Case No. 1278

THE DISCIPLINE APPEALS BOARD

THE UNIVERSITY OF TORONTO

IN THE MATTER OF an appeal of findings made and a sanction imposed by the University Tribunal on January 9, 2023, in respect of charges of academic misconduct filed on October 12, 2021,

AND IN THE MATTER OF the *University of Toronto Code of Behaviour on Academic Matters, 2019*,

AND IN THE MATTER OF the *University of Toronto Act, 1971*, S.O. 1971, c. 56 as am. S.O. 1978, c. 88

BETWEEN:

H[redacted] Z[redacted]

Appellant

-and-

UNIVERSITY OF TORONTO

Respondent

REASONS FOR DECISION

Appeal Hearing Date: January 12, 2024, via Zoom

Members of the Discipline Appeals Board Panel:
Paul Michell, Associate Chair
Professor Aarthi Ashok, Faculty Board Member
Emily Hawes, Student Board Member

Appearances:
Lily Harmer, Assistant Discipline Counsel, Paliare Roland Rosenberg Rothstein LLP
William Webb, Assistant Discipline Counsel, Paliare Roland Rosenberg Rothstein LLP
Calvin Zhang, Counsel for the Appellant, Starkman Lawyers
H[redacted] Z[redacted]

Hearing Secretary:
Christopher Lang, Director, Office of Appeals, Discipline and Faculty Grievances

A. Introduction

1. On January 10, 2024, we heard the appeal of H[redacted] Z[redacted] (the "Student"), an undergraduate at the Faculty of Arts & Science, from the University Tribunal's January 9, 2023 decision on liability and sanction under the *Code of Behaviour on Academic Matters* (the "Code"). The Tribunal's reasons for decision were released on March 23, 2023.

2. The Student raised several arguments about the manner in which the Tribunal had weighed the evidence and evaluated the credibility of witnesses. In form, these were claims that the Tribunal had erred in law. However, we take the view that in substance they were simply disagreements with the Tribunal's findings of fact. We lack jurisdiction to hear appeals from such findings. We conclude that the Tribunal did not make the legal errors, or errors of law application, that the Student ascribes to it. We would dismiss the appeal.

3. Before the Tribunal, there was a detailed agreed statement of facts. The parties also agreed on a joint submission on penalty in the event that the Tribunal accepted the Provost's position on liability. The Student had been enrolled in an introductory microeconomics course. Students were required to write five term assessments, each worth 10.5% of the final grade. On the first assessment, the Student scored 53.33%.

4. The second assessment posed a mixture of multiple-choice questions and questions requiring a numeric answer. Students were required to draft rough handwritten notes for each question, and submit pictures of their rough work to the course website. The second assessment was to be written during a window in mid-October 2020. Students were prohibited from discussing the second assessment with anyone during the assessment window. During that window, a private tutoring service called Easy Edu conducted an online review session on Zoom. In the review

session, a tutor solved questions that were substantially the same as questions on the second assessment. A video recording of the review session showed that someone using a Zoom account with the Student's name had attended the review session. The Student was the only person with that name in the course. On the second assessment, the Student scored 73.33%.

5. Thus, before the Tribunal, the main issue was whether the Student had attended the review session using his Zoom account (as the Provost argued), or whether someone else had used the Student's Zoom account to attend. The Student denied having attended the review session. Instead, he claimed that his friend X[redacted] "R[redacted]" R[redacted] had attended the session using the Student's gaming computer and Zoom account. It was common ground that if the Provost showed that the Student had attended the review session, the first charge (set out below) would be established.

B. The Charges Against the Student

6. On October 12, 2021, the Provost charged the Student with two offences:

> 1. On or about October 18 and 19, 2020, the Student knowingly used or possessed an unauthorized aid or obtained unauthorized assistance in Assessment #2 in ECO101H1F (20209) (the "Course"), contrary to section B.I.1(b) of the *Code*.
>
> 2. In the alternative, on or about October 18 and 19, 2020, the Student knowingly engaged in a form of cheating, academic dishonesty or misconduct, fraud or misrepresentation not otherwise described in the *Code* in order to obtain academic credit or other academic advantage of any kind in connection with Assessment #2 in the Course, contrary to section B.I.3(b) of the *Code*.

C. Tribunal's Decision on Liability

7. The Tribunal focused on evidence about the identity of the person who had used the Student's Zoom account in the review session.

1. Competing explanations

8. The Student's evidence was that he had not attended the review session. His explanation was that his friend Mr. R[redacted] had, without his knowledge, attended the review session using the Student's gaming computer and Zoom account. Mr. R[redacted] was not registered in the course. He testified that he had attended the review session because he had wanted to become a teaching assistant for Easy Edu, and Easy Edu had suggested that he attend a review session as a trial.

2. Participation in the review session using the Student's Zoom account

9. One issue before the Tribunal was the nature and extent of participation in the review session by the person using the Student's account. The Provost led evidence that the person using the Student's Zoom account had been a frequent and engaged participant in the review session. The Provost argued that this was more consistent with the Student having attended the review session than with the Student's explanation that he had not attended, but that Mr. R[redacted] had.

10. The Tribunal found that the Student's account had participated "quite extensively" in the review session by typing in a number of comments, most of which were directed at providing answers to the questions being taught. The Tribunal found that the nature and extent of the account's participation were consistent only with someone interested in and knowledgeable about the course materials, which it inferred would be a student in the course. The Tribunal found that the person using the Student's account was interested in understanding the course content and participating in a manner that was educative in nature.

3. Similarities between the tutor's work in the review session and the Student's rough work for the second assessment

11. The Provost called evidence from Professor Robert Gazzale, one of the course co-instructors, about similarities between the work presented during the review session and the rough

work that the Student had provided on his second assessment. He included a chart showing a visual comparison between Mr. Z[redacted]'s rough work and the Easy Edu tutor's rough work. These similarities included the use of vertical lines to indicate absolute value (something that Professor Gazzale did not teach in the course); the use of the acronym TB and the idea of total benefit (which he initially claimed he did not use in the course, but later conceded that the term had appeared in at least one question on the second assessment); the use of the acronym E to denote elasticity; and the fact that the Student had answered at least one multiple choice question (involving a shift in both the supply and demand curves) without drawing a graph in his rough notes, where it would have been difficult for students not to have drawn a graph to answer that question (unless, he implied, the student already knew the answer from the review session).

12. Professor Gazzale also testified about the Student's performance on the other assessments in the course. In each case, the Student had performed significantly worse than he did on the second assessment, making his performance in the second assessment anomalous. The Tribunal accepted this evidence as one factor in concluding that the Student had participated in the review session.

13. Finally, during the review session, the Student's account had typed the name "Lee Bailey" in response to a question about a professor at the University of Toronto Mississauga ("UTM") who taught ECO100 (a full year introductory course that had both a microeconomics and macroeconomics component). The Student's account typed the name after the Easy Edu tutor had indicated that the professor's name was "Bailey". As we discuss below, the appropriate conclusion to be drawn from this evidence was an issue on the appeal before us.

4. Mr. R[redacted]'s evidence

14. Like the Student, Mr. R[redacted] testified that he had attended the review session, not the Student. He said that he had applied for a job as a teaching assistant with Easy Edu. He claimed that Easy Edu had suggested that he attend a review session, and that he had done so, using the Student's gaming laptop and the Student's Zoom account. His evidence was that he had only realized during the review session itself that he was logged in as the Student, that he did not think it would be an issue, and that he had not been sure how to the change the name of the account.

15. The Tribunal did not accept Mr. R[redacted]s evidence. It contrasted Mr. R[redacted]s minimal qualifications to be a teaching assistant (he had never successfully completed an economics course in high school or at the University) with Easy Edu's webpage advertisements outlining the qualifications and experience of its instructors. The Tribunal also noted that Mr. R[redacted] had taken no other steps with Easy Edu, and had been slow even to attend the review session.

16. The Tribunal concluded that the Student, not Mr. R[redacted], had attended the review session using the Student's Zoom account. On this basis, the Tribunal found the Student guilty of the first charge. The Provost withdrew the second charge.

D. Penalty

17. The Provost and the Student made a joint submission on penalty to the Tribunal providing for the following sanctions to be imposed on the Student:

(a) a final grade of zero in ECO101H1F in the fall of 2020;

(b) a suspension from the University for two years and four months commencing on January 1, 2023;

(c) a notation of the sanction on the Student's academic record and transcript for four years from the date of this order until graduation, whichever comes first; and

(d) the case to be reported to the Provost for publication of a notice of the Tribunal's decision and the sanctions imposed, with the Student's name withheld.

18. The Tribunal explained that it was obliged to accept the joint submission on penalty unless doing so would bring the administration of justice into disrepute. The Tribunal saw no basis for departing from the joint submission.

19. The Tribunal considered cases involving unauthorized assistance or plagiarism, including *University of Toronto v. X.Z.* (Case No. 1274, July 11, 2022), where another student who had participated in the same review session at issue in this appeal had been found guilty, and had received a two-and-a-half-year suspension. The Tribunal also noted that the penalty for a first offence of cheating by receiving unauthorized aid generally includes a suspension of at least two years: *University of Toronto v. Y.Y.* (Case No. 851, March 1, 2017), at para. 7, and that assistance from a commercial provider is an aggravating factor in determining the length of the suspension.

20. The Tribunal considered the agreed penalty here to fall within a reasonable range, although it noted that absent such an agreement, it might have been inclined to order a more severe penalty, given what it viewed as the Student's effort to cover up his involvement with an "elaborate story" about the involvement of Mr. R[redacted]. The Tribunal reviewed the factors set out in *University of Toronto v. Mr. C* (Case No. 1976/77-3, November 5, 1976), and was satisfied that it should accept the joint submission on penalty.

E. Notice of Appeal

21. On January 12, 2023, after the Tribunal's order but before the release of its reasons for decision, the Student delivered a notice of appeal. He alleged, among other things, that the Tribunal had misapprehended the evidence, had erred in law in analysing the credibility and reliability of witnesses, and had reached an unreasonable verdict.

22. The Student's factum raised four issues, submitting that the Tribunal had erred by:

(a) improperly shifting the burden of proof to the Student;

(b) analyzing the witnesses' credibility and reliability;

(c) applying uneven scrutiny by emphasizing the Student's motivation instead of evidence of the circumstances; and

(d) admitting Professor Gazzale's evidence as expert opinion evidence.

23. We note that each of these grounds of appeal concerns liability, not the penalty imposed by the Tribunal. Although the Student filed a broad notice of appeal, and the opening paragraph of his factum sought to appeal from the penalty imposed, the balance of his factum did not address the penalty imposed or set out any reason why the Tribunal had erred in imposing it.

F. Standard of Review and Jurisdiction

24. The Student did not address the applicable standard of review on this appeal, nor our jurisdiction with respect to his grounds of appeal.

25. On the applicable standard of review on this appeal, the Provost noted that in practice the Board adheres to a level of deference to the Tribunal on the weighing of evidence (*J.H.L. v. University of Toronto*, 2022 DAB 1059, at para. 39) and findings of credibility (*M.K. v. University*

of Toronto, 2012 DAB 634 at para. 30; *University of Toronto v. L.S.*, 2017 DAB 841 at para. 9; *J.H.L.*, at para. 39).

26. The Provost submitted that, as set out in section E.4(a) of the Code, the Board lacks jurisdiction to hear appeals by an accused from a conviction at trial upon a question of fact alone, a point recently confirmed by the Senior Chair in *J.H.L.*, at paras. 38-39 and 51.

27. We agree with these submissions.

G. Student's Grounds of Appeal

1. Did the Tribunal improperly shift the burden of proof to the Student?

28. The parties agree that the Provost bore the burden of proof before the Tribunal to show that the Student was guilty of an offence, on a balance of probabilities standard. They disagreed on whether the Tribunal had properly allocated the burden of proof here.

29. The Student argued that several findings of fact showed that the Tribunal had improperly shifted the burden of proof to him in certain instances:

(a) The Tribunal found that the Student had intended to participate in the review session, although the Provost led no evidence to support this conclusion.

(b) The Tribunal found that it made no sense that Mr. R[redacted], who wanted to obtain a job, would wait from May or June 2020 until October 2020, even though the Provost had tendered no evidence contrary to Mr. R[redacted]'s evidence. The Student argued that there was evidence that Mr. R[redacted] was not eager to obtain a job at the time, and only applied when a family friend had offered him a job at Easy Edu.

(c) The Tribunal found that Mr. R[redacted] had "failed" Easy Edu's job interview by "not using his own computer which presumably had his own name on the Zoom platform" and by "not providing any feedback" to Easy Edu about the review

session. The Student argued that the Provost did not lead any evidence to show that Easy Edu requires job candidates to use their own name on Zoom. The Student also claimed that on cross-examination, Mr. R[redacted] had testified that he had provided feedback to Easy Edu, including "how he will teach the course and how the teaching environment [*sic*]."

(d) The Tribunal found that although Mr. R[redacted] had claimed that he (not the Student) had attended the review session, he gave no evidence as to how he could have understood the course content, because "he had never taken the course, nor had he completed ECO100", and "there was no credible explanation for Mr. R[redacted]'s participation". The Student argued that these findings were a "clear indication" that the Tribunal had shifted the burden to the Student to show that Mr. R[redacted] had the intention to attend the Zoom session, whereas the burden lay with the Provost to show that the Student (and not Mr. R[redacted]) had attended. The Student also noted Mr. R[redacted]'s cross-examination evidence that he had attended ECO100 before dropping the course.

30. The Provost argued that this was not a case where the Tribunal had found that an offence had been established simply because it did not believe the defence evidence, but failed to clearly accept the prosecution evidence. Instead, the Provost submitted that the Tribunal had both rejected the defence evidence *and* found that the agreed statement of facts and the prosecution evidence proved the offence. In short, rejecting a defendant's evidence cannot be equated with shifting the burden of proof to the defence: *Singh v. I.C.B.C.*, 2022 BCCA 320 at para. 24.

31. The Provost also took issue with the Student's particular claims:

(a) The Student's claim that there was no evidence that he had intended to attend the review session was incorrect. The Tribunal had relied in part on evidence that the Student's account had actively participated in the review session in a manner

consistent only with someone who was interested in understanding and learning the course content.

(b) The Student's claim that Mr. R[redacted] was not eager to obtain a job at the time was not supported by the evidence. In fact, Mr. R[redacted] had agreed on cross-examination that he had been "anxious to get a job so that [he] could start earning money."

(c) The Student's suggestion that there was no evidence that Easy Edu required prospective employees to use their own name on Zoom sessions mischaracterized the Tribunal's reasons. Instead, the Tribunal had concluded that Mr. R[redacted]'s professed desire to work for Easy Edu was inconsistent with the evidence: he did not change the Zoom account name to his own name, and he did not reach out to Easy Edu after the Zoom session (but before the allegations against the Student arose in December 2020) to provide feedback. Further, the Student misstated the evidence in suggesting that Mr. R[redacted] had testified that he had given feedback to Easy Edu about the review session. The evidence was to the contrary.

(d) The Tribunal did not shift the burden of proof to the Student to show that Mr. R[redacted] had the intention to attend the review session. Rather, the Tribunal had rejected Mr. R[redacted]'s evidence about why he had allegedly attended the Zoom session.

2. Did the Tribunal err in law in analyzing the witnesses' credibility and reliability?

32. The Student's second argument was phrased broadly. He referred us to one of the most frequently-cited statements in Canadian law: a passage from the British Columbia Court of Appeal's decision in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357 about the evaluation of the credibility of interested witnesses. The Court cautioned that evaluating the credibility of such a witness requires the trier of fact to consider whether it is in "harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions", and not simply to focus on the personal demeanor of the witness.

33. As became clear, the Student had three particular concerns.

34. First, the Student claimed that the Tribunal had, contrary to the passage just quoted, focused on the personal demeanor of Mr. R[redacted] by stating that his knowledge of economics made him "unsuitable for the role of a teaching assistant", and by finding that it made no sense for Mr. R[redacted] to have waited from May to October 2020 to contact Easy Edu.

35. Second, the Student noted that the Tribunal had rejected his explanation that rough work is not required to answer multiple choice or numeric answer questions. The Student argued that what he said was the Tribunal's explanation for this conclusion—that "all of other evidence pointed to the Student's attendance at the Review Session"—was unreasonable. The Tribunal had also rejected the Student's evidence about the similarities between his rough notes and the answers given in the review session. The Student also noted that although Professor Gazzale had testified that "total benefit" was not a term he recalled having used in the class by the time of the second assessment, in fact Professor Gazzale *had* used the term in two questions on the second assessment.

36. Third, the Student noted that Mr. R[redacted] had testified that during the review session, Mr. R[redacted] had written Professor Bailey's name in the Zoom chat, and had done so because Mr. R[redacted] knew Professor Bailey. By contrast, the Student testified that at the time of the review session, he did not know who Lee Bailey was.

37. In response, the Provost argued that the Student was seeking to have us review the Tribunal's assessment of the credibility of the defence witnesses. The Provost submitted that this was "quintessentially" a question of fact (*Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para. 38) not open to us to review, since (as noted above) we can hear appeals by an accused from a conviction only "upon a question which is not one of fact alone."

38. The Provost went on to argue that if the Student was claiming that the Tribunal had misapprehended the evidence, he had not established a reversable error. To succeed, the Student would have needed to show that any such misapprehension was material (not peripheral) and that the evidence at issue had played an essential part in the Tribunal's reasoning process: *R. v. Lohrer,* 2004 SCC 80 at para. 2; *R. v. D.A.,* 2024 ONCA 39 at para. 12. With reference to the Student's three particular examples, the Provost submitted that the Student had not done so here.

39. First, the Provost argued that the Student's concerns about how the Tribunal had considered Mr. R[redacted]'s evidence about his knowledge of economics, and his explanation about why he waited several months before following up with Easy Edu did not concern Mr. R[redacted]'s demeanor during his testimony, which refers to non-verbal presentation or cues a witness gives while testifying.

40. Second, the Provost submitted that the Student had essentially argued that the Tribunal had erred because it had rejected the Student's explanations as to why he had performed better on the second assessment than on the first assessment, and about the similarities between his rough work and the Easy Edu tutor's rough work. The Provost argued that the Tribunal did not misapprehend the evidence: it had considered the Student's evidence on these points, weighed it against the other evidence, and rejected his explanations. The Provost noted that the Board has confirmed that it will not substitute its own views in assessing credibility or the relative weight to be given to witness evidence: *e.g., University of Toronto v. L.S.*, 2017 DAB 841 at paras. 57, 70; *J.H.L.,* at para. 51.

41. Third, the Provost noted that the Tribunal had rejected the Student's evidence that he had not known Professor Bailey's name. The Provost submitted that there was ample evidence to support the Tribunal's conclusion: Professor Bailey was known to be a hard grader at UTM; the Student had been at UTM in his first year; and during the time that he was the Student's friend,

Mr. R[redacted] had dropped out of Professor Bailey's ECO100 course. In sum, the Provost submitted that the Student had failed to show that the Tribunal had committed a reversible error.

3. Did the Tribunal err in applying uneven scrutiny by emphasizing the Student's motivation instead of the circumstantial evidence?

42. The Student argued that the Tribunal was obliged to fairly and evenly evaluate the evidence called by both parties. In his view, the Tribunal had improperly focused on the motivations of the Student and Mr. R[redacted] to participate in the review session, rather than focusing on whether there was evidence that the Student had actually participated in the review session.

43. The Provost made two points in response.

44. First, he noted that arguments based on uneven scrutiny are difficult to prove, because they impugn a Tribunal's findings on credibility, which are subject to a "very high degree of deference on appeal": *R. v. G.F.*, 2021 SCC 20 at para. 99; *R. v. Chanmany*, 2016 ONCA 576 at para. 26. Indeed, in *R. v. G.F.*, at para. 100, the Supreme Court of Canada expressed "serious reservations" about whether uneven scrutiny is analytically coherent or an independent ground of appeal. In any case, the Student would need to identify a basis in the Tribunal's reasons, or in the record, to show that the Tribunal had applied different standards of scrutiny to the witnesses. The Provost submitted that the Student had not done so here.

45. Second, the Provost argued that although cloaked in the language of uneven scrutiny, the Student was really arguing about the relative weight that the Tribunal had placed on particular pieces of evidence. The Provost submitted that the Board cannot intervene in these circumstances.

4. Did the Tribunal err in admitting Professor Gazzale's evidence as expert opinion evidence?

46. The Student's final argument was that a portion of Professor Gazzale's testimony was in substance expert opinion evidence that the Tribunal should not have admitted. At issue was Professor Gazzale's testimony about the rough work that students normally did when answering multiple choice questions, and whether they would be likely to draw a graph for certain questions.

47. The Student made two points. First, he relied on the general proposition that opinion evidence is (subject to exceptions) inadmissible, and that a party seeking to rely on opinion evidence must fit it within such an exception. Second, he argued that he had not had an opportunity to retain an expert to rebut this evidence, and that this denial of opportunity violated his right to procedural fairness.

48. The Provost did not challenge the Student's characterization of Professor Gazzale's evidence as opinion evidence. Instead, he raised procedural objections to this ground of appeal.

49. First, the Provost noted that the Student had not raised this ground—and in particular, the suggestion that he had not had an opportunity to retain an expert—in his notice of appeal. Nor had the Student sought to amend his notice of appeal to add this ground.

50. Second, the Provost argued that the Student had not objected to Professor Gazzale's testimony before the Tribunal. The Provost relied on decisions confirming that a party cannot appeal based on a decision-maker's admission of evidence where the party did not object at the time (*e.g.*, *Ontario (Attorney General) v. Trinity Bible Chapel*, 2023 ONCA 134 at para. 43), and that a party cannot normally complain about a breach of procedural fairness by an administrative tribunal where the party did not raise its complaint at the earliest reasonable opportunity (*e.g., Lum*

v. College of Physiotherapists of Ontario, 2018 ONSC 567 at para. 7 (Div. Ct.)). Not only did the Student not object to the admissibility of Professor Gazzale's evidence; he did not indicate to the Tribunal that he wanted to call an expert to respond to Professor Gazzale's evidence.

51. Third, and in any event, the Provost argued that there was no evidence that the Student lacked the opportunity to retain an expert. The Student received disclosure in February 2022 and retained counsel in March 2022. The hearing did not start until November 2022. Critically, more than a month passed between Professor Gazzale's testimony (November 2022) and the date that the Student called his witnesses (January 2023). The Student thus had an opportunity to call evidence to respond to Professor Gazzale's evidence. If he needed more time, he could have sought an adjournment. He never did. And as noted above, he did not raise the issue with the Tribunal.

H. Decision

52. For the following reasons, we do not accept the Student's four grounds of appeal.

1. The Tribunal did not shift the burden of proof to the Student

53. The Tribunal did not shift the burden of proof from the Provost to the Student.

54. First, there was evidence that the Student attended the review session, including the behaviour of the person who used the Student's Zoom account. The Tribunal found the Student's explanation (and that of Mr. R[redacted]) not to be credible. A party (here, the Provost) who bears a burden of proof may fulfil that burden in different ways, including through eliciting evidence on cross-examination of opposing witnesses that supports the cross-examining party's position.

55. Second, the Student complained about the Tribunal's findings about Mr. R[redacted]'s explanation of his pursuit of employment with Easy Edu based on the inconsistency between Mr. R[redacted]'s

explanation and his (a) lack of action to pursue a position; and (b) weak qualifications for such a position. In the same vein, Mr. R[redacted]'s failure to use his own name during the review session (assuming he attended it), and his failure to provide feedback to Easy Edu about the review session (ostensibly a main reason he had attended the review session) had, in the Tribunal's view, undermined his explanation for having attended the review session in the first place. The evidence does not support the Student's submissions on this point.

56. Third, we dismiss the Student's suggestion that the Tribunal's treatment of Mr. R[redacted]'s qualifications suggests that the Tribunal shifted the burden of proof. The Tribunal found, based on evidence before it, that Mr. R[redacted] had dropped out of ECO100 before completing it (albeit having taken a substantial portion of the microeconomics element of the course), and that his academic performance in that course (and more generally) was weak. The Tribunal concluded that this evidence undermined Mr. R[redacted]'s testimony on this point. We share that view.

57. Ultimately, we agree with the Provost that these complaints simply seek to challenge the Tribunal's findings. They do not establish that the Tribunal improperly shifted the burden of proof.

2. No legal error in the Tribunal's analysis of credibility and reliability

58. The Student argued that the Tribunal had committed a legal error in the way in which it had evaluated the credibility and reliability of witnesses (and in particular, the evidence of the Student and Mr. R[redacted]). However, in substance, the Student was really challenging the Tribunal's preference for the evidence of the Provost's witnesses over his evidence and that of Mr. R[redacted].

59. First, the Tribunal did not accept Mr. R[redacted]'s evidence that he had attended the review session using the Student's gaming laptop and Zoom account. However, the Tribunal did not rely on Mr. R[redacted]'s personal demeanor to do so. Instead, it concluded that Mr. R[redacted]'s actions and

qualifications were inconsistent with his explanation. He had testified that he had attended the review session because he was seeking employment as an economics teaching assistant with Easy Edu. Yet he waited months to attend the review session, and did not follow up with Easy Edu after the review session. The Tribunal found it implausible that he would be suitable as a teaching assistant: he had not completed the basic ECO100 course, and his overall academic performance (only 2.00 credits, with a CGPA of 2.23) was weak. These findings were based on the content of Mr. R[redacted]'s evidence. The Tribunal said nothing about his demeanor.

60. Second, the Tribunal rejected the Student's explanation of his approach to answering questions on the second assessment. That raises no legal issue before us. We cannot substitute our views for those of the Tribunal in assessing credibility or the relative weight to be given to witness evidence. The Student made much of Professor Gazzale's change of evidence (described above) about his use of "total benefit", initially not recalling that he had used the term in class, but later, when presented with evidence that he had used the term on the second assessment, accepting that his recollection had been inaccurate. The Tribunal noted this change of position in its reasons, but did not view it as having undermined Professor Gazzale's evidence more generally. That conclusion was open to the Tribunal. It is not uncommon for witnesses to give contradictory evidence. Whether the contradiction undermines their credibility on a material point frequently depends on the nature of the contradiction, the significance of the evidence and the issue it relates to, and whether the witness satisfactorily explains the contradiction. Not all contradictions are the same in origin, significance or consequence.

61. Third, the Student's argument about who knew about "Lee Bailey" and when is a classic example of fact-finding that cannot ordinarily be challenged on appeal. The Tribunal considered

and evaluated the evidence of the Student and Mr. R[redacted] on this point, and identified several reasons why it did not accept that evidence. The Student has identified no legal error here.

3. No uneven scrutiny

62. We agree that the Tribunal must apply the same level of scrutiny to the evidence called by students and by the Provost: *R. v. Bartholomew*, 2019 ONCA 377 at paras. 30-31. As the Court of Appeal indicated, in the face of an uneven scrutiny allegation, we must review the reasons as a whole to ensure that the Tribunal dealt with the evidence with an open mind, and addressed conflicting accounts or inconsistencies in the evidence of both parties fairly. Nevertheless, "being disbelieved does not translate into uneven scrutiny": *R. v. Bartholomew*, at para. 31.

63. Our review of the Tribunal's reasons reveals no basis for the suggestion that it applied uneven scrutiny. The Tribunal found Mr. R[redacted]'s evidence to be "not credible, and at times bordering on the incredible." It explained why it had reached this conclusion. The Tribunal also rejected significant elements of the Student's evidence. It did not have similar concerns about the evidence of the witnesses called by the Provost. That does not mean that it applied different standards to different witnesses; it simply found the evidence of some witnesses to be wanting.

4. No error in admitting Professor Gazzale's evidence

64. Finally, we do not accept the Student's argument that the Tribunal erred in its treatment of Professor Gazzale's evidence. We doubt that the passage from Professor Gazzale's testimony that the Student now objects to was actually opinion evidence. Professor Gazzale did not purport to give expert opinion evidence. And just because a witness has expertise in a subject does not make his or her evidence "opinion evidence". Professor Gazzale testified about testing in his class, and what students normally do to answer different types of questions. That was an area in which he

had experience and expertise. Arguably, his evidence was more in the nature of a "participant expert" who gives fact evidence about the events in issue, akin to a treating physician, as in *Westerhof v. Gee Estate*, 2015 ONCA 206, not true opinion evidence based on assumed facts.

65. Nevertheless, we need not decide that question. We share the Provost's view that if the Student was concerned about the admissibility of some element of Professor Gazzale's evidence, he was obliged to object in a timely manner, not wait for the Tribunal to decide the merits of the charges against him, and then raise his objection for the first time in his appeal factum. Moreover, if the Student's real concern was to respond to the substance of Professor Gazzale's evidence, he had an opportunity to (and did) cross-examine Professor Gazzale, and there was sufficient time for the Student to call responding evidence or else seek an adjournment to do so. The Student did not take these steps.

66. Having rejected the Student's grounds of appeal, we dismiss his appeal on liability. As set out above, the Student advanced no grounds to challenge the Tribunal's decision on penalty. We thus see no basis to interfere with it.

67. The appeal is dismissed.

68. We thank counsel for the parties for their written and oral submissions, which were of great assistance to the Board to deciding this appeal.

Dated at Toronto, this 11th day of March, 2024.

Original signed by:

Paul Michell, Associate Chair
On behalf of the Discipline Appeals Board Panel