

THE DISCIPLINE APPEALS BOARD

THE UNIVERSITY OF TORONTO

IN THE MATTER of charges of academic dishonesty made on January 9, 2020

AND IN THE MATTER OF the University of Toronto *Code of Behaviour on Academic Matters, 1995* (the "Code")

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:

J [REDACTED] H [REDACTED] L [REDACTED]

Appellant

- and -

UNIVERSITY OF TORONTO

Respondent

REASONS FOR DECISION

Appeal Hearing Date: March 3, 2022, via Zoom

Members of the Discipline Appeals Board Panel:

Ms. Patricia D.S. Jackson, Senior Chair
Professor Ramona Alaggia, Faculty Panel Member
Mr. Amin Kamaledin, Student Panel Member

Appearances:

Ms. Lily Harmer, Assistant Discipline Counsel for University, Paliare Roland Rosenberg Rothstein LLP
Mr. William Webb, Co-Counsel, Paliare Roland Rosenberg Rothstein LLP
Ms. J [REDACTED] H [REDACTED] L [REDACTED]

Hearing Secretary:

Mr. Christopher Lang, Director, Office of Appeals, Discipline and Faculty Grievances

The Appeal

1. Ms. J■■■■ H■■■■ L■■ (the “Student”) appeals from the decision of the University Tribunal of January 19, 2021. The Tribunal found the Student guilty of altering and falsifying her midterm exam in GGR308 (the “Course”) and of making use of the falsified document (the “Resubmitted Exam”) by submitting it for re-grading in an attempt to obtain additional marks. The Tribunal found this conduct was contrary to section B.I.1 (a) of the *Code of Behaviour on Academic Matters* (the “Code”). The Tribunal ordered that the Student receive a final grade of zero in the Course and that she be suspended from the University for a period of four years, with the sanction being recorded for a period of five years in the Student’s academic record and transcript.

2. The Resubmitted Exam which is the foundation of the offence that was found to have occurred contains marks for the questions in the exam which differ in a number of places from the marks recorded by the Professor and the Teaching Assistant who marked the exam.

3. The Student submits that the Tribunal erred in failing to address several places where the Student alleges that, based on the markings and notations on the Resubmitted Exam described more fully below, the University failed to prove that those differences demonstrate that she had falsified the original exam paper. She says that the Tribunal did not adequately consider her evidence and these issues raise “doubts and discrepancies”. She says that she is entitled to the presumption of innocence, and that the matters she says the Tribunal did not consider raise a reasonable doubt that she is guilty, with the result that the Tribunal’s decision should be reversed.

4. For the reasons that follow, we dismiss the appeal.

The Decision Below

5. The University's case was essentially based on the evidence of two witnesses and the associated documents.

Evidence of the Teaching Assistant

6. Ms. Kira Holland was a Teaching Assistant for the Course, and marked a substantial portion of the mid-term examination in issue. At the time she had been a Teaching Assistant for two years. She was responsible for marking Parts 1 to 3 and a portion Part 4 of the mid-term exam and Professor Peirce, the Course professor, marked the balance of Part 4.

7. Ms. Holland described her usual practice for grading exams, which she would have followed in this case. She marked by question, rather than by exam paper, using an erasable red pen. She added check marks, comments and corrections to each exam paper. For this mid-term she added the marks for each part and wrote the sum on the front of the exam booklet. In doing so she testified that she would have followed her usual process of adding up all the marks twice to ensure accuracy and/or spot-checking random exam booklets to verify that the marks added up.

8. She then entered the marks for each student in an Excel spreadsheet (the "Holland Spreadsheet") and used the addition function on Excel to double check her addition of a total grade on the front of each examination booklet.

9. In the case of the Student, this resulted in a record on the Holland Spreadsheet of 10 marks for Part 1, 7.5 marks for Part 2, 7.5 marks for Part 3, for a total of 25 out of a possible 46 marks for Parts 1 to 3. She also recorded a mark of 25 out of a possible 62 for the portion of Part 4 that she marked.

10. The Resubmitted Exam that is the basis of the offence sets out 7 questions of those marked by Ms. Holland in which the mark differs from the marks recorded on the Holland Spreadsheet or the subsequently and separately prepared spreadsheet created by Professor Peirce (the "Peirce Spreadsheet"). Ms. Holland testified that although it was always possible to make an error, in her experience marking discrepancies have always been an issue of one or two points and almost always based on content, not addition. Given that the discrepancies on the Resubmitted Exam occurred in 2 separate parts of the exam, and that to her knowledge no other

students had raised any concerns about the marking of the exam, she did not believe she had made the errors that the Resubmitted Exam indicated.

Evidence of the Course Professor

11. Professor Sarah Peirce is an Assistant Professor in the Department of Geography and Planning. She taught the course in issue. She confirmed that she was responsible for marking the balance of the exam. She received from Ms. Holland the examination papers with the marks that Ms. Holland had awarded, and the Holland Spreadsheet.

12. She then marked the remaining questions. As Ms. Holland had done, she used an erasable red pen to mark the exam.

13. She then created a more detailed spreadsheet (the "Peirce Spreadsheet") of her own in which she recorded the total marks that each student had received on each portion of the questions as reflected in Ms. Holland's red ink notations on the examination booklet. The spreadsheet was not only more detailed than the Holland Spreadsheet, it was, because it was based on the examination booklets themselves, created independently of the Holland Spreadsheet.

14. According to both the Holland Spreadsheet (as it related to the questions marked by Ms. Holland) and the Peirce Spreadsheet, the Student received a total of 35.5 marks. The Professor awarded two bonus marks to all of the students after she reviewed the marks and concluded the exam had been too difficult. In the result the Student's exam received a total of 37.5 marks, for a grade of 60%.

15. Two days after returning the marked exams to the students, the Professor received an email from the Student stating that, while the total score for her examination was correct, some parts of the exam "might not be" correct. The Student said she could not attend the Professor's office but offered to send a picture of the examination so that it could be corrected. The timing of this email was within the 2-week period within which a student might request a change in exam marks.

16. At the Professor's urging, the Student in fact attended at her office at which time she provided the Professor with the Resubmitted Exam, which she claimed was the exam she had received back after marking. She described concerns that she had with possible inaccuracy of the sum of the marks recorded, and described what she said were discrepancies between individual markings of questions within the exam and the total recorded on the front page (the 35.5 marks which became 37.5 as a result of the two bonus marks). The Professor and the Student confirmed that the Student's arithmetic was correct on the basis of individual marks written in red ink within the Resubmitted Exam and on that basis the Professor agreed to increase the Student's mark from 35.5 to 43.5, which became 45.5 as a result of the bonus marks.

17. The Professor retained the Resubmitted Exam.

18. In reviewing the Resubmitted Exam more carefully after her meeting with the Student, the Professor observed a number of anomalies that caused her concern. It appeared that some comments by Ms. Holland and or the Professor had been erased and/or whited out. It also appeared that some marks had been changed using a red pen similar to the one used by Ms. Holland and the Professor.

19. It then became apparent that several marks for the individual questions and one of the total marks in the Resubmitted Exam that the Student had produced differed from those recorded on the Peirce Spreadsheet, and from the totals in the Holland Spreadsheet, and that those differences produced a total of eight additional marks. The Professor summarized the additional marks not reflected in the Peirce spreadsheet as follows:

Question	Exam for Re-marking	Peirce Spreadsheet	Difference
Part 2, Q. i	3	1.5	+1.5
Part 2, Q. iv	3	1.5	+1.5
Part 3, Q. 18	1	0	+1
Part 3, Q. 20	4.5	1.5	+3.0
Part 3, Q. 21	2.5	1.5	+1.0

Part	Cover of Exam for Re-marking	Internal Exam for Re-marking	Peirce Spreadsheet	Holland Spreadsheet
Part 1	10	10	10	10
Part 2	2.5	10.5	7.5	7.5
Part 3	12.5	12.5	7.5	7.5
Part 4	10.5	10.5	10.5	n/a
Total	35.5 + 2	43.5	35.5 + 2	n/a

20. The Professor created a black-and-white photocopy of the Resubmitted Exam on which she highlighted in yellow words that she suspected had been erased or whited out or where changes had been made. She also added comments detailing her suspicions in red as well as circling in red the comments that she had added to the Resubmitted Exam during her meeting with the Student.

21. The Professor testified that she did not recall any other students in the Course raising concerns about the grading of their exam or the calculation of marks. She also reviewed her emails and did not have any request from other students in the Course to review their exams or to schedule a meeting with her.

22. She further noted that she found Ms. Holland to be an experienced teaching assistant and grader and that she trusted the accuracy of Ms. Holland and her spreadsheet.

Evidence of the Student

23. The Student testified that when she received her exam back she saw that the internal marks did not match up with the top marks on the page and that she had questions with respect to the comments. So, she emailed the Professor and asked how it could be reviewed.

24. She said that she met with the Professor and pointed out the difference between the internal marks and the mark at the top of the page of the test, with the result that the Professor agreed to change the marks, but also asked to keep the examination paper for her review.

25. She maintained that she used a black pen when she wrote the examination and confirmed that she had made no changes. She denied making any changes subsequently and indicated that

someone else must have made them and that any error in the marking had to have been made by someone else.

26. When the Student met with the Professor to discuss the exam and the marking she was not aware of the existence of the Peirce and Holland Spreadsheets.

27. When the discrepancies between the marks recorded on the Peirce and Holland Spreadsheets and those resulting from the additional marks apparently shown on the Resubmitted Exam were pointed out, the Student then denied that she had sought additional marks in her meeting with the Professor. She said that there was no significance to the timing of her original email (within the limited time in which additional marks could be sought) and denied that her original meeting with the Professor was to seek additional marks. She said she was only seeking clarification on comments in the paper that she did not understand. She also denied that she was happy when during the meeting the Professor increased her mark.

28. When questioned as to how this was consistent with her original suggestion that she send the exam to the Professor by photograph (a process that, had it occurred, we note might have increased her mark, but would have shed no light on the comments) she denied seeking a higher mark and again asserted she was simply seeking clarification of the comments.

29. With respect to the portions of the answers that had been whited out, the Student maintained that the whiting out had all been done during the exam, out of a concern that if she wrote too much she might be penalized.

The Tribunal's Decision

30. The Tribunal concluded that the University had established on a balance of probabilities based on clear and convincing evidence that the Student had changed the marks in her examination booklet in an attempt to persuade the Professor to increase her mark.

31. They found the evidence of Ms. Holland and Professor Peirce straightforward, internally and externally consistent, and essentially untouched in cross-examination. They rejected the

evidence of the Student as lacking in credibility based on its inconsistency and essential implausibility.

32. Among the reasons in support of this conclusion, which we find to be eminently reasonable, are the following:

- It was simply implausible that both Professor Peirce and Ms. Holland would make 8 to 9 similar mistakes in their marking of the Student's examination and then both of them would make identical errors entering those marks in the independently prepared Peirce and Holland Spreadsheets.
- It was implausible and lacking in credibility for the Student to assert that she was not seeking additional marks or that that influenced the timing of her email (which expressly addressed the question of marks) and instead then to assert that she sought only to review with the Professor the comments made on the marked exam.
- That the resulting story led her to deny that she was happy when the Professor increased her mark only added to the lack of credibility and to the implausibility of her evidence.
- Her assertion that she was not seeking to increase her marks was inconsistent with and undermined by her suggestion that the matter be dealt with simply by her taking a photograph of the examination which, as noted above, would shed no light on the comments, but might lead to an increase in the marks.
- The Student's testimony that she used white out during the exam in order to shorten certain of her answers was implausible, and (in our view perhaps even more tellingly) inconsistent with the fact that parts of the red check marks created during the marking process were covered by white out.

The Appeal

33. At the hearing before the Tribunal, the Student submitted a lengthy document entitled "Doubts and Discrepancies" which detailed the ways in which she asserted that the suspicions of the Professor, and the arguments of the University concerning the changes she was alleged to have made to the Resubmitted Exam were in error. In this appeal she both complains that the document was not marked in evidence, and also that the Tribunal erred in failing to agree with its contents.

34. While the first two pages of the document in question were evidence and marked as such, the balance of the document was not marked in evidence. However, it is clear from the Tribunal's Reasons for Decision, from the Student's summary of that document in her factums, and from the argument before us that the balance of the document constituted argument which, while considered by the Tribunal, was not evidence, and was properly not treated as such.

35. The Student asked that we review "each question" raised in her list of doubts and discrepancies. She reviewed each place where it was suggested she had changed the Resubmitted Exam, giving reasons why it was wrong to suggest she had made such a change.

36. While we give below some examples of why, on the record before us, we would not be inclined to draw the conclusions the Student asks us to draw, we must begin by pointing out that the request misconceives the role, and indeed the jurisdiction, of the Discipline Appeals Board.

37. The Student is asking us to retry this case, and to make different factual findings than the Tribunal did.

38. The Code makes it clear that the purpose of an appeal is not to seek a reversal of purely factual findings. It expressly provides that a student may not appeal a question or questions which are purely factual:

4. An appeal to the Discipline Appeals Board may be taken in the following cases, only:
 - (a) By the accused, from a conviction at trial, upon a question *which is not one of fact alone*.. (Emphasis added.)

39. It is true that the Discipline Appeals Board has broad remedial powers, including the power to modify the verdict or penalty and impose any sanction that it sees fit. But the Board adheres to a level of deference to Tribunal decisions. It is well-established that the Board will not simply substitute a decision it would have made for that of the Tribunal on the basis that it would place a greater emphasis or different meaning on particular pieces of evidence. This is particularly the case where, as here, the Tribunal has made findings of credibility with the benefit of seeing the witnesses in person (via Zoom) and measuring the quality and veracity of their evidence. This is even more so in a case, such as this, where the Student has declined to order the transcript of the proceedings.

40. One other preliminary matter that we should address is the assertion by the Student that she is entitled to the "presumption of innocence". To the extent that this implies that these proceedings require the University to establish its case on the basis of a criminal standard, in other words beyond a reasonable doubt, it is in error. Nonetheless, the University *is* required to establish its case on a balance of probabilities, in other words to establish facts which sustain the charge on a basis that is more likely than not, based on clear and convincing evidence. This is expressly the standard that was applied by the Tribunal below, and it is the correct standard.

41. However, having made these observations about our jurisdiction and the burden of proof, we do not mean it to imply that if the burden of proof were different, or that if we were entitled to substitute our own judgement on the facts, we would come to a different conclusion than the Tribunal below.

42. We do not think there is any other explanation other than that the Student altered the Resubmitted Exam in a manner that was intended to lead to her receiving a higher grade than she in fact did. Those facts include the following:

- It is evident that she marked up the exam after receiving it back. Like the Tribunal, we think the explanation that she whited out portions of the examination at the same time as she was writing the exam just after she wrote them out is incredible, but is also

specifically disapproved by the fact that some of the white out obscures portions of the red checkmarks. In other words, it is clear that she altered the Resubmitted Exam after she received it back from the Professor.

- Her effort to have the Professor's review of the exam take place on the basis of a photocopy of the Resubmitted Exam transmitted by email and the contents of that email. These are consistent with the proposition that she wished the review to be disposed of on the basis of the appearance of the alterations she had made, and inconsistent with the explanation (that she was merely seeking to understand the comments on the exam) that she created after she learned of the Peirce and Holland Spreadsheets.
- Perhaps most tellingly, we agree with the Tribunal that it is simply implausible that the resulting marks in the Resubmitted Exam were the marks actually awarded when they differed in eight or nine places from the careful tally of those marks, *independently prepared*, of those marks by two professors whose marking was not questioned by any of the other students writing the exam.

43. The Tribunal went on to find that the discrepancies identified in the Holland and Peirce Spreadsheets (paragraph 19 above) were as a result of the Student making changes to her examination booklet so as to increase her mark.

44. Once the facts referred to in paragraph 42 above were established, we do not think that it was a necessary element of establishing the charge to be able to identify each instance in which the Student altered the exam as originally marked by Ms. Holland and the Professor. This is particularly so as the evidence indicates that the exam was marked in erasable red pen, so that the ability to detect every erasure and/or change could not be guaranteed or expected.

45. Nonetheless, there was a reasonable basis for each of the Tribunal's specific findings.

46. In the result, the Student's effort, in her list of "doubts and discrepancies" to take issue with the specific findings does not provide a basis upon which to dislodge the finding that the

charge was made out. Moreover, we do not consider that there is a basis, let alone a reasonable basis, for an appellate body to interfere with those findings.

47. A couple of examples may help to illustrate this point.

48. The Student notes that Ms. Holland's method of marking was to put checkmarks where things were correct, and comments where they were not. She argues that Part 2 Q i is an example where there were three checkmarks and no comments, so that there was no basis to find that the red pen mark of "3/3" was an alteration by the Student.

49. In light of the Tribunal's other findings the fact that the Peirce Spreadsheet recorded a mark of 1.5 alone provides a reasonable basis for this finding. Moreover, the conclusion that a checkmark was added and a comment removed is reinforced by the appearance, to the right of the margin, of what appears to be an erased phrase. The weighing of these evidentiary points is not for this appellate Board, and, since there is no transcript and hence no record of what the cross-examination on this issue was, no conceivable basis upon which we could even attempt to do so.

50. The Student also points to Part 2 Q iv of the Resubmitted Exam. She again says there is no basis for a conclusion that the red mark "3/3" results from her alterations since there were no comments nor crossing out. She acknowledges substantial whiting out, but says that since this was over black ink instead of red ink the conclusion must be that the words were whited out while the midterm was being written.

50. Again, we are not in a position to weigh this evidence. But we note that as for the previous example, the Peirce Spreadsheet showing the mark for this question as 1.5, not 3 is a proper basis for this conclusion. As well, we do not think that the whiting out of the black ink says anything about its timing. But, tellingly, a portion of a red checkmark and something beside it were whited. While one cannot tell what was whited out it clearly occurred after the question was marked.

51. In summary, we have neither the jurisdiction nor the relevant information to be able to attempt to reassess the weight of the evidence on which the Tribunal relied. But the Student's attempt to have us do so does not cause us to doubt the reasonableness of the Tribunal's analysis. Indeed, the review that we have done to assess the Student's arguments has reinforced the reasonableness of those conclusions.

52. For these reasons, we dismiss the appeal.

Date at Toronto this 29th day of April, 2022.

Original signed by: _____
Patricia D.S. Jackson
On behalf of the Discipline Appeals Board Panel