DISCIPLINE APPEAL BOARD
THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO

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

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

B E T W E E N:

UNIVERSITY OF TORONTO

Appellant

- and -

O[redacted]M[redacted]

Respondent

Members of the Discipline Appeal Board Panel:

- Patricia D.S. Jackson
- Aaron Christoff
- Professor Wendy Duff
- Jemy Joseph

Appearances:

- Linda Rothstein; Lily Harmer for the Appellant
- Maurice Vaturi for the Respondent

REASONS FOR DECISION

1. The University of Toronto (the "University") appeals from the August 11, 2008 decision of a Tribunal of the Trial Division of the University Tribunal (the "Tribunal") in which the Tribunal found the respondent not guilty of two charges under the *Code of Behaviour on*

Academic Matters, 1995 (the "*Code*"). For the reasons which follow we allow the appeal and send the matter back to the Trial Division for a new hearing.

2. Mr. M[redacted] was charged with submitting an answer booklet during a term test that was written prior to rather than during the test. It was alleged that his conduct was contrary to section B.I.1(b), or alternatively section B.I.3(b) of the Code.

3. A summary of the Tribunal's factual findings follows.

4. The term test in question was worth 25% of the final mark in Law and Psychiatry. The course was taught by Professor William Watson, who testified at the hearing.

5. In the winter of 2006, a student in the same Law and Psychiatry course had brought a completed test booklet into the test room and substituted it for a blank test booklet distributed at the test.[1] As a result of this, Professor Watson testified that he modified his practice and employed particular diligence in the method used for distributing booklets during the test.

6. In particular, the Tribunal noted the practice used by Professor Watson for the administration of tests as follows:

(a) To prepare he would retrieve a bundle of test booklets from the storage area in the college building. The bundles were in batches of 125 booklets. (The normal class size for a test was approximately 50.) The booklets came in two different colours: one was pure white and the other off-white with a shade of green.

(b) He would take the bundle of 125 booklets and place it on his desk, cleared for the exercise. He would remove 25 booklets from the pile and put those in a desk drawer, leaving a hundred booklets on his desk.

(c) He would then count out 60 booklets.

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[1] Leading to earlier proceedings before the University Tribunal: *University of Toronto v. B[redacted] K[redacted]*, October 10, 2007.

(d) He would then apply the same random stamp number to each of the 60 booklets. The random stamp number was different for each test. As he stamped the booklets, he recounted them. After 60 booklets were stamped and counted, he put them into a plastic bag, placing the remaining 40 unstamped booklets in a separate plastic bag together with the stamp marker.

(e) On this occasion he recalled going to the storage room and obtaining a new batch of pure white booklets.

7. As described by the Tribunal, Professor Watson further testified that on the occasion in issue the stamped booklets were distributed to the students taking the test by himself and a teaching assistant. Although he did not count the number of students taking the test, there were approximately 50 from the Tuesday class as well as some students from the Wednesday class who although scheduled to take the test the following date attended the Tuesday test. He did not count the number of stamped booklets that were initially distributed to the students. Students wanting a second booklet during the test would put up their hand and a second booklet was distributed to them from the remaining stamped 60 booklets. After the 60 booklets were distributed, he took unstamped booklets from the plastic bag where the 40 booklets had been placed and stamped them. He did not count the number of books that were distributed or the total number of unstamped booklets remaining in the bag at the end of the test. Nor did he count the number of test booklets that were returned at the end of the test.

8. The Tribunal further described Professor Watson's evidence that when the test booklets were returned, he noted one test booklet with a slightly different coloration. It was off-white with a green tint. It did not have a number stamp on it. The ink and the penmanship on page 1 of the booklet were different from the remaining pages. Page 1 was written with a ballpoint pen and cursive penmanship and the remaining pages of the booklet were written with black felt-tipped pen and the penmanship was in print form. There were also pencil marks on parts of the student's test booklet that had been written over in black felt-tipped ink and Professor Watson inferred that the student had written the answers to the specimen question in the test booklet in pencil and had used the black felt-tipped marker to write over the pencil marks during the test.

9. Professor Watson noticed that the Student had placed a coat on the desk and prior to the test commencement asked the Student to remove it. The Student then placed it on the chair beside him. The Tribunal noted that apart from that, Professor Watson did not notice any unusual behaviour by the Student. Nor was there any direct evidence that the Student brought a completed test booklet into the test. No one observed the Student switching the test booklet. And no one found the blank test booklet allegedly handed to the Student at the beginning of the test.

10. The Tribunal also noted the testimony of the Student. He denied bringing a completed test book into the classroom. He testified that he prepared for the test and wrote the answers during the test period. He testified that he did the appropriate readings, and submitted the readings with his highlighting and margin notes in evidence. He could not explain why the test booklet he submitted was of a slightly different colour and did not have a stamp on it.

11. The Tribunal noted his explanation of the difference in ink and penmanship. He presented in evidence many examples of other tests which demonstrated that he frequently switched his penmanship sometimes in the course of a single sentence. The Tribunal found this explanation credible and accepted his evidence.

12. He explained the pencil marks, stating he had a practice of writing certain portions of the test in pencil in order to get it right, after which he would write over the pencil in ink. He submitted other tests as examples of this practice. The Tribunal found the Student's explanation on this point credible and accepted his evidence.

13. On the basis of this evidence, the Tribunal concluded that the Student should be found not guilty.

14. The Tribunal noted the onus of proof in section E.4(b) of the *Code*:

> The onus of proof shall be on the prosecutor, who must show on clear and convincing evidence that the accused has committed the alleged offence.

15. The Tribunal observed the serious nature of the allegations and the serious implications for the Student, including in his intended application to law school. It concluded that in the

circumstances, the University had not satisfied the onus of proof. It provided the following explanation:

> 34. Although Professor Watson was meticulous in counting and stamping the 60 booklets, he did not count the total number of booklets that were distributed and returned. Without such a count being done, it cannot be determined conclusively or by necessary inference that the booklet submitted by the Student had not been handed out by Professor Watson during the test.
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> 35. Professor Watson testified in a clear manner and we do not question his credibility. However, there is no independent corroboration of his evidence.
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> 36. Without all the booklets distributed and returned being counted, there are many possibilities that are inconsistent with an inference of guilt.

16. The University submits that the Tribunal erred in three respects:

(a) by applying a standard of proof which required the University to prove its charges "conclusively or by necessary inference" and to disprove all possibilities inconsistent with guilt, rather than prove its case on a balance of probabilities;

(b) requiring "independent corroboration" of evidence from the University's witness, Professor Watson, notwithstanding the Tribunal's finding that his evidence was credible; and

(c) placing significant reliance on an irrelevant consideration - whether or not the number of test booklets distributed matched the number returned - in determining that there were many possibilities inconsistent with guilt.

17. We do not think there is any question that the applicable standard of proof for proceedings under the Code is according to a civil standard - on a balance of probabilities. Unlike in criminal cases, there is no presumption of innocence.[2] However, the requirement to prove the case on the balance of probabilities does not detract from the requirement found in the

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[2] *F.H. v. McDougall*, 2008 S.C.C. 53, para. 40 and 42.

Code and in the common law that the standard must be met by evidence that is clear, convincing and cogent.[3]

18. The respondent has drawn our attention to cases in which, in the context of proceedings before this and other tribunals, the issue of whether a defendant has acted "knowingly" and how that issue is to be addressed has been assessed.[4] While those cases have found criminal jurisprudence helpful in determining what is meant by the requirement that an action be engaged in "knowingly", they neither address nor detract from the clear statement of the applicable burden of proof in civil cases set forth above.

19. The Tribunal noted the general burden of proof imposed on the University of Toronto in the *Code*, and, while it did not expressly refer to the standard of a balance of probabilities, it would be presumed to apply the correct standard unless it could be demonstrated by analysis that the incorrect standard was applied.[5] One of the issues raised by this appeal is whether analysis demonstrates the application of an incorrect standard.

20. The case before the Tribunal involved a conflict between the evidence of the only two witnesses. Professor Watson's evidence was that the only test booklets that were handed out were white and stamped. The Student's evidence is that the unstamped green-tinted test booklet on which he submitted his answers was handed out to him during the test. It is not possible that the evidence of both witnesses was correct, and the task before the Tribunal was to choose one over the other, on a balance of probabilities.

21. However, as noted above, the Tribunal both accepted the Student's evidence and did not question the credibility of the Professor's evidence. .

22. While not questioning the credibility of the Professor's evidence, the Tribunal concluded that that evidence did not establish the offence because the offence was not "determined conclusively or by necessary inference", was not accompanied by "independent corroboration"

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3 *Code*, section E.4(b); *F.H. v. McDougall, supra*, at para. 45, 46; *Stetler v. Ontario* [2004], 200 O.A.C. 209 at 79-80.

4 *Shank v. The University of Toronto*, [2002] O.J. No. 50 (Div. Ct.); *R. v. Zanzibar*, [2007] O.J. No. 3381 (O.C.J.)

5 *F.H. v. McDougall, supra*, para. 53.

and that the evidence had not eliminated the "many possibilities that are inconsistent with an inference of guilt". These requirements strongly suggest that the Tribunal was requiring the University to prove the case to a standard higher than a balance of probabilities.

23. However, we are more troubled by the suggestion that the question of whether the evidence of the Professor or the evidence of the Student was correct would be resolved by counting the booklets distributed and returned. The Tribunal did not explain how it considered that a count would resolve the disputed issue, nor was the respondent able to do so on appeal.

24. If the offence was committed, the Student either switched the prepared test booklet he brought into the exam with a blank one handed out to him, or he returned the prepared booklet with the blank one. If the Professor brought 100 booklets into the test room, the former methodology would yield a count of 100 and the latter methodology a count of 101. In other words, neither count eliminates the possibility of the Student's evidence being in error.

25. Equally, a count of 100 or 101 could be consistent with the Professor's evidence being wrong. A count of 100 could be consistent with an error in the evidence that only white booklets were brought into the examination room and that no unstamped booklets were distributed to students. A count of 101 could be consistent with an error in the evidence that only white booklets came into the examination room, that only unstamped booklets were distributed to students, and that the booklets had been accurately counted before being brought into the test room. Neither count eliminates the possibility of the Professor's evidence being in error.

26. A count of the booklets distributed and returned would therefore not resolve the question of whether the Professor's evidence or the Student's evidence was correct. In focusing on the failure to count, the Tribunal focused on an issue which we conclude was an irrelevant consideration. It would not have resolved the conflict in the evidence. That conflict fell to be resolved by the application of the standard of balance of probabilities, and this the Tribunal did not do. Moreover, a finding of fact based on an irrelevant consideration is in these circumstances an error of law.[6]

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[6] *R. v. Coyl*, [2007] O.N.C.A. 728 at para. 1.

27. For the reasons expressed above, we consider the error material. We accordingly would allow the appeal and direct a new hearing on the charges.

Date: March 25, 2009

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