

UNIVERSITY OF TORONTO
DISCIPLINE APPEALS BOARD

BETWEEN: University of Toronto Complainant
(Respondent),
and
Mr. E. Accused
(Appellant),

BEFORE: D.S. Affleck, Q.C. (Senior Chair)
Peggy Haist
Henry Kim
Joseph Minta Discipline Appeals Board

APPEARANCES: John Quinn, for the Appellant
Linda Rothstein, for the Respondent

DATE: March 25, 1996

NATURE OF THE APPEAL

Mr. E. appealed the November 28, 1995 decision of a Panel of the Trial Division of the University Tribunal. The Panel had considered the following charges against Mr. E.

1. THAT on or about March 29, 1995, he intentionally counselled another member, namely Professor Harold Ohlendorf, to commit or be a party to an offence under the *University of Toronto Code of Behaviour on Academic Matters, 1991*, namely to intentionally evaluate academic work by him by reference to a criterion that does not relate to its merit contrary to Sections B.I.2.(c) and B.II.1.(iv) of the *Code*.
2. THAT on or about March 29, 1995, he attempted to forge or falsify an academic record, namely his results in HUM B56S contrary to Sections B.II.2 and B.I.3 of the *Code*.

3. THAT on or about March 29, 1995, he attempted to obtain unauthorized assistance in the final examination and in connection with academic work in HUM B56S contrary to Sections B.II.2 and B.I.1 (b) of the *Code*.

The jury accepted Mr. E.'s guilty plea and found him guilty of charges #2 and #3, and charge #1 as it relates to Section B.II.1 (iv), but not Section B.I.2.(c) of the *Code*. The Tribunal Panel recommended that Mr. E. be expelled from the University of Toronto for academic misconduct.

THE FACTS

In the Spring of 1995, Mr. E. was a student at Scarborough College and registered in a course known as HUM B56S - Modern German Prose. The course was taught by Professor Harold Ohlendorf. At the time, Mr. E. was enrolled in his sixth Winter session at the University, having commenced his education at the University in 1988.

The marking scheme for HUM B56S had four components: Mid-term Examination - 15%, Essay - 30%, Final Examination - 40%, and Class Participation - 15%.

On March 29, 1995, Mr. E. went to Professor Ohlendorf's office and advised him that he could not write the essay that was due in the course or the final examination. After being advised by Professor Ohlendorf that it was too late to withdraw from the course, Mr. E. suggested to the Professor, that 'everyone could be bought', stated that he had inquired as to 'the going rate' and was prepared to double it. In response to Professor Ohlendorf, Mr. E. advised that 'the going rate' was \$500.00.

In explaining his motivation to Professor Ohlendorf, Mr. E. advised that he did not want to have any negative marks, i.e., "F's", on his transcript. Mr. E. told Professor Ohlendorf that he wanted to continue his education by going to graduate school and enrolling in a Masters programme in criminology.

Mr. E. testified that he had suffered from depression and sleeplessness in the past so he went to see two physicians and they provided a diagnosis of "a state of some kind of depression" and gave "some sort of medication to allow me to sleep".

ARGUMENT FOR THE APPELLANT

Counsel for the Appellant initially sought to appeal the decision of a Panel of the Trial Division of the University Tribunal on two grounds.

The first argument, regarding the nature of sanction of expulsion and how it applied to the case was subsequently withdrawn.

The second argument was that the sanction imposed by Trial Division of the University Tribunal had been unduly severe in Mr. E.'s case. The undue severity of the sanction recommended was reflected in the compilation of expulsion cases considered by the University Tribunal over the past twenty years. This compilation had been provided by the Senior Discipline Counsel of the University of Toronto. The cases contained in the compilation had indicated that a practice had evolved permitting transcripts to be expunged of information regarding a student's past academic offence after a material period of time had elapsed, usually three to five years. The justification for this practice was that it provided an expelled student with an opportunity for academic rehabilitation and to obtain a degree at another institution. It was the submission of Counsel for the Appellant that, under the circumstances of this case, Mr. E. should be permitted, at the least, some opportunity at academic rehabilitation. That opportunity would be denied if the Panel's recommendation were accepted.

In addition, it was argued that the Panel failed to consider extenuating circumstances relating to Mr. E.'s mental state of health during the time of the offence and at the time of his hearing before the University Tribunal. Counsel for the Appellant, therefore, wished an opportunity to introduce new evidence to this respect.

ARGUMENT FOR THE RESPONDENT

Counsel for the Respondent submitted that the Panel of the Trial Division had considered its recommendation that Mr. E. be expelled and had concluded that expulsion was the only appropriate sanction for the following reasons:

- 1) The nature of the offence and the circumstances of its commission were such that it constituted the most serious of all offences reviewed by the Tribunal. Specifically, the Tribunal had concluded that an attempted bribery of a Professor, whether or not it was a criminal offence, was "undoubtedly an act that struck at the fundamental relationship of trust that must exist in the University" and was "an attempt to involve another member of the University community in an act of corruption".
- 2) It was an intentional act that required some preparation and planning.
- 3) There were no extenuating circumstances that could be seen as properly mitigating the sanction.
- 4) There was an overriding need to protect the integrity of the University and its institutions in the face of an act of corruption.

Counsel for the Respondent cited the case of 1976/77-03 (1976), submitting that it was not the function of an appellate tribunal to decide whether or not it agreed with the Trial Division's sanction or recommended sanction. The role of an appellate tribunal was to attempt to achieve some degree of uniformity in trial division decisions. In short, the appeal on this ground should be dismissed unless it was established that the decision constituted a radical departure from the sanctions imposed for similar offences. It was submitted that the Appellant could not meet this burden.

Counsel for the Appellant advised that Mr. E. was prepared to undergo a psychiatric assessment. The assessment would be undertaken by a psychiatrist who would be professionally qualified to give such an opinion and would be paid for by Mr. E. should the Board recommend this course of action.

Counsel for the Respondent stated that this course of action was not the University's first choice; but, if the Board determined that it was appropriate, she would co-operate in any way she could. However, she did not subscribe to the view that the introduction of new evidence was appropriate in this case at this time.

Mr. Affleck advised that, in light of the submissions of counsel, the Board was prepared to grant the appeal in part and on certain specific conditions. The Board was unanimous in its view that a panel of the Tribunal differently constituted, should hear fresh submissions and new evidence on behalf of Mr. E. regarding sentence and only sentence.

Mr. E.'s appeal was, therefore, allowed in part. His appeal as to sentence would be allowed to proceed provided that:

1. Mr. E. will not seek a degree or attend the University until such time as he has undergone a professional psychiatric assessment and the Trial Division has dealt with his sentencing.
2. The assessment is to be undertaken by a professional satisfactory to both the University and its counsel as well as to Mr. E. and his counsel and to be paid for by Mr. E.
3. The assessment is to be completed by the end of June, 1996.
4. Mr. E. agrees not to change his plea of guilty to the charges originally brought against him on any re-hearing;
5. Mr. E. will provide the assessor and the University with all documentation concerning depression or any psychiatric condition.
6. Mr. E. will provide the assessor at the outset of the assessment with written consent for the production of his medical records.

The Board was prepared to remain seized of the matter until such time as it was referred back to the Trial division in case there were questions on the terms imposed.

Counsel for the Appellant noted that there were no problems with respect to the terms as stated. In response to Counsel for the Respondent's request, Mr. Affleck clarified the following:

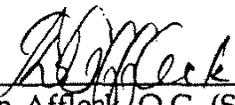
1. The cost of the medical assessment was to be borne by Mr. E., subject to the condition that if such costs were beyond Mr. E.'s ability to pay, the matter would be brought back to the Panel for further consideration.
2. The introduction of the medical assessment would be heard by a newly constituted Panel of the University Tribunal.

Counsel for the Appellant asked if Mr. E. could have access to his University records. Counsel for the Respondent confirmed that these records were his to ask for at any time.

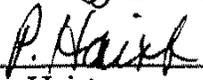
REASONS FOR THE DECISION (delivered orally by D. S. Affleck)

The Board believes the offence to be heinous. If there were no mitigating factors, the University community could be advised accordingly. On the other hand, Mr. E. , through his counsel, had raised some indication that he did have some health problem or problems. The Board was not the body to make the decision as to whether these problems were in fact real or relevant to the case. That is why the Board was concerned that if a penalty was imposed there was no room for doubt as to why it was imposed and the fact that it had been imposed on somebody who had no disability at the time of the charged offences.

I realize the University's position, and as I say, we do believe these are heinous offences. However, there are some matters in the record that are inexplicable at the moment, and in my view and the views of my colleagues, these should be cleared up.



Don Affleck, Q.C. (Senior Chair)



Peggy Haist



Henry Kim



Joseph Minta

July 9, 1996