Case No.: 837

THE DISCIPLINE APPEALS BOARD
UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty made on January 7, 2016

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

THE UNIVERSITY OF TORONTO

Appellant

- and -

M[redacted] A[redacted]

Respondent

REASONS FOR DECISION

Hearing date: December 13, 2016

Panel Members:

Ronald G. Slaght	Chair
Elizabeth Peter	Faculty Panel Member
Allan S. Kaplan	Faculty Panel Member
Jiawen Wang	Student Panel Member

Appearances:

Robert Centa	Counsel for the University of Toronto

In Attendance:

David Dewees	Dean's Designate

INTRODUCTION

[1] This appeal comes before the Discipline Appeals Board on appeal by the Provost from a penalty imposed by a Panel of the Tribunal, at a hearing held April 25, 2016.

[2] The Respondent to the appeal, M[redacted] A[redacted], advised she would not be appearing and she was not represented before us, but she was represented at the hearing below by experienced administrative law counsel. At the hearing, the parties jointly submitted an Agreed Statement of Facts[1] and a Joint Submission on Penalty[2].

[3] The Agreed Statement of Facts reveals that Ms. A[redacted] was a 19 year old international student from Kazakhstan, who had completed her second year at the University of Toronto. In the Summer 2015 Term she was enrolled in MAT133Y1Y, a course which included three term tests, each worth 13.5% of the final grade, and a final exam worth 50% of the final grade. On the first two tests Ms. A[redacted] received marks of 38% and 28%.

[4] In July 2015, the Respondent hired a woman referred to as "Casey" to impersonate her and to write the third and final term test on her behalf. Casey was given Ms. A[redacted]'s U of T card and was paid $500.00 to write this test in her name, which Casey did. Ms. A[redacted] received a grade of 93% on that test.

[5] Around August 13, 2015, Ms. A[redacted] paid Casey an additional $500.00 to write the final examination for her, which Casey did, and a mark of 90% was received on that test.

[6] The Professor became suspicious and in due course Ms. A[redacted] was invited to meet, on October 20, 2015, with Professor Dewees, the Dean's Designate. Ms. A[redacted], however, did not attend the meeting but instead sent Casey to impersonate her in that academic discipline meeting.

[7] Ultimately, Ms. A[redacted] was charged with one count of impersonation (with respect to the final examination) and one count of academic dishonesty not otherwise captured in the Code (with respect to the meeting with Prof. Dewees).

[8] Although she admitted in the Agreed Statement of Facts that she had hired Casey to write the third term test she was not charged with this offence as the test booklet had been returned to her before suspicions were raised.

[9] Thus, there were three personation offences admitted to in the Agreed Statement of Facts but only two resulted in actual charges before the Tribunal. On the basis of the Agreed Statement of Facts, the Panel accepted Ms. A[redacted]'s guilty plea and the hearing proceeded to the penalty phase and particularly whether the Panel would accept the Joint Submission on Penalty (the "JSP") the parties had submitted.

[10] In the JSP, the Provost and the student submitted that the Tribunal should impose the following sanctions:

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[1] Agreed Statement of Facts, Appeal Book, Tab 4
[2] Joint Submission on Penalty, Appeal Book, Tab 6

(a) a final grade of zero in MAT133Y1Y;

(b) a suspension from the University for a period of 5 years from May 1, 2016 to April 30, 2021; and

(c) a permanent notation of the sanction on her academic record and transcript.

[11] Also in the JSP, Ms. A[redacted] agreed to withdraw voluntarily from the University and not to reapply in the future.

[12] At the conclusion of the hearing the Panel advised the parties that it accepted paragraphs (a) and (b) of the JSP but it rejected paragraph (c) and substituted, instead of a permanent notation, a notation of the sanction on Ms. A[redacted]s academic record and transcript for a period of 5 years.

[13] The Panel subsequently released Reasons for its decision on penalty and dealt with its amendment to paragraph (c) in the following terms:

> 13. The Tribunal was prepared to accept the Joint Submission with respect to the imposition of a final grade of zero in the subject course, and a suspension from the University for 5 years beginning May 1, 2016.
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> 14. The Tribunal was not prepared to accept a permanent notation of the sanction on the Student's academic record and transcript. In light of the Student's agreement to withdraw voluntarily from the University and not to reapply in the future, the Tribunal was concerned that a permanent notation of the sanction would have the effect that the penalty would approximate expulsion from the University. The Tribunal considered that a sanction with this effect was too severe in the circumstances. Accordingly, the Tribunal instead ordered that the sanction be recorded on her academic record and transcript for a period of 5 years beginning May 1, 2016. (emphasis in original)

[14] Essentially on this appeal, the Provost submits that the JSP was not unreasonable and that the Tribunal erred in rejecting the JSP, specifically, in applying the wrong test when rejecting the JSP, failing to explain, as is required, why the JSP was unreasonable or unconscionable and in failing to consider and assess all the relevant circumstances prior to rejecting the JSP.

JURISDICTION

[15] Under the *Code of Behaviour on Academic Matters* (the *Code*) the Discipline Appeals Board has very broad powers on appeal with respect to penalty. Section E.7 of the *Code* reads in part as follows:

> ...
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> c. The Discipline Appeal Board shall have power...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.

[16] The Discipline Appeals Board has described its core function to be ensuring consistency in the application of principle and policy within the University setting as articulated over time in Tribunal decisions.

THE HEARING

[17] Much of the hearing below was taken up with submissions surrounding the JSP. It is clear from the transcript that the Panel was expressing some concern with paragraph (c) of the JSP. Counsel for the Provost and for Ms. A[redacted] made submissions in that respect. In the course of the hearing, Counsel for the Provost did review the principles and applicable test which the Tribunal is required to meet before rejecting a JSP. However, shortly before the Panel expressed its decision that it would not impose a permanent notation on the transcript, the following exchange occurred:

> Mr. Centa: That said, you know, and I speak very strongly in favour of the joint submission on penalty. That said I want to again underline that it does not fetter or tie your hands and you are free to impose the sanction, including the transcript notation, that you think is appropriate in the circumstances.
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> Mr. Morrison: Thank you.
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> Ms. Ritacca: So I'm in a bit of a funny position because it sounds like the panel may be inclined to order something a little less than what Ms. A[redacted] agreed to.
>
> So I will start by saying this: The order that's before you is something that Ms. A[redacted] agreed to and was part of the negotiations that we had with the University. So I don't want to in any way suggest that we're moving away from that or we're resiling from that agreement. Certainly she made that agreement.
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> And I think Mr. Centa's right when he articulates why, at the time, we believed that was an appropriate deal to make because, of course, there was a risk if we weren't able to reach an agreement here that we came to either a full hearing, you know, complete on the liability part of the hearing as well.
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> Or even if we were here just arguing sanction, the University's position is we, as it was articulated to us, was that it would be seeking expulsion and then the notation on her record would be very different than what we've agreed to here.
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> So that's how we came to the agreement that we did here. A notation that says sanctioned for academic misconduct was something that Ms. A[redacted] was prepared to live with and something - - and she was not willing to risk a notation of expulsion.
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> That said, of course if we are in your hands, you are quite right that the case law in front of you, the two cases where there's an agreement, the notation - - the time that the academic sanction is noted on the record is time limited or in the transcript is time limited. So certainly both I think are within the range of reasonable and certainly within your jurisdiction to order something different than what we've agreed to.

> But I, you know, I can't stand before you as an officer of this tribunal to say, to resile from our position. It think what we agreed to was reasonable. It made sense in the circumstances. But certainly if this panel's inclined to order something a little different, you know, we don't take issue with that.
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> Mr. Morrison: Okay. Thank you.
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> Mr. Centa: I agree with everything Ms. Ritacca said.
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> Mr. Morrison: Thank you.

[18] Immediately following the above exchange, the Chair advised orally that the Panel accepted the Joint Submission in so far as paragraphs (a) and (b) were concerned but rejected the JSP in so far as paragraph (c) was concerned and substituted, instead of a permanent notation, a notation of the sanction on Ms. A[redacted]'s academic record and transcript for a period of 5 years.[3]

[19] In light of the exchange on the record set out above, it is apparent, understandable, and not at all surprising that the Panel did order "something a little different" in accord with its inclination to do so, in its oral disposition of the penalty. Nor is it at all surprising that in its subsequent Reasons, the Panel, whose Chair is a knowledgeable and experienced counsel of long standing, did not expound at length on the reasons and rationale for the decision that the Panel had made orally at the hearing.

[20] Notwithstanding all of the above, this Appeals Board has decided to allow this Appeal, exercising its original jurisdiction to substitute the sanction agreed to by the parties in the JSP, for the reasons that follow. We do however want to make it clear that we recognize that the Panel's reasonable expectations arising from the exchanges reproduced from the transcript above would reasonably support its oral disposition of the paragraph (c) issue and the relatively brief reasons it subsequently delivered in respect of that decision.

[21] Our rationale in allowing the appeal is rooted in the function of the Appeals Board to ensure consistency among Tribunal decisions, to ensure that due consideration is given to a JSP when it is reasonable in its terms and to recognize the increasing importance in Tribunal matters, which continue to multiply, that where reasonable agreements are made between the parties to enter a plea the parties can expect with a high degree of certainty the joint submission will be accepted when considered by the Tribunal. We discuss these considerations in the balance of these Reasons.

THE TEST

[22] In *F*[redacted][4], the Appeals Board established the principles applicable at the Tribunal when the parties bring forward a Joint Submission on Penalty for consideration by a panel.

[23] The first of these, a matter of fundamental importance, is that a panel is not obliged or required to accept the joint submission. The panel enjoys all of the right, responsibility and

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[3] Transcript, Appeal Book, Tab 7, pgs. 100-103

[4] *The University of Toronto and S*[redacted] *F*[redacted], 2014, Discipline Appeals Board Case No. 690, Appellant's Authorities, Tab 1

obligation to impose a fit sentence in the circumstances of every case, including one where a joint submission has been put forward.

[24] Equally, however, a joint submission may be rejected by a panel only in circumstances where to give effect to it would be contrary to the public interest or would bring the administration of justice into disrepute.[5]

[25] This test, in a university setting, means that the joint submission must be measured against the understood and entrenched set of values and behaviours which members of the University community are expected to uphold. Only if the joint submission is fundamentally offensive to these values, may it be rejected.

[26] This is an objective test and in *F*[redacted], the Appeals Board affirmed the principle that only after careful consideration and an assessment of all the relevant circumstances, and only if the joint submission is truly unreasonable or unconscionable, should a joint submission be rejected.[6]

[27] Recently, the Supreme Court of Canada has weighed in on this issue once again. In *R. v. A*[redacted]*-C*[redacted][7], Justice Moldaver reviewed the principles applicable when triers of facts are deciding whether to depart from a joint submission. The Supreme Court of Canada confirmed that the test is that a court should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. This disposition is consistent with the Appeal Board's statement of the principles in *F*[redacted]. The public interest in the context of a university setting would involve an assessment of those values reflected in the University community represented, by way of example, by the preamble to the Code.

[28] In *C*[redacted], however, in addition to reaffirming the existing test, the Court emphasized another aspect of the matter, also now very relevant for the work of the University Tribunal.

[29] Justice Moldaver for the Court emphasized that agreements on a joint submission on sentence in exchange for a guilty plea are not only commonplace but are vitally important to the well-being of the justice system at large. In the context of the University Tribunal this principle is equally important. Joint submissions promote certainty in circumstances where the accused has given up his or her right to a hearing in favour of a guilty plea and a negotiated sentence, acceptable to all. Time and resources are thus conserved. In such circumstances the parties ought to expect that a hearing panel will impose that sentence, unless to do so would be fundamentally contrary to the interests of the University community and objectively unreasonable or unconscionable. In this way, the greater interests of the discipline process in fairness and efficiency is furthered and the system as a whole benefits.[8]

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[5] *F*[redacted], *supra*, at para. 18
[6] *F*[redacted], *supra*, at paras. 21 and 22
[7] *R. v. A*[redacted]*-C*[redacted], 2016 SCC 43, Appellant's Authorities, Tab 2
[8] *C*[redacted] *supra*, at paras. 40-42

DISPOSITION

[30] We will shortly state the reasons why in our view this appeal must be allowed.

[31] The Panel below concluded that in its view a permanent notation of the penalty on the student's academic record and transcript was too severe and substituted a five-year notation for that reason. Respectfully, while a five-year notation might well fall within a band of reasonable dispositions on this issue, the Tribunal may not substitute its own subjective conclusion for the one the parties had agreed to. Rather, it can refuse to implement the joint submission only if it concludes that the parties' own agreement is unreasonable or unconscionable, or as the Supreme Court of Canada said in *C*[redacted], "so unhinged from the circumstances of the offence" that its acceptance would lead a reasonable observer to believe that the proper functioning of the justice system had broken down.[9]

[32] It cannot be said in this case, that a permanent notation on the student's academic record meets that test. Thus, we conclude that the Panel erred in this respect.

[33] Moreover, perhaps understandable in the circumstances, the Tribunal did not go on to explain why the penalty that was jointly proposed would harm the University's interests or why reasonably informed members of the University community would so conclude. Hearing panels must explain their reasons for rejecting a joint submission and, if departing from that joint submission, why doing so can be justified in a given case. Here the Panel rather concentrated on its own subjective view rather than considering the proposal against the greater community interests, as recognized by the jurisprudence.

[34] Finally, the Panel did not consider the actual circumstances that led to the joint submission, which a tribunal must weigh and balance in the event a joint submission is to be rejected.

[35] Here, it is evident that both parties to the JSP through the negotiations gained advantages which on balance support the acceptance of the JSP in this case.

[36] One of the features of the joint submission was that Ms. A[redacted] agreed that she would not reapply for admission to the University of Toronto after completion of her five-year suspension. It must be remembered that the Agreed Statement of Facts included admissions of three serious personation offences, which on the Tribunal's jurisprudence, could well have justified the Provost seeking a penalty of expulsion from the University, not a five-year suspension. In making the agreement not to reapply, an agreement that is not recorded on the student's academic record or transcript, the student avoided the prospect of expulsion from the University and she was able to leave the University of Toronto without a permanent notation of expulsion on her transcript and academic record.

[37] As well, if the notation had been time limited to five years, as is the period of suspension, and since the agreement not to reapply is not recorded on the student's academic record, after the five-year period expired, there would have been nothing on this student's academic record to alert

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[9] *C*[redacted], *supra*, at para. 34.

any subsequent Institution to make its own inquiries, if it chose to do so, upon application by Ms. A[redacted].

[38] Accepting the JSP as it was agreed, would flag for any subsequent Institution the fact of and the serious nature of the academic offences in this case.

[39] And of course, it is to be remembered that the parties, represented by experienced counsel, negotiated and considered the relative trade-offs to be reasonable in reaching an agreed statement of facts, a guilty plea and the Joint Submission on Penalty. From the University's perspective, the admissions in the Agreed Statement of Facts and the guilty plea obviated the need to grapple with the absence of the elusive Casey, who, of course, was nowhere to be found.

[40] In all the circumstances therefore this Appeals Board concludes that the JSP was reasonable in its terms and circumstances, and ought to have been accepted by the Panel below.

ORDER

[41] This Appeal Board orders that the Panel's Order on penalty is set aside and the penalty provided for in the JSP is hereby imposed.

Dated at Toronto:

December 22, 2016

Ronald G. Slaght, Q.C.
Chair, for the Appeals Board Panel