

Justices of the Peace Review Council

IN THE MATTER OF A HEARING UNDER SECTION 11.1 OF THE *JUSTICES OF THE PEACE ACT*, R.S.O. 1990, c. J.4, AS AMENDED

Concerning a Complaint about the Conduct of Justice of the Peace Errol Massiah

Before: The Honourable Justice Deborah K. Livingstone, Chair
Justice of the Peace Michael Cuthbertson
Ms. Leonore Foster, Community Member

Hearing Panel of the Justices of the Peace Review Council

DECISION ON GROUNDS TO BE ARGUED ON THE MOTION ALLEGING ABUSE OF PROCESS

Counsel:

Ms. Marie Henein
Mr. Matthew Gourlay
Henein Hutchison, LLP
Presenting Counsel

Mr. Ernest J. Guiste
EJ Guiste Professional Corporation
Mr. Jeffry A. House
Counsel for His Worship Errol Massiah

Decision on Grounds to Be Argued on the Motion Alleging Abuse of Process

1. Counsel for His Worship, Mr. Ernest Guiste, has advanced a motion alleging abuse of process and issues of jurisdiction in relation to a Notice of Hearing regarding the conduct or actions of Justice of the Peace Errol Massiah.
2. In the intervening time, between when his second Amended Notice of Motion, dated February 23, 2014, was filed (February 24, 2014) and today's date, June 18, 2014, Mr. Guiste argued an Application for Judicial Review in relation to a previous Justices of the Peace Review Council (JPRC) hearing about His Worship Massiah. The Divisional Court delivered an oral decision on June 4, 2014 and the written reasons *Massiah v. Justices of the Peace Review Council*, 2014 ONSC 3415 were released on June 17, 2014.
3. Having reviewed the decision, the Hearing Panel invited submissions from both His Worship's counsel, Mr. Guiste, and Presenting Counsel as to their respective views of what is left to be judicially considered in relation to the abuse of process motion.
4. As we stated to counsel, the Hearing Panel is mindful of the provisions of the *Statutory Powers Procedures Act*, made applicable to this hearing by s. 11.1(4) of the *Justices of the Peace Act*:

23(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

5. Accordingly, we do not intend to allow His Worship to re-litigate already decided issues.
6. Presenting Counsel, Ms. Marie Henein, submitted that all but two of the grounds (3 and 6(3)) argued in Mr. Guiste's motion have now been adjudicated by the Divisional Court.
7. Mr. Guiste submitted that the following grounds were not determined by the Divisional Court: 1, 3, 3a, 5, 6(2), which is also 2b, and 6(3). He conceded that the Divisional Court's ruling adjudicated the issues in grounds 1a, 1b, 2, 2a, 4 and 6(1).

8. On June 17, 2014, this Panel gave its oral decision that the Divisional Court ruling does not preclude His Worship from advancing the following three grounds as set out in his second Amended Notice of Motion:

1. None of the purported complaints comply with the express requirement in s. 10.2(2) of the *Justices of the Peace Act* that they be in writing.
3. All of the purported complaints pre-date the disposition rendered on the applicant's prior proceeding and are consequently subsumed in that disposition.
6. The complaints committee's decision to order a formal hearing into the complaint pursuant to s. 11(15) of the *Act* was void of natural justice and fairness, in that

(3) The Applicant was entitled to some reasons which would inform him of the legal basis for the referral to a public hearing.

9. What follows are our written reasons regarding those grounds which the Hearing Panel declines to further consider.

10. Mr. Guiste argues that ground 6(2), also contained in ground 2(b), has not been foreclosed by the Divisional Court. We disagree. In summary, in these grounds His Worship argues that relevant evidence, namely a report from a behavioural therapist, was not, but should have been, considered by the Complaints Committee. After findings of judicial misconduct in the previous JPRC hearing, His Worship was ordered by that Hearing Panel "to undergo specific judicial education or counselling in gender sensitivity and professional boundaries, as a condition of continuing to sit as a justice of the peace, such education or counselling as deemed appropriate by the Chief Justice or her designate". Mr. Guiste has informed this Hearing Panel that His Worship took counselling with a therapist.

11. At paragraph nine of its decision, the Divisional Court states:

[9] It is important to understand that the Complaints Committee conducted an investigation and not a hearing.

At paragraph 10, it sets out the following:

[10] It is here that the fact that this is an investigation, not a hearing into the complaint, becomes significant. The obligation of the Complaints Committee is not to determine if the complaints are justified. The Committee may find the complaint frivolous, may seek to provide advice concerning the issues raised, may refer the complaint to the Chief Justice of the Ontario Court of Justice, or as here, order that a formal hearing be held (*Justices of the Peace Act*, R.S.O. 1990, c. J.4., s. 11(15)). The actions taken here fall properly within the context of an investigation. There has been no breach of natural justice and no denial of any right to a hearing by an unbiased decision-maker. (*audi alteram partem*).

12. The Divisional Court has highlighted the clear distinction between the investigative phase of the JPRC complaints process and the hearing stage. During the investigation phase of the complaints process that gave rise to the current hearing, His Worship was provided with an opportunity to respond to the allegations being investigated by the Complaints Committee. His response, in writing, dated February 17, 2013, and the response from his former lawyer, Mr. Bhattacharya, dated February 26, 2013, both referred to the education and counselling which His Worship received as part of the disposition ordered during the previous JPRC hearing. (Applicant's Motion Record, July 12, 2013, Tab 4.)
13. The letter from the Complaints Committee inviting His Worship to respond included the following sentence: "You are invited to provide the committee with any information or response you feel is appropriate." (Applicant's Motion Record, Tab 3.) His Worship had the opportunity to provide the therapist's report when he responded to the Complaints Committee. He chose not to do so. It was not the obligation of the Complaints Committee investigating the complaint that gave rise to this hearing to seek a copy of the report when His Worship did not voluntarily release it. As the Divisional Court states, "The obligation of the Complaints Committee is not to determine if the complaints are justified."
14. Mr. Guiste submits that ground 3a of his Amended Notice of Motion has not been addressed by the Divisional Court's decision. Paragraph 3a states as follows:

3a All of the allegations cited in the Notice of Hearing stem from the improper investigation carried out by the complaints committee and not from the complaints advanced by the complainants pursuant to the Act.

15. We find, once again, that the decision of the Divisional Court forecloses the argument in relation to the allegation in 3a. The Complaints Committee was acting in accordance with the authority provided in the JPRC Procedures Document, namely it was conducting “such investigation as it considers appropriate”. (*Justices of the Peace Act*, s. 11(7); Justices of the Peace Review Council Procedures Document, page 7.)

16. Finally, Counsel for His Worship argues that he should be permitted to advance his ground, number 5, that “the Applicant was removed from his judicial duties contrary to law and established legal principles since August 2010.” This issue was argued and determined at the Divisional Court in the context of His Worship’s contention that he had ineffective legal counsel in the earlier proceedings. The Court stated, at paragraph 13:

[13] The decision of a Regional Senior Judge, not to assign the applicant to sittings before the recommendation of the Complaints Committee had been made, is authorized pursuant to s. 15(1) of the *Justices of the Peace Act*. The failure to object is not evidence of ineffective counsel and, in any event, is irrelevant for judicial review. There is no merit in the submission that counsel was ineffective.

17. We agree that the non-assignment of His Worship, ordered in accordance with s. 15(1) of the *Justices of the Peace Act*, was clearly a decision within the jurisdiction of, and at the discretion of, the Regional Senior Judge.

18. The Panel has the written submissions, facts, Motion Records and Books of Authorities already filed by counsel. Counsel for His Worship and Presenting Counsel have been directed that any further submissions they wish to present on the three remaining grounds 1, 3 and 6(3) in the Applicant’s second Amended Notice of Motion must be filed on or before the end of day July 7, 2014. The substantive part of the hearing is scheduled to commence on July 15, 2014. The Hearing Panel may entertain further submissions on the motion alleging abuse of process after the evidence has been heard, and will address this motion at the end of the hearing.

Date: June 19, 2014

Hearing Panel:

The Honourable Justice Deborah K. Livingstone, Chair

His Worship Michael Cuthbertson
Ms. Leonore Foster, Community Member