



FOR INFORMATION

OPEN SESSION

TO: Academic Board

SPONSOR: Mr. Christopher Lang, Director, Appeals, Discipline and Faculty Grievances

CONTACT INFO: christopher.lang@utoronto.ca

PRESENTER: See Sponsor

CONTACT INFO:

DATE: May 23, 2019 for May 30, 2019

AGENDA ITEM: 18(b)

ITEM IDENTIFICATION:

Academic Appeals Committee, Individual Reports, Spring 2019

JURISDICTIONAL INFORMATION:

Section 2.1 of the *Terms of Reference of the Academic Appeals Committee* describes the function of the Committee as follows:

To hear and consider appeals made by students against decisions of faculty, college or school councils (or committees thereof) in the application of academic regulations and requirements and to report its decisions, which shall be final, for information to the Academic Board. The name of the appellant shall be withheld in such reports.

Section 5.3.4 of the *Terms of Reference of the Academic Board* provides for the Board to receive for information Reports of the Academic Appeals Committee without names.

GOVERNANCE PATH:

1. Academic Board [for information] (May 30, 2019)

PREVIOUS ACTION TAKEN:

The last semi-annual report came to the Academic Board on November 22, 2018.

HIGHLIGHTS:

The purpose of the information package is to fulfill the requirements of the Academic Appeals Committee and, in so doing, inform the Board of the Committee's work and the matters it considers, and the process it follows. It is not intended to create a discussion regarding individual cases or their specifics, as these were dealt with by an adjudicative body, with a legally qualified chair and was bound by due process and fairness. The Academic Appeals Committee's decisions are based on the materials submitted by the parties and are final.

FINANCIAL IMPLICATIONS:

There are no financial implications.

RECOMMENDATION:

For information.

DOCUMENTATION PROVIDED:

- Academic Appeals Committee, Individual Reports, Spring 2019

THE UNIVERSITY OF TORONTO
THE GOVERNING COUNCIL

Report #399 of the Academic Appeals Committee (Chair Only)
November 8, 2018

To the Academic Board
University of Toronto

Chair

Professor Hamish Stewart

Student

Ms. J. P. (“the Student”)

Division

Faculty of Arts and Science, Woodsworth College

Preliminary Issue

This appeal was conducted on the basis of written submissions in order to determine jurisdiction as per Section 3.1.7 of the Academic Appeals Committee Terms of Reference. The parties did not attend.

The Student seeks to appeal a decision of the Office of the Registrar, Woodsworth College, refusing to register her as a non-degree student for the Summer 2017 and Fall 2018 terms, owing to outstanding balances in her account with the University.

Throughout, the Registrar has acted pursuant to the *Policy on Academic Sanctions for Students Who Have Outstanding University Obligations* (the “Policy”), section 3.3, which provides that “Registration will be refused to a continuing or returning student” who has “outstanding recognized University obligations”. It is not disputed that at the relevant times the Student did have outstanding financial obligations to the University. But the Student’s position is that when attempting to register for the Summer 2017 term, she was a new student, not a continuing or returning student, and that section 3.3 of the *Policy* therefore did not apply to her.

The Student was admitted to Woodsworth College as a non-degree student for the Summer 2017 term. At that time, she had an outstanding balance on her university account resulting from her residence at Graduate House since January 2017. It is not entirely clear from the material filed whether the Student did or did not register for the Summer 2017 term or how she came to be living at Graduate House. In an email of August 24, 2018, Jennifer Guyatt, Associate Registrar of Woodsworth College, states that she did register:

A review of the record indicates that you enrolled as a summer student at the College on April 19, 2017. Presumably, this facilitated your placement at Graduate House residence where the

charges in question were generated. You cancelled the last of your summer courses on May 18, 2017, but remained living at Grad House. Although you again enrolled for the 2017 Fall/Winter session on Aug 15, you were not able to complete the registration because of the outstanding charges.

In contrast, in her reply to Ms. Guyatt on August 27, 2018, the Student states that she did not register:

[In May 2017,] I initiated enrolling in courses when my status on Acorn was “invited”, at that time I was allowed to add courses. However, systematically it got cancelled at some point later. Then my status on Acorn turned into “financially cancelled”. I have never had “registered” status.

The Student states further that she was permitted to live at Graduate House from January 2017 onwards despite the fact that she was not enrolled in any University program at that time.

While the registration status of the Student remains in dispute, the Faculty of Arts and Sciences argues that your Committee should not consider the merits of the appeal. The Faculty submits that your Committee lacks jurisdiction to hear the Student’s appeal because the appeal “concerns a financial obligation to the University as it relates to the practices of registration, [...] not a matter of academic review.” (Faculty response, October 11, 2018). The Student’s reply does not directly address the jurisdictional issue, but restates her position that she was a new student, and speculates that perhaps the Acorn system “could not recognize the difference between a new student with outstanding balance and a continuing/ returning student with outstanding balance” (“Written Submission”, received October 17, 2018).

Section 2.1 of the AAC terms of reference provide that one of the AAC’s functions is

To hear and consider appeals made by students against decisions of faculty, college or school councils (or committees thereof) in the application of academic regulations and requirements ...

The decision of the Registrar to refuse to register the Student was not an “application of academic regulations and requirements”. Applications of academic regulations and requirements typically involve questions that go to the academic merit of a student’s work and the integrity of their academic record, such as the evaluation of their course work, their standing in their programs, or the reasonableness of a division’s response to a request for an accommodation of some kind. The decision here concerns the consequences of the Student’s financial relationship with the University for her ability to register. The AAC does not have jurisdiction over this decision. The registration status of the Student as either “new” or “continuing” in May 2017 is arguable, but that question cannot be heard by the AAC.

**THE UNIVERSITY OF TORONTO
THE GOVERNING COUNCIL**

Report #400 of the Academic Appeals Committee
November 15, 2018

To the Academic Board
University of Toronto.

Your Committee reports that it held a hearing on Wednesday, October 24, 2018 at which the following members were present:

Professor Hamish Stewart, Senior Chair
Professor Andrea Sass-Kortsak, Faculty Governor
Ms. Susan Froom, Student Governor

Hearing Secretary:
Mr. Christopher Lang, Director, Appeals, Discipline and Faculty Grievances

Appearances:

For the Student Appellant:

Mr. S.T. ("the Student")

For the Faculty of Arts and Science:

Professor Melanie Woodin, Associate Dean, Undergraduate Issues and Academic Planning
Mr. Thomas MacKay, Director, Faculty Governance & Curriculum Services

The Appeal

The Student appeals from a decision of the Academic Appeals Board of the Faculty of Arts and Science, dismissing his appeal from a decision of the Committee on Standing, dismissing his appeal from a decision of the Faculty which dismissed his petition for late withdrawal without academic penalty from CSC108, Winter 2017.

The appeal is allowed and the Student is granted late withdrawal without academic penalty.

Procedural Rulings

The Student requested a closed hearing on the basis that an open hearing might reveal certain personal financial details which he did not wish to become public. Your Chair dismissed this request. The financial details in question, though not very specific, do help to explain some aspects of the Student's situation during the Winter 2017 term. But they are for the most part irrelevant to your Committee's decision and are not revealed in this decision. Your Chair was in any event not satisfied

that the danger that these details might be revealed would rebut the presumption in favour of an open hearing.

The Student offered a piece of new evidence at the hearing. As noted below, your Chair received this evidence with the consent of the Faculty.

Overview of the Facts

The Student graduated from the University with an Honours BSc in 2009. In the Winter 2017 term, he returned to the University to pursue a second undergraduate degree and enrolled in Introduction to Computer Programming (CSC108H1S) Early in the term, he was diagnosed with a hernia. He had surgery to repair the hernia on February 22, 2017, during Reading Week, and resumed attending classes the following week. The applicable “drop date” for CSC108 was March 13, 2017. In late March and early April, the Student found that his “post-operative condition changes from manageable to an increasing discomfort and pain”. He wrote the examination for CSC108 in April 2017. It can be inferred that the Student performed very poorly on the examination because, despite having done very well on the term work, the Student failed the course.

In August 2017, the Student petitioned the Faculty for late withdrawal without academic penalty from CSC108. The petition was dismissed. The Student’s subsequent appeals to the Committee on Standing and to the Academic Appeals Board were dismissed. In its letter advising the Student of its decision, the Board stated:

You acknowledge that you received very clear advice from your doctors that you needed at least six weeks off from school and from work in order to recover from your operation. ... Your medical circumstances did not affect your mental state and decision-making capacities about your studies. You chose to remain in the course despite the medical advice that you received.

The letter to the Student states that its decision is “final.” That is true as far as proceedings within the Faculty were concerned, but the Student did have a further right of appeal to your Committee. The Policy on Academic Appeals Within Divisions, section 4.i, clearly states:

Divisional processes should require that any student whose appeal has been denied must be advised of a further right to appeal of the decision of the divisional appeals committee to the Academic Appeals Committee of the Academic Board of Governing Council. The existence of this right of appeal should be clearly communicated, in writing to students for whom the appeal was denied at the divisional level.

Accordingly, the Board’s letter to the Student should have advised him of his right to appeal to your Committee. Your Committee trusts that this oversight will not be repeated.

The Student appeals to your Committee.

Decision

The Student’s written and oral submissions emphasized the ways in which his post-operative condition, particularly the unexpected worsening of his condition in late March and early April 2017,

affected his performance on the final examination. The Student appeared to be under the impression that the Faculty did not accept this explanation for his failure. That is not the case. The Faculty has never contested the fact that the Student's medical condition affected his performance on the final examination.

On the other hand, the Faculty appears to have been operating under a misapprehension about the Student's condition following the surgery. It is unclear on what basis the Board concluded that the Student had been advised to take six weeks off following the surgery. There is nothing in the material received by your Committee to support that conclusion. (There is a retrospective diagnosis from one of the Student's family doctors that he was "significantly impaired" between February 2 and April 30, 2017, but your Committee notes that the Student's surgeon, again retrospectively, diagnoses him as "severely" impaired from February 22 to March 8, and only "moderately" impaired thereafter. The surgeon nowhere states that he advised the Student to take six weeks off.) At the hearing, the Student provided your Committee with a hospital brochure titled "Instructions for Care Following Hernia Repair" that he was given following the surgery. This brochure should have been introduced into the proceedings at a much earlier stage; however, as the Faculty did not object, your Chair admitted it. The brochure does not come close to suggesting that a patient should take six weeks off following hernia repair; to the contrary, it advises that the patient can "resume light activity" as soon as the day following the surgery. It advises that the patient "should not lift anything heavier than 5 to 10 pounds for 4 to 6 weeks" and should return for a follow-up appointment in 6 weeks. The inference your Committee draws from this brochure is that the Student and his surgeon reasonably expected that he would be able to resume his studies following Reading Week—as indeed he did. This is not a case where the Student chose to proceed with course work in the face of medical advice to the contrary; it is a case where the Student's medical condition, manageable before the drop date, unexpectedly worsened after the drop date.

A student who becomes unexpectedly ill after the "drop date" or before or during an examination should contact his or her college Registrar to work out an accommodation, if possible and appropriate. So, when the Student's condition unexpectedly worsened in late March or early April, he should have contacted the Woodsworth College Registrar. (At the hearing, the Student made a number of complaints about his Registrar's office. Your Committee is not in a position to decide whether those complaints were justified in his case, but observes that, in its experience, the University's registrars normally provide efficient, professional, and compassionate services.) At that point, a number of options could have been explored: for example, a deferred examination, an opportunity to rewrite the examination, or a timely petition for late withdrawal without academic penalty. However, your Committee finds that this is one of those rare cases where the Student's ability to make decisions about how to handle his situation was impaired by an unexpected deterioration in his medical condition, such that he was unable to properly consider his options. This is not one of those cases where the Faculty's entirely justified concern about a student "rolling the dice" by choosing to write an examination, believing that they later have an option not seek late withdrawal, applies. His failure to seek timely advice from his Registrar is understandable and the remedy he would likely have been granted had he sought it at the time is granted now.

**THE UNIVERSITY OF TORONTO
THE GOVERNING COUNCIL**

Report #401 of the Academic Appeals Committee
February 27, 2019

To the Academic Board
University of Toronto

This appeal was conducted on the basis of written submissions. The parties did not attend.

Panel

Professor H. Stewart, Senior Chair
Professor J. Mahrt-Smith, Faculty Governor
Mr. T Sutherland, Student Governor

For the Student Appellant:

Mr. N.M.: Mr. Hatim Kheir, Downtown Legal Services

For the Faculty of Medicine:

Ms. Sari Springer, Littler LLP

The Appeal

The Student appeals from a decision of the Chair of the Faculty of Medicine's Academic Appeal Committee (FMAAC), dismissing as abandoned his appeal from a decision of the Faculty's Board of Examiners (BoE), dismissing him from the M.D. program.

Background

The Student was admitted to the M.D. program and commenced his studies in the fall of 2012. He encountered a number of difficulties relating to substance abuse and other issues, and in September 2014 went on a leave of absence. In October 2016, the Student was readmitted to the program, subject to a number of conditions. One of those conditions was that he enroll in the Physician Health Program (PHP) of the College of Physicians and Surgeons of Ontario. The PHP required him to sign a monitoring agreement which contained a number of conditions. On this basis, in September 2017, the Student was readmitted to the M.D. program. On October 28, 2017, he revoked his consent to one of the conditions of the monitoring agreement, effectively terminating that agreement and therefore his participation in the PHP. On November 22, 2017, the Faculty's

Board of Examiners dismissed the Student from the M.D. program because his readmission was conditional on his enrollment in the PHP.

The Student sought to appeal the BoE's decision to the FMAAC. His Notice of Appeal was timely. The initial deadline for the submission of his Statement of Appeal was February 2, 2018. Meanwhile, the Student had made a request under the *Freedom of Information and Privacy Protection Act*, R.S.O. 1990, c. F.31 (FIPPA). The documents disclosed as a result of this request amounted to almost 9000 pages and were available to be picked up on a USB drive at the University's FIPPA office on March 20. At various times, the Faculty agreed to extend the deadline for submission of the Student's Statement of Appeal, first to March 5, then to March 20, and eventually to April 3, 2018.

The Student missed the April 3 deadline, explaining to the Faculty Affairs Officer that he had mistakenly believed the deadline to be April 6 and stating that he would deliver his Statement of Appeal by April 9. He did not do so. On April 10, the Student picked up the FIPPA documents. That same day, the Faculty Affairs Officer granted him a further extension to April 16 and advised him that if the Statement of Appeal was not received by that date, the appeal would be considered abandoned. The Student did not submit his Statement of Appeal by April 16. On April 17, the Chair of the FMAAC dismissed the Student's appeal as abandoned.

Scope of the Appeal

The Student's appeal to your Committee was originally framed as both an appeal from the FMAAC's decision to dismiss his appeal as abandoned and an appeal from the merits of the BoE's decision to dismiss him from the M.D. program. The Student's appeal materials provide submissions on both issues, and include what appears to be a draft Statement of Appeal to be submitted to the FMAAC (though the FMAAC has never received it). Subsequently, the Faculty proposed that your Committee should consider only the FMAAC's decision and, if that decision was set aside, should return the matter to the FMAAC to consider the appeal on its merits. The Student agreed with this approach. The Chair of your Committee also agreed that this was the appropriate way to proceed. Accordingly, in its response to the Student's appeal materials, the Faculty did not make any submissions on the merits of the BoE's decision, and at its meeting on January 19, your Committee did not consider the merits of that decision.

Standard of Review

The Faculty submits that the FMAAC's decision to dismiss the appeal as abandoned should be set aside only if it was "capricious or arbitrary" (Faculty's submissions, para. 68). That is not correct. The applicable standard of review is whether the decision appealed from is a reasonable application of the academic policy in question, in this case, the Faculty's appeal policy.

The Student submits that this appeal is, in effect, a request for an extension to file his appeal at the FMAAC and that your Committee's decision should be guided by the criteria laid out in *Canada*

(*Minister of Human Resources Development*) v. *Gattellaro*, 2005 FC 883, adapted to this context: (i) did he have an intention to pursue the appeal; (ii) does he have an arguable case; (iii) is there a reasonable explanation for the delay; and (iv) is there prejudice to the Faculty? (Student's submissions, para. 45.) The issue before your Committee is better framed as whether FMAAC's decision was reasonable; nevertheless, considering these factors has assisted the Committee in deciding that issue.

Decision

The Faculty submits that the Student had "failed to comply with 5 different deadlines: February 2, March 5, April 3, April 9, and ... April 16" (Faculty's submissions, para. 46). This submission is overstated. The Student was granted extensions from the deadlines of February 2 and March 5. If an extension is granted, the former deadline replaced by a new deadline. Thus, February 2 and March 5 are not deadlines that the Student missed. April 9 was not a deadline either; rather, it was the date by which the Student, after missing the deadline of April 3, told the Faculty Affairs Officer that he would submit his Statement of Appeal.

Thus, the Student missed two deadlines: April 3 and April 16. The Student explains these missed deadlines in part with reference to his FIPPA request. Your Committee finds that there is some merit to this explanation.

The Faculty makes three submissions in regard to the delay occasioned by the FIPPA request. First, the Faculty submits that while the Student was entitled to make the FIPPA request, "he ought not to be able to ... rely on the magnitude of the disclosure that he himself sought, to then seek multiple and repeated extensions ..." (Faculty's submissions, para. 50). Relatedly, the Faculty notes that the Student did not use any of the FIPPA documents in his appeal to your Committee. Your Committee rejects these related submissions. It was appropriate for the Student to seek extensions to enable him to determine whether there was anything in the FIPPA materials that could assist his appeal. The right to freedom of information would be of little value in the context of an academic appeal if the time lines for appeals could not be adjusted to give students time to consider the material obtained. Moreover, during this period, the Student was not represented by counsel and therefore did not have the benefit of counsel's advice as to whether and how the materials might assist him. Third, the Faculty notes that although the FIPPA materials were available on March 20, the Student did not pick them up until April 10. The Student explains that he was in Alberta until April 5. The Faculty argues that the Student "assumed he could simply disregard the April 3 deadline, pick up the documents on April 10 without any repercussions" (Faculty's submissions, para. 53). Your Committee is not entirely satisfied with the Student's explanation for the delay in picking up the FIPPA documents. We do not know when he went to Alberta or what arrangements he might have made to have the USB drive sent to Alberta. The Student explains that he did not return to Toronto before the April 3 deadline because of the importance of being with his family (Student's submissions, Tab 19); yet, pursuing his appeal was also very important. But your Committee does not draw the inference urged by the Faculty, and in any event considers the delay

caused by the FIPPA request to provide at least some explanation for the Student's missing the two deadlines.

In arguing that the appeal should be dismissed, the Faculty relies on a number of events that occurred after April 17, 2018. Your Committee is of the view that these events do not bear directly on the reasonableness of the FMAAC's decision as they could not have been known to that Committee. Moreover, it is not clear what inference should be drawn from them. On the one hand, they might be taken to show that the Student generally has difficulty complying with deadlines; on the other hand, they might also be taken to show that it took him some time to complete his review of the FIPPA materials and that he never intended to abandon his appeal.

On April 17, 2018, the Chair of the FMAAC knew that the Student had missed a deadline on April 3, that he had missed another deadline on April 16, and that the Student had been explicitly warned that his appeal would be dismissed as abandoned if he missed the April 16 deadline. However, the Student was at that time not represented by counsel and had recently received a large volume of material through the FIPPA process, which he had not yet fully reviewed. It would have been better if the Student had formally requested an additional extension in advance of the April 16 deadline, rather than allowing that deadline to pass; nevertheless, your Committee finds that in these circumstances it was unreasonable for the FMAAC to treat the Student's appeal as abandoned. Although there had been considerable delay in the process, much of the delay was caused by the Student's not unreasonable decision to make a FIPPA request, which cannot be held against him. The two deadlines that the Student missed were recent and close together. There could be no doubt that the Student intended to pursue the appeal. It is difficult to see what prejudice an additional brief extension would have caused to the Faculty, and indeed (apart from a general reference to the importance of following the rules) the Faculty makes no submissions on that point.

Your Committee understands that the lengthy delays in bringing this matter on for appeal are frustrating for the Faculty. Your Committee does not dictate any timetable to the parties before the FMAAC but urges them to deal with the matter expeditiously. In this connection, your Committee notes that the Student is now represented by counsel and has prepared a draft Statement of Appeal which, presumably, can be filed with the FMAAC in a timely manner.

Conclusion

The appeal is allowed and the matter is returned to the FMAAC.

**THE UNIVERSITY OF TORONTO
THE GOVERNING COUNCIL**

Report #402 of the Academic Appeals Committee (Chair Only)
March 29, 2019

To the Academic Board
University of Toronto

This motion was conducted on the basis of written submissions. The parties did not attend.

Senior Chair

Professor Hamish Stewart

For the Student

Mr. W. H.: Mr. Selwyn Pieters

For the Toronto School of Theology (TST):

Mr. Robert A. Centa, Paliare Roland Rosenberg Rothstein LLP

Preliminary Issue

The Student was enrolled in the Doctor of Theology (Th.D.) program in the Biblical Studies Department of the Toronto School of Theology (TST). On December 16, 2016, the Student and TST executed Minutes of Settlement (TST Book of Documents, Tab 3). The Minutes were intended to resolve certain issues arising out of the Student's performance in the program and certain prior academic appeals. In the process of negotiating the terms of the settlement, the Student was represented by Ms. Amanda Ross and the TST by Mr. Robert Centa. The Minutes required the Student to complete his second major comprehensive examination in the Department "on or before June 30, 2017, with a minimum grade of A-" and laid out certain further requirements with specific timelines. The Minutes provided that if the Student did not meet those requirements, his registration in the program would be terminated. Para. 2 of Schedule A further provided that he "waives any right to academic appeal any grade or any decision to terminate his registration in the program for any reason."

The Student took the second major comprehensive examination and was assigned a grade of 73% (B-). On July 31, 2017, Professor Jaroslav Skira, director of the Graduate Centre for Theological Studies at TST, advised the Student that his registration in the TST program was terminated, in accordance with the Minutes of Settlement.

The Student now seeks to appeal the termination of his registration. On December 10, 2018, he filed a Notice of Appeal to your Committee. Your Chair asked for written submissions from the parties as to whether your Committee had jurisdiction to hear the appeal. TST filed its submissions on January 9, 2019. The Student filed a Revised Reply (February 6, 2019), and TST provided a brief further Reply on February 22, 2019.

TST submits that that your Committee lacks jurisdiction to hear the Student's appeal. TST submits that the Minutes of Settlement deprive your Committee of jurisdiction to hear the appeal and that your Committee has no jurisdiction to review the validity of that agreement. TST submits further that, apart from the Minutes of Settlement, the Student would first have to appeal to TST's Graduate Studies Council Academic Appeal Committee (GSCAAC) before appealing to your Committee.

The Student submits that because he cannot appeal to the GSCAAC, he must be able to appeal to your Committee (Student's Revised Reply, para. 17); he argues, in effect, that he has exhausted his remedies within TST. He also indicates that he will argue that the Minutes of Settlement are not enforceable; specifically, that he cannot contract out of his human rights (para. 23) or out of his appeal rights within the University (paras. 25-26).

Your Committee's Terms of Reference provide that its function is "To hear and consider appeals made by students against decisions of faculty, college or school councils (or committees thereof) in the application of academic regulations and requirements ..." (2.1). Appeals from the GSCAAC to your Committee are explicitly provided for by s. 14.3.7 of TST's Program Handbook for doctoral students (2018) (at p. 56). In the normal course of events, the Student would appeal the TST's decision to the GSCAAC; if that appeal were dismissed, he could then appeal to your Committee. However, your Committee lacks jurisdiction to hear an appeal directly from a decision that was made at lower level than the council of a faculty, college or school. Accordingly, your Committee would have jurisdiction to hear the Student's appeal from a decision of the GSCAAC, but does not have jurisdiction to hear his appeal directly from TST's decision to terminate his registration.

However, the Minutes of Settlement are on their face a bar to the Student's appeal from the termination appeal to the GSCAAC. The Student submits that your Committee must therefore have jurisdiction to hear his appeal. The Chair of your Committee rejects this submission. The Committee's jurisdiction depends on its terms of reference, and is not created by the fact that no other University body has jurisdiction over a dispute between a student and a division of the University.

Moreover, the Minutes of Settlement on their face are also a bar to the Student's appeal from the termination to your Committee. TST submits that your Committee has no jurisdiction to consider the validity of the Minutes of Settlement because it "is not a decision in the application of an academic regulation or requirement" (TST Submissions, para. 2; see also paras. 15-18). The Student raises a number of arguments as to why the Minutes should not be enforced. As to whether your Committee has jurisdiction to consider its enforceability, he submits that an appeal to AAC is his "only alternative" (Revised Reply, para. 17; see also para. 19). But the fact that there is no other alternative appeal route does not give your Committee jurisdiction. He also argues that the Minutes of Settlement "arose out of issues encountered by [the Student] due to a disability ... and that required accommodation by the TST" (para. 20). It is not in dispute that TST had a duty to accommodate the Student; nor is it disputed that a student can appeal an academic decision on the ground that he or she was inadequately accommodated. At its highest, the Student's submission amounts to an argument that the Minutes of Settlement themselves could be construed as an aspect

of TST's accommodation of the Student's disability and would therefore be reviewable in the academic appeal process. In light of my conclusion that your Committee does not have jurisdiction to hear the Student's appeal at this stage, it is not strictly necessary to decide whether characterizing the Minutes of Settlement in this way would give jurisdiction; however, your Chair observes that it would be quite extraordinary for a University appeal body to consider the merits of an agreement that had been negotiated between a student and a division of the University where both parties were legally represented.

The Student's appeal is quashed.

**UNIVERSITY OF TORONTO
GOVERNING COUNCIL**

Report #403 of the Academic Appeals Committee
May 9, 2019

To the Academic Board
University of Toronto

The following academic appeal was heard on Thursday, March 28, 2019.

Panel:

Ms. Vanessa Laufer, Chair
Professor Mark Lautens, Faculty Governor
Ms. Mala Kashyap, Student Governor

Appearances:

For the Student:

D.B., the “Student”
Mr. Michael D. Wright, Cavaluzzo LLP
Mr. Tyler Boggs, Cavaluzzo LLP

For the Faculty of Medicine:

Ms. Emily Lawrence, Paliare Roland Rosenberg Rothstein LLP
Mr. Robert A. Centa, Paliare Roland Rosenberg Rothstein LLP

The Appeal

The Student appeals a decision of the Faculty of Medicine Appeals Committee (the “FMAC”) of April 30, 2018 (the “FMAC Decision”) that upheld the decision of the Undergraduate Medical Education Board of Examiners (“BOE”) dated October 14, 2015 wherein the BOE concluded that the student had lapses in professional behaviour and referred him for remediation in professionalism (the “BOE Decision”). The Student is seeking that your Committee set aside the FMAC Decision, find that there were no minor lapses in professionalism, and that the Student’s record be amended accordingly. The Student appeals on grounds of procedural fairness and that the decision was unreasonable. Specifically, the Student argues that:

- i) Faculty of Medicine regulations and procedures were not followed;
- ii) Relevant evidence was not taken into consideration when the decision was made; and

- iii) The decision could not be supported by the evidence that was considered when it was made by the FMAC.¹

The Faculty of Medicine submits that the FMAC Decision was reasonable and this appeal should be dismissed.

Overview of the Facts

The Student graduated from the MD Program in May 2016. He is a registered member of the College of Physicians and Surgeons of Ontario and is a practicing physician.

From 2012 – 2016, the Student was enrolled in the 4-year Faculty of Medicine Undergraduate Medical Program at the University of Toronto (“MD Program”). The MD Program included two years of pre-clerkship in a classroom setting followed by two years of clerkship rotation in a hospital setting, in various areas of medical practice.

The clerkship phase was overseen by Dr. Stacey Bernstein, Clerkship Director. Each course during the clerkship had a course director who reported to Dr. Bernstein.

Professional behaviour and ethical practice are requirements of the MD Program.² “Satisfactory professional behaviour is a requirement to achieve credit in every course, and assessment of professionalism is included in every course.”³ Accordingly, the MD Program has formal mechanisms such as Professionalism Evaluation Forms wherein course directors and supervising teachers can note professionalism lapses, and informal mechanisms for assessing and monitoring students’ professionalism including communicating issues directly to students or to the Pre-Clerkship and Clerkship Directors. Furthermore, relevant, context-specific expectations are also set out in the *Standards for grading and promotion of undergraduate medical students*, *Standards of Professional Practice Behaviour for all Health Professional Students*, *Guidelines for the Assessment of Undergraduate Medical Trainees in Academic Difficulty*, and *Regulations for Student Attendance and Guidelines for Approved Absences from Mandatory Activities*.

There is disagreement between the parties about the characterization of the Student’s professional behaviour during the MD Program.

December 2013 – Pre-clerkship

Dr. Pier Bryden cited the Student for “1 or 2 minor lapses in professional behaviour” on the Preclerkship Professionalism Evaluation Form for not notifying “... a course director or faculty lead of a recent absence from an ethics session until he was contacted after the session.”⁴ Dr.

¹ Affidavit of the Student, Notice of Appeal of the Student, Tab C, p 2 – 3

² *Standards for grading and promotion of undergraduate medical students*, Section 5, Tab 4, p. 22 in the Student’s Book of Documents.

³ Ibid.

⁴ Preclerkship Professionalism Evaluation Form, Tab 2, E, p.61, Faculty of Medicine’s Book of Documents.

Bryden spoke to the Student about the issue and noted the following under the Areas for Improvement section of the Form: “We discussed that when [the Student] anticipates a potential absence or difficulty meeting an academic obligation, he needs to contact the appropriate supervisor, course director directly and proactively, and ask for help if required.”⁵ This minor lapse in professionalism is undisputed by the parties to this appeal.

August 2014: Transition to Clerkship (TTC) – absence request for concert

During TTC, the Student sought and received permission in advance for a planned absence from an education session to attend an out of town concert, and he later completed required make-up activities. However, when permission for the absence was granted, the Student was made aware of the *Regulations for Student Attendance and Guidelines for Approved Absences from Mandatory Activities* by Dr. Schreiber, then Co-Director of the TTC Course, and told that requests for such an absence during clerkship would not be permitted.⁶ At the FMAC, the Student submitted this was incorrectly presented to the BOE as a lapse in professionalism. However, the Faculty of Medicine contended this was not presented to the BOE as a lapse but to indicate that the Student had been told during TTC that such requests would not be allowed during clerkship and that he had been directed to the relevant policy.

October 2014: Internal Medicine shift and meeting changes

During the Student’s Internal Medicine Clinical Rotation, he received approval from Dr. Isaac Bogoch to switch a work shift from a Saturday to a Thursday. His site supervisor, Dr. Cheryl Jaigobin denied the Student’s subsequent request for an earlier mid-rotation feedback meeting with her so he could leave by train to Windsor Friday morning for thanksgiving. Dr. Jaigobin indicated the Student had not been given permission through proper protocols to change his Saturday shift. The Student then met with and asked Dr. Bernstein to advocate for the shift change, which was then approved requiring the Student to complete an additional weekend shift. Dr. Jaigobin contacted Dr. Bogoch who indicated that he had approved the change due to a safety issue.⁷ The Student claims that Dr. Bogoch initiated the shift change due to a safety concern about the long drive.

The Student’s conduct was outlined by Dr. Katina Tzanetos on the Student’s Internal Medicine Clerkship Professionalism Evaluation Form under Critical Comments: “The student requested to be given time off call during the thanksgiving weekend without notifying the site directors. The importance of meeting call responsibilities was discussed with him and he agreed to complete an additional weekend shift.”⁸ It was not characterized as a lapse of professional behavior on the form.

⁵ Ibid., p. 63.

⁶ Faculty of Medicine’s Book of Documents, Email from Dr. Schreiber to the Student, Exhibit F, p. 65

⁷ Faculty of Medicine’s Book of Documents, Email from Dr. Bogoch to Dr. Jaigobin, Exhibit B, p. 121.

⁸ Affidavit of Dr. Michael Roberts, Respondent’s Book of Documents, Tab 4, p 135

At the FMAC, the Student submitted Dr. Bernstein misrepresented this situation to the BOE and characterized him unfairly as just wanting an extra-long thanksgiving weekend rather than indicating his request was due to a family thanksgiving dinner with older relatives.

The Faculty indicated that the Student was made aware of the protocols for call shifts at the beginning of the Internal Medicine rotation.

May 2015: Issues in Portfolio Course

The Student's Portfolio Course instructors, Drs. Roberts and Parker, assessed the Student's May 28, 2015 Portfolio Group performance as insufficient under all categories due to his behavior, and that subsequent email correspondence and a meeting with the Student led them "to question his ability to work in a professional manner."⁹ Dr. Roberts indicated he would have noted this as a professionalism lapse if the course had used Professionalism Evaluation Forms at that time.¹⁰ The matter was shared with the Course Director, and then Dr. Bernstein who referred the Student to Dr. Erika Abner (the faculty ethics advisor) for professionalism coaching and moved the Student to another Portfolio Group.

The Student submitted that his behavior in portfolio was not disruptive or disrespectful, the Faculty wrongly indicated that he did not make himself readily available to meet about the May 28th session, that it was incorrect and misleading for the Faculty to imply the alleged behaviour took place in more than *one* session and to suggest that he was referred to Dr. McKnight. He submitted that his meeting with Dr. Abner was not a remediation nor was a professionalism lapse mentioned as part of that meeting.

August 2015: Faculty Medicine Rotation – missing a seminar, and shift change requests

In August 2015, Dr. Lisa Ilk, the Student's Family Medicine Rotation Clinical Supervisor, cited him for two minor professionalism lapses - one for missing a seminar without prior approval, even after a discussion with her about the protocol; the other for attempting to change his shifts to work with specific doctors, even after he had been told by Dr. Ilk that this was inappropriate. Dr. Ilk indicated the Student informed her about his stepfather's health but when asked, had said he did not need time off for it.

The Student's view is that he followed correct protocols regarding the missed seminar and the shift changes.

He sent a critical email to Dr. Ilk about her mentorship, indicating that he was uncomfortable with the minor lapses, and that she had not considered his stepfather's health. Dr. Ilk informed the Course Director, Dr. Azadeh Moaveni of the situation.

⁹ Affidavit of Dr. Michael Roberts, Faculty of Medicine's Book of Documents, Tab 4, p 132.

¹⁰ Ibid., p 135.

The Student submitted that Dr. Bernstein omitted information about the Student's stepfather's health from the BOE presentation and exhibited bias, and that he did not know the seminar was mandatory. He disagreed that there had been multiple requests to change the schedule to work with preferred doctors.

September 2015 – Referral to Board of Examiners

The Faculty submitted that Dr. Moaveni upheld the professionalism lapses and noted the tone of the Student's email to Dr. Ilk was unprofessional¹¹. She shared this with Dr. Bernstein. The Student emailed Dr. Bernstein and Dr. Moaveni outlining his disagreement and that he had made an appointment with Dr. Abner, (the faculty ethics advisor). In an email dated September 15, 2015, Dr. Bernstein indicated that she would be bringing the Student to the BOE in October about his professionalism. Despite attempts to meet to discuss, the Student and Dr. Bernstein did not meet before the BOE hearing. There were additional email exchanges including during the weekend prior to the BOE hearing at which time a 45-minute phone call between the Student and Dr. Bernstein also took place.

Process at the BOE

The Student submitted that i) the Faculty did not follow its own regulations and procedures when it referred him to the BOE, ii) relevant evidence was not taken into consideration by the BOE when the decision was made, and iii) that the decision could not be supported by the evidence that was considered when it was made by the FMAC. The Student also indicated that Dr. Bernstein's prepared written submission to the BOE¹² attacked his character without evidence, and without the Student having the opportunity to defend himself. He suggested Dr. Bernstein was biased against him and implied potential impropriety of the attendance of Dr. Nickell, Associate Dean, Health Professions. The Student submitted that since his emails were not presented to the BOE, its members could not evaluate them and the Student could not dispute their characterization in Dr. Bernstein's prepared submission as he did not know what would be presented. He further alleged that he was not given proper notice of the BOE hearing; was not provided adequate time to prepare a defence or know the full case against him; was not permitted to attend or have an advocate attend to present his case in front of the BOE; was not given the right to call witnesses; had a reasonable concern of bias and was not afforded due process regarding professionalism lapses.

The Faculty submitted that it followed its regulations and procedures and acted fairly in all dealings with the Student; followed its Standard in identifying the Student's professionalism issues and provided notice of referral to the BOE and the five incidents to be addressed there; that the FMAC was a fair process with a reasonable and correct finding that upheld the decision of the BOE, that

¹¹ Faculty of Medicine's Book of Documents, Tab 6, Exhibit C, Email from Dr. Moaveni to the Student, p. 248.

¹² Dr. Bernstein's Summary of Difficulty for the Student, Student's Book of Documents, p. 89

the Student presented no evidence of bias and that neither Dr. Bernstein nor Nickell participated in decision-making.

The Standard of Review on this Appeal

The question for your Committee on this appeal is whether the FMAC decision was reasonable.

Decision

Faculty of Medicine regulations and procedures were followed

Your Committee concluded that it was reasonable for the FMAC to determine that Faculty regulations and procedures were followed, that the *Guidelines for the Assessment of Undergraduate Medical Trainees in Academic Difficulty* (“Assessment Guidelines”) could be considered an outline of normal practice regarding minor professionalism lapses, and that the Clerkship Director may deviate from normal practice when referring a case to the BOE provided a rationale is given.

It was reasonable for the FMAC to conclude that Dr. Bernstein had reasonable grounds to take the Student’s case to the BOE considering the professionalism concerns of the Faculty. The evidence showed that in her capacity as Clerkship Director, Dr. Bernstein was the frontline decision maker who received direct observations and assessments of the Student’s professional behaviour from Faculty of Medicine colleagues, such as Drs. Bryden, Jaigobin, Tzanetos, Parker, Roberts, Berger, Moaveni and Ilk. These came in the form of formal assessments (such as Preclerkship Professionalism Form, Critical Comments in the Clerkship Professionalism Form, Evaluation of Group Meetings Form) and/or informal communications including conversations and emails. We accept the Faculty of Medicine’s submission that these doctors were experts who were well suited to make informed, context-specific professionalism evaluations that accordingly should not be interfered with by this Committee.

It was reasonable for the FMAC to reject the Student’s claim that he had not been provided reasonable notice of the BOE meeting or sufficient time to prepare a defence. Email correspondence of September 15, 2015 submitted by the Faculty showed Dr. Bernstein informed the Student more than a month in advance that she would be taking his case to the BOE plus a rationale for so doing. Her email and rationale were also part of an email string from the same day that included correspondence from Dr. Moaveni to the Student outlining in considerable detail his two Family Medicine lapses and the fact they had met to discuss them. Given this timing, it was reasonable for the FMAC to conclude that the Student had more than a month to make further inquiries about the issues and prepare his written submissions.

Your Committee was not persuaded by the Student’s interpretation of the *Standards for grading and promotion of undergraduate medical students* that the word “normally” does not pertain to professionalism. A broader reading of these Standards must include professionalism since

“Satisfactory professional behaviour is a requirement to achieve credit in every course, and assessment of professionalism is included in every course”¹³.

Relevant evidence was taken into consideration when the decision was made

Your Committee finds the FMAC received and considered extensive evidence – affidavit, documentary, and oral submissions by the parties - and its decision was rationally connected to and based on that evidence. The Student attended the FMAC hearing in person with legal representation and oral submissions were made.

August 2014: Transition to Clerkship (TTC) – absence request for concert

Based on the evidence, including Dr. Schreiber’s August 13, 2014 email to the Student, your Committee finds it was reasonable for the FMAC to determine that the TTC absence was presented to the BOE not as a lapse in professionalism but to make them aware that the Student was informed at that time that missing sessions for personal reasons during Clerkship would not be allowed and that he was directed to the relevant regulations at that time.

October 2014: Internal Medicine shift and meeting changes

Based on the evidence, your Committee finds it was reasonable for the FMAC to determine that the Student reasonably ought to have known that Dr. Bogoch was not the right person to approve a call shift and that the safety rationale for requesting a shift change was questionable. This is supported by the August 13, 2014 email sent to all year 3 Medicine Clerks indicating the complexity of the call schedule, that switching call or requests for planned absences is not simple and providing the relevant policy. Moreover, the Student’s October 6, 2014 email to Dr. Jaigobin requested the meeting change so he could to go to Windsor for the thanksgiving weekend by train. It was reasonable for the FMAC to find that aside from the Student’s testimony, there was no indication that Dr. Bogoch initiated the change request as there was no evidence, aside from the Student’s, to support this.

May 2015: Issues in Portfolio Course

Based on the evidence, it was reasonable for the FMAC to accept the Portfolio scholars’ observations of the Student. As noted above, your Committee accepts these doctors are experts who are well suited to make informed, context-specific professionalism evaluations that accordingly should not be interfered with by this Committee. This includes Dr. Bernstein’s evidence about being unaware of any other conflict arising between student and portfolio facilitators.

August 2015: Faculty Medicine Rotation – missing a seminar, and shift change requests

As the Student had noted in his Statement of Appeal to the FMAC that Dr. Ilk told him there was an expectation for him to attend the seminar, your Committee finds it was reasonable for the

¹³ Affidavit of the Student, Notice of Appeal of the Student, Section 5, *Standards for grading and promotion of undergraduate medical students*, Tab 4 para 5 p. 23.

FMAC to conclude that Dr. Ilk had made it clear to the Student that the seminar was mandatory. We further find that it was reasonable for the FMAC to rule that the combination of the *Clerkship in Family and Community Medicine Student Handbook* and the *Regulations for Student Attendance and Guidelines for Absences from Mandatory Activities* together with Dr. Ilk's expectation of attendance made it reasonably clear that the session was mandatory.

With regards to the second professionalism lapse during the Family Medicine Rotation, based on the evidence of Drs. Ilk and Moaveni, the Committee finds that it was reasonable for the FMAC not to accept the Student's submission that he asked for only one shift change.

The decision could be supported by the evidence that was considered when it was made by the FMAC

Your Committee accepts as reasonable the FMAC findings that Dr. Bernstein's document presented to the BOE was a high-level summary that was not intentionally misleading, and that no evidence of bias was found on the part of the BOE members. We further accept as reasonable the FMAC's determination that the BOE's decision was supportable and connected to the evidence.

Your Committee listened carefully to the submissions of both parties and further reviewed the following legal cases that were provided regarding procedural fairness: *Baker v. Canada (Minister of Citizenship & Immigration)*¹⁴, *Khan v. The University of Ottawa*¹⁵, and *AlGhaithy v. University of Ottawa*.¹⁶

Among other things, the *Baker* case established that an oral hearing is not always necessary "to ensure a fair hearing and consideration of the issues involved"¹⁷ and that the duty of fairness has a flexible nature that "recognizes that meaningful participation can occur in different ways in different situations."¹⁸ Five factors for considering procedural fairness were outlined:

1. the nature of the decision being made and process followed in making it;
2. the nature of the statutory scheme and the term of the statute pursuant to which the body operates;
3. the importance of the decision to the individuals affected;
4. the legitimate expectations of the person affected by the decision; and
5. the agency or administrator's choice of procedure.

Accordingly, the Committee considered the specific context of the case before it. The BOE process is *in camera* and submissions are primarily written. Its process is not close to a trial model and so need not be court like. The consequences at the BOE for the Student were remedial, educational and restorative, not punitive. It was not a situation where the Student's right to continue in the program or his career were at stake. The Committee was informed that the Student is currently a

¹⁴ *Baker v. Canada*, [1999] SCC 699 (S.C.C) Book of Authorities of the Student, Tab 1.

¹⁵ *Khan v. The University of Ottawa*, [1977] O.J. No. 2650 (O.C.A) Book of Authorities of the Student, Tab 2.

¹⁶ *AlGhaithy v. University of Ottawa*, 2012 ONSC 142 Book of Authorities of the Faculty of Medicine, Tab 12

¹⁷ *Baker v. Canada*, [1999] SCC 699 (S.C.C), Book of Authorities of the Student, Tab 2 para 33.

¹⁸ *Ibid.*, para 34.

registered member of the College of Physicians and Surgeons of Ontario and is a practicing physician, but as there was no evidence presented on whether the Student suffered grave and permanent consequences on his professional career, it was not a factor that your Committee could weigh in favour of a higher standard of procedural fairness. We concluded that a more relaxed standard of procedural fairness is appropriate in this situation.

Your Committee considered the *AlGhaithy* case and the submissions made about it. The case states that “Courts are reluctant to interfere with the academic decisions of universities unless there has been “manifest unfairness” in the procedure adopted or the decision is unreasonable.”¹⁹ Your Committee does not consider the proceedings of the BOE or the FMAC were manifestly unfair or that the decisions were unreasonable.

Your Committee notes that the Faculty of Medicine had chosen the procedures of its own BOE.²⁰ The Faculty is well-suited to determine what is best for its own community, its faculty members are expert assessors of professionalism within its academic programs, and this Committee should not interfere with their academic assessments. The option to appeal the BOE decision was also available, and the Student availed himself of this option at the FMAC and at this Academic Appeal.

As noted above, your Committee accepts that reasonable notice and sufficient time to prepare a defence were afforded to the Student regarding the BOE hearing. Moreover, detailed communications / assessments of the Student’s professional issues had already been provided to him on previous occasions; these were already well-known to him. He had appeared before the BOE previously and was familiar with its process. Moreover, the evidence shows that all UME students were directed to the BOE Terms of Reference online. No evidence was provided of bias on the parts of Drs. Bernstein or Nickell.

However, if your Committee is incorrect and there was any denial of procedural fairness at the BOE, this Committee accepts the submission of counsel for the Faculty that any such defects were cured by the FMAC proceeding, which amounted to a hearing *de novo* and met the requirements of procedural fairness. Indeed, the FMAC considered the appropriateness of the BOE decision based on extensive evidence and so stood in the BOE’s shoes. The Student had every opportunity to fully present his case there, and he did so with legal representation.

Your Committee notes that the Student’s case is clearly differentiated from the *Khan* case. Unlike the *Khan* case where Khan was facing a failed year and a possible delay if not end to her career, the Student here was not facing a failed year or loss of the right to continue in his profession. Furthermore, the Student’s credibility was not a central issue in this case whereas it was in *Khan* as the only direct evidence in that case was Khan’s word. As such, in the Student’s case, procedural fairness did not require an oral hearing.

¹⁹ *AlGhaithy v. University of Ottawa*, 2012, ONSC 142, Faculty of Medicine’s Book of Documents, Tab 12, p. 305.

²⁰ Board of Examiners Terms of Reference, Faculty of Medicine’s Book of Documents, Tab 9, p. 259.

For the reasons outlined above, your Committee finds the decision of the Faculty of Medicine Appeals Committee of April 30, 2018 to be reasonable.

The appeal is dismissed.