

UNIVERSITY OF TORONTO
UNIVERSITY TRIBUNAL
TRIAL DIVISION

IN THE MATTER of the University of Toronto Act, 1971, S.O. 1971, c. 56 as amended;

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

AND IN THE MATTER of disciplinary charges against Mr. A [REDACTED] A [REDACTED].

Members of the Panel:

- Laura Trachuk, Chair
- Adil D’Sousa, Student Panel Member
- Professor Graham Trope, Faculty Panel Member

Appearances:

- Hugh Scher for Mr. A [REDACTED] A [REDACTED], the Student
- Edward Holmes for the Intervenor Canadian Union of Public Employees Local 3902
- Ms. Linda Rothstein, Discipline Counsel for the University of Toronto
- Ms. Lily Harmer, Assistant Discipline Counsel for the University of Toronto

PRELIMINARY DECISION

Mr. A [REDACTED] has raised a preliminary objection to the jurisdiction of the University Tribunal to proceed with a hearing with respect to charges laid against him under the *University of Toronto Code of Behaviour on Academic Matters, 1995* (the “Code”). He asserts that the Tribunal has no jurisdiction to proceed because a labour arbitrator has exclusive jurisdiction with respect to this matter. The parties have agreed that the Canadian Union of Public Employees, Local 3902 (referred to as the “union”) should be permitted to intervene with respect to this preliminary objection.

In the alternative, Mr. A [REDACTED] has also raised an objection with respect to being charged as a student under the *Code*. He alleges that any charges against him under the *Code* should have been as a member of the faculty.

The parties proceeded by way of affidavit as well as written and oral submissions.

The Facts

For the purpose of this preliminary objection, the following facts are considered to be true and provable. A [REDACTED] A [REDACTED] registered as a student at the University of Toronto (the “university”) in the fall of 2004 and was in his final term of the Bachelor of Business Administration program in April 2008. During the fall 2007 term, Mr. A [REDACTED] was employed as a teaching assistant in MGTBO3H – Management Accounting. In the winter 2008 term he was employed as a teaching assistant in MGTCO3H – Principles of Finance. As a teaching assistant, Mr. A [REDACTED] was a member of the union’s bargaining unit. The union has a collective agreement with the university.

The university alleges that in April 2008, Mr. A [REDACTED] was marking exams for MGTCO3H and significantly inflated the mark on one of them, The person who had written the exam was his brother. The university also alleges that it subsequently discovered that Mr. A [REDACTED] changed the grade that had been given to his brother on the mid-term for MGTBO3H by falsifying a document that had been provided to him. It alleges further that he inflated the mark on his brother’s final exam mark in MGTBO3H. Mr. A [REDACTED] had not disclosed to the faculty members responsible for the courses that his brother was in the class.

The Provost has proceeded with charges against Mr. A [REDACTED] under the *Code*. He has also received a written reprimand from the Chair of the Department of Management with respect to the allegations. Mr. A [REDACTED] has filed a grievance challenging the written reprimand and has also filed a grievance with respect to the university’s decision to proceed with charges under the *Code*. The grievances have been forwarded to arbitration and a date has been scheduled for the hearing in February 2009.

The following charges were laid against Mr. A [REDACTED] on August 7, 2008:

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 April 23, 2008 you knowingly forged or in any other way altered or falsified any document or evidence required by the University, or uttered, circulated or made use of any such forged, altered or falsified document, whether the document be in print or electronic form, namely the final exam submitted by N [REDACTED] A [REDACTED] in MGTCO3H – Principles of Finance, contrary to section B.I.1.(a) of the *Code*.
2. In the alternative, 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 final exam submitted by N [REDACTED] A [REDACTED] in MGTC03H – Principles of Finance, contrary to section B.I.3.(a) of the *Code*.

3. 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 here and otherwise described, in order to obtain academic credit or other academic advantage of any kind, in marking the final exam of N [REDACTED] A [REDACTED] in MGTC03H – Principles of Finance, contrary to section B.I.3.(b) of the *Code*.

The following charges were laid against Mr. A [REDACTED] on November 21, 2008:

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 document or evidence required by the University, or uttered, circulated or made use of any such forged, altered or falsified document, whether the document be in print or electronic form, namely the marks for the mid-term exam submitted by N [REDACTED] A [REDACTED] in MGTB03H – Management Accounting, contrary to section B.I.1.(a) of the *Code*.
2. In the alternative, 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 the mid-term exam submitted by N [REDACTED] A [REDACTED] in MGTB03H – Management Accounting, contrary to section B.I.3.(a) of the *Code*.
3. 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 marking the mid-term exam of N [REDACTED] A [REDACTED] in MGTB03H – Management Accounting, contrary to section B.I.3.(b) of the *Code*.
4. On or about December 10, 2007 you knowingly forged or in any other way altered or falsified any document or evidence required by the University, or uttered, circulated or made use of any such forged, altered or falsified document, whether the document be in print or electronic form, namely the marks for the final exam submitted by N [REDACTED] A [REDACTED] in MGTB03H – Management Accounting, contrary to section B.I.1(a) of the *Code*.

5. In the alternative, 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 the final exam submitted by N [REDACTED] A [REDACTED] in MGTB03H – Management Accounting, contrary to section B.I.3.(a) of the *Code*.
6. 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 marking the mid-term exam of N [REDACTED] A [REDACTED] in MGTB03H –Management Accounting, contrary to section B.I.3.(b) of the *Code*.

As charges were laid against Mr. A [REDACTED] alleging that he violated the *Code* he has not been permitted to graduate pursuant to Section C.I.(a)12.

Relevant Statutory Provisions

The University of Toronto Act, 1971

1. (1) In this Act,

(l) “student” means any person registered at the University for full-time or part-time study in a program that leads to a degree or post-secondary diploma or certificate of the university or in a program designated by the Governing Council as a program of post-secondary study of the university;

(m) “teaching staff” means the employees of the University, University College, the constituent colleges and the arts and science faculties of the federated universities who hold the academic rank of professor, associate professor, assistant professor, full-time lecturer or part-time lecturer, unless such part-time lecturer is registered as a student, or who hold any other rank created by the Governing Council and designated by it as an academic rank for the purposes of this clause;

2. (14) The government, management and control of the University and of University College and of the property, revenues, business and affairs thereof, and the powers and duties of The Governors of the University of Toronto and of the Senate of the University under *The University of Toronto Act, 1947* as amended are vested in the Governing Council, and, without limiting the generality of the foregoing, the Governing Council has power to,

(o) do all such acts and things as are necessary or expedient for the conduct of its affairs and the affairs of the University and University College.

Ontario Labour Relations Act, 1995

48(1) **Arbitration provision** – Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

Statutory Powers Procedure Act

Dismissal of proceeding without hearing

- 4.6(1) Subject to subsections (5) and (6), a tribunal may dismiss a proceeding without a hearing if,
- a. the proceeding is frivolous, vexatious or is commenced in bad faith;
 - b. the proceeding relates to matters that are outside the jurisdiction of the tribunal;

Code Provisions

A. PREAMBLE

...

This *Code* is concerned, then, with the responsibilities of faculty members and students not as they belong to administrative or professional or social groups, but as they co-operate in all phases of the teaching and learning relationship.

...

B. OFFENCES

The University and its members have a responsibility to ensure that a climate which might encourage, or conditions which might enable, cheating, misrepresentation or unfairness not be tolerated. To this end, all must acknowledge that seeking credit or other advantages by fraud or misrepresentation, or seeking to disadvantage others by disruptive behaviour is unacceptable, as is dishonesty or unfairness in dealing with the work or record of a student.

Wherever in this 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.

B.I.1. It shall be an offence for a student knowingly:

- a. to forge or in any other way alter or falsify any document or evidence required by the university, or to utter, circulate or make use of any such forged, altered or falsified document, whether the record be in print or electronic form;

3. It shall be an offence for a faculty member and a student alike knowingly:

- a. to forge or in any other way alter or falsify any academic record, or to utter, circulate or make use of any such forged, altered or falsified record, whether the record be in print or electronic form;
- b. to engage 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.

INTERPRETATION

2. In this Code, unless the context otherwise requires:

(k) “faculty member” means a member of the teaching staff;

(m) “instructor” means any person who teaches or instructs or has a duty to evaluate the work of a student or students or who evaluates or who has a duty to evaluate the work of a student or student, and includes a faculty member, a teaching assistant and a librarian;

(o) “member” or “member of the university” means a student or a faculty member, proctor or invigilator in the university, and includes a group;

(s) “student” means that type of member of the University who is currently or was previously

- i. engaged in any academic work which leads to the recording and/or issue of a mark, grade, or statement of performance by the appropriate authority in the university or another institution; and/or
- ii. registered in any academic course which entitles the member to the use of a University library, library materials, library resources, computer facility or dataset; and/or
- iii. a post-doctoral fellow.

Collective Agreement Provisions

ARTICLE 3: RESERVATION OF MANAGEMENT RIGHTS

3:01 The Union acknowledges that it is the right of the Employer to maintain order and efficiency; hire, classify, transfer, promote, demote, layoff, discipline, suspend, or discharge employees; establish and enforce rules and regulations not inconsistent with the provisions of this Agreement, which govern the conduct of the employees; and generally to manage and operate the University of Toronto. The Employer agrees to exercise these rights in a manner which is fair, reasonable, equitable and consistent with the provisions of this agreement.

ARTICLE 10: ACADEMIC FREEDOM

10:03 Course Instructors’ employment obligations and responsibilities to the university shall encompass teaching, which includes, without being restricted to, responsibilities as follows:

An employee shall carry out his or her responsibility for teaching with all due attention to the establishment of fair and ethical dealings with students, taking care to make

himself or herself accessible to students for academic consultation, to inform students adequately regarding course formats, assignments, and methods of evaluation, to maintain teaching schedules in all but exceptional circumstances, to inform students adequately of any necessary cancellation and rescheduling of instructions and to comply with established procedures and deadlines for determining, reporting and reviewing the grades of his or her students.

In performance of their duties, they shall deal fairly and ethically with their colleagues, shall avoid discrimination, shall not infringe their colleagues' academic freedom, and shall observe appropriate principles of confidentiality.

ARTICLE 13: PROGRESSIVE DISCIPLINE

13:01 Discipline will normally follow investigation and discussion with the employee, and will normally proceed through the following steps, with the objective of resolving the matter and/or correcting the behaviour as early as possible:

Step 1: Oral or written warning

Step 2: Letter of reprimand, suspension (with or without pay), change in assignment

Step 3: Discharge or cancellation of subsequent appointments

Disciplinary measures shall be proportional to the seriousness of the issue and shall increase in severity with repetition of the same or similar occurrences. An oral warning alone shall be used only in cases that appear minor or unlikely to proceed to Steps 2 and 3 of the discipline procedure.

The Employer reserves the right in serious circumstances to bypass Steps 1 and 2 of the recommended procedure.

An employee who is disciplined at Steps 2 and/or 3 shall be advised in writing of the nature of the discipline and the reasons therefore. The Union will receive a copy of the notification of discipline or written warning within one (1) working day (24 hours).

ARTICLE 14: GRIEVANCE PROCEDURE

Definition

14:01(a) A grievance shall be defined as any difference arising out of the interpretation, application, administration or alleged violation of the Collective Agreement. Employment under the provisions of the Collective Agreement is a prerequisite for the filing of a grievance, with the exception of a hiring grievance as defined in Article 14:01(b).

- 15:03 An arbitrator shall not have the authority to make any decision which is inconsistent with the terms of the Agreement nor to add to or amend any of the terms of the Agreement. The jurisdiction of the arbitrator shall be confined to the issue in dispute. The decision of the arbitrator shall be final and binding on the parties.
- 15:04 In the event that an arbitrator deals with a matter relating to the discharge, suspension or disciplinary action, then the arbitrator has the authority to reinstate an employee with or without compensation for wages and any other benefits lost, or to make any other award he/she may deem just and reasonable which would be consistent with the terms of the Agreement.

Unsatisfactory Performance

- 18:03 In the event that a supervisor forms the opinion that an employee's performance is unsatisfactory, the supervisor shall prepare a written evaluation as prescribed in Article 18:02 without undue delay, for discussion with and comment by the employee.

Employment File

- 18:06 An employment file shall be maintained within each Department for each employee employed within it, which shall be separate from the employee's academic record. The employment file shall contain only those documents bearing the employee's signature, acknowledging receipt only, and relating to the employee's employment.

Submissions of the parties

Mr. A [REDACTED] submits that the dispute between himself and the university arises under the collective agreement and that a labour arbitrator, therefore, has the exclusive jurisdiction to determine it pursuant to section 48(1) of the *Labour Relations Act, 1995*.

Mr. A [REDACTED] argues that the conduct which is the subject of the university's allegations before the Tribunal arises directly from his employment relationship which is governed by a collective agreement. The dispute therefore involves the interpretation, administration, application or alleged violation of the collective agreement. He contends that "but for" his employment relationship he could not have engaged in the misconduct with which he is accused. Mr. A [REDACTED] maintains that the nature of the dispute must be determined by examining the facts surrounding it and is not determined according to how the legal issues have been framed. In this case, he submits, the dispute arises from his alleged failure to properly carry out the duties of his employment. He has been disciplined for that with a letter of reprimand and a grievance has been filed. He asserts that the charges also relate to the manner in which he carried out his teaching

assistant duties and therefore a labour arbitrator, not the Tribunal, has jurisdiction over the matter.

Mr. A [REDACTED] submits that the scope of the collective agreement is determined by its provisions. A dispute is within the scope of the collective agreement if it arises either explicitly or implicitly from the interpretation, application, administration or alleged violation of the terms of the collective agreement. In this case, he says, the collective agreement covers discipline, unsatisfactory performance, the contents of the employment file and academic freedom and integrity. Mr. A [REDACTED] claims that the essential character of the university's allegations against him relate to unsatisfactory and unethical work performance and the appropriate discipline for that conduct. He asserts that those matters are within the scope of collective agreement.

Mr. A [REDACTED] also claims that the charges against him are frivolous, vexatious, made in bad faith and amount to an abuse of process because he was charged under the *Code* even though he was engaged in his employment duties when the alleged misconduct occurred. He contends that none of the charges relate to his conduct as a student at the university. He maintains that the university is proceeding against him under the *Code* rather than under the collective agreement because of its belief that the collective agreement does not provide for a sufficient remedy for the alleged misconduct. He claims that that is not a legitimate basis for laying charges under the *Code*.

Mr. A [REDACTED] argues, in the alternative, that even if he is subject to charges under the *Code* when performing his teaching assistant duties, he should be charged as a member of faculty not as a student. A faculty member is defined under the *Code* as a member of the teaching staff. Mr. A [REDACTED] claims that he was a member of the teaching staff because his primary duties were to teach, instruct, grade and evaluate students. He contends that the university is only proceeding against him as a student because the penalties available against students are harsher than those against faculty members or staff. Furthermore, the remedies available to the university, if it proceeded against him as a member of faculty or staff, are the same as the disciplinary provisions of the collective agreement. He maintains that the charges are therefore an abuse of process.

Mr. A [REDACTED] also denies that he should be considered a student under the *University of Toronto Act, 1971* (U of T Act). He claims that under the U of T Act he should be considered part of the administrative staff. He argues that the *Code* does not apply to administrative staff and that demonstrates that the definitions in the U of T Act should not be applied to the *Code*. Mr. A [REDACTED] says that he is an instructor under the *Code* and that instructors should be considered faculty. He maintains that the Tribunal must distinguish between faculty, students and instructors in an internally consistent way.

Mr. A [REDACTED] submits that he has not gained any personal advantage by committing the misconduct alleged and that he has been prevented from graduating and proceeding with the next step in his desired career as an accountant. He asks that the Tribunal find that it has no jurisdiction to proceed with the charges or, in the alternative, order that all of the charges against him be stayed pursuant to section 4.6(1) (a) and (b) of the *Statutory Powers Procedure Act*.

Mr. A [REDACTED] refers to the following authorities: *Bartello v. Canada Post Corp.* (1987), 46 D.L.R. (4th) 124 (Ont. H.C.J.); *Chapman v. 3M Canada Inc.* [1995] O.J. No. 564 (Gen.Div.) Aff'd

[1997] O.J. No. 928 (Ont. C.A.); *Chapman v. 3M Canada Inc.* [1997] O.J. No. 928 (Ont.C.A.); *Giorno v. Pappas* (1999), 170 D.L.R. (4th) 160 (Ont. C.A.); *Jadwani v. The Attorney General of Canada* (2001), 52 O.R. (3d) 660 (Ont. C.A.); *Piko v. Hudson's Bay Company* (1998), 167 D.L.R. (4th) 479 (O.C.A.); *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners* [2001] 1 S.C.R. 360 (SCC); *St. Anne-Nackawic Pulp and Paper Co. Limited v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704 (SCC); *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (SCC).

The union states that its interest in this matter is to protect the integrity of the collective agreement that it executed with the Governing Council. It endorses Mr. A [REDACTED]'s position that jurisdiction lies exclusively with the arbitrator. It contends that the university is prosecuting this matter but that it is the same body that has agreed in the collective agreement that differences will be addressed under the grievance arbitration process. It maintains that the particulars to the charges provide the factual context or character of the matter and that the essential character of the dispute is an alleged violation of the collective agreement. It compares the letter of reprimand and the charges and claims that they are almost the same. It submits that it was impossible for Mr. A [REDACTED]'s alleged transgression to have occurred without the employment relationship. He could not have committed the transgression solely in his capacity as a student. It contends that the duties Mr. A [REDACTED] was performing at the relevant time were duties under the collective agreement and that those were the duties that are captured in the letter of reprimand and in the particulars of the charges.

The union argues that this situation is distinguishable from the professional college decisions relied upon by the university because, in this case, the same body is involved in both the grievance and the academic discipline process.

The union asserts as well that the *Code* contemplates violations committed by students actually enrolled in courses and not transgressions such as those with which Mr. A [REDACTED] has been charged. The union claims that the *Code* does not appear to contemplate the actions of a student holding the position of a teaching assistant.

The union also relies upon the definitions in the *Code* which include teaching assistant under the definition for instructor.

The union denies that the university would be deprived of an ultimate remedy if the *Code* proceeding were stayed. It notes that Mr. A [REDACTED] has received a letter of reprimand and claims that the university could also relieve him of his teaching assistant duties. It maintains that the remedy is only required to be responsive to the transgression even if a different remedy would be available in another forum.

The union refers to the following authorities: *McFadyen v. Ontario (Mining and Lands Commissioner)*, [2007] O.J. No. 4875, Ontario Superior Court of Justice, Div. Ct.; *Wentworth County Board of Education v. Wentworth Women Teachers' Assn.*, [1990] O.P.E.D. No. 4; *Goudie v. Ottawa (City)*, [2003] S.C.J. No. 12, Supreme Court of Ontario, Judgment: March 20, 2003; *K.A. [Indexed as A.(K.) v. Ottawa (City)]*, 80 O.R. (3d) 161, Court of Appeal for Ontario;

Giorno and Pappas (supra); British Columbia (Director of Employment Standards) (Re), [2001] B.C.E.S.T.D. No. 628, Nov. 14, 2001.

The university argues that the essential character of the dispute falls squarely within the ambit of the *Code*. It asserts that labour arbitrators do not have exclusive jurisdiction in every circumstance where the conduct in issue occurred in the course of employment. Nothing ousts the jurisdiction of the courts or other tribunals over matters that arise in the employment context but fall outside traditional labour law issues. It claims that other tribunals may possess overlapping jurisdiction, concurrent jurisdiction or themselves be endowed with exclusive jurisdiction.

The university contends that overlapping jurisdiction requires careful consideration of the essential character of the dispute, legislative intent, the ambit of the collective agreement and the responsiveness of the remedies provided. The university submits that the legislature, through the U of T Act, empowered Governing Council to regulate the academic conduct of its students and faculty and that Governing Council intended matters of academic conduct to be addressed by the procedures under the *Code*. Mr. A [REDACTED] is a member of the university and is governed by the *Code* and the process it provides for dealing with breaches of its provisions. The university maintains that the conduct that the Tribunal is being asked to consider constitutes an egregious breach of the provisions of the *Code*. The issues are fundamentally about academic misconduct, not employment. It states that the *Code* is concerned with issues of academic honesty and integrity and the remedies provided are responsive to those issues. The collective agreement does not address allegations of cheating or academic dishonesty, nor does it provide an adequate remedy for the conduct with which Mr. A [REDACTED] has been charged. The arbitrator therefore does not, and was not intended to have, exclusive jurisdiction.

The university contends that the fact that Mr. A [REDACTED] was able to engage in the alleged cheating because he held a position as an employee of the university does not change the essential character of the dispute. The dispute involves academic misconduct and falls within the purview of the *Code*. The remedies available to the Tribunal are commensurate with the academic nature of the offences prohibited under the *Code* and include reduction in marks, suspension from the university and expulsion. In contrast, the remedies available under the collective agreement do not address the offence with which Mr. A [REDACTED] is accused. The most serious discipline available is discharge or cancellation of subsequent appointments. A labour arbitrator could not order any sanction which could affect Mr. A [REDACTED]'s status as a student. The university claims that, if the arbitrator has exclusive jurisdiction in this case, Mr. A [REDACTED] will be in a better position, due to his status as a teaching assistant, than any other student that improperly assisted his brother to falsely improve his grades.

The university compares this situation to those in which professional discipline bodies take jurisdiction with respect to the misconduct of members even where they work in a unionized environment. It argues that labour arbitrators do not have exclusive jurisdiction in such cases. It claims that there is a difference in focus between the grievance procedure and the disciplinary process of a regulatory college. Employees who engage in professional misconduct in the course of employment may be disciplined by their employer as well as by their professional regulator. Likewise the legislature has given the university the power to discipline and there is no

meaningful distinction between this case and those dealing with the discipline processes of regulatory colleges.

The university denies that it has acted in bad faith by charging Mr. A [REDACTED] as a student. It argues that the *Code* states that it applies to students and faculty. It does not specifically state that it applies to teaching assistants. Teaching assistants are included in the definition of instructors because instructors are referred to in the Divisional Procedures section, i.e. the process prior to the laying of charges. The university asserts that, pursuant to the rules of statutory interpretation, the terms in the *Code* must be defined consistently with those of its authorizing statute, the U of T Act. "Faculty" under the *Code* is defined to include "teaching staff" and "teaching staff" under the U of T Act excludes part-time lecturers registered as students. Therefore, Mr. A [REDACTED] could not be a faculty member for the purposes of the *Code*. It maintains that there is no inconsistency between the *Code* and the U of T Act because "instructor" has no bearing on who is covered by the prohibitions of the *Code*. When Mr. A [REDACTED] is acting as a teaching assistant he still has the obligations of a student under the *Code* but not those of a faculty member. Mr. A [REDACTED] has the status of a student whether or not he is acting "in his capacity" as a student. The university argues that the *Code* is about the responsibilities that attach to the status and privilege of being a student. Therefore, a student is prohibited from assisting another student to cheat. It maintains that it is fallacious to argue that a student who is cheating is acting "in the capacity" of a student.

The university denies that this is a case of unsatisfactory work performance and claims that it is a case about Mr. A [REDACTED]'s obligations as a member of the university. It contends that academic integrity is what is at stake. It submits that if the parties to the collective agreement had intended to exclude the bargaining unit members from the purview of the *Code* or the jurisdiction of the Tribunal they would have said so. The university denies that the concept of academic freedom in the collective agreement is the same thing as the concept of academic misconduct. It denies that any other provisions of the collective agreement apply to academic misconduct. It says that if an arbitrator was intended to have jurisdiction over academic integrity that would have been specifically addressed by the parties.

The university asserts that the charges against Mr. A [REDACTED] were laid by the Provost and not by Governing Council. It asserts that the Provost is not Mr. A [REDACTED]'s employer.

Finally, the university argues that if Mr. A [REDACTED] and the union are successful with this preliminary objection there is really no remedy for Mr. A [REDACTED]'s alleged offences. Mr. A [REDACTED] had completed his last term of study and his last contract as a teaching assistant so discharging him or barring him from further contracts would be pointless. It denies that a labour arbitrator would have the authority to impose the academic sanctions contemplated by the *Code*.

The university refers to the following authorities: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185; *Gagnard et al. v. Canada (Attorney General)*, 2003 CanLII 40299 (ON C.A.); *Bhadauria v. Ontario College of Teachers*, [2004] O.J. No. 2468 (Div. Ct.); *Fox v. British Columbia College of Teachers*, [2004] B.C.J. No. 2322 (S.C.); *University of Saskatchewan v. Professional Assn. of Internes and Residents of Saskatchewan*, [2001] S.J. No. 346 (C.A.)

Mr. A [REDACTED] acknowledges that he is bound by the *Code* but denies that the Tribunal process should be used for offences that allegedly occurred while he was working as a teaching assistant. He argues that the U of T Act does not provide specifically for how the *Code* is to be established or for the Tribunal. He asserts that it is therefore not correct that the Tribunal and the *Code* take jurisdiction from the U of T Act. He claims that the *Code* and its processes are not an expressed legislative scheme and that they are incidental to the university's jurisdiction under the U of T Act. Mr. A [REDACTED] maintains that when the ambiguous jurisdiction, which the university asserts is derived from the U of T Act, is compared with the explicit exclusive jurisdiction arbitrators derive from section 48(1) of the *Labour Relations Act*, it is clear that the legislature intended that disputes that arose under the collective agreement would be within that exclusive jurisdiction. Mr. A [REDACTED] also asserts that the collective agreement does include academic integrity in Articles 10.03, 13 and 18 and that it provides for a mechanism to address it. Mr. A [REDACTED] contends that, if the Tribunal were to proceed, there is a risk of its results conflicting with those of the labour arbitrator.

Mr. A [REDACTED] maintains that the fact that he would not be a teaching assistant if he were not a student is irrelevant. He also argues that it is not relevant whether he is better off if he committed the offence while working as a teaching assistant because he was working under a collective agreement. Finally, Mr. A [REDACTED] argues that it is an abuse of process for the university to prevent him from graduating just because of actions he allegedly committed as a teaching assistant.

Decision

Mr. A [REDACTED] asserts that this Tribunal should not proceed with the charges against him for two reasons. First he asserts that the Tribunal has no jurisdiction because the offences with which he is charged were committed in the course of his employment as a teaching assistant and, therefore, an arbitrator has exclusive jurisdiction to determine any dispute about them. Secondly, Mr. A [REDACTED] claims that even if charges could be laid against him under the *Code*, he should have been charged as a member of faculty and, therefore, the charges against him were an abuse of process and should be stayed. However, we find that the Tribunal does have the jurisdiction to proceed with the hearing and that Mr. A [REDACTED] was properly charged as a student.

Mr. A [REDACTED] is a student of the University of Toronto because he is enrolled in a course of study. By enrolling in the university, a student agrees to abide by the rules that apply to members of the university community including the rules about academic integrity found in the *Code*. Mr. A [REDACTED] is a student of the university whether or not he is actually attending a class or studying for an exam because being a student of the university is his status and is not a position, like teaching assistant, that he fills from time to time. He was therefore still a student even when he was working as a teaching assistant. In fact, he could not have worked as a teaching assistant unless he was a student. As a result of Mr. A [REDACTED]'s status as a student, he is bound to his obligations to the university community at all times including those times when he is working as a teaching assistant. Those obligations include a commitment to academic integrity.

An arbitrator has exclusive jurisdiction over any dispute arising between the university and the union relating to the interpretation, administration, application or violation of the collective

agreement. That is the principle for which *Weber v. Ontario Hydro (supra)* stands. It does not stand for the principle that every dispute that arises in the employment context is within the exclusive jurisdiction of an arbitrator. The charges against Mr. A [REDACTED] are not a dispute arising explicitly or implicitly out of the collective agreement. The essential character of the dispute is whether Mr. A [REDACTED] violated his obligations with respect to academic integrity. The charges against Mr. A [REDACTED] arise from allegations that he fraudulently inflated his brother's marks. In other words, he is a student who allegedly cheated. He was not relieved of the obligation he has as a student to act with academic integrity when he stepped into the classroom as a teaching assistant.

The issue before the Tribunal is whether Mr. A [REDACTED] violated the *Code* and, if so, what penalty should be imposed. That is not an issue over which an arbitrator has jurisdiction. As noted above, an arbitrator has jurisdiction over the interpretation, application, administration or alleged violation of the collective agreement. However, not all issues that arise in an employment context fall into those categories. For example in *Piko v. Hudson's Bay Company (supra)*, the Ontario Court of Appeal found that the court did have jurisdiction to hear a law suit against the employer alleging malicious prosecution. The Court noted at paragraph 11 that, "Some disputes between employers and employees may not arise under the collective agreement; others may call for a remedy that the arbitrator has no power to grant." In *Regina Police Association Ltd. (supra)* the arbitrator did not have jurisdiction over disciplinary matters because the legislature had intended that those issues be determined through a different process. In *St. Anne-Nackawic Pulp and Paper Co. (supra)*, the court found that it had the jurisdiction to impose an injunction in a labour dispute because the labour arbitration process could not provide an adequate remedy. In *Goudie v. Ottawa (supra)*, a claim was allowed to proceed before the court because it was found to be about a pre-employment agreement and therefore did not arise out of the interpretation, application, administration or alleged violation of the collective agreement. In *Quebec (Commission des droits de la personne et des droits de la jeunesse) (supra)*, the Supreme Court found that the Human Rights Tribunal had jurisdiction with respect to a provision in a collective agreement which allegedly discriminated against younger teachers because the issue in essence was about the negotiation of the collective agreement not its interpretation, application, administration or alleged violation. The "full factual context" of this dispute is that Mr. A [REDACTED] is not just an employee of the university but that at the time he allegedly committed the offences he was also a student and bound to act with academic integrity or face sanctions under the *Code*.

This collective agreement does not cover disputes that arise out of Mr. A [REDACTED]'s status as a student under the *Code*. There are no provisions in the collective agreement that deal specifically with academic integrity. Nothing in the collective agreement ousts the Provost's right to lay a charge under the *Code*. Given the crucial importance of academic integrity to this, or any, university, the parties to a collective agreement would have to very clearly state that students working as teaching assistants were not subject to the *Code* or its procedures to oust the jurisdiction of the Tribunal. The absence of such language indicates that that was not the parties' intention.

The collective agreement is a labour relations scheme, but the *Code* is an academic integrity scheme. The Tribunal has the power to impose academic penalties which are appropriate to the alleged offences such as suspension from a course, program or the university for a period of time

and ordering that a student's record reflect the sanctions. Mr. A [REDACTED] wishes to apply for a course leading to the profession of accountant. It is a profession requiring trustworthiness. If he committed the alleged offences, it may be appropriate for his records to reflect his dishonesty for a period of time. The university's reputation that its degrees are honestly obtained is ultimately all that it has. If Mr. A [REDACTED] committed the acts with which he is accused, he has undermined his own degree as well as those of his fellow students. He has disadvantaged those who obtained their marks honestly by dishonestly raising his brother's marks. These are all issues which arise because the essential characteristic of the dispute is one of academic integrity and not the violation of the collective agreement. These are not issues which would be part of a dispute before a labour arbitrator but are always concerns of the Tribunal. The university has an interest in ensuring that students who graduate have acted with academic integrity as members of the community and also in deterring students from helping each other cheat. Those are not considerations that arise from the employment context. These considerations are similar to those of the disciplinary body of a professional college which must take into account the public interest. For example in *Fox v. British Columbia College of Teachers (supra)*, the court found at paragraph 26 that "The considerations which govern the outcome of labour arbitrations and grievances are not identical to the concerns of a body like the College of Teachers, which must consider the broader public interest on a province wide basis: see *Young v. British Columbia College of Teachers*, [2001] B.C.J. No. 405, 2001 BCCA 164 at Paras.44 to 64."

The union has suggested that if the Tribunal were to proceed with this matter it would threaten the collective agreement or the collective bargaining relationship. There is no real basis for that fear. The only time the Tribunal would be involved with one of the bargaining unit members is in a situation in which a teaching assistant is accused of violating the *Code*. It is a situation so rare that neither party was able to come up with a case where it had been addressed even though teaching assistants are unionized at many universities. The issues of academic integrity included in the *Code* are not included in the collective agreement and therefore proceeding with this dispute does not undermine any of its provisions.

Mr. A [REDACTED] also argues that he should be considered a member of faculty under the *Code*. The *Code* is concerned "with the responsibilities of faculty members and students". There is no question that Mr. A [REDACTED] was bound to the *Code* as a student. The only question is whether he had a different status under the *Code* during those hours in which he was working as a teaching assistant. The words "teaching assistant" are only mentioned in the definition of "instructor" but instructor is only mentioned in the Divisional Procedures section of the *Code*. "Instructor" is not a status under the *Code*. Mr. A [REDACTED]'s status under the *Code* continued to be that of student. He was a student who was hired as a teaching assistant. He was not part of the teaching staff. Guidance can be drawn from the U of T Act under the authority of which the Governing Council issued the *Code*. The U of T Act clarifies that part-time lecturers who are also students are excluded from the definition of "teaching staff". Mr. A [REDACTED] is a student for the purposes of the *Code* because that is his status at the university. He did not stop being a student and become a member of the faculty when he worked as a teaching assistant. His alleged offence is properly treated as an offence committed by a person who is asking the university to confer a degree. He should not be in a better or different position than any other student who assists another student to cheat. Mr. A [REDACTED] was still bound to the obligations of a student under the *Code* when he was

working as a teaching assistant and was capable of being charged as a student. The charges laid against Mr. A [REDACTED] were not an abuse of process and should not be stayed.

For all of the above reasons, we find that the Tribunal has the jurisdiction to proceed with hearing the charges against A [REDACTED] A [REDACTED]. Mr. A [REDACTED]'s preliminary motion is therefore denied.

Dated at Toronto, January 14, 2009

Laura Trachuk, Co-Chair
Adil D'Sousa, Student Panel Member
Graham Trope, Faculty Panel Member