THE DISCIPLINE APPEALS BOARD OF THE UNIVERSITY TRIBUNAL
UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty

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:

THE UNIVERSITY OF TORONTO

– AND –

S[redacted] C[redacted] N[redacted] R[redacted] H[redacted] AND M[redacted] K[redacted] K[redacted]

Hearing Date: October 24, 2011

Members of the Panel:
Ronald G. Slaght, Q.C., Chair
Elizabeth Peter, Faculty Panel Member
Kenneth Davy, Student Panel Member
Sabrina Tang, Student Panel Member

Counsel:
Robert Centa for the Appellant, Provost of the University of Toronto
Joy-Ann Cohen for the Respondents, S[redacted] C[redacted] and M[redacted] K[redacted] K[redacted]
Philip Trotter for the Respondent, N[redacted] R[redacted] H[redacted]

REASONS ON APPEAL

INTRODUCTION

1. This matter comes before this panel of the Discipline Appeals Board of the University Tribunal on appeal by the Provost from the penalty imposed by a majority of a panel of the Tribunal, at a hearing held on June 14, 2010.

2. On consent of the students, Ms. C[redacted] Ms. K[redacted] and Ms. H[redacted], their cases had been heard together on that date and also by agreement the Tribunal was permitted to admit the evidence heard in one proceeding in the other two proceedings.[1]

3. At the hearing, each of the students pleaded guilty to having committed plagiarism, contrary to s. B.1.1(d) of the Code of Behaviour on Academic Matters ("the Code").

4. Each student admitted that the three had planned together to purchase essays and then submit the purchased essays in a course in which they were all enrolled, EAS 333 Modernism and Colonial Korea, taught by Professor Janet Poole ("the Course"). The students each admitted to having purchased an essay which each did submit on March 3, 2010 for academic credit in the Course.

5. The hearing proceeded on an Agreed Statement of Facts. Each student was represented by a member of Downtown Legal Services. The students were convicted of the offences on the basis of the admissions in the Agreed Statement of Facts and an Agreed Joint Book of Documents.

6. The hearing was therefore mostly concerned with the penalty phase. There was an Agreed Statement of Facts on Penalty in which each student agreed that she had previously committed two earlier academic offences. Ms. H[redacted] also admitted that she had purchased and submitted an essay in a University course in October 2009. All the students gave evidence on the penalty hearing.

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[1] Exhibit 1, para. 3, Appeal Book, Tab D, pg. 47

7. The panel below was divided on the penalty. The majority, Professor Andrea Litvack and the student member, Sybil Derrible, imposed a final grade of zero in the course, a five year suspension, and a notation on the student's academic record and transcript to remain until graduation. The third member, Chair Julie Hannaford, dissented, and would have recommended to the President of the University that he recommend to Governing Council that the students be expelled.

8. The Provost brings this appeal pursuant to section E. 4 (c) of the Code and asks this Appeals Board panel to vary and modify the sanction imposed below and that the Appeals Board recommend to the President of the University that the President recommend to the Governing Council that each student be expelled from the University.

9. Present in the hearing room for this Appeal were this Appeals Board panel, and counsel for the parties. Ms. C[redacted] Ms. K[redacted] and Ms. H[redacted] participated via video link from South Korea.

JURISDICTION AND PRELIMINARY MATTERS

10. The Code provides a right of appeal from a sanction decision of a Tribunal Panel to the Discipline Appeals Board:

> An appeal to the Discipline Appeals Board may be taken in the following cases only:
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> (c) by the accused or the Provost, from a sanction imposed at trial.[2]

11. The Discipline Appeals Board has wide powers to modify a sanction imposed and may impose any sanction that it sees fit that the Tribunal panel may have imposed:

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[2] Code, Section E.4

The Discipline Appeals Board shall have power,

(c) in any other case, to affirm, reverse, quash, vary or modify the verdict, penalty or sanction appealed from and substitute any verdict penalty or sanction that could have been given or imposed at trial.[3]

12. Thus the Appeals Board has a very broad jurisdiction. While an appeal does not proceed as a hearing *de novo*, as no evidence is led in the usual course, the expansive language of this section of the Code, as has been recognized in Appeals Board decisions over the years, means the Appeals Board has very broad powers and little obligation to show deference to the Tribunal below.

13. *C*[redacted], a decision of the Appeals Board in 1976, and long recognized as the leading decision on sentencing principles, holds that it is appropriate for an Appeals Board panel to vary a sanction if it believes the sanction imposed below to be wrong.[4] Other statements have been made in the cases over the years. For example, in *S*[redacted] the Appeals Board held that a panel has authority to quash or modify a Tribunal decision where there are errors of law and significant errors of fact.[5]

14. A review of Appeals Board cases demonstrates as well that the Board has concern in its decisions to ensure that there is some order of consistency in sanctions and that like penalties are imposed for like offences, and that direction is given in that respect.

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[3] Code, Section E.7

[4] *C*[redacted], Provost Book of Authorities, Tab 2, pg. 3

[5] *S*[redacted], Provost Book of Authorities, Tab 1, para. 10

15. In S[redacted], the Board stated that it would modify a sanction if it "concluded that the sanction imposed in this case is materially inconsistent with the weight of other Tribunal and appeal decisions".[6]

MOTIONS

16. We heard three motions at the outset of this appeal. Mr. Trotter moved on behalf of his client, Ms. H[redacted], for the admission of his client's affidavit, sworn October 6, 2011. The gist of the affidavit is that, after the events in question, Ms. H[redacted] returned to Korea and found employment. She has attained new levels of maturity and confidence and now understands the true value of a university education, rather than just responding to parental pressure to obtain a degree. She suggests this new level of understanding will stand her well and rule out the prospect of further cheating, if she is permitted to continue at the University at some point.

17. Although we had serious doubts about the admissibility of this affidavit, within the test for the admissibility of new evidence, we did admit the affidavit with the caveat that we expected the evidence would have little weight in our deliberations.

18. Ms. Cohen brought two *ad hoc* motions on behalf of her clients. First, she sought to introduce evidence from her clients at this hearing about their current circumstances including their employment, and to have them describe their current states of mind. We dismissed that motion although, on consent, we agreed to take into our consideration the fact that the two students are now employed. In our view, the time for the presentation of evidence had long

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[6] *Savovic*, Provost Book of Authorities, Tab 1, para. 48

passed, and the marginal relevance of this evidence combined with the late application for its admissibility were both elements leading to our decision.

19. Ms. Cohen also sought to have the final submissions at the Tribunal level, which had been recorded in the transcripts, added to the material before us on this appeal. Ms. Cohen submitted that it would be of value for us to review the questions and answers that had been posed and responded to during the course of the argument below. Ms. Cohen disavowed any suggestion that anything inappropriate had occurred during the course of that argument. We dismissed that motion. Argument is not usually received in appeals of administrative law matters, and we saw no reason to depart from that principle in this case. The appeal is from the sanction order itself, which was supported by lengthy reasons from both the majority and minority members. We saw nothing to be gained by adding the submissions to this record.

THE FACTS

20. The facts giving rise to these offences can be easily stated, and were concisely described in the two Agreed Statements of Fact put before the Tribunal below.

21. Each of the respondents enrolled in the Course in the Winter 2010 term. Professor Poole, in the Course syllabus, clearly described her expectations with respect to plagiarism, and that any such case would be referred to the authorities in accordance with the Code. The syllabus set out in some detail particulars of plagiarism. These included the following:

> "It is … an offence if the ***student*** knowingly;

- represents as one's own any idea or expression of an idea or work of another in any academic work, i.e. to commit plagiarism"[7]

22. The Course required submission of an 8-10 page paper, worth 30% of the final grade. The three respondents discussed this assignment among themselves in February, 2010, and decided they would each purchase an essay from an entity called The Essay Place. Internet advertising from The Essay Place was before the Tribunal. The Essay Place writes custom essays, among its broad range of services, with prices starting at $28.00 per page. Rush jobs begin at $32.00 per page.

23. The Essay Place, without any apparent hint of irony, advises that it takes plagiarism very seriously, and assures students that plagiarism has no place in its business. Every order from The Essay Place is 100% original and will never appear anywhere else.[8]

24. Each of the students purchased and submitted a purchased essay in satisfaction of the assignment, each seeking academic credit for these works. Each admitted that she did no meaningful academic work on the essay and the essays were submitted in the same form received by them from The Essay Place.

25. We reviewed the papers. Ms. C[redacted] submitted a 9 page paper, with her name on the front page, entitled "Depiction of the City in 1930s Korean Fiction". Ms. H[redacted] submitted a 9 page paper, under her name, entitled "Nostalgia and Modernity in Korean Fiction of the 1930s", and Ms. K[redacted], under her name submitted a 9 page paper, "The city in 1930s Fiction".

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[7] Syllabus excerpt, Appeal Book, Tab E-8

[8] Appeal Book, Tab E-12

26. Professor Poole suspected plagiarism and referred the students to the authorities. Ms. C[redacted] was the first to meet with Professor John Browne, the Dean's Designate for academic integrity at the Faculty. Ms. C[redacted] first told Professor Browne that she had written this essay herself. Ms. C[redacted] was confronted with the metadata embedded in the essay, which revealed that Michael Thompson, the owner of The Essay Place, was listed in the author field of the document. She then admitted to having purchased the essay.

27. Ms. H[redacted] and Ms. K[redacted] met with Professor Browne on the same day, December 2, 2010, but after Ms. C[redacted] meeting. They admitted they had purchased their essays from The Essay Place.

28. All the students expressed remorse and shame throughout the discipline process, including to Professor Browne and in their evidence at the penalty phase of the hearing. Each offered explanations and justifications for her motivations and all described the influences that had led to these purchases.

29. A good deal of the controversy about the majority decision in this matter arises from the question: what effect on penalty should flow from the admitted facts that each of the students had committed two previous academic offences (and Ms. H[redacted] had admitted to a third, the previously purchased essay in 2009).

30. The particulars of each student's two previous offences were contained in the Agreed Statement of Facts on Penalty. Of note, each student had committed her first offence separately, but they had committed their second offences together, as with the third.

31. It is necessary to set out in some detail the nature of the previous offences.

THE FIRST OFFENCES

32. Ms. C[redacted] first offence consisted of her providing, to her then boyfriend, an electronic copy of another friend's essay which had been submitted in a course, PHY 205, in 2008. Ms. C[redacted] boyfriend then submitted that essay in virtually unaltered form, in the same course, PHY 205, but in 2009.

33. Ms. C[redacted] admitted to the academic offence of knowingly providing unauthorized assistance to a student, contrary to section B.1.1(d) of the Code. She received a censure notation on her academic record and transcript for a two year period, to end March 24, 2011. She also received a letter from Professor Britton, then the Dean's Designate. The letter contained a warning that Ms. C[redacted] future academic work must be conducted in accordance with the rules and regulations of the University, and that "a second offence will be treated more severely".

34. As to Ms. H[redacted], in summer 2008 she had been enrolled in ECO 200, and had obtained a deferral of the first term test, worth 25% of the grade, to June 23, 2008.

35. A few days before that date, Ms. H[redacted] requested a further deferral due to a family emergency and provided the instructor with a screen shot of her eTicket, showing her flying from Toronto to London, England at 11:00 a.m. on June 23, 2008.

36. Investigation revealed that the flight was actually scheduled to depart at 11:10 p.m., not a.m., as the screen shot had shown.

37. In August 2008, Ms. H[redacted] admitted to violating the Code by altering the time of the flight on the electronic itinerary, because she was not prepared to write the test on June 23.

38. The Dean's Designate, Professor Solecki, suspended Ms. H[redacted] for six months, from July 1, 2008 until December 31, 2008 and her transcript was annotated until May 31, 2010. Professor Solecki's letter to Ms. H[redacted] contained the warning that her future academic work must be conducted in accordance with the rules and regulations of the University and that "... any further offence will be treated more severely."

39. As for Ms. K[redacted], in fall 2005 Ms. K[redacted] was enrolled in AST 101. In November, she wrote a mid term examination, worth 25% of the final mark. Following an investigation, Ms. K[redacted] admitted that she had permitted a friend to copy her examination answer and that she had provided her friend with unauthorized assistance during the mid term. The Dean's Designate, Professor Browne, gave Ms. K[redacted] a grade of zero on the question she allowed her friend to copy, and a two year annotation was placed on her academic record, expiring on October 31, 2007.

40. Professor Browne's letter to Ms. K[redacted] contained a warning that "... a second offence will be treated more severely."

41. All the students expressed regret for their actions in committing these first offences.

THE SECOND OFFENCES

42. In Fall 2009, the respondents were all enrolled in ES 209, a full year course. In October they wrote a term test, worth approximately 2% of the final grade in the Course. The three students, and a fourth, submitted virtually identical answers to the term test.

43. Investigation ensued and in December 2009, each of the students admitted that she had committed a second academic offence by copying from each other during the test and they had each knowingly received unauthorized aid during the test, contrary to section B.1.1(b) of the

Code. On December 3, 2009 Professor John Browne, the Dean's Designate, wrote to each student to advise each would receive a final grade of zero in ES 209 and a notation on her academic record and transcript until graduation from the University.

44. Ms. H[redacted] received an additional penalty, a four month suspension which Professor Browne agreed to defer until May 1, 2010 to permit Ms. H[redacted] to complete the courses in which she was then enrolled.

45. Professor Browne wrote to all three students by letters dated December 3, 2009, imposing these penalties. In each of the letters Professor Browne recorded that the students had regretted their actions, and had apologized.

46. Each letter contained the following warning:

> Academic offences constitute unacceptable behaviour in the University. This letter also serves as a warning to you that all of your future academic work must be conducted in accordance with the rules and regulations of the University, with which, as a senior student, you should be fully familiar. I remain troubled by the fact that you committed this offence so late in your academic career, especially when you had been previously sanctioned by this office. I strongly suggest that you reflect on your academic integrity goals and how best to achieve them while adhering to the highest standards of academic integrity.
>
> Finally, while I hope that you have learned from this experience, I must warn you that a third offence will be treated very severely.[9]

47. These offences were dealt with in December 2009. The students were all given fair warning over the possible consequences of any third offence. The students all expressed regret, and vowed there would be no repetition. Ms. H[redacted] was waiting for the commencement of her suspension, to begin in May 2010. Ms. C[redacted] had an existing censure still on her academic record

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[9] Appeal Book, Tabs E-16, E-17 and E-18

from her first offence. All had existing notations on their academic records from the second offences. Notwithstanding all of this, three months to the day from Professor Browne's December 3, 2009 letters, the students each submitted, on March 3, 2010, a purchased essay for credit in Professor Poole's Course, following the plan they had hatched together in February, 2010.

EVIDENCE AT THE HEARING

48. In their evidence at the hearing, it was clear that all the students had understood from the letters they had received and the discussions they had had with the Dean's Designate after the second offence, the seriousness of the warning they had been given about the consequences of any third offence.[10]

49. Each of the students gave some troubling evidence at the hearing about their views of the earlier offences that each had committed. Ms. C[redacted] advised the panel that she had decided it would be okay to give unauthorized assistance to her friends and to receive unauthorized assistance from them because the test did not seem like a big part of the grade and did not seem important at the time.[11]

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[10] Transcript (C[redacted] p. 59 l.9 to p. 61, l.7
Transcript (H[redacted]), p. 74, l.21-24
Transcript (K[redacted]), p. 74, l.21-24

[11] Transcript, (C[redacted] p. 55, l.25 to p. 56, l.17

50. Ms. H[redacted] admitted on cross-examination that she had cheated on the test because she didn't think she was going to do very well, because the test was not worth very much and because she did not think "it was a very big deal"[12]

51. Ms. K[redacted] admitted that she had done exactly the same thing in the second offence that she had done on the first: let a friend copy her answers during a test.[13]

52. All agreed that they had expressed remorse, shame and regret for having committed these second offences.

MAJORITY DECISION ON PENALTY

53. A review of the majority reasons discloses that the majority fully understood the history of the students' prior clashes with the principles of honesty and integrity and the core relationship of trust that exists between students and the University. For example, the majority did not miss, and specifically commented upon, the fact that within a couple of months of Ms. C[redacted]s meeting with the Dean over her second offence in December 2009, she was meeting with her fellow students and planning to purchase an essay, to be delivered on its due date in March 2010.[14]

54. The majority recorded that Ms. H[redacted], for example, had not thought cheating on a test worth only 2% was a "big deal" but she had come out of her meeting with the Dean on December 2, 2009 with the realization that it was a big deal. Notwithstanding all of that, in that

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[12] Transcript (H[redacted]), p. 74, l.11 to l.20

[13] Transcript (K[redacted]), p. 87, l. 9 to p. 88, l. 8

[14] C[redacted] – Majority Reasons, paras. 41-42

same term, in October 2009 Ms. H[redacted] had submitted a purchased essay, and as to that, she responded to one of Mr. Centa's questions, that she had "hesitated over the price being charged for the essay" but then went ahead and purchased it.[15]

55. As for Ms. K[redacted], the majority recited her admission in cross-examination that she had told the Dean she hadn't really learned from her first offence and for that reason she committed the second (cheating on the 2% test); and that she had told the Dean's Designate then that she was truly sorry and was not going to commit another offence, just what she told the panel at this hearing.[16]

56. The majority noted in some detail that in the planning stages of their essay purchasing scheme not only did the students coordinate this together but they admitted to each other that each of them had two prior offences and that each one of them knew that what they were doing was wrong. Ms. K[redacted] had considered her earlier conversations with the Dean's Designate and only after considering those discussions did she decide to purchase her essay.[17]

57. At the same time, the majority was much impressed with the demeanor of the students at the hearing, and the manner in which they gave their evidence and explanations. There was audible weeping, the students were apparently traumatized by the seriousness of what they were facing. As they gave their evidence they needed moments to compose themselves.[18]

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[15] H[redacted] - Majority Reasons, paras. 37-38

[16] K[redacted] - Majority Reasons, paras. 46-47

[17] K[redacted] - Majority Reasons, para. 48

[18] Majority Reasons, para. 32

58. The majority also noted that each of the students again expressed regret for their actions, and noted their evidence that if given another chance they would not commit yet another "mistake". The panel recited in some detail Ms. C[redacted] explanation of family difficulties and pressures and the isolation of her particular circumstances. [19]

59. Similarly Ms. H[redacted] had similar family pressures, and lacked confidence. She had purchased the essay in order to deal with family issues, her own insecurities and doubts and constant inquiries from home about her grades.[20]

60. The majority recorded that Ms. C[redacted] and Ms. K[redacted] had received counselling but this was for anxiety, distress and confusion about the impending hearing.[21]

61. In approaching its findings and conclusions on penalty, the majority recited the sentencing principles laid down in C[redacted]. They understood they were dealing with a choice between a five year suspension, the submission made on behalf of all the students, and a recommendation for expulsion, the penalty sought by the Provost. The majority recorded that the offences were "egregious, offensive, and made all the more invidious because of their connection to an industry that capitalizes on cheating". [22]

62. The majority chose suspension, and expressed their rationale in a number of ways. To us, overall, it is evident that the majority put most of its emphasis on the expressions of remorse that

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[19] Majority Reasons, paras. 33-36

[20] Majority Reasons, paras. 40-41

[21] Majority Reasons, paras. 39-40

[22] Majority Reasons, paras. 39-40

came from the students during the hearing, and the significant recognition of their dishonesty that had been brought home to them as a result of the proceedings. The panel observed that the very process of the trial and the requirement of the students being publicly confronted with their misdeeds was the thing that brought home the need for change to each of the students. The discipline process, from the time the charges were read to the conclusion of the hearing galvanized the students by terror, remorse, sadness, self-pity, and profound fear.[23]

63. More specifically, the majority made a series of findings that the Provost argues on this appeal were unsupported by the case authorities, were errors of fact or were simply unsupported by any evidence at all.

64. These findings and conclusions of the majority included their describing the students' resort to The Essay Place as a last resort – one undertaken to salvage each of them from the prospect of coming home to the disapproval of their family in shame and humiliation. Moreover, the majority found that the three students were victims at the hands of The Essay Place, just as much as the University was.[24]

65. In the same vein, the majority deconstructed the previous offences in a manner that shifted responsibilities from the students to those the students had advantaged by their actions. Thus, for example, the majority characterized Ms. C[redacted] giving her boyfriend a copy of a term

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[23] Majority Reasons, para. 59

[24] Majority Reasons, para. 52

paper as, from her perspective, an act of "misguided collegiality" but characterized the actions of the boyfriend as "the commission of an offence".[25]

66. The majority also put some emphasis in analyzing the previous offences, that they were not the same as each other and not the same as offences that had been committed by the other students. Thus, in Ms. H[redacted]'s case, for example, the majority thought Ms. H[redacted]'s admission to the Dean about why she tried to avoid taking her test, to them an action borne out of desperation to avoid confronting her lack of preparedness, was so different from her other offences that it should not be seen as a continuum of planned and deliberate dishonesty.[26]

67. As to the collective cheating on the 2% quiz, the majority placed great emphasis, as some of the students had in their explanations, that the course was worth only 2%, as a reason to reject the conclusion that this particular act of dishonesty meant that there would be additional dishonest activity from the students. The majority expressed some sympathy with the students' position, that they did not believe that cheating on a 2% test was such a grave offence.[27]

68. The majority made reference to the cases (without referring to any particular case name) and concluded that cases where expulsion was warranted were in respect of a series of incidents greater in number and more serious in kind than the pattern evinced by these three students.[28]

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[25] Majority Reasons, para. 53

[26] Majority Reasons, para. 53

[27] Majority Reasons, para 54

[28] Majority Reasons, para. 58

69. More importantly, the majority concluded that a five year suspension rather than expulsion was warranted in this case from the "clear and unwavering expression of remorse by each of the students ...". The majority found that each of the students were well and truly afraid and panicked by the thought of being expelled and afraid for the reactions of their parents. They were appalled by their own actions and by their fundamental failure to heed the prior warnings of the Dean when they were caught cheating on two previous occasions. It appeared to the majority that these students were deeply shamed and profoundly ashamed of what they had done. The majority found that it was this process of trial that had brought home to the students the need for change.[29]

THE DISSENT

70. In expressing the reasons for her dissent from the majority opinion, in that Ms. Hannaford would have called for expulsion of the three students, Ms. Hannaford spent some time reviewing the facts of the offences in question and the earlier offences committed by these students. She did not see the previous offences in as benign a light as had the majority. Whatever their nature, she saw the prior offences as breaches of trust, but also an opportunity to learn from these incidents, and when they did not, as evidence that these students are all likely to continue to offend. The best evidence of this is the clear descriptions of their dishonest conduct provided to them by the Dean's Designate each time and also their expressions of regret and remorse returned by them to the Dean, none of which had any effect upon their subsequent conduct.[30]

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[29] Majority Reasons, para. 59

[30] Minority Dissent, paras. 11, 26

71. Ms. Hannaford reviewed in close detail, the explanations which the students had provided by way of justification or extenuating circumstances. Ms. C[redacted] mother's illness, Ms. H[redacted]'s lack of confidence in her ability and parents' expectations and Ms. K[redacted]'s subsequent family upsets were not temporally related to the third offences. In any event, as Ms. Hannaford saw it, these narratives cannot be elevated in the case of these students to a degree that it could be said they caused the students to act as they did. The fact these offences were committed, the warnings given and the subsequent dishonest acts are the important facts and the rest is secondary, and cannot be permitted to detract from the clear and admitted intention of the students to cheat, time and again.[31]

72. Ms. Hannaford also saw the expressions of remorse and regret in a different light. Ms. Hannaford did not doubt that the expressions of remorse and regret were genuine. Ms. Hannaford's view was that such after the fact regret, while relevant and admissible, cannot in a case like this mitigate the penalty that must flow from this level of academic dishonesty. The earlier offences also brought with them the same expressions of remorse and regret, together with clear statements that dishonest conduct would not be repeated and an acknowledgement that severe consequences will be visited if it is. The students cannot then blunt those consequences, by repeating and reiterating the same expressions of remorse and regret, one more time.[32]

73. Finally, Ms. Hannaford stressed the nature of the offence – purchasing essays –as the most serious of academic offences that can be committed, particularly with the difficulty in detecting such dishonesty. Therefore these offences call for, as a matter of general deterrence, a

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[31] Minority Dissent, paras. 18, 20-25

[32] Minority Dissent, paras, 17-18

penalty that is proportional to the severity of the offence, and which, in this case is more than supported on the fact of this agreement among the students, even the discussion among them about their past offences and how they knew this was wrong, yet nonetheless they did proceed to purchase and submit false work as their own.[33]

74. Ms. Hannaford would thus have recommended that steps be taken leading to the expulsion of the students from the University.

POSITION OF THE PROVOST ON THE APPEAL

75. The Provost makes a number of arguments in support of the University's position that we ought to vary the sanction below and substitute a recommendation for expulsion in this case.

76. The first of these is that the decision by the majority is inconsistent with other recent Tribunal decisions in similar cases.

77. In *S[redacted]-B[redacted] P[redacted]* the Tribunal panel dealt with a matter where Mr. P[redacted] in the very course with which we are concerned in this appeal, had also purchased an essay and submitted that purchased essay, also on March 3, 2010 for academic credit in the course.

78. Mr. P[redacted] had no prior convictions and testified to a number of similar circumstances as did the three students in this case, including separation from family, family business difficulties and depression. Mr. P[redacted] had also initially put up a spirited defence to the suggestion that he had purchased the essay and, among other things had fabricated documents purporting to be preliminary drafts. He eventually pleaded guilty.

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[33] Minority Dissent, paras. 34, 39, 42

79. The issue in *P[redacted]* was whether Mr. P[redacted] should be suspended for a lengthy period or expelled, as the Provost sought. The panel in *P[redacted]* expressed its disagreement with the panel in the cases before us. The panel in *P[redacted]* imposed a five year suspension upon Mr. P[redacted] and commented that it preferred the position of the minority, Ms. Hannaford, because upon a proper calibration of the various cases, the respondents before us ought to have been expelled rather than suspended for five years because of the prior offences which were absent in Mr. P[redacted]'s case and the heavy emphasis the *P[redacted]* panel thought should have been placed on the conspiracy among the students to commit their third offences, after two prior offences.

80. The Provost points to a second case, that of *K[redacted] H[redacted] H[redacted]*, again remarkably similar to the facts here and in *P[redacted]*. Mr. H[redacted], once again in the very course with which we are concerned, EAS 331, purchased an essay from The Essay Place and submitted the essay for academic credit in EAS 331.

81. Mr. H[redacted] had initially denied these facts but ultimately admitted in the Dean's meeting that he had done so and pleaded guilty to the offence. Mr. H[redacted], on his penalty hearing, put forward a number of reasons in explanation for his actions including that he had learned he would have to enter the South Korean Military and was concerned that he would not be able to complete his degree and pass EAS 331. His lack of confidence led him to purchase the essay.

82. Mr. H[redacted] had no prior acts of academic misconduct.

83. Mr. H[redacted] sought a two or three year suspension from the Tribunal. Again, the Provost requested that the Tribunal recommend expulsion.

84. The panel in *H[redacted]* opted for a five year suspension. The panel emphasized the need for deterrence as it noted that five students in one term in EAS 331 had purchased and submitted essays from The Essay Place. Again, the panel reviewed the Tribunal decision in the case before us and noted that each of the respondents here had been convicted of serious academic misconduct on two prior occasions and that if Mr. H[redacted] had been in that position the panel would have recommended expulsion.

85. Because Mr. H[redacted] had no prior convictions the panel imposed a five year suspension.

86. The Provost points to other authorities – essay purchase cases – and suggests there is no case where students with two prior convictions received just a five year suspension for a third offence involving a purchased essay.

87. The Provost also submits that the majority below minimized the seriousness of the offence these students had admitted and made findings in that respect for which there was no evidence before them.

88. These include characterizing the students as victims, as we have set out above in paragraph 64. Related to that finding of the majority, the Provost submits there is no evidence to support the majority's view that The Essay Place "preyed upon" the students or that the students considered that that had been the case. The Provost quarrels with the majority finding that students resort to The Essay Place was as a "last resort" and suggests rather that the evidence supports only a finding that the students went to The Essay Place as a conscious decision to avoid doing their own work and with a view to subverting the principles they already understood were part of their relationship with the University.

89. The Provost also argues there was no evidence to support the Tribunal's sympathetic view of the students' failure to attend counselling (other than for the expected trauma to be experienced in these hearings) and argues that these were conscious choices, and there was no evidence from the students themselves that their failure to attend or continue counselling was because of the lack of time or resources.

90. The Provost also submits that the majority erred as a matter of principle in its treatment of the prior offences both in making the distinctions among the various offences that we have outlined in paragraph 66 above and particularly that the majority erred by discounting the effect of the prior offences on a theory that, because they were not identical, they ought not to be considered very important when looking at the third offence.

91. Finally the Provost contends that the majority erred by placing too much emphasis on the students' demeanor observed at the hearing itself, and that the manner in which students react to the bringing forward of charges based on their own academic dishonesty cannot be a mitigating factor on the question of penalty.

92. As to the emphasis placed by the panel on the students' expressions of remorse and regret, the Provost argues these were repeated after each offence just as were the students' promises not to reoffend. Such expressions, genuine or not, when measured against the other important sentencing principles in a case like this, cannot be relied upon, as each hearing would become a drama in itself with demeanor overriding facts and objective analysis.

93. For these reasons the Provost seeks a variation in the sanction.

POSITION OF THE RESPONDENTS ON THE APPEAL

94. Mr. Trotter for the respondent, Ms. H[redacted] and Ms. Cohen for the respondents, Ms. C[redacted] and Ms. K[redacted], take similar positions on the issues arising in this appeal.

95. Mr. Trotter, for his part, takes no serious issue with the statements of fact set out in the Provost's Factum. Ms. Cohen asserts some mild disagreements with some elements of the Provost's characterization of the majority's findings.

96. Both counsel however stake the foundation of their defence of the decision below, on principles of deference and that the majority made no errors in stating the relevant sentencing principles, taken mostly from C[redacted]. They argue that the majority's decision, including its characterizations of conduct, the prior offences, and the emphasis placed on the expressions of remorse and regret and the clear benefit the majority had from observing the students, are all matters of discretion, a discretion which the majority was entitled to exercise and with which this Board ought not to interfere.

97. Counsel acknowledges that while Ms. Hannaford may have seen the issues differently and characterized elements of the offences and the students conduct differently, that is of no moment, as the majority made no error in principle in reaching its decisions and there is no basis for this Appeals Board to interfere.

98. In an effective submission, Ms. Cohen also took serious issue with Mr. Centa's argument that the majority decision was out of sync with other decisions of the University Tribunal in purchased essay cases. She and Mr. Trotter urge this Board to take cognizance of the fact that while the Provost may seek expulsion in all cases of purchased essays, as was the case in *P*[redacted]

and *H*[redacted], the panels had not followed that approach but rather had made discretionary decisions depending on the facts and the panels' views of the overall circumstances in each case, and this is how it should be.

99. Ms. Cohen had prepared a chart, detailing a summary of purchased essay cases, with which Mr. Centa took no serious disagreement, showing the sanction in 14 cases with the aggravating and mitigating factors taken into account. There are 4 expulsions, 8 five year suspensions (including the three here), 1 three year suspension and 1 two year suspension in those cases.

100. Among the cases that Ms. Cohen discussed is that of *D*[redacted] *F*[redacted], contained in the Provost's Book of Authorities. Mr. F[redacted] was expelled for purchasing essays, but he had purchased two and had also committed three earlier academic offences all directly related to plagiarism. Ms. Cohen submits that while *F*[redacted] is a proper case for expulsion on its facts, the majority below made distinctions about the prior offences of the three students here, that they were not as serious nor the same as the third offence, as part of its rationale to distinguish the instant case from that of *F*[redacted] and thus impose a proper, lesser penalty than that correctly imposed in *F*[redacted].

101. Ms. Cohen suggests, again, this is simply the proper and permitted exercise of discretion of a Tribunal panel to measure the circumstances of the case before them against those of other cases and impose penalties, in their discretion.

102. Finally, Ms. Cohen submits that, if distinctions are to be drawn, her clients Ms. C[redacted] and Ms. K[redacted] are less culpable than Ms. H[redacted] both in the nature of their prior offences, and the mitigating circumstances which surrounded their acts.

103. For his part, Mr. Trotter referred us to his client's affidavit, suggesting that, whatever had gone on in the past, a new leaf had turned, and we should give effect to Ms. H[redacted]'s present expressions of new insight into her past behaviour.

ANALYSIS

NATURE OF THE OFFENCE

104. We begin our analysis by explaining our views about the nature of the offence in this case. As previous decisions of this Board make clear, purchasing academic work for a fee and then submitting that work with a view to securing academic credit, has always been considered among the very most, to use the majority's description, "egregious" offences a student can commit in the University environment. There are a number of reasons for this. First, in taking these steps, there is clear evidence of intention, deliberation and knowing deception, both in the planning, managing and completion of the offence, all of which occurs over a period of time, as in this case. As well, the act of paying for the services of another in this context, introduces a commercial element into the relationship of a student with the University, a factor very distant from the core values of an academic institution, where individual effort, intellectual thought and hard work are the hallmarks.

105. Moreover, this particular variety of plagiarism is quite different and more severe than the usual appropriation of the work of another through internet sources or the many ways that existing work can be commandeered. With purchased work, as the advertising of The Essay Place makes clear, the student buys an original work, tailored to the specific subject and which will not be found through the increasing sophisticated antennae of professors and their electronic helpers.

106. But for the trail of metadata left in this case, these frauds may well have gone undetected, or come up short against student denials.

107. Here, Ms. C[redacted] first denied the allegation and confessed only when faced with the embedded data showing the owner of The Essay Place as the author of the paper. Ms. H[redacted]'s purchase and submission of an essay in 2009 did go undetected.

108. There is every reason therefore that, once detected, these offences must be dealt with at the serious end of the sanction spectrum. This is consistent with the Provost's Guidelines for Sanction, which form part of the Code and which recommend expulsion as the appropriate sanction for submitting purchased work.

109. This Appeals Board panel then starts its consideration of this matter from this assumption – expulsion should be considered as a likely, perhaps the most likely, sanction in cases of students purchasing and submitting purchased essays as their own work, for academic credit.

DEFERENCE

110. We return to this issue, now in the context of this specific decision. There is no doubt this Board has very wide latitude in substituting its views, if warranted, for those expressed below by the majority. There are a number of different grounds upon which an appellant body can vary or set aside an order made by a trial panel below. These always include errors of law, (this expression in University Tribunal cases means both errors of general administrative law and errors in interpreting and applying that large body of University Tribunal and Appeals Board cases relevant to the particular charges in a given case), significant errors of fact finding, particularly if findings are made for which there is no evidence. It is likely however that,

because of the language of section E.7 (c) of the Code, Appeals Board jurisdiction is even broader than these well understood principles, and may well extend to simply substituting its own view of the sanction in any case where it believes the panel below reached the wrong result, for whatever reason.

111. Our view of the Appeals Board cases however shows that the Board has been reluctant to embrace the broadest view of its powers, and has generally analyzed a decision under appeal within the appellant principles that I described just above. The practical effect is often therefore that some deference is shown to the result below, in that Appeals Boards generally make specific determinations based on a principled analysis, rather than simply a "you think the result should be X, but we think the result should be Y" approach, which nonetheless in principle may well be authorized by the Code.

112. As well, in our view, the Appeals Board must give some effect to the major advantage that any trial forum has over any appeal forum, and that is in relation to credibility issues, the opportunity for the triers of fact to observe the witnesses and the accused, measure their demeanor, make findings of credibility about witnesses and, when necessary, among various witnesses. We recognize that this factor does constrain any Appeals Board in approaching an appeal from a decision of a trial panel of the University Tribunal.

113. Where then does this leave us in this particular appeal?

114. We see our role in this case to involve a two step process. First, we need to examine the decision below within the bounds that we have set out above, to determine whether the trial panel has made reversible errors of law or fact. Second, if that is the case, we then need to

decide whether those errors should result in a variation of the penalty that was imposed by the panel.

115. Certainly not every error would necessarily result in setting aside the ultimate decision on penalty made by a trial panel.

DECISION

116. In this case, reluctantly, we have come to the conclusion that the majority below made significant errors in its findings of fact and in its characterization of the evidence, which are material, and which if permitted to stand uncorrected, would detrimentally affect the University's reasonable and long-standing position that students must take individual and primary responsibility for their actions themselves.

117. We have examined the record below, and considered the submissions of counsel, but we can find no support in the evidence for the majority's finding that, in any respect, the three students were victims in the circumstances of this tableau. We, as a matter of first impression, would have some difficulty with that proposition even as a matter of theory – that is, how could it be that three students, meeting to decide that they would together purchase essays for submission in their course, reviewing among themselves their previous history of offences, knowing that they all had remaining indices of their past indiscretions on their records, making conscious decisions to nonetheless proceed, knowing what they were doing was wrong, and then approaching The Essay Place, could ever result in a characterization that they were victims of The Essay Place, or even victims of their circumstances in the broader sense.

118. On the facts here, however, the students did not portray themselves as victims. We can find no evidence that supports any finding that they thought of themselves in this light, or suffered what might be seen as some form of duress from anyone. Rather, they patronized The Essay Place in order to accomplish their goals, which were to pass the Course, by whatever means, and thereby avoid doing work which they had little confidence they could successfully produce, and to satisfy those external pressure which they all felt.

119. The evidence shows their concerns were more with the high dollar cost of cheating. Their insight went only to the point of a purchase of essays to help them secure a pass in the Course.

120. Ms. H[redacted] of course had already successfully achieved that on a prior occasion.

121. None of this is to say that the majority is not right in condemning the role of The Essay Place, and finding that the University is a victim in these circumstances. Both were worthy conclusions.

122. Nonetheless, this Appeals panel is concerned that both as a matter of approach, and as a matter of the evidence in this case, the reasonable expectations that the University has of its students, does not permit this conduct to be characterized as the majority did. As a matter of principle we are not prepared to endorse the availability of that line of defence in these cases.

123. Related to this, are our concerns with other elements of the majority's view of the evidence. For example, we can see nothing in the evidence that supports a finding that these students' approach to The Essay Place was as a last resort. Rather, we see the evidence revealing a decision by these students to make that approach rather than just doing the work themselves.

The students sought no additional help from Professor Poole, they did not ask for an extension, nor did they seek other help from the University.

124. From our perspective, this Board cannot endorse any suggestion that would justify purchasing an essay in a commercial transaction, because a student may have doubts about his or her ability to otherwise meet the requirements of the course. Surely, most students feel in that particular boat from time to time, and it is part of the obligation of the University to offer assistance and support, as it may, but ultimately the University must maintain its standards, and these include conveying the message as clearly and loudly as possible, that purchasing essays is no substitution in any circumstance for approaching difficult assignments on their own terms.

125. In the same vein, we cannot agree with the rather benign view the majority took of the earlier offences. The earlier offences were of course not identical, not as serious in their own terms, as the third offence, which was the ultimate in a University setting. The importance of these earlier offences however lies not just in their commission and in that regard the second involved the same joint agreement among the students as did the third, but also in what occurred in their contacts with University principles over these occasions.

126. One specific example of why we have difficulty with the majority approach to the earlier offences and their meaning for the third, can be seen in paragraph 54 of the majority reasons. There, in assessing the aftermath of the 2% test debacle, the majority wrote:

> It was our view that the students' understanding of the gravity of what they were doing – and that it evolved after meeting with the Dean, is an important consideration in the continuum of their expression of remorse.

127. What we see missing from this analysis, is any appreciation that, whatever the students took from their meeting with the Dean in 2009, within two months they were conspiring together

to commit much more serious offences, in the full realization that what they were doing was wrong.

128. The students cheated. The students were caught. The students admitted and understood that they offended the Code and the larger interests of maintaining academic and moral integrity in the University setting. The students were sanctioned. The students were warned about subsequent offences. The students expressed their regret, shame and remorse. The students understood why and what they had offended. The students apologized. And then the students committed other offences, with their third coming before they were out of the shadows of the second. These matters count, when it comes time to deal with the last of the offences and the fact that the earlier offences were not identical to the last or to each other is of no moment in trying to measure their importance in the overall context of deciding a sanction for these third offences.

129. To us, these are fundamental issues arising from the majority decision which we are unable to let stand by reason of their implications for future cases that may come before the Tribunal for decision in purchased essay cases.

130. There is one further issue that we have anxiously considered. The majority placed considerable emphasis on the way the students presented at the hearing and gave their evidence, explaining the various factors and influences that had led them to the sorry state of affairs in which they found themselves. The students expressed shame, remorse and regret and the majority, indeed Ms. Hannaford as well, generally accepted these expressions as genuine and sincere. It would not be appropriate for us to interfere with those findings (although we do observe that the same expressions were made at each of the other junctures). The difference this

time of course was that this was a live hearing and obviously laid additional stress upon these students.

131. The issue for us however is what effect should be given to these findings, of which there are really two. The first being the demeanor and manner in which the students actually appeared during the hearing and the second being their expressions of shame, regret and remorse. The majority took both these into account in ameliorating the penalty and imposing a five year suspension rather than expulsion.

132. In our view, these findings, in this case, cannot be elevated to that degree of significance when measured against the other principles of sentencing laid down in C[redacted]. In our view, while such evidence is always of importance, it cannot stand equally or take on more significance than that of deterrence. In our view with the seriousness of the offences at issue, the majority erred in placing the emphasis it did on this subjective component and we would not do so.

THE PENALTY

133. This then brings us to the second element. We have found that the majority below made errors of the nature that permit us to interfere with its conclusion. Should we do so, set aside the penalty imposed below and substitute another.

134. In approaching that issue, it might be helpful, in light of our function to decide appeals in a manner that will assist in ensuring consistency and the fair application of principle to matters like this coming before trial panels of the University Tribunal, to set out what we consider to be the appropriate approach to sentencing in purchased essay cases.

135. While we can accept the general point of Ms. Cohen and Mr. Trotter's submissions, that each case needs to be decided on its own peculiar set of facts and that there should be no absolute rule, contended for by the Provost, that every case of a purchased essay should result in expulsion, we believe there should be at least a broad set of factors for panels to make reference to for guidance.

136. As we stated in paragraph 108 above, and for the reasons we have expressed, in our view purchased essay offences are about as serious as can be committed in a University setting. The Tribunal should therefore approach sentencing in such cases with the working assumption that expulsion from the institution is the sanction that is best commensurate with the gravity of the offence. There is no absolute rule, however, and whether or not expulsion results will depend upon many factors, as revealed in the particular case. Prime among these will be to analyze and understand the facts of that particular case. Under what circumstances was the essay purchased and submitted. What degree of intent and deliberation was involved. What recognition that the conduct was grave and wrong can be seen in the student. Was anyone else involved. Were there influences that can legitimately influence the penalty. What were the subsequent events – did the student admit guilt or attempt to continue the fraud. Is there anything particularly egregious or saving about the case or are there other facts that may ameliorate what is otherwise conduct to be condemned.

137. Has the student learned anything from the entire matter. Are there true expressions of remorse, regret and apology, although these even if accepted, will rarely blunt the force of the offence itself. Are there extenuating circumstances and can these be seen to be relevant to the ultimate sanction.

138. The answers to these questions, even if positive in many respects, may not blunt the presumption of expulsion, but they may, and each review will produce its own result.

139. Of course, there is the issue of previous academic offences. If there is none, and an otherwise positive record, perhaps expulsion will not be the result, as it was not in *P*[redacted] and *H*[redacted]. If there are one or more, then, whatever their nature, this is a powerful indication that expulsion may well be warranted. If the offence in issue, purchasing and submitting a bought essay, has been the subject of a previous discipline process, then it would be most unusual for that student to escape expulsion for a second such offence.

140. But previous academic offences do not have to be identical or similar to have that same result. Previous offences are indications of continuing dishonest motive and a failure to recognize and adhere to core University values, particularly if remorse and regret were pleaded earlier in mitigation. All of this will be important when measuring the degree of sanction in such a setting.

141. Finally, a balancing of all the factors involved in sentencing must occur and be seen to occur as the Tribunal reaches an ultimate conclusion. In our view, the need for deterrence in respect of purchased essay cases is very high in the spectrum of those factors.

142. This analysis is not intended to be exhaustive because other elements will emerge in particular cases but it is important to set down at least an approach that should be followed consistently when trial panels are faced with fixing an appropriate penalty in a purchased essay case.

143. It should also be said that if expulsion is not the result in a particular case then it would be the rarest of alternatives that something less than a five year suspension would be imposed.

144. In our judgment, in this case, moving through this cascade of factors, and having regard to the views we have earlier expressed, we reach the conclusion that expulsion was and is the appropriate penalty for the students in this matter.

145. We are unable to give any effect to Ms. H[redacted]'s affidavit in ameliorating that result in her case. Ms. H[redacted]'s evidence was not much different than her earlier expressions of regret and there would need to have been something materially more dramatic to overcome the overwhelming facts that otherwise point to expulsion in her particular case.

146. In our judgment, sentencing in purchased essay cases, and certainly in this one, must consider two of the C[redacted]sentencing principles to be paramount over all the others. These are the detriment to the University occasioned by the offence of purchasing essays, and the need to deter others from committing a similar offence. These offences strike deeply at the roots of the institution, and must be deterred with an emphasis on these objective elements of the sentencing matrix.

147. While we sympathize with the students in this case and, again, take no issue with the findings made by the Tribunal below about their states of mind and expressions of regret, their actions in the end are what must dictate the appropriate sentences in these cases.

ORDER

148. The majority decision, that the students are to be suspended for a period of five years from the University from June 14, 2010 until June 13, 2015 is to be set aside and varied such that

S[redacted] C[redacted] N[redacted] Ri H[redacted] and M[redacted] K[redacted] K[redacted] shall be suspended immediately, and we recommend to the President of the University that he recommend to the Governing Council that each student be expelled from the University.

149. We are grateful to all counsel for their valued assistance in this difficult matter.

November 23, 2011

Ronald G. Slaght, Q.C., Chair
on behalf of the Appeals Board Panel