FILE: 2000/01-05
Trial: 1999/00-04
Judicial Review Dismissed – Court File 607/02, March 29, 2004

IN THE MATTER OF THE UNIVERSITY TRIBUNAL

OF THE UNIVERSITY OF TORONTO (APPEAL DIVISION)

BETWEEN:

Mr. W.

Appellant

- and –

UNIVERSITY OF TORONTO

Respondent

Panel:

Patricia D.S. Jackson, Chair
Professor Marvin Gold
Josh Hunter
Professor Lorraine Weinrib

Appearances:

W. Gerald Punnett, Counsel for the Appellant
Lily I. Harmer, Counsel for the University

[1] This is an appeal by Mr. W. to the Discipline Appeals Board from his conviction by the Trial Division of the University Tribunal on a charge of plagiarism, contrary to the *Code of Behaviour on Academic Matters*. The student also appeals the sanction imposed by the Trial Division.

[2] Mr. W. was convicted of the following charge (the "Charge"):

1. In or about March 12, 1999, you did represent as your own idea any idea or expression of an idea or work of another in connection the report entitled "The Required Process and Affects of Legislation over Pollutant Emissions in the

Automotive Industry" submitted for academic credit in MIE415S, contrary to section B.I.1.(d) of the University of Toronto's Code of Behaviour on Academic Matters, 1995 (the "Code").

[3] On December '7, 1999 Mr. W. was found guilty of the Charge. The Trial Division Panel imposed the following sanctions:

- a grade of zero in the course;
- the recording of the sanction on his academic record and transcript for a period of two years;
- the case be reported to the Vice President and Provost, who may publish a notice of the decision of the Tribunal and the sanctions imposed in the University newspapers, with Mr. W.'s name withheld; and
- suspension from the time of the offence up to whatever date is appropriate (e.g. end of December or early January) to permit the student to re-enrol in the course in January 2000, if otherwise eligible.

[4] On January 10, 2000, Mr. W. notified the University Tribunal of his desire to appeal the conviction on the basis that the Trial Division panel wrongly disallowed evidence he wished to introduce to show that another student committed plagiarism but had not been charged. There followed discussion and correspondence between Mr. W. and the University as to the scope of the appeal, and the extent of the evidence which was required to be transcribed as a result.

[5] On May 23, 2000, the student (through recently retained counsel) delivered an amended notice of appeal to which the University consented. In it he stated as the grounds of his appeal that his rights under section 15 of the *Charter of Rights and Freedoms* had been breached, that he had not been able to make full answer and defence to the charges, and that the proper procedure for the laying of charges had not been followed. In the alternative, the student set forth his intention to appeal his sentence.

[6] At the hearing of the appeal on August 29, 2000, Mr. W.'s counsel set forth the following grounds of appeal:

1. Mr. W. should not have been tried at the same time as Mr. K., a second student charged with the same offence in relation to the same report[1];
2. the attribution of sources in the report demonstrates that the appellant did not intend to plagiarize or alternatively such attribution was sufficient that there was no plagiarism;

[1] See 1999-00-05.

3. the Chair of the Trial Tribunal wrongly allowed the University to reopen its case during the course of submissions, resulting in fundamental unfairness to the appellant;

4. the Tribunal wrongly excluded evidence of plagiarism by other students who wrote other chapters of the same report;

5. the University did not comply with the pre-hearing procedures specified in the *Code*; and

6. the penalties imposed by the Trial Division were inappropriate.

[7] No objection was taken by the University to this further expansion of the grounds for the appeal.

THE TRIAL

[8] The Charge was one of two relating to Chapter 3 (the "Chapter") of a report entitled *The Required Process and Effects of Legislation Over Pollutant Emissions in the Automotive Industry* (the "Report"). Chapters 1 and 2 were written by other students. Chapter 3 was written by Mr. W. and another student, Mr. K. Mr. K. was charged with the same two offences with which Mr. W. was charged. The students were jointly tried. Neither student was represented at the trial by counsel.

[9] At the outset of the trial, the Chair of the panel spent some time reviewing with the students the seriousness of the charges, their entitlement to a lawyer, and to an adjournment to obtain a lawyer. She said:

> And at the outset, I just wanted to ensure that you are aware that you're absolutely entitled to have a lawyer representing you. Sometimes, although people are aware of it, they don't fully realize the implications and the desirability of having a lawyer until they get close to the hearing date, then sometimes they have trouble finding one on short notice. And I really wanted to make sure that you know that the allegations against you are quite serious; that this is going to be conducted in a relatively quasi-judicial way and that the University has a lawyer, so I wanted to make sure that you have had every opportunity to consider whether you wanted to obtain a lawyer and that you had an opportunity to do so. That's one matter.
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> I also wanted to have some time and I think probably off the record discussion just about it if you don't and you are prepared to go on, what we should do about the fact that there are two with charges against both of you. So you may want some time to consider that. I would say at the outset, if you want further time in order for you to obtain a lawyer you are entitled to have that and we would ensure that you got it, and I think its something you'd want to think about very seriously

> before you decide that you don't want one.
>
> I don't know if the University has advised you what remedies they might be seeking against you or not. We are not told what they are so I don't know, but I know that the range of remedies are all fairly serious and it's a matter of something that you carry with you if you are found to have committed the offences. You carry that with you, generally speaking, for some time. So I think it's very important that you have every opportunity to ensure that whatever position you take is put forward absolutely as well as it could be put forward.

[10] There followed a discussion, some on the record and some oft of the various alternatives that the students might wish to consider as a source of legal representation. At the end of that discussion the students declined the opportunity of an adjournment to obtain counsel and indicated they wished to proceed.

[11] The Chair of the panel then returned to the issue alluded to above; that it was proposed to proceed against the two students together. She said:

> We were just discussing off the record some of the issues involved in proceeding against two students together versus separately, and, again, I'd just like to, for the record, indicate that you've been invited to discuss or to raise any issues you have about being heard together. We have advised you that you could have been heard separately if you so wish. If that wasn't clear, let me make it clear. Likewise, if you decide you would like to have them heard together but if there's any issue that arises later which you feel you may have the same position that you should raise it at that time so that there's no concern about the fairness of having it heard together. Do you have any questions on that?

While the transcript records the answer to that question as "inaudible" the Chair restated it in a fashion which indicates there was an affirmative response. She said: "You're content that the University proceed against both of you together?" Again the response recorded in the transcript was "inaudible". However, the entire conduct of the trial is consistent with an affirmative response and entirely inconsistent with any reservation being expressed to a trial of the two students together. As the Chair said, if either student wished the charges to be heard separately they would be. In this appeal Mr. W.'s counsel affirmed that he was not saying that Mr. W. did not consent to a joint trial and further affirmed that if Mr. W. had not consented to the joint trial evidence to clarify the inaudible portion of the transcript would have been led on the appeal.

[12] The evidence led by the University established that the Chapter was 18 pages long. The first eight and three-quarter pages were prepared by Mr. K., and the balance by Mr. W. There were five footnotes in the portion of the Chapter prepared by Mr. K. There were none in the portion prepared by Mr. W. With the exception of the occasional word or phrase, everything in the 18 page chapter, except a one paragraph conclusion, was entirely copied from a consultant's report referred to in the footnotes.

[13] At the conclusion of the University's case, the appellant and Mr. K. indicated that they

wished to introduce certain documentary evidence. The appellant indicated the documents related to his desire to demonstrate that the students who had been responsible for chapters 1 and 2 of the Report had copied portions of the documents he sought to introduce and hence had also committed the offence of plagiarism. In an extended discussion with the Trial Division panel, the students confirmed that the purpose of the documentary evidence was entirely related to the question of whether other students had committed the same offence. The Trial Division panel concluded that the question of whether or not other students had also committed an offence was not relevant to the issue of whether Mr. K. and Mr. W. had committed an offence. The panel further concluded that it did not have authority to conduct a wide ranging inquiry into whether other students, who had not been given notice, who had not been charged, and who were not there to defend themselves, had committed plagiarism. The panel held the evidence should be restricted to whether or not the students before them had committed the offence.

[14] Following this ruling, and although he was advised that he was entitled to present evidence as to whether or not he had committed an offence, including any evidence which would explain his understanding of the instructions given in the course or his intentions as to whether the work was his own or not, the appellant advised the Tribunal he had no further evidence to submit. Mr. K. testified that he thought he and the appellant had provided sufficient attribution in the Chapter to indicate that they were not in effect claiming the work as their own.

[15] At the conclusion of the trial the panel found both students guilty of the Charge. The panel provided the following reasons for its decision:

> The students ought to have known that the manner of presentation of their chapter suggested that a very significant portion of the chapter was original work and clearly it was not. We find that the acknowledgement on page 23 of the Report suggests that the recommendations were original although based on analysis of others, in this case a technical sub-group. In fact, however, the recommendations were also those of the same consultants whose analysis was relied on. Further, the whole chapter is almost a verbatim reproduction of the consultant's report. To no reader could this acknowledgement be taken to indicate that the whole chapter was such a reproduction, despite the footnote attached to it. The footnotes found later in the chapter, only in Mr. K.'s portion, did give some attribution to the consultant's report. These however were insufficient to disclose the extent and indeed the totality of the reliance on the consultant's report. In our view, the instructions and the advice given in instructions early in the course clearly indicated that both extensive research and original analysis were required. We are of the view that these students ought to have known that a chapter so deficiently documented would be taken as their own to a very considerable extent. Fourth year students ought to have known that the finding and reproduction of the consultant's report would not meet the requirements of the team project.
>
> With respect to the procedural complaints made, we find that the procedure set out in the *Code of Behaviour on Academic Matters, 1995* was not entirely complied with. It appears that the opportunity to meet with the instructor without the Chair, as set out in C.I.(a)2. was not provided. The Chair ought not to have

> been brought in until the later stage under C.1.(a)4. However, we find this defect did not put the students at any disadvantage. They ultimately were aware of the allegations and they had an opportunity to respond to them in the decanal procedures.

[16] The panel provided the following reasons for the sanctions noted at the outset of this decision:

> We would have been inclined to impose a one-year suspension from approximately the date of the offence, which would have been from the spring of 1999 to the spring of 2000, and permitted the students to enrol to redo the course in September, 2000. However, we appreciate that practically speaking, this is not possible because the course is not offered in the fall term. We understand that the course will be offered in January, 2000. We are, therefore, of the view that it would be fair in the circumstances in this case to impose the following sanction [set out above]…
>
> We note that this sanction is more lenient than we might have imposed had the course not been available only in January; however, we feel that the requirement to wait until the following January would in effect be almost a two-year suspension from the offence until graduation. We have taken into account that graduation in normal course has been precluded and that the course is not being offered in the fall term, the fact that the project was 20% of the course, and, finally, although it was totally inadequate, there was some attribution given. We are of the view that some acknowledgement has been given this evening with respect to the deficiencies of the work.
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> We emphasize that plagiarism must be viewed very seriously because it is an offence which runs counter to all principles of learning and of trust that the University stands for. It really cannot be tolerated and we very much hope that the students appreciate the severity of their actions and that they are getting a second chance to complete their studies in accordance with University standards.

From this decision, Mr. W. appeals.

APPELLATE JURISDICTION

[17] By virtue of the provisions of section E.4.(a) and (c) of the *Code*, an appeal to the Appeal Division of the University Tribunal lies in the case of a conviction, on a question which is not one of fact alone, and, in any event, from the sanction imposed.

First Ground of Appeal: The joint trial

[18] The University Tribunal is governed by the provisions of the *Statutory Powers*

Procedures Act. Pursuant to section 9.l(l)(a), the Tribunal may combine two or more proceedings involving the same or similar questions of fact, law or policy with the consent of the parties.

[19] The appellant says that the trial panel erred by:

1. putting the onus on the accused to say why they should not be tried together;

2. failing to identify why the cases should be heard together; and

3. failing to ensure that the appellants' consent was recorded on the transcript.

[20] We do not consider that the Tribunal erred in any of these respects. The trial panel made it clear to both students that if either of them objected they would be tried separately. There was no suggestion that they had to justify such a separation.

[21] Moreover, this is a case where the similarity of the facts and law underpinning the identical charges against two students who jointly authored the chapter which is the subject of the charges is evident. The conditions of section 9.1 are accordingly met. It is not incumbent upon the Tribunal to identify such evident similarities as a basis for exercising the jurisdiction accorded by the section.

[22] As to the requirement of consent, both the contents of the trial transcript as a whole, and the submissions of the appellant's counsel make it clear that the parties did consent to a joint trial. The failure of the reporter to fully record that consent does not avoid it. As noted above, the appellant's counsel confirmed that he would have led evidence if there was any suggestion that the appellant had not in fact consented.

[23] Finally, we do not consider that there was any injustice as a result of the joint trial. The appellant was asked whether it resulted in any prejudice. He referred to a general explanation given by the panel Chair to the two students in connection with their rights of cross-examination. She advised both students that they were entitled to cross-examine but explained that generally speaking it was not permitted to have exactly the same cross-examination done twice. The appellant appeared to suggest that this unexceptional explanation of the law resulted in a hypothetical denial of the appellants' right to cross-examine. However, there was no indication at the trial or on appeal of an area in which the appellant sought to cross-examine and was denied.

[24] Nor was there any indication that the defences of the two students were in conflict. Indeed, the appellant relied substantially on Mr. K.'s evidence both at the trial and throughout the appeal.

[25] We do not consider that the joint trial of the two students is a basis upon which to allow this appeal.

Second Ground Of Appeal: The appellant did not intend to plagiarize or alternatively the

appellant gave adequate attribution to his sources

[26] The appellant argued that the attribution which resulted from the five footnotes in the Chapter indicated that he did not intend to represent the Chapter, or his portion of it, as his own work. Alternatively, he argued, such attribution was sufficient that no plagiarism occurred.

[27] The appellant did not give evidence at the trial. Specifically, he did not testify that he did not intend to plagiarize. This ground of the appeal proceeded on the footing that the attribution contained in the Report, taken with what the appellant alleges is ambiguity as to what constitutes plagiarism, indicates that he did not intend to plagiarize. Alternatively, he argued, such attribution was sufficient that no plagiarism occurred.

[28] It is to be noted that the *Code* defines the offence of plagiarism as follows:

> It shall be an office for a student knowingly:…
>
> > to represent as one's own any idea or expression of an idea or work of another in any academic examination or term test or in connection with any other form of academic work. (Code, s.B.I.1(d))

The Code further provides:

> Whenever in this Code an offence is described as depending on 'knowing' the offence shall likewise be deemed to have been committed if the person ought reasonably to have known. (Code, s.B.)

In other words the finding of the Trial Division panel that the appellant "ought to have known that the Report suggested that a significant portion of the it was original work when it was not", and "ought to have known that a report so deficiently documented would be taken as [his] own to a very considerable extent" is a finding of the necessary mental element to constitute the offence of plagiarism.

[29] The Applied Science and Engineering calendar begins with a message from the Dean in which he draws the students' attention to the *Code* and in particular cautions students that plagiarism will not be tolerated in any course. The calendar goes on to contain the sections of the *Code* defining plagiarism as the representation of plagiarism as it is expressed in the Charge.

[30] The written guidelines for the term project in respect of which the Report was written contains the clear direction: "superficial reports containing 'filler' gleaned from a few books or journals will be treated harshly. Therefore, it is expected that you will utilize all possible sources of information such as libraries, computer searches, contacts with industry and government employees, and original analysis."

[31] Even absent these express directions, we agree with the Trial Division which did not accept that the finding and reproduction of a consultant's report would meet the requirements of a fourth year term paper, or that fourth year students could accept that it would. We also agree

with them that no reasonable reader (including the two students) could consider that five footnote references would be sufficient acknowledgement to indicate that the whole chapter (save the one paragraph conclusion) was copied from a consultant's report. We note, as well, that there was no such attribution in the portion of the Chapter for which the appellant was responsible.

[32] The Trial Division panel's rejection of this defence was based on its findings of fact as described above. We think those findings of fact are more than supported by the evidence. Even if we had the jurisdiction to interfere with these purely factual findings, we would not do so. We do not consider that this second ground is a basis upon which to allow the appeal.

Third Ground of Appeal: The Re-opening of the University's Case

[33] During the closing submissions of the University the Chair of the Trial Division panel asked a question about the relationship of the Chapter to the balance of the Report. She followed that up with a question as to whether it was the only chapter that related to VOC emissions. In response to the Chair's technical question and after some further discussion, Professor Thompson gave some explanatory evidence. Before he testified, the University inquired whether there would be any objection to his addressing the question. After his testimony, the appellant was given an opportunity to ask further questions on the evidence. He neither objected nor asked further questions.

[34] The evidence given by Professor Thompson in answer to the Chair's question was to clarify why the Chapter did not appear to relate to the structure of the rest of the report and why it received the further consideration which ultimately led to a determination that a charge of plagiarism would be laid. It did not go to the question of whether plagiarism had occurred. It was simply by way of clarification to a technical question by the Chair as to the structure of the Report.

[35] We do not consider that this brief exchange which does not go to proving any element of the offence amounts to a "re-opening" of the University's case. Even if it did amount to a re-opening, and even in a criminal case, there is a discretion to permit such re-opening which should not be interfered with unless an injustice has resulted.

[36] The appellant takes the position that any further evidence with respect to the paper amounts to a prejudice to him. However, he was able to offer no explanation of how or why this brief exchange related to the question of whether he had committed plagiarism.

[37] We do not consider that there was any injustice in allowing Professor Thompson to answer the Chair's questions and we would not allow the appeal on this basis.

Fourth Ground of Appeal: Exclusion of evidence of plagiarism by other students

[38] The appellant submitted that the failure to allow evidence intended to indicate that the authors of other chapters of the Report had also committed plagiarism was unfair and constituted

an error.

[39] We do not agree that the Trial Division panel's decision to exclude this evidence was in error. We agree that the issue to which the evidence was said to be directed, the potential commission by others of an offence, is irrelevant to the question of whether the appellant committed the offence.

Fifth Ground of Appeal: Failure to comply with the Code's pre-hearing procedures

[40] The Code sets forth a set of divisional procedures to be followed when an instructor believes that an academic offence has been committed. Included among the procedures are the following:

> (a) Where an instructor has reasonable grounds to believe that an academic offence has been committed by a student, the instructor is to inform the student immediately and invite the student to discuss the matter. Nothing said in that discussion may be used or receivable in evidence against the student. (*Code*, s.C.I.(a).2)
>
> (b) If after that discussion, the instructor believes that an academic offence has been committed, or if the student does not respond to the invitation for a discussion, the instructor is to make a report of the matter to the Department Chair or through the Department Chair to the Dean. (*Code*, s.C.I.(a).4)
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> (c) When the Dean or the Department Chair has been so informed, he or she is to notify the student in writing, provide him or her with a copy of the *Code* and afford the student an opportunity for discussion of the matter. In the case of the Dean being informed, the Chair of the Department and the instructor are to be invited by the Dean to be present at the meeting. (*Code*, s.C.I.(a).5)
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> (d) Before proceeding with the meeting, the Dean is to inform the student that he or she is entitled to seek advice, or to be accompanied by counsel at the meeting, before making, and is not obliged to make, any statement or admission. The student is to be advised that any statement he or she makes at the meeting may be used or receivable in evidence against the student in the hearing of any charge with respect to the alleged offence in question. (*Code*, s.C.I.(a).6)

[41] The *Code* further provides that these procedures will not normally be examined in a hearing before the Tribunal. A failure to carry out the procedures or any defect or irregularity in the procedures does not invalidate subsequent proceedings before the Tribunal unless the Chair of the hearing considers that such failure, defect or irregularity resulted in a substantial wrong, detriment or prejudice to the accused. (*Code*, s.C.I.(a).l1)

[42] In this case, as the Trial Division panel found, the pre-hearing procedure was not entirely complied with. The appellant did not have an opportunity to meet with the instructor without the

Departmental Chair as set out in C.I.(a).2. In the first instance there was an off-the-record meeting with the instructor and the Chair, followed by the meeting contemplated as set out in sub-paragraph (c) above.

[43] The appellant urged that he ought to have had an opportunity to meet with the teaching assistant who marked the Report and argued that had that meeting occurred the problem might have been "nipped in the bud and a decision taken not to proceed with the prosecution". There does not appear to be any evidentiary basis for this argument. Moreover, there is no requirement in the *Code* to afford a meeting with the teaching assistant, but rather with the. instructor. More importantly, we do not see any basis for departing from the conclusion of the Trial Division panel that the students were not at any disadvantage as a result of the defect in procedures. We have not been asked to find, and we do not, that there is any basis for suggesting that the conclusion of the Trial Division panel that the students were aware of the allegations and had an opportunity to respond to them in the decanal procedures is wrong. We do not consider that there was any substantial wrong, detriment or prejudice to the accused and we decline to allow the appeal on this basis.

Sixth Ground of Appeal: Inappropriate penalty

[44] The appellant asks that the penalty be varied and that his grade in the course not be reduced to zero. He proposes two alternatives. He suggests that his mark in the course be determined on the basis that only his grade in respect of the Report (worth 20% of the final mark) be reduced to zero. Alternatively, he asks that the Report be marked and the inadequacy of attribution be dealt with in the mark.

[45] In support of this submission, he argues that the Trial Division panel was attempting to impose a sanction which would allow him to return to the course in January. However, he says, with a mark of zero in the course he would not be eligible to return.

[46] During the course of the original hearing with respect to sanctions the University endeavoured to apprise the Trial Division panel of information with respect to the appellant's academic status to allow them to assess the impact of any sanction imposed. The appellant objected to the University providing the Trial Division panel with that information, and also refused to provide any information himself in that regard. Accordingly, and as a result of the position taken by the appellant, there was no information before the Trial Division panel as to the impact of the sanctions which were being considered, except information from the appellant's co-defendant, Mr. K. It was Mr. K.'s evidence that led the Trial Division panel to reduce the suspension it would otherwise would have imposed.

[47] Although he had objected to the Trial Division being advised of his academic status in respect of the assessment of sanction, the appellant now complains of the impact of the sanction on his academic status. The University indicated that in light of the appellant's position it was prepared, with his consent, to address the question of the impact of the sanction on his academic status and in particular his ability to re-enrol in the course. After consultation, the appellant's counsel advised that he did so consent.

[48] The University then advised us that the appellant's academic record was such that he would be unable to re-enrol regardless of the result in this course. He would have to achieve 93% in the course, an apparent impossibility regardless of the result on the Report, in order to re-enroll.

[49] We do not consider this an appropriate case to vary the penalty imposed by the Trial Division. We note that it was not the objective of the Trial Division panel to impose a sanction which would necessarily permit the student to re-enrol in the course in January 2000, only to re-enrol if he was otherwise eligible. He was not otherwise eligible. Further, we agree with the observations of the Trial Division concerning the seriousness of the offence of plagiarism and its threat to the underlying principles of learning and trust upon which the University depends. The Trial Division imposed a sanction which in all of the circumstances was lenient. We do not consider it appropriate to make it more lenient. Penalizing the appellant only in relation to his mark in the Report, rather than in the course as a whole does not, in our view, adequately reflect the reality that plagiarism does not simply reflect a want of academic quality, but also of academic integrity. If the sanction were limited to the mark in the particular Report, we do not consider that it would adequately signal to the appellant or to other students the severity of the offence of which he has been convicted.

[50] For all of these reasons we dismiss the appeal.

March 8th, 2001

Patricia Jackson
Marvin Gold
Josh Hunter
Lorraine Weinrib