THE UNIVERSITY TRIBUNAL (DISCIPLINE APPEALS BOARD)
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on October 30, 2008

AND IN THE MATTER OF the *University of Toronto Code of Behaviour on Academic Matters, 1995* (the "*Code*")

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

B E T W E E N:

UNIVERSITY OF TORONTO

Respondent

- and -

M M

Appellant

Appeal Hearing Date: September 8, 2010

Members of the Discipline Appeal Board Panel:

Ms. Patricia D.S. Jackson, Chair
Ms. Margaret Kim, Student Panel Member
Professor Elizabeth Cowper, Faculty Panel Member
Ms. Jemy Joseph, Student Panel Member

Appearances:

Mr. Robert A. Rastorp, for the Appellant, M M
Mr. Robert A. Centa for the Respondent, The University of Toronto

Parties and Their Representatives in Attendance:

Mr. M M the Student
Ms. Lucy Gaspini, Academic Affairs Office, The University of Toronto Mississauga

REASONS FOR DECISION

1. Mr. M ("the student") was charged and convicted of the following academic offence:

> On or about November 19, 2007, you knowingly represented as your own an idea or expression of an idea or work of another in connection with an essay entitled "the Ode - Qasida" (the "Essay"), which you submitted for academic credit in RLG 204 H5F, contrary to section B.I.1.(d) of the *Code*.

2. The panel hearing the case imposed:

> "(1) a final grade of zero in the course RLG 204;
>
> (2) a two-year suspension and a notation of the sanction on the student's transcript for two years; and
>
> (3) a report of the decision and sanction to the Provost for publication by the University, presumably with the name of the student withheld."

3. The student, who did not appear at the hearing at which he was convicted, appeals from the conviction and the sentence that was imposed.

4. In summary, the grounds of his appeal are:

- he was not adequately notified of the hearing at which he was convicted and sentenced;
- the Tribunal erred in proceeding in his absence;
- that in the result he did not have the opportunity to put before the Tribunal evidence regarding character and mitigating circumstances that would have affected the verdict and/or the sentence; and

- he has suffered delay in being advised of the result of that hearing and has accordingly been prejudiced by being denied an entire academic year of study and credit towards his degree program.

5. The student also asked the Discipline Appeals Board to admit evidence which he says should have been heard at the hearing as to his character and mitigating factors. Specifically, he says that as an immigrant to Canada with no experience in the Canadian educational system he did not fully understand the nature, particulars, seriousness or consequences of plagiarism prior to be being charged with the offence. He says that this is either an adequate excuse or in any event constitutes an absence of the requisite *mens rea* for a conviction. He says that the nature and seriousness of the offence was not adequately explained to him, but that he now fully understands the seriousness and consequences and solemnly vows never to engage in any behaviour that could reasonably be construed as plagiarism or any other form of economic dishonesty.

6. Finally, and in the alternative, the appellant asks that the penalty be reduced by reason of these circumstances, because he has already lost one full academic year as a result of the charges and disciplinary process against him and that because of this and the resulting significant personal and family hardship resulting from conviction, the two year suspension should be reduced to one year.

7. For the reasons which follow, we deny the appeal both as to conviction and as to sentence. While we do not consider that this is an appropriate case for the admission of new evidence, we find that, in any event, the proposed new evidence does not constitute a basis upon which it would be appropriate to disturb either the original conviction or the penalty imposed.

8. Because the student takes the position that he did not have proper notice of the hearing at which he was convicted, the parties agreed that it would be appropriate to lead affidavit evidence and the transcripts of resulting cross-examinations on

this appeal. The Discipline Appeals Board has considered that evidence and it is reflected in the factual summary which follows.

Factual Background

9. The student first registered at the Mississauga campus of the University of Toronto ("UTM") in the fall of 2007.

10. In his first year of study, the student enrolled in five courses. He received a final grade of F in four of those courses. The fifth course, RLG 204 H5F: "Introduction to Islam" (the "Course"), is the subject of this appeal.

11. As a result of his very low grades, the student was placed on academic probation. His grade point average was so low that even if he had earned an A+ in the Course his overall grade point average would still have been at a level that would result in his being on academic probation.

12. In his second year, the student enrolled in two courses. He received a final grade of F in both courses and his grade point average remained at zero.

13. In the result, the student was automatically suspended for one year from May 2009 to May 2010. In other words, and contrary to the student's grounds of appeal, his academic standing prevented him from registering for the 2009-10 academic year irrespective of the current discipline proceedings.

14. The Course in which the student enrolled in 2007 was an Introduction to Islamic Studies.

15. In the fall of 2007 two guest speakers, the Head of Academic Skills Centre at UTM and the Librarian, attended the Course to speak to the students on how to conduct research, and showed examples of plagiarism and discussed how to avoid it.

16. The following week the Course Professor talked about plagiarism quite extensively.

17. In an affidavit filed in support of the appeal, the appellant says he was not present on either of these occasions.

18. During the fall term students were required to submit a "Wikipedia-style article". The Course description warned students regarding plagiarism in this assignment as follows:

> Your encyclopedia entries will be submitted through the "turnitin.com" facility through our course website. Plagiarism and inadequate referencing of sources will be penalized in accordance with the University's Rules and Regulations (http://www.utm.utoronto.ca/regcal/WEBGEN117.html). If you wish to use an alternative to the turnitin.com facility, please speak with your designated TA to discuss alternatives. Participation in writing clinics can help students who find writing a challenge to increase their grade. Cleo Boyd and Debbie Foran at UTM's Academic Skill Centre are available for consultation to improve your general writing and reference skills.

19. The student handed in the Essay through the turnitin.com facility on the course website. The turnitin originality report on the Essay generated an overall similarity index of 72%. The teaching assistant responsible for reviewing the turnitin.com reports was concerned that the Essay contained plagiarism and she reported her concerns to the professor.

20. On April 30, 2008 the Assistant Dean at UTM sent the student a registered letter to the mailing address he had provided to the university (the "Mailing Address"). It set out the nature of the report that had been received from the Professor, that the conduct described would constitute an offence under section B.I.1.(d) of the *Code* (a copy of which was enclosed in the letter), that he was entitled to an opportunity

to discuss the allegation with the Dean or his representative and at that meeting to be accompanied by counsel. Further particulars with respect to his rights and options were set out. In bold face the letter directed the student to contact the Academic Affairs Officer before Wednesday, May 14, 2008 and provided the relevant phone number. The student did not do so.

21. The University of Toronto provides students with a free email service called UTORmail. Students create their own email addresses, which must include "@utoronto.ca". The student created such an account in the summer of 2007. The designated address is that email account (his "utoronto address"). At the same time, he set the account to automatically forward all messages received at that address to a designated hotmail address which incorporated portions of his name (his "hotmail address"). These settings were never changed. In cross-examination the student confirmed that the hotmail.com address was his primary email account and that he checked it once or twice each week.

22. Having received no response to its registered letter, on August 7, 2008 the Dean's office sent an email message to the student at the utoronto address requesting a response. On cross examination, the student agreed that this was an example of an email message that was sent to his utoronto address and forwarded automatically to his hotmail address.

23. On August 8, 2008 the student replied to the message from his hotmail address. In the email he told the Dean's office that he remembered reading the registered letter (thereby acknowledging receiving it) but that he was on vacation and would not be back in Toronto until August 25th. On cross examination, he said that he did not know that the registered letter required him to contact the Dean's office before May 14, because he did not read that portion of the letter.

24. The student did not contact the Dean's office when he returned to Canada from his vacation.

25. On September 4 and again on October 1, 2008 the UTM sent follow-up emails to the student's utoronto address asking him to contact the Dean's office to set up a meeting. The student did not respond. Although on cross examination the student stated that he did not recall receiving these messages, he acknowledged checking his hotmail address once or twice each week.

26. Also on October 1, UTM sent the student a second registered letter, again to the Mailing Address he had provided to the University. (A copy of the letter was also attached to the October 1 email sent to the student's utoronto address). Once again the letter directed the student to the fact that the conduct described constituted an offence under the *Code*. Once again a copy of the *Code* was enclosed. In bold face letters the letter again directed him that if he wished to meet with the Dean, he needed to advise of his availability by October 10, 2008 failing which it would be assumed he was declining that opportunity. The student did not deny receiving this letter, although on cross-examination he said he could not recall having done so. He did not respond to the letter.

27. On October 30, 2008, the Provost wrote to the student to advise him that he had been charged under the *Code*. The letter was sent both by mail to the student at the Mailing Address and by email to his utoronto address. While the student said that he did not receive the charges in October of 2008, he acknowledged that they had been sent to the Mailing Address, and while he couldn't remember whether it was emailed to him at his utoronto address, he again acknowledged that such emails were automatically forwarded to his hotmail account which he checked once or twice a week.

28. On November 5, 2008, the Judicial Affairs Officer in the Office of Governing Council sent a letter by email to the student's utoronto address and by courier to the Mailing Address. The letter described the procedures under the *Code*. It urged the student to consider retaining legal counsel and advised him that Downtown

Legal Services ("DLS") or the Law Society's Lawyer Referral Service were potential sources of such representation. The letter told him the case would be heard by a three person panel comprised of a lawyer, faculty member and student member. It directed him to past Tribunal decisions on the internet. Once again, the student's evidence did not deny receipt of these communications, he said only that he did not remember them.

29. On March 2, 2009, Discipline Counsel for the University sent a letter and disclosure package both by courier to the Mailing Address and to the utoronto address. Discipline Counsel suggested hearings on one of March 31, April 7 or April 14, 2009 and asked the student to contact the office no later than March 5, 2009 to discuss the hearing date. She advised the student that in the absence of contact she would assume he was available on any of the proposed dates. Once again, the student did not deny receiving these communications, simply stated he did not recall receiving them either at the Mailing Address or at the utoronto address. He acknowledged that he did not contact Discipline Counsel by March 5, 2009.

30. On March 10, 2009, Discipline Counsel's office sent a message to the student's utoronto address proposing ten different hearing dates in May and June, 2009. The message indicated that failing contact by March 12, 2009, the Judicial Affairs Officer would be asked to schedule a hearing on one of the proposed dates. The student did not respond. The student again testified that he did not remember receiving this message. He acknowledged he made no contact in response to it.

31. On March 13, 2009, Discipline Counsel's office asked the Judicial Affairs Officer to schedule a hearing for May 5, 2009, copying that message to the student at his utoronto address. The student acknowledged that he did receive this message, but did not respond.

32. On March 18, 2009, the Judicial Affairs Officer issued a Notice of Hearing for May 5, 2009. The Notice was sent to the student's utoronto address and by courier to the Mailing Address as well as to the permanent address provided by the student (the "Permanent Address"). Also enclosed were copies of earlier correspondence, and another copy of the *Code*. The student acknowledged that he received this Notice of Hearing.

33. On March 25, 2009 the student sent an email message from his hotmail address to the Academic Affairs Officer in the office of the Dean at UTM acknowledging that he had been charged under the *Code* and that his hearing was scheduled for May 5, 2009.

34. On March 31, 2009, the student emailed the Judicial Affairs Officer requesting the May 5 hearing date be adjourned for until after May 19, to facilitate his potential representation by DLS. There followed an exchange of email correspondence about the adjournment request, the student responding from and receiving at the hotmail address that the evidence indicated he regularly used.

35. During a subsequent conversation between the student and the Office of Discipline Counsel, he again confirmed his understanding that, in the absence of an adjournment, the hearing would proceed on May 5, 2009.

36. Shortly thereafter, the Chair of the Tribunal panel that was to hear the student's case granted his request that the hearing be adjourned until after May 19, 2009 to enable him to arrange representation by DLS.

37. The student agrees that the next day he was contacted by Discipline Counsel's office who advised him to get in touch with the Judicial Affairs Officer and sought confirmation of how he could be contacted about the hearing. He confirms that he advised he could be reached at 647-669-1713 or at his hotmail email address.

38. Some weeks later, on June 4, 2009, a representative in Discipline Counsel's office reached the student by telephone. The student advised Discipline Counsel that, notwithstanding the basis upon which he had sought an adjournment of the May 5 hearing date, he had not made an appointment to meet with anyone at DLS after that adjournment. He was told the hearing could be scheduled on any of July 2, 3, 6 or 8, 2009. The student advised that while he could not attend on July 2, all the other dates were acceptable. The student agrees that he was told this and also told that the hearing would be scheduled for either July 3, 6 or 8 and that he would be copied on the message seeking a specific hearing date.

39. Two days later, on June 5, 2009 Discipline Counsel's office emailed the Judicial Affairs Officer, copied to the student at both his utoronto and hotmail addresses, asking that the hearing be scheduled for July 3, 2009. The same email asked that the Notice of Hearing be directed to the student at the same two email addresses. The student does not deny that he received this message but does say he doesn't remember reading it. Although he admits that he was told he would be copied on this message, he never called Discipline Counsel's office to say that he had not received the message or to otherwise inquire about the timing of the hearing he knew would be scheduled on July 2, 3, 6 or 8.

40. On June 11, 2009, as requested in the message copied to the student's two email addresses, the Judicial Affairs Officer sent a Notice of Hearing for July 3, 2009 to the student at both his utoronto and hotmail addresses. The University's post office audit trail confirms that the email containing the Notice of Hearing successfully passed on this message to the hotmail post office which accepted responsibility for delivering it to the student's hotmail address. The student says he does not recall receiving this Notice of Hearing.

41. On June 23, 2009 Assistant Discipline Counsel sent an email message to the student at his hotmail address referring to the upcoming hearing on July 3, 2009

and requesting the student to contact him as soon as possible. The student did not recall receiving this message. He agreed he did not respond to it.

42. On June 25, 2009, the Judicial Affairs Officer sent the student a message at his utoronto and hotmail addresses advising him that one panel member scheduled to hear the July 3, 2009 case had been replaced by another person.

43. On June 30, 2009, Discipline Counsel telephoned the student at the telephone number he had provided. Although no one answered the call there was a voicemail greeting left by a male voice who said "M ". Discipline Counsel left his name, stated that he was calling about the hearing scheduled for July 3 and said that it was very important that the student call him back. He further advised that if the student did not attend the hearing Discipline Counsel would ask the Tribunal to proceed in his absence. The student did not call back. Although he said he did not remember whether he had received the voicemail message, the student acknowledged that he had a voicemail account on that telephone number on that date and that he was the only one who retrieved voicemail messages for that telephone number.

44. When the University Tribunal convened on July 3, 2009 the student did not appear. Discipline Counsel presented evidence outlining the steps taken by the university to provide notice of the hearing to the student as outlined above (except for references to the student's cross-examination which, as noted, occurred in connection with this appeal), and the Tribunal determined to proceed in the student's absence.

45. Following evidence and submissions, the panel made a finding of academic misconduct and imposed the penalties described at the beginning of these reasons.

The Provision of Reasonable Notice of the July 3 Hearing

46. There is no issue as to the legal requirement on the University to provide reasonable notice to the student of the hearing. The issue raised by the appellant is his assertion that he did not receive reasonable notice.

47. While not determinative, it is important to note that the notice provided to the student was made in the context of the University's Policy on Official Correspondence with Students (the "Policy"). It:

(a) authorizes the University to use electronic mail and/or postal mail to deliver official correspondence to students;

(b) obliges students to advise the University via ROSI of a current valid postal address and the address for University-issued electronic mail account and to keep this information current;

(c) warns students that failing to do so may result in students missing important information and will not be considered an acceptable rationale for failing to receive official correspondence;

(d) obliges students to monitor and retrieve their mail, including electronic mail, on a frequent and consistent basis; and

(e) permits students to forward messages from their University-issued electronic mail account to another account, but warns students that they remain responsible for ensuring that all University electronic message communication sent to the official University-issued account is received and read.

48. The Policy reads, in part, as follows:

> "The University and its divisions may use the postal mail system and/or electronic message services (e.g., electronic mail and other computer-based on-line correspondence systems as mechanisms for delivering official correspondence to students.
>
> Official correspondence may include, but is not limited to, matters relating to students' participation in their academic programs, important information concerning University and

> program scheduling, fees information, and other matters concerning the administration and governance of the University.
>
> **Postal Addresses and Electronic Mail Accounts**
>
> Students are responsible for maintaining and advising the University on the University's student information system (currently ROSI), of a current and valid postal address as well as the address for a University-issued electronic mail account that meets the standard of service set by the Vice-President and Provost. [Footnote omitted]
>
> Failure to do so may result in a student missing important information and will not be considered an acceptable rationale for failing to receive official correspondence from the University. ...
>
> **Students' Rights and Responsibilities Regarding Retrieval of Official Correspondence**
>
> Students are expected to monitor and retrieve their mail, including electronic messaging account[s] issued to them by the University, on a frequent and consistent basis. Students have the responsibility to recognize that certain communications may be time-critical. Students have the right to forward their University-issued electronic mail account to another electronic mail service provider address but remain responsible for ensuring that all University electronic message communication sent to the official University-issued account is read and received."

49. The Policy in effect codifies, and notifies students of the mechanism by which they will be provided with notice of important information concerning their academic careers at the University, in other words how the University will provide them with reasonable notice.

50. The University has taken a number of steps to bring the importance of the Policy and its content to the attention of students:

- it is available on the University's website;

- the UTM calendar warns students that they are subject to and required to be familiar with the Policy, explains the importance of establishing and maintaining a utoronto.ca email account and checking it on a regular basis, and explains that it is the responsibility of the student to ensure that contact information is correctly recorded in ROSI and to monitor, read and understand information sent to them via the utoronto.ca email account;

- the Student Web Service home page advises students of the Policy as follows:

> "**Policy on Official Correspondence with Students:** You are responsible for setting up a UTOR mail account and for correspondence sent to you by the University at that account. It is important that you read the policy. Only University-sponsored email addresses (those ending in utoronto.ca or toronto.edu) can be updated through the Student Web Service. Please make certain you update your U of T email address as soon as possible and before classes begin."

51. The evidence indicated that the student frequently logged in through the Student Web Service, and that he monitored and received a number of messages at the utoronto and the forwarded hotmail addresses.

52. In this case, the University not only complied with the steps the Policy advised the students would be when to provide him with notice, the University did much more.

53. In our view, the steps taken by the University in this case to notify the student of the hearing and its consequences, to consult with him with respect to dates, to accommodate him by an adjournment, and to provide him with further notice and updated communications with respect to the rescheduled hearing are more than adequate to achieve the requirement of reasonable notice. In this respect we agree with the conclusion of the Tribunal Panel. Indeed, on the basis of the expanded

evidence on this issue which was placed before us, we conclude that the student was more than adequately informed of the proceedings and the hearing dates.

Tribunal Proceeding in the Student's Absence

54. On this appeal, the student argued that even if he had received reasonable notice and should have attended, the Tribunal Panel erred in deciding to proceed in his absence rather than adjourn for "a week or two" before proceeding. We disagree.

55. A finding that the Tribunal should have adjourned, in the face of the evidence as to the substantial notice provided to the student, would undermine the seriousness of the process of providing a notice of hearing. It would be a clear (and undesirable) message that would only serve to encourage other students to approach discipline proceedings on the basis that they can delay or ignore them indefinitely.

56. Moreover, the scheduling of a hearing such as the one below, and any rescheduling, involves coordinating the schedules of the student, the student's counsel, if any, Discipline Counsel, the members of the University instructing Discipline Counsel, the University's witnesses, the student's witnesses, if any, and the schedules of the volunteer panel members hearing the case, a task made substantially more difficult by the fact that virtually all of these people have full-time occupations. Any adjournment inevitably leads to substantial delay, which is one of the reasons why the University makes substantial efforts to consult on the hearing time in advance, as it did on multiple occasions with the student in this case.

New Evidence of Character and Mitigating Circumstances

57. The student asks this Discipline Appeal Board to admit and consider evidence that was not before the Tribunal panel, concerning "character and mitigating circumstances that would affect my verdict and/or my sentence if the verdict is upheld on appeal".

58. Specifically, the new evidence the students asks to introduce is contained in an affidavit in which he deposes that as an immigrant to Canada he had no experience with a Canadian educational system prior to his registration at the University and in consequence did not understand until he was charged with the offence in issue in these proceedings the nature, particulars, seriousness or consequences of plagiarism. The student has filed an affidavit setting forth these facts, as well as his assertion that he was not present when the nature and gravity of plagiarism were explained by guest lecturers or the professor in this course, that he did not read in any detail the written course outline or syllabus for the class, but that in any event that outline or syllabus did not fully explain the consequences of plagiarism.

59. His affidavit continues that now he has been charged with the offence he fully understands the nature, particulars and seriousness and consequences of plagiarism and solemnly vows never to engage in any behaviour that could be construed as plagiarism or any other form of academic dishonesty.

60. Section E.8 of the Code permits this Board to receive fresh evidence in exceptional circumstances:

> An appeal shall not be *trial de novo*, but in circumstances which it considers to be exceptional, the Discipline Appeal Board may allow the introduction of further evidence on appeal which was not available or was adduced at trial, in such manner and upon such terms as the members of the board hearing the appeal my direct.

61. The Provost has submitted that when exercising its discretion, the Board should be guided by the well-established test for admitting fresh evidence on appeal. Specifically, the Provost submits that the party seeking to adduce fresh evidence must show all of the following:

(a) the evidence was not available at the time of the hearing by the exercise of due diligence;

(b) it must be relevant to a potentially decisive issue at first instance;

(c) it must be credible; and

(d) it could if believed and taken together with the rest of the evidence, reasonably to be expected to affect the initial decision.

62. We do not think that in every case a party seeking to adduce fresh evidence on an appeal must satisfy all of these criteria to be successful. In the first place, section E.8 of the Code appears to us to contemplate potentially a greater level of discretion in the introduction of new evidence that exists in other forums. We note, as well, that the Supreme Court of Canada has only recently determined that it may not be necessary in every case to show that the evidence was not available at the time of the hearing by the exercise of due diligence, particularly when there is a reasonable explanation for the failure to adduce the evidence. (*R. v. J.A.A.*, 2011 SCC 17)

63. However, we do think it is appropriate to consider these four criteria in deciding whether to admit new evidence.

64. The reason that the student did not advance the evidence he now seeks to adduce at the hearing is not that the evidence was not then available to him, but rather that he was not at the hearing. We have already agreed with the Tribunal Panel that the student's failure to attend cannot be excused on the basis that he did not have reasonable notice of it. We do not agree that it is appropriate (at least in the absence of special circumstances) that a student who has failed to appear at a hearing of which he has reasonable notice should be entitled to introduce the evidence he otherwise would have lead at that hearing on appeal.

65. Equally importantly, although we do not consider that this is an appropriate case for the introduction of new evidence, we have nonetheless considered the

proposed evidence and have concluded that it neither would nor ought to have changed the result of the hearing below either on the issue of liability or on sentence.

66. In the first place, even if one accepted that the student did not appreciate the significance of plagiarism at the commencement of his academic year any continuing failure to appreciate the significance of plagiarism was not due to his having arrived from another academic culture, but to his having not attended the two lectures at which the significance of plagiarism was canvassed at length, and having not familiarized himself with the provisions of the syllabus and course description.

67. Moreover, there could be no doubt that the seriousness of the offence of plagiarism was brought home to the student on the multiple occasions of communications in connection with these proceedings, starting with the April 30, 2008 letter from the Assistant Dean and the further emails, letters and conversations that occurred subsequent to that letter up to and including the hearing itself.

68. In other words, even when there could have been no doubt that the seriousness of the offence of plagiarism had been repeatedly brought to the attention of the student, he did not provide any explanation for his behaviour, any indication of remorse, or any expressed intention never to engage in such behaviour in the future. Rather, the student's response was to ignore the processes for dealing with such behaviour.

69. The student's actions are entirely inconsistent with the position the student now advances that the plagiarism that he engaged in was due to his ignorance that it was a serious offence and that once apprised of the seriousness he will behave (and by implication would have behaved) differently.

70. In the circumstances, we do not think the student's very lately expressed regret is consistent with his actions up to the time of the hearing, of that it would or should have affected the result below.

Delay

71. As noted above, on the basis of his academic record the student would not have been able to enroll in the 2009-2010 academic year. This was not as a result of the discipline proceedings against him. In any event, given that we have upheld the result below he is ineligible to enroll until the 2010-2011 academic year.

Disposition

72. For these reasons, the appeal is dismissed.

Date: April 14, 2011