic records or she did circulate, alter or make use of such forged, altered or falsified records, namely a note dated April 21, 1992 purportedly from Professor Thompson and her second term test in ECO 328Y contrary to Section B.I.1.3(a) of the University of Toronto Code of Behaviour on Academic Matters.

2) that in or about April 21, 1992, she made additions to her ECO 328Y second term test and submitted a forged note with the intent to falsify or alter her academic record, being her course results for ECO 328Y, contrary to Sections B.I.1.3(a) and B.II.2 of the University of Toronto Code of Behaviour on Academic Matters.

The appellant pleaded guilty to the charges. The jury accepted the guilty pleas and following submissions by counsel for both parties, agreed unanimously on the imposition of the following sanctions:

- a grade of 'zero' in ECO 328Y;
- suspension for a period of three years from the University;
- that the foregoing sanctions be recorded on her academic transcript for four years;
- that the decision and sanctions imposed be reported to the Vice-President and Provost for publication in the University newspapers, with the name of the student withheld.

Preliminary Matters

Counsel for the appellant raised a concern that he had not received a copy of the Reasons for Decision in [1989/90-06] until shortly before the appeal was scheduled to begin. These reasons had been referred to in the written submissions of counsel for the University. Counsel for the appellant argued that this document was critical to his submissions.

The Chair agreed that the hearing would be adjourned for some thirty minutes to give counsel for the appellant an opportunity to review the reasons.

The appellant's factum summarized the grounds for the appeal, which were addressed in the following sequence.

1) Novelty of Procedure

Counsel for the appellant reviewed the facts of the case. He said that the Agreed Statement of Facts signed by his client and counsel for the University had been prepared solely for the purpose of the pleas of guilty and not for purposes of sentencing. The Chair indicated that he had difficulty in

considering the proceeding to be divided in separate parts: a trial and a sentencing procedure. He remarked that the jury, having been provided with the statement of facts, could not be expected to erase its recollection of this same document after its acceptance of the guilty pleas. Counsel for the appellant argued that, if he had known that he might have had to adduce evidence through his client he would have expanded upon the agreed Statement of Facts.

In response to clarification about a statement he made that his submissions at the trial had been disallowed, counsel for the appellant indicated that he had not been allowed to continue with his submission about the particulars of the appellant's home life and personal background. The Chair outlined the differences between giving evidence and advancing a submission. He referred to the guidelines issued to students preparing for the Bar Admission Course: "Evidence adduced may be *viva voce* evidence, testimony, or by an agreed to narrative of facts stated by counsel or other form agreed to by counsel and acceptable to the Court."

Counsel for the appellant argued that hearsay evidence should be allowed at a Tribunal and that it was the role of the Tribunal to be more relaxed than a criminal court in its admission of evidence. He claimed that an administrative tribunal was a fact-finding body which permitted a wide range of evidence to be presented. By taking all of this evidence into account, the Tribunal effectively achieved its function and arrived at the best possible solution.

The Chair pointed out that at the trial counsel for the University had in fact agreed to the submission of hearsay evidence in the form of letters submitted by counsel for the appellant. At the same time, the Tribunal could not allow counsel for the appellant to present evidence on behalf of his client without the consent of the University counsel. Otherwise the Tribunal could potentially be faced with conflicting, disparate types of evidence which were in no way amenable to tests of credibility. The Tribunal therefore had to define some parameters for the range of "evidence" it would accept. He also pointed out that the appellant herself did have the opportunity to give her own account and that the counsel for the appellant was able to elicit a full and comprehensive account from her.

Counsel for the appellant referred to the procedures followed by the Tribunal, contending that they were different from those followed at the Tribunal hearing attended by his colleague, Douglas Harris, who had provided an affadavit to that effect. In Mr. Harris's affadavit, he indicated that the University Tribunal had allowed evidence in the form of submissions from counsel. The counsel for the appellant remarked on his own experience in the Provincial Court, where he could speak on behalf of his client. The Chair agreed that, if there were no objection, this practice was acceptable. In the case before the Tribunal, however, there had been an objection to the giving of evidence by counsel. The Chair reiterated his observation that counsel for the appellant had called *his client to give evidence, and that this testimony, coupled with the appellant's* letters were comprehensive. He wondered what more the counsel for the appellant could have done.

Counsel for the appellant said that he could have prepared the appellant for possible cross-examination. It seemed unfair to him that the respondent, as a result of her familiarity with the procedures of the Tribunal, could benefit from a statement of facts that she knew could be used in sentencing whereas the appellant had acted on the premise that the Tribunal was a flexible, evidence-gathering body.

Counsel for the appellant argued that, whereas according to the Code the accused could not be compelled to testify, the appellant had been under an implicit compulsion to testify because otherwise there would have been virtually no evidence to present in her defence. The context of the letters presented would have been senseless without the testimony of his client. He also claimed that, if had been aware of the procedures, he would have called on additional witnesses, such as friends of the appellant or, most notably, the learning disability specialist. The Chair again suggested that the kind of information being described by counsel for the appellant was adduced during his examination of his client. He did not see what the counsel for the appellant himself could have said about the case that his client had not told him or was not communicated to the Tribunal during her testimony.

2) Lack of Disclosure

Counsel for the appellant said that case law was provided to counsel for the University by the Office of the University Tribunal. Counsel for the appellant only learned of the availability of this case law on November 4th, one day before the trial, when he spoke with counsel for the University. He received the case material one hour before the trial began.

In response to a question from the Chair, counsel for the Appellent indicated that he did not ask for an adjournment. He had been unaware of the availability of nor made efforts to obtain previous case law through the office of the Secretary of the University Tribunal. In discussions with Mr. Harris, no mention had been made of the existence or availability of previous cases. In regard to the matter of adjournment, counsel for the appellant indicated that, although he did not request an ajdournment, one hour of preparation was not sufficient time to review the cases. He suggested that silence on the part of an agent should not be construed as acquiescence or the waiver of a right to obtain disclosure. He argued that, in law, silence rarely constitutes acquiescence. Counsel for the appellant argued that an error of law existed regardless of whether it was commented upon at the time of its commission.

Counsel for the appellant noted that, in criminal cases, the prosecution was required to supply the defence with full disclosure of all relevant materials not readily available to both parties. The Chair asked whether all relevant materials included case law. Counsel for the appellant noted that criminal law cases are published. The Chair cited an example of an instance where case law not published locally may be available to the Crown, but not the defense. He asked counsel for the appellant whether, in such an instance, the Crown had an obligation to disclose all of its background materials. Counsel for the appellant argued that, in his client's case, disclosure of an entire body of case law was at issue.

Counsel for the appellant argued that, had he known of the availability of case law, he would have assembled some cases of his own, citing the case of the [1992/93-09] , which, in his opinion, was an example of a comparable case to that of his client, but in which a more lentient set of sanctions was imposed.

Counsel for the appellant then referred to the case of Stinchcombe, claiming that this case must be read as a decision on policy, not just guidelines for handling a specific situation. He argued that Stinchcombe stood for the proposition that the role of the prosecution was not to get a conviction, but to do justice, suggesting that a parallel could be drawn to the role of the University in prosecuting students. Counsel for the appellant asserted that the University should seek truth, not retribution, and that the truth is best obtained by getting as much information as possible from both sides. He suggested that the accused should be made aware of all information the prosecution expects to level against him or her. Informed rebuttal allowed for maximum exposure of both sides of the argument and the eventual truth.

The Chair asked whether Stinchcombe referred to the defendant's entitlement to anything other than evidence or prospective evidence. Counsel for the appellant advised that it was the failure to disclose the case law used by the University that was at issue. He also argued that, because these cases served as a precedent, they provided a strong guideline and greatly influenced the jury in its deliberations. The Chair indicated that both counsel for the University and the Trial Chair in his directions had emphasized the importance of not giving great weight to the cases that were mentioned because the facts were different in each case.

3) Incorrect Direction for Sentencing

Counsel for the appellant argued that the Trial Chair directed the jury to be unsympathetic in the determination of its verdict, reading from page 43 of the transcript, which stated: "This is not an exercise in being sympathetic, this is a judicial exercise and you have a certain role and responsibility under the Code. ...you must dispassionately, objectively and without sympathy...arrive at a sentence..." . The Chair responded by cautioning against taking this sentence out of context, pointing out that the Trial Chair's directions contained many other points of guidance to the jury, including the need to consider extenuating circumstances and the character of the accused. As an example, the Chair quoted a sentence from the same page of the transcript which read: "So what you must do is as dispassionately as possible and paying due attention to the sentencing principles that have been discussed with you - deterrence, character, the impact on the University and the nature of the offence, whether there is a likelihood of repetition, and so on, all of these things".

Counsel for the appellant suggested that the direction he had quoted undermined the Trial Chair's earlier instructions to consider the whole of the appellant's situation. He also argued that, if this were a determination of guilt, advising the jury to be dispassionate would have been valid, but was not appropriate in the process of sentencing. To support this claim, he referred to the case of [1989/90-06] as well as his factum and stated that "mercy, humanity, sympathy, and evidence of remorse *are vital factors in passing sentence.*" *He argued that, in instructing the jury to* be unsympathetic, the Trial Chair erred in law.

A member of the Board suggested that counsel for the appellant was misinterpreting the statement he had quoted. He noted that the first sentence in that same paragraph read: "There are elements of sympathy in any case, either a great feeling of sympathy or perhaps, in some cases, an absence of sympathy." He said that the Trial Chair was not instructing the jury to be unsympathetic but rather that, regardless of whether they were for or against the accused, they were not to be unduly influenced by these feelings. He said that it was a fallacy to interpret this as signifying that the Chair instructed the jury to *be unsympathetic. Rather, he was instructing them to control these feelings* during their deliberations.

ORDERS SOUGHT

Counsel for the appellant concluded by seeking the following:

THAT the Tribunal Appeals Board should order:

1) a new hearing under Section C.III.8.B. of the Code;

Counsel for the appellant noted that counsel for the respondent 's submission stated that, in order to order such a hearing, exceptional grounds were needed; it was the counsel for the appellant's submission that such grounds existed in this case.

In the alternative, if the Tribunal did not find exceptional grounds, counsel for the appellant asked:

2) that the Tribunal apply its power under the Code of Behaviour in Section C.III.8.(c) which allows them to "reverse, quash, vary, or modify any penalty or sanction".

3) Counsel for the appellant recommended that the Tribunal Appeals Board limit its sanctions to suspension from the Economics Department, under Section C.II.B.1.(h).

Counsel for the appellant asked that, if the Board decided to impose a suspension, the start date be the end of this term, pointing out that the student had been attending courses since September, and that it would be contrary to the rules of fairness to not give her credit for the work completed. The start date for the suspension was never specified at the hearing. Counsel for the appellant argued that although expulsion had been one of the sanctions available the jury had presumably chosen suspension with the intention that the appellant could later return and complete her degree. If the suspension began at the end of this term, the appellant could then complete her year and have one more course to complete for her degree. Otherwise, she would have to repeat the year.

Counsel for the appellant asked that his client be allowed to address the Board. Counsel for the Respondent indicated that, while it was not customary to permit both the appellant's counsel and the appellant to address an appeals tribunal, she had no strong objections. The Board members adjourned for a few minutes, and returned to indicate that they would permit the appellant to give a brief address, noting that it was extraordinary, but in the circumstances they were prepared to do so.

The appellant argued that the sanctions were inappropriate and excessive. She argued that, after the experience of having her case brought before the Tribunal, there was no possibility of her committing another offence, saying that the unpleasantness of the Tribunal process itself was sufficient deterrence. The Chair noted that the appellant had committed a previous offence in May of 1991 and, in spite of the sanctions imposed at that time, which where in themselves quite extensive, had decided to commit another offence within one year of that offence. He also noted that it was the responsibility of the University to graduate students who had obtained their degrees through honest and diligent work, and not through subterfuge.

The appellant then argued that students in circumstances of extreme stress might be expected, when an opportunity presented itself, to take advantage of that opportunity. The Chair noted that all students were under varying degrees and different types of stress. He sought clarification of the appellant's statement, suggesting that it would be fair to paraphrase the statement by saying that the appellant was arguing that all students, if sufficiently stressed, could be expected to cheat. The appellant had nothing further to say.

REASONS FOR DECISION OF THE TRIBUNAL APPEALS BOARD (DELIVERED ORALLY BY D. S. AFFLECK)

We have considered the submissions contained in the two factums filed and, of course, the materials that were before the jury at the original hearing on November 5th of 1992 and the oral argument presented today. The factums (facta) were particularly helpful to us and we thank counsel for their efforts in presenting their argument in a clear and concise manner.

In his argument and in his factum, counsel for the appellant has articulated three main submissions:

1) Novelty of Procedure

The first related to the Novelty of Procedure and the argument in this regard was that, as counsel for the Accused Student, he was not permitted to give evidence on behalf of the accused in the matter of sentence, but had to call his client to give that evidence. He asserts that that method of proceeding was new to the Trial Division, and that, if he had been aware of it, he would have attempted to have elicited the evidence in some other way, or had it placed in the statement of facts that had been agreed to by counsel.

It is our view that there was nothing novel with the procedure followed by the Tribunal in this instance. Counsel for the appellant alluded to procedure in the criminal court. Those procedures require the adducing of evidence. Evidence cannot be given through counsel's submissions without leave of the other counsel and the Adjudicator. We are not prepared to accept that submission on behalf of the appellant.

2) Lack of Disclosure

The second submission was the absence of disclosure. Certain case law of the Tribunal that was to be relied upon by the University was not presented to counsel for the appellant until one hour before the proceeding. Notwithstanding that fact, counsel for the appellant argued with respect to those cases and, in fact did not seek an adjournment. In the transcript, there were warnings from the Chair that those cases were not to be given weight in the jury's deliberations. We do not believe that, even if counsel had been given greater time to consider those cases, there would have been any change in the outcome of this particular hearing.

3) Direction of the Chair

Counsel for the appellant takes the position that the instruction to the jury from the Chair found at page 43 of the transcript [and referred to earlier] to the jury was that they were to be unsympathetic in their consideration of sentence for his client.

The Board does not read that instruction to the jury in the same way. If you read the complete paragraph and what preceded it, the instruction in our view to the jury was to consider the principles of sentencing, including the character of the accused, without a strong feeling of sympathy or a lack of sympathy, in other words in a neutral and evenhanded way. We consider that to be an appropriate instruction to the jury, taken in the context of this case.

The Chair advised that the appeal was dismissed.

Counsel for the appellant asked when the suspension was to commence. Counsel for the appellant was advised that sanctions commence from the date of the hearing, in this instance November 5, 1992, unless the jury directs otherwise. The Chair advised counsel for the appellant that the members of the Board had not seen any extenuating circumstances with the appellant's case that would cause them to change the start date. Counsel for the appellant then asked if the suspension date could be moved prior to May 1, 1992. He argued that the start date of November 5, 1992 in effect amounted to a four-year suspension because she would have already lost this year. If she were allowed to return in January 1996, she would have difficulty fitting into the academic year, which for most courses begins in September.

The Chair advised that, while under different circumstances, the Board might be prepared to consider the modification of the start date for the suspension, this was a second offence, the jury had been aware of this, and the Board was not prepared to change its decision.

"Donald Affleck"	"John Slater"	"Brian Procter"
Donald Affleck	John Slater	Brian Procter