

UNIVERSITY OF TORONTO
The University Tribunal
Trial Division

IN THE MATTER of charges of academic dishonesty made on March 4, 2009;

AND IN THE MATTER of the University of Toronto *Code of Behaviour on Academic Matters, 1995*;

AND IN THE MATTER of *The University of Toronto Act, 1971*, S.O. 1971, c. 56 as amended S.O. 1978, c. 88

BETWEEN:

UNIVERSITY OF TORONTO (the "University")

- and -

N [REDACTED] A [REDACTED]

Members of the Panel:

Ms. Laura Trachuk
Mr. Adil D'Sousa
Professor Graham Trope

Appearances:

Phil Downes for N [REDACTED] A [REDACTED]
Linda Rothstein and Lily Harmer for the University of Toronto

DECISION

- [1] A hearing of the Trial Division of the University Tribunal was convened on September 10, 2009 to consider charges brought against N [REDACTED] A [REDACTED] under the *University of Toronto's Code of Behaviour on Academic Matters* (the "Code").

Charges

- [2] On March 4, 2009 N [REDACTED] A [REDACTED] was charged as follows:

CHARGES

Note: Wherever in the *Code of Behaviour on Academic Matters, 1995* ("Code") an offence is described as depending on "knowing", the offence shall likewise be deemed to have been committed if the person ought reasonably to have known.

1. On or about November 29, 2007, you knowingly forged or in any other way altered or falsified any academic record or uttered, circulated or made use of any such forged, altered or falsified record, whether the record be in print or electronic form, namely the marks for your mid-term exam in MGTB03H – Management Accounting, contrary to section B.I.3.(a) of the *Code*.

2. In the alternative, on or about November 29, 2007, you knowingly engaged in any form of cheating, academic dishonesty or misconduct, fraud or misrepresentation not herein otherwise described, in order to obtain academic credit or other academic advantage of any kind, in connection with your mid-term exam in MGTB03H – Management Accounting, contrary to section B.I.3.(b) of the *Code*.

3. On or about December 10, 2007, you knowingly forged or in any other way altered or falsified any academic record or uttered, circulated or made use of any such forged, altered or falsified record, whether the record be in print or electronic form, namely the marks for your final exam in MGTB03H – Management Accounting, contrary to section B.I.3.(a) of the *Code*.

4. In the alternative, on or about December 10, 2007, you knowingly engaged in any form of cheating, academic dishonesty or misconduct, fraud or misrepresentation not herein otherwise described, in order to obtain academic credit or other academic advantage of any kind, in connection with your final exam in MGTB03H – Management Accounting, contrary to section B.I.3.(b) of the *Code*.

5. On or about April 23, 2008, you knowingly forged or in any other way altered or falsified any academic record or uttered, circulated or made use of any such forged, altered or falsified record, whether the record be in print or electronic form, namely the marks for your final exam in MGTC03H – Principles of Finance, contrary to section B.I.3.(a) of the *Code*.

6. In the alternative, on or about April 23, 2008, you knowingly engaged in any form of cheating, academic dishonesty or misconduct, fraud or misrepresentation not herein otherwise described, in order to obtain academic credit or other academic advantage of any kind, in connection with your final exam in MGTC03H – Principles of Finance, contrary to section B.I.3.(b) of the *Code*.

- [3] Mr. A█████ contends that the University may not proceed with the charges listed at paragraphs 5 and 6 above because the Dean's designate made a prior decision to dismiss

those charges and conveyed that decision to him by letter on June 24, 2008. He asserts that the University is precluded by the provisions of the Code from charging him after that decision was made.

Facts

- [4] The parties introduced the following agreed Statement of Facts which was signed by Mr. A [REDACTED] and counsel for the university:

1. For the purposes of this hearing under the *Code of Behaviour on Academic Matters* ("Code"), the University of Toronto (the "University") and N [REDACTED] A [REDACTED] have prepared this Agreed Statement of Facts ("ASF") and a joint book of documents ("JBD"). The University and N [REDACTED] A [REDACTED] agree that:

- a. they consent to the admission into evidence of each document contained in the JBD for all purposes, including for the truth of its contents, without further need to prove the document; and
- b. if a document indicates that it was sent or received by someone, that is *prima facie* proof that the document was sent and received as indicated.

2. On August 10, 2009, the University delivered a Notice of Hearing in this matter. This Notice of Hearing is included in the JBD at Tab 18.

3. The Notice of Hearing arises out of charges of academic misconduct filed by the Provost under the *Code*. A copy of the Charges dated March 4, 2009 is included at Tab 19 of the JBD.

A. BACKGROUND

4. In Fall 2006, N [REDACTED] A [REDACTED] registered at the University of Toronto at Scarborough ("UTSC") in the Specialist (Co-Operative) Program in Management. At the end of the Winter 2009 term N [REDACTED] A [REDACTED] had accumulated 12.5 credits. A copy of N [REDACTED] A [REDACTED]'s academic record dated August 24, 2009, is found in the JBD at Tab 2.

5. A [REDACTED] A [REDACTED] is N [REDACTED] A [REDACTED]'s older brother. At all material times N [REDACTED] A [REDACTED] lived together with his brother A [REDACTED] and their parents in the family home.

6. Both N [REDACTED] and A [REDACTED] A [REDACTED] were enrolled at UTSC in the Specialist (Co-Operative) Program in Management (the "Program"). This is an enriched program which combines academic studies with work experience in public and private enterprises. Co-operative programs are considered desirable because students have contact with, and heightened exposure to, prospective employers and career opportunities following graduation. At UTSC, approximately 80 per cent of students applying to the Management program from high school seek

admission into Co-Operative programs, of which approximately 50 per cent are actually accepted. Admission is granted on the basis of an applicant's academic performance as well as their interest, experience and potential ability. N[REDACTED] A[REDACTED] was admitted to the programme directly out of high school.

7. A[REDACTED] A[REDACTED] was enrolled in this Program from 2004 to 2008. A[REDACTED] A[REDACTED] was also employed by UTSC as a teaching assistant ("TA") in a number of management courses from the Summer of 2006 to the Winter of 2008. As a TA A[REDACTED] A[REDACTED]'s responsibilities included marking student course work and invigilating exams.

8. N[REDACTED] A[REDACTED] enrolled in the Program in the Fall 2006 term and has completed his third year of study. In Summer 2007, N[REDACTED] was placed on the Honours List. In June 2008, N[REDACTED] joined, and was appointed Director of Finance of, DECA U. DECA U promotes itself as being "part of an international organization aimed at preparing university students for a variety of careers ... maintaining a strong focus on business-related areas ...". In January 2009, N[REDACTED] competed against 77 students at a DECA U Provincial Conference sponsored by TD Bank and was awarded a Top 5 Medal in Financial Services.

9. N[REDACTED] A[REDACTED] was enrolled in the following courses at the same time that his brother A[REDACTED] A[REDACTED] was employed as a TA in those same courses:

- c. MGTB05 in Fall 2006;
- d. MGTB03 in Fall 2007; and
- e. MGTC03 in Winter 2008.

10. N[REDACTED] A[REDACTED] knew that his brother was a TA in each of these courses, but did not advise any of the course instructors in MGTB05, MGTB03 or MGTC03 that his brother A[REDACTED] was a TA in the same course in which he was enrolled.

B. FACTS RELATING TO MGTB03H3

11. MGTB03H3 was an introductory course in Management Accounting. It was a required course for successful completion of the Program. N[REDACTED] A[REDACTED] was enrolled in this course in Fall 2007. It was taught by Professor Liang Chen.

12. A[REDACTED] A[REDACTED] was employed as a TA in MGTB03 in the Fall term of 2007 while his brother was enrolled in the course. N[REDACTED] A[REDACTED] was aware that his brother was a TA responsible for marking course work. He did not inform Professor Chen that he was A[REDACTED] A[REDACTED]'s brother. N[REDACTED] A[REDACTED] was never asked by any faculty member or instructor if he was related to A[REDACTED] A[REDACTED].

13. Grades in the course were assigned as follows: 4 assignments – 10%; midterm test – 40%; final exam – 50%. There were approximately 205 students enrolled in this course, divided into three lecture groups of 65 students (L1), 78 students (L30), and 62 students (L31). A copy of the Course Outline for MGTB03H3 is found in the JBD at Tab 4.

14. As one of three TA's in the course, A■■■■ A■■■■ had electronic access to all of the course marks for all students enrolled in the course, including his brother N■■■■ A■■■■.

15. N■■■■ A■■■■ submitted 4 assignments for credit in MGTB03, worth in total 10% of the overall course mark, and received the following marks:

- f. October 1, 2007 - Assignment 1 (worth 3%): 100%
- g. October 16, 2007 - Assignment 2 (worth 3%): 100%
- h. November 12, 2007 - Assignment 3 (worth 2%): 96%
- i. November 26, 2007 - Assignment 4 (worth 2%): 100%

Mid-term exam

16. The mid-term in MGTB03 was written on October 23, 2007. It was worth 40% of the overall course mark. N■■■■ A■■■■ received a mark of 70 out of 100 on the mid-term. This mark, and the breakdown of his marks by question (Q1: 26, Q2: 18, Q3: 26) was recorded on an electronic spreadsheet to which the TA's, including A■■■■ A■■■■, were given access by the course instructor. A copy of the electronic spreadsheet showing N■■■■ A■■■■'s mid-term mark as 70 is found in the JBD at Tab 6.

17. N■■■■ A■■■■ received his marked mid-term back in class in early November, 2007, clearly indicating that he had received a mark of 70. He was aware that he had received a mark of 70 for the mid-term at that time.

18. On November 30, 2007, A■■■■ A■■■■ inflated N■■■■ A■■■■'s mid-term grade by 20 marks to 90% by altering the mid-term mark on an electronic spreadsheet which was maintained by the course instructor, and to which he had access. A copy of the electronic spreadsheet altered by A■■■■ A■■■■ to show a mid-term mark for N■■■■ A■■■■ of 90% is found in the JBD at Tab 8.

Final exam

19. The final exam in MGTB03 was held on December 10, 2007. It was worth 50% of the overall course mark. N■■■■ A■■■■ wrote this exam. A■■■■ A■■■■ served as an invigilator during this exam, and together with the other 2 TAs and

Professor Chen, marked the exam papers immediately after the exam.

20. A■■■■ A■■■■ marked N■■■■ A■■■■'s final exam paper. In the course of doing so he inflated the marks given to N■■■■ A■■■■'s answers to the final exam as follows:

- j. he marked 3 multiple choice questions in Question 1 as having been answered correctly when they were not, and thereby gave an additional 6 marks in Question 1, so that N■■■■ A■■■■'s mark for the multiple choice questions in Question 1 showed as 44/50 when it should have been 38/50;
- k. he awarded a mark of 15/25 for Question 2, when the answer should only have received a mark of 11/25;
- l. he awarded a mark of 19/25 for Question 3, when the answer should only have received a mark of 13/25.

21. When these adjustments are made to N■■■■ A■■■■'s total mark for the final exam, he should have received a mark of 62%, and not the 78% given to him by A■■■■ A■■■■. A copy of the Answer Booklet submitted by N■■■■ A■■■■ on December 10, 2007 for the final exam in MGTB03, with the original marks recorded in black ink and the corrected marks recorded in red ink, is found in the JBD at Tab 11.

22. N■■■■ A■■■■ received a final grade of 85 in MGTB03. This final mark was calculated using an improperly inflated mid-term mark of 90, and an improperly inflated final exam mark of 78. If the marks actually earned by N■■■■ A■■■■ had been used to calculate his final grade, his actual final mark in the course should have been 69.

23. The improperly inflated grade of 85 was posted on ROSI on December 12, 2007. N■■■■ A■■■■ accessed his transcript on ROSI at least six times on December 12, 2007. He continued to access his transcript on ROSI a further seven times on December 13, 14, 15, and 16. He was aware at that time that he had received a final grade in MGTB03 of 85%. A copy of the ROSI access records for N■■■■ A■■■■'s account using his access identification number is found in the JBD at Tab 20.

24. In order to receive a final mark in MGTB03 of 85%, N■■■■ A■■■■ would have had to score 94.16% on the final exam, because he only received a grade of 70 on the mid-term. N■■■■ A■■■■ knew that he would have had to have done very well, and much better than he had done on the mid-term, in order to receive such a high final grade in the course.

25. Only 3 people in the class of 144 students received a mark of 90 or higher on the final exam. 10 people in the class (other than N■■■■ A■■■■) received a mark of 85 or higher in the course. Only 3 people improved their mark on the final

exam by more than 20 marks, as N■■■■ would have had to have done to achieve a course mark of 85. Each of these 3 students, however, had failed the mid-term and needed to improve their marks significantly on the final exam in order to pass the course. A further 5 students achieved a mark on the final exam that was between 16 and 20 marks higher than each had earned on the mid-term; 3 of these students had also failed the mid-term, while 2 had received marks in the 60's. A copy of the marks recorded for all of the students in MGTC03 in Fall 2007 is found in the JBD at Tab 21. A table comparing the mid-term marks with the final exam marks highlighting the 8 students described above, as well as those who did worse on the final than the mid-term by the same spreads, is found in the JBD at Tab 22.

26. When the improperly inflated marks are removed from N■■■■ A■■■■'s record, he earned a mark of 69 in MGTC03, and not the recorded 85.

27. The fact that N■■■■ A■■■■'s marks were inflated by his brother A■■■■ A■■■■ on both the mid-term and the final exams was not detected by the University until after the University became aware that A■■■■ A■■■■ had inflated N■■■■ A■■■■'s marks on the final exam in MGTC03, as described below.

C. FACTS RELATING TO MGTC03

28. N■■■■ A■■■■ was enrolled in MGTC03 in the Winter 2008 term. MGTC03 was a required course for successful completion of the Program. MGTC03 was a course in Principles of Finance, taught by Esther Eiling. Grades in the course were assigned as follows: assignments – 15%; midterm exam – 30%; final exam – 55%. A copy of the Course Outline for MGTC03 is found in the JBD at Tab 14.

29. N■■■■ A■■■■ received 100% (15/15) on the assignments and 96% (28.8/30) on the midterm exam.

30. A■■■■ A■■■■ was employed as a TA in MGTC03 in the Winter 2008 term at the same time his brother was enrolled in the course. N■■■■ A■■■■ was aware that his brother was a TA responsible for marking course work. He did not inform Professor Eiling that he was A■■■■ A■■■■'s brother. N■■■■ A■■■■ was never asked by any faculty member or instructor if he was related to A■■■■ A■■■■.

31. The final exam in MGTC03 was written on April 23, 2008. The exam consisted of 9 questions. A■■■■ A■■■■ was one of the invigilators at the exam. A copy of the Exam Question Book is found in the JBD at Tab 15.

32. N■■■■ A■■■■ wrote the final exam in MGTC03 on April 23, 2008. A copy of his Answer Booklet is found in the JBD at Tab 16.

33. A■■■■ A■■■■ graded his brother N■■■■ A■■■■'s exam paper. In doing so he gave inflated marks on 6 of the 9 questions, so that N■■■■ A■■■■'s reported mark on the final exam was 56.5/68, or 83%, when it should have been 31.5/68, or 46.3% - a failure. N■■■■ A■■■■'s mark was therefore improperly increased by a total of 25 marks. This inflated mark on the final exam would have improved N■■■■ A■■■■'s final mark in the course by 20%. A comparison of the marks awarded by A■■■■ A■■■■ to the correct grades is found in the JBD at Tab 17.

34. Professor Eiling discovered the inflated marks improperly awarded to N■■■■ A■■■■'s paper at the time she and the course TAs, including A■■■■ A■■■■, were marking the final exam papers.

35. N■■■■ A■■■■ acknowledges that the University has advised him to obtain independent legal advice before signing this ASF and that he has done so.

36. N■■■■ A■■■■ acknowledges that the University has made no promises or representations to him regarding the penalty the University will seek in this matter.

- [5] Mr. A■■■■'s brother, A■■■■ A■■■■, was the only person to testify in this matter. Mr. A■■■■ A■■■■ acknowledged that he had falsified his brother's marks in two courses in which he had been a teaching assistant. He also testified that he and his brother had discussed the courses on a few occasions but did not do so regularly. Mr. A■■■■ A■■■■ denied that he ever told his brother that he had altered his marks.
- [6] Mr. N■■■■ A■■■■'s transcript was included in the joint book of documents and it showed that Mr. A■■■■ was a good student who frequently received "A's" in his courses.
- [7] Mr. A■■■■ met with the Dean's designate, Eleanor Irwin, about the alterations to his marks in MGTC03- Principles of Finance on June 17, 2008. At that time he was advised that he would not be charged and a letter to that effect followed on June 24, 2008. The University subsequently learned about the changes to his marks in MGTB03 and then decided to lay charges against him with respect to the changes to his marks in both courses. A statement by Professor Irwin was submitted on the agreement of the parties.

Submissions With Respect to the Objection to the Charges Relating to MGTC03.

- [8] Mr. A■■■■ submits that the University had no authority to impose charges with respect to the exam in MGTC03 as the Dean's designate had already made and issued a decision that no charges would be laid. He relies upon the following sections of the Code:

C.I.(a) Divisional Procedures

Note: Where a student commits an offence, the faculty in which the student is registered has responsibility over the student in the matter. In the case of Scarborough and Erindale Colleges, the college is deemed to be the faculty.

...

3. If after such a discussion, the instructor is satisfied that no academic offence has been committed, he or she shall so inform the student and no further action shall be taken in the matter by the instructor, unless fresh evidence comes to the attention of the instructor, in which case he or she may again proceed in accordance with subsection 2.

...

7. If the dean, on the advice of the department chair and the instructor, or if the department chair, on the advice of the instructor, subsequently decides that no academic offence has been committed and that no further action in the matter is required, the student shall be so informed in writing and the student's work shall be accepted for normal evaluation or, if the student was prevented from withdrawing from the course by the withdrawal date, he or she shall be allowed to do so. Thereafter, the matter shall not be introduced into evidence at a Tribunal hearing for another offence.

[9] Mr. A█████ argues that the plain meaning of section C.I.(a)(7) of the Code precludes the Dean's designate from relying on the charges she had dismissed in any other proceeding and the University therefore cannot rely on the charges related to MGTC03. Mr. A█████ argues that the Dean decided that no academic offence had been committed with respect to MGTC03 and had informed him in writing. He contends that the University is therefore precluded from introducing those allegations into evidence at the Tribunal hearing for another offence pursuant to section C. I. (a) (7). He notes that section C.I.(a)(7) does not include an exception for fresh evidence although such an exception is found at the instructor level in section C.I.(a)(3). Mr. A█████ argues that even if such an exception exists at the decanel level, no fresh evidence came to the attention of the Dean's designate. Specifically, there was no new evidence about whether N█████ A█████ knew about his brother changing his marks. Professor Irwin said she changed her mind because she learned about the changes to Mr. A█████'s marks in MGTB03. However, Mr. A█████ claims that she knew or should have known about those changes at the time she made the decision not to lay any charges in MGTC03. Mr. A█████ submits that a student is entitled to finality when a Dean investigates an allegation and then dismisses it.

[10] The University responds that Mr. A█████'s interpretation of the Code is too narrow. It asserts that the Code should be read purposively and as a whole. The University claims that it would not be consistent with the purpose of the Code for a Dean to be prevented from forwarding charges to the Provost when she or he becomes aware of new information. In this case, the second meeting was not with the instructor but with the Dean. The University may, therefore, have skipped a procedural step but Mr. A█████ has not objected to that. The University relies upon section C.I.(a) (11) of the Code

which provides that decanal procedures will not normally be reviewed by the Tribunal unless there has been a substantial wrong. The University argues that, in this case, all that has occurred is that there has been a second Dean's meeting instead of a second instructor's meeting..

- [11] The University argues that the last sentence of section C.I.(a)(7) of the Code is not meant to apply to a situation such as this. It claims that the section is intended for situations in which an allegation has been dismissed and therefore never dealt with. The University would be prevented from raising such an allegation in a subsequent proceeding. The University says that these circumstances are different because it has laid charges with respect to the allegation. As a result, Mr. A [REDACTED] has a full opportunity to meet the case against him and there is no prejudice.
- [12] The University maintains that the Dean's designate did act on fresh evidence when she referred the charges because she learned of the changes to Mr. A [REDACTED]'s marks in MGTB03 in the fall of 2008. It asserts that the standard for the introduction of fresh evidence upon which Mr. A [REDACTED] is relying is the civil standard for introducing evidence on appeal and is not appropriate in these circumstances. The University contends that the decanal process is intended to be flexible and that the Dean cannot investigate every possible source of information before making a decision. According to the University, the Dean must be able to go back and revisit a decision after it has been made. In this case, the University says, Mr. A [REDACTED] withheld the information that his brother had been the teaching assistant in previous courses that he had taken.
- [13] Mr. A [REDACTED] replies that the Code says that an instructor may revisit an allegation when new *evidence* comes to light not new *information* and in this case there was no new evidence. Mr. A [REDACTED] maintains that he was never asked if his brother was a teaching assistant in any other course. He claims that the Dean's designate did not change her mind because she learned of new evidence. She changed her mind about his credibility and the University should not be permitted to proceed with the charges in those circumstances.

Submissions on the Merits

- [14] The University argues that Mr. A [REDACTED] knew that his brother A [REDACTED] had changed his marks and is therefore guilty of the offences with which he is charged. It asserts that it has proven his knowledge on a balance of probabilities. The University contends that it is more likely than not that Mr. A [REDACTED] knew what his brother had done and that any other explanation is improbable. It relies upon A [REDACTED] A [REDACTED]'s evidence and claims that it is highly improbable that he discussed the course with his brother as infrequently as he claimed or that he never discussed his marks. It points to the fact that the conduct continued for a long period of time. It argues that the only explanation for why A [REDACTED] A [REDACTED] would change the marks is that he wanted to help his brother. It relies upon the fact that A [REDACTED] A [REDACTED] never offered any other explanation for his actions.

- [15] The University referred to the decision of the Supreme Court in *F.H. v. McDougall* [2008] 3 S.C.R. 41.
- [16] Mr. A████ responds that the University has not proved on the balance of probabilities that he knew about the changes to his marks. He contends that the University has not provided clear, cogent and convincing evidence. He maintains that it is not drawing an inference from the evidence but is only speculating as to what may have occurred. Mr. A████ notes that there is nothing about his previous academic performance which would lead him to the conclusion that his marks must have been changed. He denies that the fact that A████ is his brother and that they live together should lead to the conclusion that they must have discussed what A████ was doing. He argues that no information has been provided about his family. He notes that it is completely possible that he and A████ did not discuss what A████ was doing if A████ was trying to protect him.
- [17] The University replies that if A████ was acting alone to protect his brother he could have provided that explanation but he did not do so.

Decision

- [18] The parties agree that the University has the burden of proof with respect to the charges against Mr. A████ and must prove that he violated the Code on the balance of probabilities. The Code states at section C.II.(a)(9) that the prosecutor has the onus of proof and “must show on clear and convincing evidence that the accused has committed the alleged offence”. The panel has considered all of the evidence and has determined that the University has not met that onus.
- [19] There is no dispute that Mr. A████ A████ changed his brother’s marks. However, there is no direct evidence and insufficient circumstantial evidence that Mr. A████ knew what his brother was doing. A████ and N████ are brothers who live in the same house and A████ used his position as a teaching assistant to improve N████’s marks. That is all relevant circumstantial evidence. However, it is not clear and convincing enough to prove that N████ knew A████ had changed his marks. We know almost nothing about the relationship between the brothers. Family dynamics can be very complicated. We could speculate that N████ must have known what his brother was doing. We could also speculate that if A████ was prepared to put his own future in jeopardy to help his brother, he may very well have not told him what he was doing in order to protect him. However, we cannot convict Mr. A████ on the basis of speculation. We also cannot infer that Mr. A████ necessarily should have known his marks had been inflated given how well he did on the assignments and in prior courses. We do not know whether he felt confident in the answers he gave. He is a student who usually did well. We note that the University did not argue that he should have known that the marks he received did not reflect how he had done on the tests. Ultimately, we do not have sufficient evidence to conclude Mr. A████ knew that A████ A████ had changed his marks let alone any evidence of any more active participation in those actions. The University has therefore not proved on the balance of probabilities that Mr. A████ knew that A████ A████ was

going to change his marks or had changed his marks before the University became aware of it.

- [20] We therefore find that the University has not proved that Mr. N█████ A█████ violated the Code. The charges against him are therefore hereby dismissed.
- [21] As the panel has decided to dismiss the charges after reviewing all of the evidence it need not decide whether the University was precluded from proceeding with the charges related to MGTC03H.

Dated at Toronto, October 9, 2009



Laura Trachuk for the panel
Graham Trope
Adil D'Sousa