Case No. 1388

THE DISCIPLINE APPEALS BOARD

THE UNIVERSITY OF TORONTO

IN THE MATTER of charges of academic dishonesty made on July 28, 2022

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 amended S.O. 1978, c. 88

B E T W E E N:

X[redacted] M[redacted]

Appellant

- and –

UNIVERSITY OF TORONTO

Respondent

REASONS FOR DECISION

Appeal Hearing Date: August 11, 2023, via Zoom

Members of the Discipline Appeals Board Panel:
Patricia D.S. Jackson, Senior Chair
Professor Ramona Alaggia, Faculty Panel Member
Brinda Batra, Student Panel Member

Appearances:
William Webb, Assistant Discipline Counsel for the University, Paliare Roland Rosenberg Rothstein LLP
X[redacted] M[redacted]

Hearing Secretary:
Carmelle Salomon-Labbé, Associate Director, Office of Appeals, Discipline and Faculty Grievances

1. X[redacted] M[redacted] (the "Student") was charged and convicted of the offence of unauthorized assistance, contrary to section B.I.1 (b) of the *Code of Behaviour on Academic Matters, 2019* (the "*Code*").

2. The panel hearing the case imposed the following sanctions:

(a) a final grade of zero in the course in question;

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

(c) a notation of the sanction on the Student's academic record and transcript for three years from the date of the order.

3. Despite numerous notifications and attempts by the University and its counsel to engage with the Student, she did not participate in the hearing below, either on the question of liability or sanction.

4. On this appeal, the Student acknowledges her liability, apologizes for the offence, and appeals on the question of the length of the suspension alone. She also seeks to introduce new evidence in support of her appeal.

5. For the reasons set forth below, we dismiss the motion to introduce new evidence, and allow the appeal to the extent of reducing the period of the suspension from two years to one year.

The Facts

6. The Student was registered at the University of Toronto commencing in the Fall of 2019. In the Fall of 2020 she was enrolled in a course titled Computational Thinking (the "Course"). By the time of the hearing she had accumulated 13 credits, with a cumulative GPA of 2.98.

7. The Course is a first year one designed to teach students about basic coding and computer science skills. Students in the course were required to write three coding assignments, each worth

10% of their final grade. Each such assignment was to be completed by the Student independently.

8. The uncontested evidence at the hearing, which was not in dispute on the appeal, was that four of the students in the Course, including the Student, copied each other's assignments.

9. When confronted with their conduct, the other three students admitted they had copied each other's assignments and, unlike what the record demonstrates in the case of the Student, also admitted to having done so in one other instance. One of these three students had also previously committed another serious academic offence.

10. In each of these three cases, the sanction imposed on the student was a zero in each copied assignment, and a time-limited annotation on the student's record. In the case of the student who had committed three academic offences and was in first year, the annotation was two years; for the other two students the annotation was until graduation.

11. The argument in this case proceeded on the basis that the same penalty was proposed to the Student if she would admit to the offence.

The Motion to Introduce New Evidence

12. The Student’s request to introduce new evidence and the nature of that evidence was set forth in a letter which constituted her notice of appeal, and in a subsequent notice of application to introduce fresh evidence.

13. By way of summary, in her letter the Student acknowledged her offence, apologized for failing to respond to the proceedings earlier, and characterized her decision in that regard as "very stupid". She said she cherished the opportunity to study at the University of Toronto. In her freshman year she had a GPA of 3.92, but thereafter was affected by several difficulties, including a family illness, significant financial burdens on herself and her family, the pandemic, and a deteriorating mental state. This led to a declining GPA, and, as well, to the commission of the offence. She said she started deliberately avoiding communications from the University in

order not to have to address the fact that an excellent student had become such a poor one. She also expressly avoided telling her parents about what has happened, because, she says, they sold their house in order to finance her education. And she concluded by saying she was open to any punishment, except a two-year suspension, which she was concerned might adversely affect her status as an international student.

14. The letter is not, of course, evidence, and were new evidence to be introduced, it would be necessary that there be an opportunity to cross-examine or at least clarify in evidence some of the statements made in the Student's letter. This would necessitate sending the case back to the panel that heard the original proceeding. The result would be contrary to what the Student seeks in this case, namely a timely reduction of the period of her suspension in order that she might register in the University before she loses her international student status.

15. In any event, however, the Student has not met the test for the introduction of new evidence on appeal. So that the inevitable delay which would have resulted had her application been successful will not occur.

16. It is well established that in determining whether to admit new evidence, the Board should consider four traditional criteria for the admission of fresh evidence on appeal, namely that the evidence:

(a) was not available at the time of the hearing by the exercise of due diligence;

(b) must be relevant to a potentially decisive issue at first instance;

(c) must be credible; and

(d) if believed and taken together with the rest of the evidence, could reasonably be expected to affect the initial decision.

17. The University acknowledges that a party seeking to adduce new evidence on appeal need not satisfy all of these criteria in order to succeed, and that this Board has greater discretion to permit the introduction of such evidence than may exist in other forums.

18. We agree, but are also cognizant of the importance of being clear to students and others that they may not ignore discipline hearings in the expectation that if the result is unfavourable additional evidence can be brought forward on appeal. Due regard to the limited circumstances in which new evidence may be received is important.

19. In this case, with respect to the first criterion, all of the matters the Student seeks to introduce as new evidence were known to her at the time of the hearing. The reason that evidence was not adduced is not that it was unavailable or unknown, but that she did not attend the hearing.

20. As to the remaining criteria, it is difficult, given the generality and apparent inconsistency of some of the elements in the Student's letter and the absence of any medical evidence, to determine its ultimate credibility or whether or to what extent it might have affected the initial outcome at the hearing.

21. However, as noted above, even if we allowed the evidence we consider that we would need to send this matter back to the original panel, and the Student's objectives on this appeal would be completely undermined by delay.

22. Moreover, putting the evidence at its highest and assuming its credibility, we do not consider that it would affect the outcome beyond the adjustment we make to the sanctions in this appeal, described below.

23. In the circumstances, we decline to allow the introduction of the new evidence.

The Appeal of the Length of the Period of Suspension

(a) Immigration Status

24. As noted above, we have not admitted as new evidence the matters proffered by the Student, and in particular have not adjusted the sanction ordered on the basis that it would or might affect her immigration status.

25. However, having heard argument on this point we would like to record one area in which the University and/or future panels of the Tribunal or this Board may wish to re-examine the question of the impact of sanctions on international students.

26. It has been said in previous decisions that a student's status as an immigrant is an irrelevant factor to the question of sanction – that it would be an error in principle to impose either a less or more severe sanction based on a student's immigration status. (See, for example, *University of Toronto v C.A.M.* (Case No. 684, June 3, 2014) at para. 38) ("*C.A.M.*").

27. To the extent that this means that the fact that the student is an international student is not, by itself, a reason to depart from a penalty that would be imposed on a domestic student, that seems to us to be correct in principle.

28. However, in this case the Student has raised the possibility that a lengthy suspension would lead to her losing her status as an international student and preclude her re-attending at the University at the end of the period of suspension. We do not know if that is in fact true. But it does seem to us that if a defined period of suspension would necessarily result in an international student losing immigration status and the ability to re-attend at the University when the suspension was over, the impact of such penalty would be markedly more severe than for other students. This is a factor that the University and/or the Tribunal might wish to consider in any future determination of sanction in such a case.

(b) Standard of review

29. This Board has wide powers to modify a sanction imposed, and on appeal may impose any sanction that could have been imposed below. Section E .7 of the *Code* provides that the Board shall have the power to "affirm, reverse, quash, vary or modify the verdict, penalty or sanction appealed from and substitute any verdict, penalty or sanction that could have been given or imposed at trial."

30. Although the appeal does not proceed as a hearing *de novo,* decisions over the years have recognized that the Board has very broad powers, and, especially as it relates to sanction, little obligation to show deference to the decision below.

31. Nonetheless, there must be a principled reason for the Appeals Board to vary the sanction imposed at trial.

(c) The length of the suspension in the circumstances of this case

32. Before turning to the issue that has caused us concern in this case, we make a preliminary observation about a section of the *Code* that was referred to in passing. That is the Provost's Guidance on Sanctions at Appendix "C".

33. For the benefit of students that appendix sets forth guidance as to the sanction the University will ordinarily seek for a finding of offence at the Tribunal level. In the case of a student such as this one, who has not committed a previous offence, it says that in the absence of exceptional circumstances the University will usually request that the Tribunal suspend the student for two years.

34. It is guidance, and we expect it is helpful to students, as to what sanction the University will *request* at the Tribunal hearing. But it is not guidance to or from the Tribunal, and it is certainly not binding on the Tribunal. And in the circumstances of this case, as we describe below, we do not consider that a suspension of two years is appropriate.

35. In this case, our concern, and our questions to the parties, focused on the apparent discrepancy with the sanction proposed below and imposed on the three other students who admitted to committing the very same offence but had also committed an offence or offences in addition to the one committed by the Student.

36. As we elaborate more fully below, our concern was not that the sanctions proposed for the Student and imposed on the other three students should be the same or similar to that imposed on the Student by the Tribunal. We acknowledge, indeed we emphasize, that a sanction

imposed at the end of a contested hearing will almost always be more serious, frequently significantly so, than the sanction that would have been imposed had a student acknowledged the offence immediately.

37. But there must be some rational relationship, connected to the reasons for imposing a more serious sanction, between the sanctions imposed on a student who immediately admits an offence, and one who unsuccessfully contests it.

38. In fairness to the University, this concern was not raised prior to the hearing. It was not referred to by the Student in her materials, but emerged in our questioning during argument.

39. The University's response was that there need not be any relationship between the sanction imposed on a student who readily admits committing an offence, and that imposed on a student who has unsuccessfully denied the same offence at a contested hearing.

40. In support of that position, the University relied on a 2007 decision of the *University of Toronto v D.S.* (Case No. 451, August 24, 2007) ("*D.S.*").

41. Before discussing the significance of the *D.S.* case, we note that there is a more recent case, not referred to by the University, whose facts are closer to the ones before us, and which stands for the contrary proposition to that advanced by the University.

42. We appreciate that University Counsel had not been alerted to the issue we have been describing before the hearing and so may not have examined the issue in any detail. But particularly in a process such as this, and particularly where students are often unrepresented, we remind everyone how dependent we are on counsel's statement of the legal principles that have previously been determined.

43. The case that stands for the proposition contrary to the one argued for by the University is the 2013 decision in *University of Toronto v C.A.M.* The case was actually cited by the University on another point, and is referred to above at paragraph 26.

44. In the *C.A.M.* case the student initially admitted to the offence in issue at a decanal meeting. He was told that the sanction for the offence would be a mark of zero in the course and the placing of the sanction letter in his file but with no other recording of the sanction on his academic record. He then withdrew his admission.

45. After a contentious hearing, and in light of the student's conduct at the hearing and his previous violations of the *Code*, the University sought a recommendation that the student be expelled.

46. In that case, the Board noted the well-established criteria which should guide a decision on sanction:

> (a) the character of the person charged;
>
> (b) the likelihood of a repetition of the offence;
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> (c) the nature of the offence committed;
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> (d) any extenuating circumstances surrounding the commission of the offence;
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> (e) the detriment to the University occasioned by the offence; and
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> (f) the need to deter others from committing a similar offence.

47. The Board observed that a number of factors in that case pointed to a sanction at the very high end. However, the Board observed that unlike in many other cases, the University had already engaged in a serious examination of the appropriate penalty for this very offence by this student and had determined that a sanction of zero in the course was appropriate.

48. The Board went on to observe:

> 55. Because of the foregoing, the issue in this case is not whether the seriousness of the offence as augmented by the Student's conduct at the hearing warrants expulsion, but the narrower and more difficult question of whether the Student's refusal to acknowledge the offence and his conduct at the hearing warrants an escalation [to expulsion] from the zero in the Course

> the University was previously prepared to impose for an offence of the seriousness. Our answer is to the latter question, not the former, and it is that we do not think that it does.
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> 56. It is well-established in the Tribunal's jurisprudence, and the Student in this case was advised that penalties imposed at the decanal level when a student admits an offence, are more lenient than those imposed after a contested hearing at the Tribunal. There are sound reasons for this. A student who acknowledges his or her fault and accepts the penalty reflects significantly on the assessment of the student's character, remorse and the likelihood of repetition of the offence. In other words, the more serious penalties imposed are as a result of the application of the C factors, not an arbitrary penalty for the Student seeking a hearing.

49. We agree with this and would add one other factor which also explains the imposition of the more serious level of sanctions imposed for offences found after a Tribunal hearing. The factor is an important one for the proper and timely administration of the discipline process at the University of Toronto. That additional factor is the cost in time and resources to the University of proceeding to a contested hearing.

50. In the result, we agree with the decision in the *C.A.M.* case that it is appropriate that the sanctions imposed after a contested hearing be more serious, often significantly more so, than those imposed at the decanal level. Indeed this point is illustrated by the *C.A.M.* case itself, where the student who would have faced a sanction of zero in the course had he admitted to the offence at the decanal level, received a five-year suspension (but not expulsion) after the contested hearing and appeal.

51. But we also agree with the *C.A.M.* case that where the record discloses a sanction proposed at the decanal level for the very offence in issue by the student in question, the difference between that sanction and the one to be imposed by a Tribunal must be generally explicable by the factors described above as they apply in the circumstances of the particular case.

52. It is not clear to us that the *D.S.* case referred to by the University stands for a contrary proposition. The issue was dealt with very briefly in the case, but it appears from the reasons that

what the Tribunal in that case was being asked to do was to impose a sanction that was the same or similar to the decanal sanctions imposed on other students for similar offences. The Tribunal noted that the circumstances in the decanal letters it was asked to review were unclear (suggesting that they related to a number of previously sanctioned offences similar to the one before it), and that in any event the sanctions imposed at the Tribunal level should be more serious, for the reasons that are included in the ones we have described above.

53. To be clear, we reiterate that the only proposed decanal sanction that would ever be relevant to a Tribunal determination would be one that was disclosed in the record as having been proposed for the same student for the same offence. Moreover, we are not saying that the Tribunal sanction should be the same or even similar. Quite the contrary. It will almost invariably be significantly more serious. But it must be explicable.

54. In this case, the University argued that the Tribunal sanction should be more serious than one proposed at the decanal level for reasons that we agree with and that have been referred to above. But it did not otherwise explain how those factors justified the relationship between the more serious sanction and the earlier proposed to decanal sanction, because its position was that there was no need for such a relationship or explanation. In other words, the University's determination of an appropriate sanction at the decanal level for the same offence by the same student should have no bearing on or relationship whatsoever to an appropriate sanction at the Tribunal level.

55. Because we disagree, we now turn to our assessment of that relationship.

56. We have no hesitation in saying that the Student's refusal to engage in the discipline process before this appeal warrants a more severe sanction then would have been imposed had she admitted it initially. While it is our impression that the Student, who appeared personally on this appeal, is now genuinely remorseful, and unlikely to reoffend, the failure to demonstrate those qualities in a timely fashion does reflect adversely on her and should be accounted for in the penalty.

57. In addition, her failure to engage in any way with the process before now led not only to an expenditure of time and resources in the hearing itself, but in the University's many attempts to get her to engage. This has led to a significant waste of time and resources in the University discipline process, where both are at a premium.

58. On the other hand, unlike in other cases (including *C.A.M.*) this is not a case where the Student's conduct at the hearing demonstrated a desire to obstruct, to deceive, or to otherwise undermine the hearing process. It is also the Student's first offence, and it is evident that it has had a marked impact on her.

59. We are also influenced by the evidence in this case that at the decanal level, the University considered a sanction of zero in an assignment (not the whole course), a time limited annotation and no suspension appropriate for the other students who not only engaged in the same offence as the Student, but also other academic offences in which the Student did not participate.

60. In all of the circumstances, we consider that the appropriate penalty for the Student is the zero in her course and a time limited annotation on her record (neither of which she contested) but with the period of suspension reduced to one year, not two.

61. We accordingly allow the appeal to the extent of reducing the period of suspension from two years to one year, and otherwise affirm the decision below.

Dated at Toronto this 12th day of September 2023.

Original signed by:

Patricia D.S. Jackson
On behalf of the Discipline Appeals Board Panel