

**THE UNIVERSITY TRIBUNAL
THE UNIVERSITY OF TORONTO**

IN THE MATTER OF charges of academic dishonesty made on August 24, 2018,

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:

UNIVERSITY OF TORONTO

- and -

A [REDACTED] M [REDACTED] (the “Student”)

REASONS FOR DECISION

Hearing Dates: November 13 and 20, 2019 and January 15, 2020

Members of the Panel:

Mr. Shaun Laubman, Lawyer, Chair
Professor Julian Lowman, Faculty Panel Member
Ms. Karen Chen, Student Panel Member

Appearances:

Ms. Tina Lie, Assistant Discipline Counsel, Paliare Roland Rosenberg, Rothstein LLP
Ms. Hanna Yakymova, Downtown Legal Services, Representative for the Student

Hearing Secretary:

Krista Kennedy, Administrative Clerk and Hearings Secretary, Office of Appeals, Discipline and Faculty Grievances, University of Toronto

In Attendance:

The Student, (in person on November 13, 2019); (via Skype on November 20, 2019; and January 15, 2020)

1. The Trial Division of the University Tribunal heard this matter over three days. Mr. M██████ (the “Student”) participated in person on the first date and by videoconference on the second and third.
2. For the reasons provided below, the Tribunal found the Student guilty of academic misconduct.

Background and Agreed Statement of Facts

3. Helpfully, the parties provided an Agreed Statement of Facts (“ASF”) that was relied upon by the Tribunal. The ASF addressed many of the underlying facts and certain procedural matters and is reproduced in full as Schedule “A” to these Reasons.
4. The Student was charged as follows:
 - a. On or about March 15, 2018, you knowingly forged or in any other way altered or falsified a document or evidence required by the University, or uttered, circulated or made use of such forged, altered or falsified document, namely a Scantron sheet that you submitted in a midterm examination in LMP301H1 (the “Course”), contrary to section B.I.1(a) of the *Code*.
 - b. On or about March 15, 2018, you knowingly obtained unauthorized assistance in connection with a midterm examination that you wrote in LMP301H1, contrary to section B.I.1(b) of the *Code*.
 - c. In the alternative, on or about March 15, 2018, you knowingly engaged in a form of cheating, academic dishonesty or misconduct, fraud or misrepresentation in order to obtain academic credit or other academic advantage of any kind in connection with a midterm examination that you wrote in LMP301H1, contrary to section B.1.3(b) of the *Code*. (collectively referred to as the “Charges”)

The University's Position and Evidence

5. The University's position was that the Student copied off the exam paper of one or more students sitting around him in the exam room. However, since there were two different versions of the exam distributed (version A and version B), the Student had to misrepresent on his Scantron form that he had a version A exam since that was the version of the exam that he copied off of. The Student had in fact been given a version B exam.
6. The University called Dr. Lei Fu as its first witness. Dr. Fu was one of the course instructors. She was present during the exam although she did not participate in the distribution of the exam prior to the students entering the room. She did describe the room layout, where there were tables and chairs aligned in straight rows.
7. She also described how each row received either a version A or a version B exam with each table in a row receiving the identical version. The version distributed alternated between rows to reduce the potential for cheating.
8. Both versions of the exam had the same questions but the questions were arranged in a different order.
9. Dr. Fu said she did not notice anything suspicious during the exam. If students finished the exam early, they were permitted to hand in their completed Scantron form and exam and leave within ten minutes of the end of the session. Students who did not finish earlier than ten minutes before the end had to remain and their Scantron forms and exams were collected at the end.
10. Dr. Fu described how the forms and exams were collected quickly at the end as students were in a hurry to leave. She said that she separated the version A and version B forms/exams into separate piles. When she went through them individually, she noticed that there was a version A Scantron form with a version B exam. The form in question was the Student's.

11. In other words, the Student indicated on his Scantron form that he had a version A exam but the exam that he submitted with the form was a version B exam.
12. Dr. Fu counted all of the submitted forms and exams and found there were an equal number of version A and version B exams, 62 of each. However, when she counted the submitted Scantron forms, she counted 63 version A forms and 61 version B forms. She said she recounted the forms and exams three times to confirm the discrepancy. The Student's Scantron form was the only one where the version noted on the form differed from the associated version of the exam.
13. The University's second witness was Professor Elizabeth Cowper, Dean's Designate for Academic Integrity. She testified about the Dean's Designate meeting with the Student.
14. According to Prof. Cowper, at the meeting, the Student was confronted with the allegation that the specific version B exam that was entered into evidence at the hearing was the exam he had been given. The Student denied that he was provided a version B exam and insisted that he had received a version A exam. When asked about apparent erased markings on the version B exam, the Student denied that the markings were his handwriting. According to Prof. Cowper, at the meeting, the Student denied any knowledge as to why there was a discrepancy between his Scantron form and the version of the exam he handed in with it.
15. Finally, the University tendered the affidavit evidence and expert report of Diane Kruger, a forensic document examiner. Ms. Kruger's opinion evidence went in on consent and was uncontested.
16. Ms. Kruger determined that the erased markings on the version B exam were the Student's. Importantly, this was admitted by the Student by the time of the hearing (see paragraph 13 of the ASF). The Student also admitted in the ASF that he had in fact received a version B exam.
17. Ms. Kruger was able to reconstruct the markings that the Student had erased. In the upper right hand corner of the exam pages, he had written answers to the questions that

corresponded with the answers he used on his Scantron form. He then erased the answers on the exam.

18. The University's position was that the Student was compelled to change his explanation and denial from the Dean's Designate's meeting after he was confronted with the expert forensic evidence tying him to the version B exam with the erased markings.

The Student's Position and Evidence

19. The Student testified in his own defence.
20. The Student described that when he entered the exam room, the exams and Scantron forms were already distributed on the individual tables. He said that he had a version A exam and it wasn't until after the exam had already started that he noticed he had somehow been given a second exam as well, this one a version B exam.
21. The Student acknowledged during his cross-examination that he could have raised his hand and asked for guidance on what to do with the two versions of the exam. However, he said he was worried that he would get in trouble for having two versions and in a panic he decided that the best course of action was to complete his Scantron form using the version A exam he said he noticed first.
22. When it came time to hand in his exam, the Student's testimony was that he intended to hand in the version A exam but he inadvertently handed in the version B exam instead. He said he took the version A exam with him from the exam room and disposed of it before he was aware there was any issue of academic misconduct.
23. The Student's explanation for the erased markings on the version B exam he submitted was that he used it as a worksheet when he ran out of room on the version A exam.
24. Finally, the Student said that he felt that Prof. Cowper had already made up her mind and there was no benefit to explaining what had happened at the Dean's Designate meeting. He acknowledged being given the opportunity to provide an explanation but claimed that he did not think that Prof. Cowper would listen to him so he simply denied that the version B exam was his.

25. The Student's position was that he was given both versions of the exam and that he did in fact have a version A exam as indicated on his Scantron form. He claimed to have received no advantage as a result of getting both versions of the exam since the questions were identical (only in a different order). He denied any academic violation and maintained that the answers on his Scantron form were his and not copied off of anyone.

Additional Witnesses and Motion for an Adjournment

26. The Tribunal had to address a number of mid-hearing motions and evidentiary issues. In each case, the Tribunal sought to arrive at a decision that was consistent with the procedural and evidentiary rules and that balanced the interests of the parties.

27. Reasons for the mid-hearing motions were delivered orally during the course of the hearing. However, in order to assist future Tribunals confronted with similar issues, a brief summary of the issues and reasoning for the decisions is provided below.

Inadmissible evidence

28. First, the Student sought to call a second witness at the hearing, Brendan Neufeld. Mr. Neufeld was the Student's initial case worker at Downtown Legal Services during the summer of 2019.

29. Mr. Neufeld was going to provide evidence regarding his observations of the distribution of answers across the 124 exams that were completed for the mid-term. The purpose of this evidence was to support the Student's argument that there were no other exams that had an identical or substantively similar pattern of correct and incorrect answers. The inference that the Student wanted to have drawn was that he did not copy off of any other student taking the exam.

30. The University objected to Mr. Neufeld's evidence and the objection was upheld. First, there is a concern that a party's legal representative (even if that representative is not actively conducting the hearing) should not be giving evidence at a hearing unless there are compelling reasons for it. More significantly, the proposed evidence was Mr. Neufeld's observations and conclusions drawn from the documentary evidence. It is

questionable whether the proposed evidence was in fact evidence as opposed to argument but, even if it was, it would effectively be opinion not fact evidence and of no assistance to the Tribunal in the circumstances.

31. The Student was allowed to address the observations and arguments that had been proposed to be put into evidence via Mr. Neufeld as part of the closing submissions.

Adjournment to call reply evidence

32. The next motion arose after the Student completed his evidence and the defence rested its case. The University requested an adjournment in order to call reply evidence. The Student opposed the adjournment request.

33. The basis for the University's request was that it wanted to consider and potentially call the teaching assistants for the Course, who were involved with distributing the exam papers, in reply to the Student's evidence that he had been given both version A and version B exams. The University asserted that the first time it had heard this explanation was when the Student testified and therefore it could not have anticipated the need to call the TAs as witnesses.

34. The Student opposed the adjournment request for several reasons:

- a. the University was splitting its case. According to the Student, the University could and should have anticipated the Student's defence and called the TAs to testify at the hearing as part of its case in chief; and
- b. the prejudice to the Student arising from the further delay. The Charges had been outstanding for over one and a half years already and the Student would have to travel back from England, where he lives, if there was another day of hearing.

35. The adjournment request was granted on terms. While it was reasonable to argue that the University could have called the TAs as witnesses during their case in chief given their involvement in the events in question, it was true that the Student chose to provide his explanation for the first time during his testimony. That was his right, however, fairness dictated that the University be given an opportunity to call reply evidence.

36. While the need for an adjournment was unfortunate, terms were imposed in order to negate any potential prejudice:
- a. The University was instructed not to discuss the evidence at the hearing with the potential reply witnesses;
 - b. Any reply evidence was strictly limited to true reply, that is, it had to be in response to evidence that was raised for the first time in the Student's testimony;
 - c. The delay due to the adjournment was brief as all parties and counsel were accommodating and able to find a date within one week to resume the proceeding; and
 - d. The Student was given the opportunity to participate in the resumed hearing via videoconference. Since he had already testified, there was no impact on the quality of the evidence as a result of this accommodation.

Production of counsel's notes

37. On the second hearing date, prior to the University calling its reply witnesses, the Student brought a motion seeking production of University counsel's notes of interviews conducted with the reply witnesses in between the hearing dates.
38. The University called as reply witnesses two of the TAs for the Course who were invigilators for the exam. Prior to the second hearing date, the Student was provided with a "Will Say" summary of the reply witnesses' proposed evidence.
39. The Student argued that the University should have to produce counsel's notes from the interviews with the witnesses in order to understand what questions were asked. The Student contended that it was relevant to know what questions were asked since the way that the questions were framed could impact the substance of the answers.
40. The University opposed production on the basis that counsel's notes were privileged. It also argued that the content of the questions was irrelevant and production could lead to

the need for University counsel to become a witness, thereby leading to a further adjournment.

41. The Student's production motion was denied. While the case law submitted to the Tribunal in support of the parties' respective positions was largely distinguishable, there is a general principle that the notes prepared by counsel of interviews conducted in preparation for a hearing are subject to litigation privilege. The underlying facts are not subject to privilege, however, the notes themselves ordinarily will be. That applies even in a case such as this one where the University acknowledged that the discussions with the TAs in between the hearing dates were the first time that the potential witnesses were interviewed.
42. However, to ensure that the Student had full disclosure of the underlying facts within the proposed reply witnesses' knowledge, the University was ordered to review the counsel notes and to provide a summary of any additional facts that were not reflected in the "Will Say" summaries that had already been produced even if the additional facts were not evidence that the University intended to lead.

University's Reply Evidence

43. As stated, the University called two reply witnesses, Scott Ryall and Kristiana Xhima.
44. Mr. Ryall was the lead TA for the Course. He was the individual primarily responsible for preparing and distributing copies of the exams. He described the procedure that he followed for distributing copies of the exams, alternating between version A and version B for adjacent rows. He also described the process he followed for counting the number of exams that he brought to the exam room, that were distributed to students at the exam and then either not used (as there were extra copies) or handed in at the end of the exam with the completed Scantron forms.
45. Mr. Ryall described the methodical counting process he undertook to ensure that all copies for the exams were accounted for. He said that the exam was a "restricted exam" meaning that students were not permitted to keep copies of the exams. This was because the same exams were used each time the Course was offered, at least in recent years.

46. Mr. Ryall said he did not notice anyone cheating during the exam. However, he did say he recalled Dr. Fu stopping in the middle of collecting the exams at the end. According to Mr. Ryall, she stopped when she collected the Student's Scantron form and exam and noticed the discrepancy between the two.
47. Ms. Xhima did not recall as many details as Mr. Ryall. She did recall that there was a system in place to alternate between handing out version A and version B exams but she did not recall the specifics.
48. Ms. Xhima did not recall Dr. Fu stopping in the middle of collecting the exams. Instead, like Dr. Fu, she recalled that the discrepancy between the Student's Scantron form and his exam was discovered following the exam when Dr. Fu was reviewing all of the exams that were handed in.

Decision of the Tribunal

49. The Tribunal deliberated and after considering the evidence and submissions presented by both the University and the Student, it unanimously determined that the Student was guilty of knowingly engaging in a form of cheating, academic dishonesty or misconduct, fraud or misrepresentation in order to obtain academic credit or other academic advantage of any kind in connection with the midterm examination in LMP301H1, contrary to section B.I.3(b) of the *Code of Behaviour on Academic Matters*.
50. As set out in the ASF, there was no dispute regarding the following facts:
- a. The Student did receive a version B exam;
 - b. He did not provide his name or student number on the exam paper, as required;
 - c. He made markings on the exam paper and subsequently erased some of them;
 - d. He submitted a Scantron form indicating that he had received a version A exam;

- e. The Student answered 18 out of 25 questions correctly based on the version A exam. Based on the version B exam, he would have only received a score of 4 out of 25.
51. There was also no dispute that the Student did not give the explanation that he had received copies of both the version A and version B exams when he met Prof. Cowper for the Dean's Designate meeting. Instead, at the meeting, the Student denied that the version B exam was his.
52. The Student's explanation at the Hearing was not accepted by the Tribunal. As stated above, it was inconsistent (and directly contrary in some respects) to the explanation he gave at the Dean's Designate meeting. The Student's evidence as to why he did not tell Prof. Cowper that he had received two exams was not credible. By the time of the meeting, the Student knew he faced an allegation of serious academic misconduct. It did not make sense for him to lie if he had in fact received two versions of the exam as he claimed at the hearing.
53. It is more likely that the Student denied getting a version B exam at the Dean's Designate meeting because he believed at the time that was his best opportunity to avoid liability. However, in the face of the University's expert handwriting evidence that tied him to the version B exam, he had to change his explanation to the Tribunal.
54. The Tribunal also did not accept the Student's account of what took place on the day of the exam. There was no direct evidence to corroborate that he received a version A exam. The Tribunal does not accept that the Student would not have raised his hand and asked for assistance had he actually discovered that he had been given both versions of the exam. We also do not accept the Student's evidence that he inadvertently handed in the version B exam and left with the version A exam that he had intended to submit with his Scantron form.
55. The Student had no explanation for why he erased the answers that he wrote in the upper corners of his version B exam booklet. The erased markings corresponded with the

answers on his Scantron form. It is more likely than not that he erased the answers in an effort to conceal them when he handed in the exam booklet.

56. While there were some inconsistencies in the evidence of the University's witnesses, these can be explained by the passage of time since the exam date. Mr. Ryall's evidence established that there was a system in place for ensuring that students received only one version of the exam and that the overall number of exams that were distributed were accounted for throughout. His evidence established that it was very unlikely that the Student inadvertently received two different versions of the exam.
57. Finally, while the Tribunal was satisfied by the evidence that the Student had committed an academic offence, we were not convinced that the Student cheated in the manner alleged by the University. There was no direct evidence showing that he copied off another student at the exam. All of the University's witnesses testified that they did not notice any unusual activity while the exam was being written.
58. In light of the fact the professors have used the same exam for several years (a practice they may wish to reconsider going forward), it is just as likely that the Student had access to the answers for a version A exam before the exam was administered. He could have then copied the answers to his exam paper from memory and then erased those markings in an effort to conceal that the version B exam was his.
59. The Panel accepted the University's submission that it did not have to prove exactly how the Student cheated in order to establish that an academic offence was committed. It relied on the "Ms. B" [Case No. 2003/04-1, April 7, 2004] and "Ms. K" [Case No. 595, October 12, 2010] Tribunal Decisions that stand for this proposition. The University did establish on a balance of probabilities, with clear and convincing evidence, that the Student had violated the *Code*.
60. Based on the evidence before it, and the fact that the precise method of cheating on the exam was not established but various forms of misrepresentation were proven, the Tribunal determined that there had been a violation of the third charge, pursuant to section B.I.3(b) of the *Code*.

Penalty

61. Both the University and the Student presented evidence at the penalty stage.
62. The Student had a prior offence. In the Winter 2016, the Student had submitted two forged quizzes for credit. He admitted to the academic offence when he was caught. He was ultimately given a grade of zero for the course, suspended for eight months and a notation was placed on his transcript until graduation. He also was required to write letters of apology to his professor and the Department administrator.
63. The University relied on the prior offence and the fact that the misconduct in the Course was committed in his first semester back at the University as aggravating factors. The University acknowledged that the Student had cooperated during the discipline process (consenting to evidence and agreeing to the ASF) but contrasted that with his untruthful evidence at the hearing. The University also contended that the Student had not demonstrated that he had learned from his mistakes or accepted responsibility for his actions.
64. The University asked the Tribunal to impose a grade of zero for the Course, a suspension until December 31, 2022 (just under three years), a notation on the Student's transcript until graduation and publication of the decision.
65. The Student testified that he was only one credit short of graduation. In fact, he testified that, but for the conviction, he had been offered the chance to improve his grade in a mathematics course and that would have been enough for him to graduate. He also testified that he had an open job offer but it was contingent on his graduation. The Student spoke about the stress he experienced with a difficult and demanding course load and with the pressure of meeting the expectations of his family and the requirements to maintain an external scholarship he had received to attend the University.
66. The Student accepted all of the University's proposed sanctions except for the duration of the suspension. The Student's position was that a suspension of two years and eight months was appropriate and would allow the Student to return and complete his studies in the Fall 2022 semester.

67. The Tribunal imposed the following penalty on the Student:

- a. a grade of zero in the course LMP301H1;
- b. a suspension from the University of Toronto from the date of this Order until July 13, 2022;
- c. a notation of the sanction on his academic record and transcript from the date of this Order until the date he graduates from the University of Toronto or until June 1, 2023, whichever date is later; and
- d. that this case be reported to the Provost, with the Student's name withheld, for publication of a notice of the decision of the Tribunal and the sanctions imposed.

68. The parties agreed on the sanction except the length of the suspension. Even then they were only months apart. The Tribunal accepted the Student's submission and determined that a suspension that allowed the Student to return to the University to complete his studies in the Fall 2022 semester was appropriate. The July 13, 2022 date was selected because the hearing commenced on November 13, 2019 and the Tribunal felt it was unfair to penalize the Student for the two months it took to complete the hearing given that an adjournment came at the University's request.

69. However, the Tribunal also felt it was appropriate to ensure that the notation on the Student's transcript lasted until at least June 1, 2023. This was out of concern regarding the possibility of the Student re-offending if he elects to immediately pursue graduate studies after graduation.

70. Finally, the Tribunal also noted the length of time that passed between when the offence was committed and the matter was brought to a hearing. In total, it was twenty months between the exam date and the hearing. While the inherent prejudice to the Student was mitigated by the fact he was able to take and complete courses in the interim, this amount of time is less than ideal. It is expected that the discipline process will typically be much shorter since students should not be subjected to the stigma, uncertainty and stress of being charged any longer than necessary.

Dated at Toronto, this 31st day of January, 2020

A handwritten signature in blue ink, appearing to read "Shaun Laubman", with a long horizontal flourish extending to the right.

Shaun Laubman, Co-Chair