Case No.:719

DISCIPLINE APPEALS BOARD
THE UNIVERSITY OF TORONTO

IN THE MATTER OF charges of academic dishonesty filed on July 22, 2013;

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

B E T W E E N:

W[redacted]K[redacted]

Appellant

- and -

THE UNIVERSITY OF TORONTO

Respondent

Hearing Date: December 12, 2017

Members of the Panel:
Ms. Lisa Brownstone, Barrister and Solicitor, Chair
Dr. Ramona Alaggia, Faculty Panel Member
Professor Elizabeth Peter, Faculty Panel Member
Mr. Sean McGowan, Student Panel Member

Appearances:
Ms. Lisa Freeman, Courtyard Chambers, Counsel for the Student
Mr. Robert A. Centa, Assistant Discipline Counsel, Paliare Roland Barristers

In Attendance:
Mr. W[redacted]K[redacted], the Student
Dr. Kristi Gourlay, Manager & Academic Integrity Officer, Office of Student Academic Integrity, Faculty of Arts & Science
Ms. Tracey Gameiro, Associate Director, Appeals, Discipline & Faculty Grievances
Ms. Krista Osbourne, Administrative Clerk & Hearing Secretary, Appeals, Discipline & Faculty Grievances
Mr. Sean Lourim, IT Support, Office of the Governing Council

Introduction

[1] This matter comes before the Discipline Appeals Board (the "DAB") on appeal by the Student from the penalty imposed by the Tribunal in a decision released on April 11, 2017.

[2] At the Tribunal hearing, after a series of adjournments and case conferences, the Student pleaded guilty to eight (8) counts of academic misconduct, two of which consisted of falsification of evidence and six of which were plagiarism offences. One of the plagiarism offences involved a purchased essay. The Student and the Provost filed an agreed statement of facts in respect of the eight (8) charges.

[3] On the basis of the agreed statement and the supporting documents, the Panel made findings on the eight (8) charges referred to above. The hearing then continued with the penalty phase, which also saw several adjournments. It concluded on January 16, 2017, at which time the Panel reserved its decision.

[4] The Panel unanimously imposed a final grade of zero in each course in which an academic offence had occurred, a suspension of up to five years, and a recommendation to Governing Council that the Student be expelled.

[5] The Student brings this appeal under section E.4(c) of the Code and asks the DAB to substitute a suspension in place of the recommendation for expulsion.

Jurisdiction and Preliminary Matters

[6] Counsel for both parties agreed that, although the Code provides the DAB broad powers on appeal, including the ability to impose any sanction it sees fit that the Tribunal may have imposed, in fact the DAB should interfere with the sanction only if there were errors of law or significant errors of fact. The Appellant proceeded with the argument, therefore, on the basis that the DAB should substitute its view in this case because the Tribunal had made errors of law in two respects.

Background Information

[7] In order to situate the argument on the errors of law, some background information on the hearing below is required. It is safe to say that the hearing did not proceed smoothly. Charges were filed in July, 2013 but the hearing did not commence until August, 2016.

[8] After two adjournments were granted in November, 2013 and March, 2014, seven interim orders were issued by three different Tribunal chairs between April, 2015 and February, 2016. Several counsel represented the Student.

[9] On April 13, 2016, the Student made a further adjournment request, which was denied. At that point, the Student called an ambulance and the police, was taken to CAMH and

the matter was adjourned until August. Prior to the August hearing dates, the Student signed a plea agreement and the agreed statement of facts referred to above. The facts acknowledge eight academic offences in four courses. The two counts of falsified evidence related to false statements in the Student's personal statement filed in support of his petition seeking late withdrawal from a course, and in his appeal of the decision denying his petition. The six plagiarism offences occurred in three courses, and included one offence of submitting a purchased essay. The dates of the offences were as follows:

September 17, 2012:	false personal statement in course CHM139 (Charge 1)
November 5, 2012:	plagiarism in assignment in course UNI209 (Charge 11)
December 2, 2012:	false personal statement in course CHM139 (Charge 2)
December 4, 2012:	plagiarism in assignment in course NEW241 (Charge 4)
December 10, 2012:	plagiarism in assignment in course UNI209 (Charge 12)
February 20, 2013:	plagiarism in assignment in course NFS284 (Charge 7)
March 13, 2013:	plagiarism involving a purchased essay in course NFS284 (Charge 8)
April 2, 2013:	plagiarism in assignment in course NEW241 (Charge 5)

[10] That is, the eight offences occurred within about a six month period. Notably, the first offence occurred ten days after a meeting between the Student and the Dean's Designate, Professor Britton, about two plagiarism offences, and five days after the Student received two letters from Professor Britton imposing sanctions for plagiarism at the Decanal level.

[11] The Sanction hearing was scheduled to continue in August. The Provost tendered the evidence of Professor Britton, who testified that he had met with the Student on September 7, 2012 in connection with the two previous plagiarism offences. On September 12, 2012, Profession Britton sent emails to the Student confirming the Student's admission and advising of the sanctions. The emails contained explicit instructions on how to acknowledge sources properly and avoid plagiarism.

[12] After Professor Britton's testimony, the Student sought an adjournment, which was denied, and began to testify on his own behalf. The hearing was adjourned at the Student's request to allow Dr. Ford, the student's educational psychologist, to testify. Although the Student called Dr. Ford to support his position that his then undiagnosed learning disabilities caused his misconduct, Dr. Ford in fact testified that that connection did not exist. Rather, he testified that the learning disabilities did not cause the misconduct.

[13] The Student also filed reports from CAMH, including reports from April 13, 2016, the night he was taken from the Tribunal hearing by ambulance. The authors of these reports did not testify. The Tribunal allowed the documents to be filed, reserving the question of the weight to be accorded to them.

[14] On November 2, 2016, after the Provost's submission on sanction, the Student requested and was granted a further adjournment.

[15] On January 16, 2017, after an evidentiary ruling against the Student during his submissions, the Student contacted Campus Police and again left in an ambulance. The Tribunal closed the hearing and deliberations ensued. No issue was raised on appeal about the events of January 16, nor did the Student seek to tender any medical or other evidence about those events on appeal.

[16] On April 11, 2017, the Tribunal released its decision on sanction, which is the subject of this appeal.

The Argument

[17] Against this background, the Student argued that the Tribunal made two significant errors of law: first, it considered irrelevant factors and second, it erred in principle and misapprehended the evidence in finding that the Student had created or fabricated medical evidence for purposes of the sanction hearing. In light of these errors of law, the Student argued, the Appeals Board should intervene, should demonstrate compassion for the specific circumstances of this Student and should impose a suspension in place of the recommendation for expulsion.

[18] The irrelevant factors were said to be the following aggravating factors referred to by the Panel:

- on four of the six hearing dates, the Student arrived at the hearing 30 minutes to one hour late, blaming the weather conditions, the transit system or traffic, or offering no reason;

- on two hearing dates, the Student arrived unprepared, without hard copies of his documentary evidence, blaming a broken printer, necessitating a lengthy break while the Office of Appeals staff photocopied and collated his evidence;

- the Student filed a written submission containing inflammatory and unfounded allegations of "perjury" and "defamation" against Discipline Counsel for the University; and

- after persisting in disagreeing with an evidentiary ruling made by the Tribunal on the final day of the hearing, the Student stated that the Tribunal was "not honest" and was "rigged".

The Tribunal also referred to the Student having blamed the University for failing to accommodate him. These factors were said to be irrelevant and therefore should not have been taken into account by the Tribunal. The Student was, it was argued, punished for things he was not charged with. Being late and unprepared for a hearing is not the same as an aggravating factor such as lying and does not, it was argued, support a finding that

the Student was essentially ungovernable. The Tribunal was said to have erred in using these findings in this way.

[19] The Student's actions, including some attempts to distance himself from the agreed statement of facts, should, it was argued, be understood as confusion of a then unrepresented student as opposed to a student who was unprepared to follow rules or live by his word.

[20] We disagree. The Panel's reasoning clearly indicates that it made limited and proper use of these factors. The Panel found that the Student's conduct at the hearing was relevant to its assessment of the Student's character (a factor clearly relevant to sanction) and also heightened its concerns that the Student would not follow rules of the University if the relationship between the Student and the University were not severed. The Tribunal noted:

> In our view, these incidents are an aggravating factor as they demonstrate a lack of respect for the University and its discipline process and raise a serious concern about the Student's continued inability to govern himself in accordance with the University's standards, rules and responsibilities.

[21] There is no error in drawing these conclusions. We find that the Panel was entitled to consider the Student's conduct during the hearing. Further, we note that it is evident from the decision that the Panel did not place too much weight on this conduct in coming to its conclusions. It is clear from the Reasons that the hearing conduct is not what motivated the Panel to impose the sanctions that it did. Indeed, in its summary of its reasoning in paragraphs 84-87 of its decision, there was no reference whatsoever to the Student's conduct at the hearing. Standing on its own, the reasoning in these paragraphs would amply support the sanction imposed.

[22] The second error was said to be the Tribunal's finding that the Student fabricated medical evidence in respect of the CAMH assessments. It was argued that the Panel found the Student was being dishonest and then used this conclusion to punish him, as opposed to limiting itself to considering any possibly suspect motivation when assessing the reliability of the medical evidence.

[23] The evidence in question is a consultation note from the Student's attendance at CAMH the night of the April, 2016 adjournment, as well as further CAMH evidence that followed shortly thereafter. The notes were received in evidence, but ultimately not afforded great weight. The Tribunal stated as follows:

> As the Tribunal did not hear from any of the physicians referred to in these documents and there was no opportunity to question the authors, we approach this evidence with caution. We note that the April 22, 2016 Note reports that the Student was previously diagnosed with bipolar disorder (February 24, 2016) and a learning disability including symptoms of ADHD and anxiety (October 2015). The Consultation Note gives a provisional diagnosis of major depressive disorder ("long standing untreated depression with comorbid symptoms of anxiety") and disagrees with the earlier diagnosis of bipolar disorder.

> We accept that the Student received this provisional diagnosis in April 2016, and that depression can be a chronic condition, but the evidence before us is insufficient to conclude that the Student was therefore suffering from depression and anxiety at the time of the commission of the offences in 2012 and 2013. The Student testified that he was depressed and anxious during this period, and the 2016 Notes record that the Student reported to the CAMH physicians in 2016 that his symptoms of depression either began or worsened when he started University. There are no contemporaneous medical records to support the timing of the onset of these symptoms. However, the Student has provided his Student Medical Certificates for the period of 2012-2013 which do not indicate that the Student sought assistance during this period for symptoms of anxiety or depression. The Certificates are for illnesses such as colds and stomach flu. The Certificates we have reviewed record complaints of anxiety and /or depression starting in 2014, one year after the commission of the offences.
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> We also have a concern about the reliability of the Student's statement to the CAMH physicians in 2016 regarding the timing of the onset of his symptoms. The 2016 Consultation Note reports that the Student planned to use the physician's assessment note as evidence before this Tribunal. The Student's April 2016 CAMH assessment resulted from the Student's behaviour after he called 911 from outside the hearing room when he was denied an adjournment by this Tribunal. The notes of the April 13, 2016 assessment state that the Student wanted "a copy of this assessment as he 'wants to be taken seriously' by staff at University of Toronto". While this does not mean that the Student misrepresented the timing of the onset of his symptoms when speaking to the doctors, it does mean that the Student was aware that he was creating evidence for this proceeding when he provided information to them, and we therefore give this evidence less weight.[1]

[24] In the Student's submission, it was an error for the Panel to conclude that he was fabricating evidence for the hearing. We note that the Panel's findings were that the Student, at the time he went to CAMH and referred to the University hearing, knew that he was **creating** evidence for the hearing. In the Student's submission, this had an inference of fabrication to it, and also would negate any forensic assessments done for purposes of any penalty hearing, which are always done knowing that the information provided will be used at a penalty hearing. However, as the Provost pointed out, when a forensic assessment is done (and the Student rightly conceded that this was not a full forensic assessment), the authors of those assessments are presented for cross-examination so that, among other things, the underlying information provided to them can be tested. No such cross-examination could take place here as the authors of the reports did not testify. The Panel therefore admitted the reports, but placed little weight on it, something that the Panel was entitled to do. The Tribunal thoughtfully and carefully considered both the content of all of the medical evidence and its circumstances, and made no errors in this regard.

[25] Thus, the Student's submission that the Panel erred in principle and misapprehended the evidence in this respect must fail.

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[1] Reasons for Decision, paras. 53-55, Appeal Book, pp. 27-28

[26] Having dismissed the Student's argument that the Panel erred in law, the analysis could end here. However, we will consider the Student's argument that in his unique circumstances we should exercise compassion and substitute a different penalty, in the event that we are incorrect in our findings on the first two arguments, or in the event that these unique circumstances should convince the DAB to give an expansive reading to our powers on appeal.

[27] The Student conceded that an expulsion penalty may be appropriate if one were simply to look at the eight offences in this case (and taking into account the previous two offences dealt with at the Decanal level). In his submission, the circumstances here were unique given his diagnoses of learning disabilities, anxiety and depression.

[28] This submission must fail. First, there is no evidence that the Student was suffering from anxiety and depression at the time the offences occurred. While the Student's counsel asked us to infer that this was the case, given the later information provided to the physicians who saw him at CAMH, and the provisional diagnosis he was given then, the only contemporaneous medical evidence shows that at the time of the offences, the Student was seeing physicians for other, non-mental health related illnesses such as headaches, sore throats, fever and bloating.

[29] Further it was conceded both at the hearing and on appeal that the only expert who did testify, Dr. Ford, explicitly stated that he could find no nexus between the learning disability and the commission of the offences; that is, the learning disabilities did **not** cause the Student to commit the offences. Thus, even if we were to infer that the Student was suffering from anxiety and depression at the time of the commission of the offences (and we reiterate that we find no basis in the evidence for this inference), we would be unable to go the extra step and infer that the commission of these offences was caused by or contributed to by those disorders.

[30] The Student took us to other cases which he argued were similar to his in which the student was not expelled. However, in none of these cases were there eight counts of academic misconduct which closely follow two instances of academic misconduct dealt with at the Decanal level, which resulted in explicit warnings to the Student not to repeat the behaviour. Three of these cases did not deal with purchased essays, and the one that did deal with a purchased essay pre-dates the case of *C, H and K*, (Case No.: 596, 597, 598, November 23, 2011), which indicated that there is a presumption (acknowledging that that presumption may be rebutted) that expulsion is likely where a purchased essay is involved for several reasons: it shows evidence of intention, deliberation, and knowing deception; second, it introduces a commercial element into the relationship of a student with the University; and third, it is more difficult to detect.

[31] That is, the DAB concludes that the Hearing Panel made no error in law and further states that, if we are wrong and any errors were made, they would not justify a new hearing. We are of the view that if the two rulings made by the Committee were an error, which we do not find they were, they are of such a minor nature that they did not materially affect the result and do not require a new hearing.

[32] If we were to exercise our own discretion on penalty on the facts of this case, without regard to the Student's conduct at the hearing or his statements to CAMH, we would order the same sanction as did the Tribunal. The seriousness of the offences, the deliberateness of the conduct, the timing of the offences, and their repeated nature warrant a sanction of recommended expulsion.

[33] For the reasons set out above, the appeal is dismissed.

Dated this 20th day of February, 2018.

Lisa Brownstone, Chair
on behalf of the Appeals Board Panel