

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 Diane M. Lahaie (Chair)
Justice of the Peace Liisa Ritchie
Ms. Jenny A. Gumbs, Community Member

Hearing Panel of the Justices of the Peace Review Council

REASONS FOR DECISION ON RECONSIDERATION OF THE ISSUE OF COMPENSATION FOR LEGAL COSTS

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

Mr. Ernest J. Guiste
Counsel for His Worship

Reasons for Decision on Reconsideration of the Issue of Compensation for Legal Costs

INTRODUCTION:

[1] Following an application by Mr. Massiah for judicial review of the decisions and orders of a Hearing Panel (hereinafter referred to as the “2012 Panel”) of the Justices of the Peace Review Council (JPRC), the issue of compensation for legal expenses incurred by the Applicant Justice of the Peace (as he then was) was remitted by the Divisional Court in *Massiah v. Justices of the Peace Review Council*,¹ to the 2012 Panel for reconsideration.

[2] As the Chair of the 2012 Panel had retired, the two remaining members of that Hearing Panel received written submissions from the parties and considered the matter remitted to it by the Divisional Court. The written submissions provided an opportunity for the parties to set out their arguments on the application of the factors set out by the Divisional Court.

[3] The two members were unable to reach a unanimous decision as to whether to make a recommendation to the Attorney General that Mr. Massiah receive compensation for his legal costs in connection with the hearing.

[4] The Chief Justice of the Ontario Court of Justice appointed a new three member Hearing Panel to replace the 2012 Panel in order to determine the narrow issue of compensation for legal expenses.

[5] Although it is somewhat unclear whether Mr. Massiah is claiming the entire amount set out in the accounts submitted, these accounts, submitted for this Panel’s consideration, include legal fees and disbursements totaling in excess of \$770,000.00.

¹ *Massiah v. Justices of the Peace Review Council*, 2016 ONSC 6191

[6] At the direction of this Panel, on December 19, 2017, the Registrar sent a letter to the parties communicating that the Panel would consider the written submissions filed by Mr. Guiste on behalf of Mr. Massiah on March 24, 2017 and the submissions filed by Presenting Counsel on May 1, 2017. The letter also informed the parties that the Panel would have available to it the same materials available to the Panel that preceded it. The Panel indicated that it would provide its decision in writing.

THE LAW

[7] Sections 11.1(17) and 11.1(18) read as follows:

Compensation

11.1(17) The panel may recommend that the justice of the peace be compensated for all or part of the cost of legal services incurred in connection with the hearing.

Maximum

(18) The amount of compensation recommended under subsection (17) shall be based on a rate for legal services that does not exceed the maximum rate normally paid by the Government of Ontario for similar services.

[8] The Divisional Court in the matter of *Massiah v. Justices of the Peace Review Council, supra*, set out the starting premise or presumption to be applied to such decisions as well as some of the issues to be reviewed when determining whether or not a justice of the peace should be compensated for legal expenses. At paragraphs 56 and 57 of that Decision, Nordheimer J. wrote:

[56] For these reasons, adjudicative bodies, dealing with complaints against judicial office holders, ought to start from the premise that it is always in the best interests of the administration of justice, to ensure that persons, who are subject to such complaints, have the benefit of counsel. Consequently, the costs of ensuring a fair, full and complete process, ought usually to be borne by the public purse, because it is the interests of the public, first and foremost, that are being advanced and maintained through the complaint process. Again, this reflects the public interest nature of the process.

[57] All of that is not to say that, in every case where a judicial office holder is subject to a successful complaint, that judicial office holder can expect that his or her legal expenses will be compensated. It is a decision that

must be made separately in each case and only after a consideration of the particular circumstances of the case viewed in the context of the objective of the process. Chief among those circumstances will be the nature of the misconduct and its connection to the judicial function. For example, misconduct that is more directly related to the judicial function may be more deserving of a compensation order than conduct that is less directly related. In contrast, conduct that any person ought to have known was inappropriate will be less deserving of a compensation decision than would conduct that is only determined to be inappropriate as a result of the ultimate decision in a particular case. Further, misconduct where there are multiple instances may be less deserving of a compensation recommendation than would a single instance of misconduct. Similarly, repeated instances of misconduct may be less deserving of a compensation recommendation than one isolated incident.

[9] Further, at paragraph 60, the Court provided that if a conclusion is reached that compensation should be paid:

[60] It is open to a hearing panel to include in its recommendation for compensation that such compensation should not include the costs associated with steps taken that, in the view of the hearing panel, were unmeritorious or unnecessary. In any event, the Attorney General, upon receipt of any recommendation from a hearing panel that legal expenses be compensated, could, of course, require that those legal expenses be assessed for reasonableness – both in terms of time incurred and fees charged.

[10] Having reviewed the submissions of counsel for Mr. Massiah, as well as those of Presenting Counsel, it is our view that all of the factors to be considered in determining the appropriateness of compensation militate in favour of a denial of a recommendation that the justice of the peace be compensated for legal expenses in this case.

[11] Chief among the circumstances to consider is the nature of the misconduct and its connection to the judicial function. The misconduct found as against this justice of the peace is serious and had little to do with the judicial function. While one aspect of the misconduct was leering at female defendants in a sexual manner; most of the instances of misconduct related to out-of-court interactions with female court staff in the courthouse.

[12] It is noteworthy that the misconduct involved sexualized behavior in the workplace, which any person would have known was inappropriate and an obvious violation of the standard of conduct expected of a justice of the peace. There were findings of a pattern of misconduct by His Worship towards women in the workplace which made them feel uncomfortable, uneasy, embarrassed and offended. It was found by the 2012 Hearing Panel to be a pattern of inappropriate and offensive conduct that resulted in a poisoned work environment. Given the serious nature of the misconduct and the fact that it was not directly connected to the judicial function, this factor weighs against a recommendation for compensation.

[13] By the time this hearing was underway, this justice of the peace should have known that his conduct was inappropriate based on common sense and everyday experience but especially so, once he had the benefit of the first Panel's findings. The 2012 Panel found, on the basis of the justice's testimony at the hearing, that Mr. Massiah is "unable or unwilling to acknowledge the distinction between appropriate and inappropriate conduct in the workplace".

[14] In addition, the Panel presiding over and making findings in this hearing found many instances of misconduct in relation to multiple female court staff members, as well as female prosecutors. Again, this factor weighs against a recommendation for compensation.

[15] There was finding of misconduct by the 2011 Panel² in relation to his conduct toward women at a different court location. Mr. Massiah sought and received compensation at the expense of the public for the legal costs of that hearing. This is not one isolated incident of misconduct; there were multiple instances of misconduct.

[16] The objective of the judicial discipline process is maintaining or restoring public confidence in the integrity of the judiciary in general. While there is a presumption in favour of having the public purse bear the legal costs incurred for legal representation during the hearing process, a circumstance in this case is that Mr. Guiste's conduct in

² *Re Massiah: Reasons for Decision* (JPRC, 2012)

representing Mr. Massiah did not advance this objective. Yet throughout this hearing, Mr. Massiah continued to retain the services of Mr. Guiste as co-counsel.

[17] As reflected in the first Hearing Panel's Addendum to its Reasons on the initial compensation hearing³, Mr. Guiste's conduct often demonstrated a mockery of the process and did nothing to advance Mr. Massiah's interests. In our view, this factor is also relevant in determining whether compensation should be recommended in the circumstances of this case. If public confidence in the judiciary and in the judicial discipline process is to be preserved, the manner in which this judicial officer responded during the disciplinary hearing is a consideration in whether the public should bear his legal costs for this second judicial discipline hearing.

[18] Among the many tactics employed to frustrate and delay proceedings, Mr. Massiah, through Mr. Guiste, filed a number of frivolous and vexatious motions interrupting the Panel's deliberations, as well as alleging, without basis, bias and various other acts of misconduct on the part of people involved in these proceedings. In response to various motions, the presiding Panel issued a number of decisions refusing permission to re-litigate matters that had already been determined, decisions involving allegations of abuse of process, lack of jurisdiction, motions involving disclosure of materials which had already been disclosed or simply did not exist. There was no basis for the vast majority of these motions, which consumed a great deal of time and resources.

[19] In his submissions before this Panel, Mr. Massiah appears to argue that requesting the Attorney General to pay his fees is somehow distinct from requiring "the public" to do so. This argument is yet another example of Mr. Massiah's lack of insight and judgment, as the Attorney General's funds are the public's funds.

[20] Mr. Guiste's accounts for fees and disbursements, which exceeded a half a million dollars, are unreasonable on their face. More importantly, we are of the view that they are comprised almost entirely of frivolous and unreasonable actions taken in the hopes of defeating the public interest nature of the process.

³ *Re Massiah: Decision on the Request for a Recommendation for Compensation of Legal Costs* (JPRC, 2015)

[21] With respect to the remaining claims for compensation, the Panel finds that, having been through the first Hearing, presided over by the 2011 Panel, and having received the findings of that Hearing Panel, Mr. Massiah ought to have known that multiple instances of misconduct would be found in the case brought before the 2012 Panel.

[22] Where the nature of the misconduct is in large part removed from the judicial duties of the justice of the peace, where there are multiple instances of misconduct that impacted on several female victims, where a previous finding of misconduct has been made involving similar instances of misconduct by the same justice at a different court location and the public bore his legal expenses, and there is a complete lack of insight on the part of the justice of the peace into his offending behavior and its impact on public confidence, given the nature and objective of this process, it is not in the public interest that the justice of the peace be compensated for his legal expenses.

[23] Taking all of these factors into account and applying them to the guidance received from the Divisional Court, it is in the best interests of the administration of justice that Mr. Massiah not receive compensation for his legal expenses. To do so would be contrary to the public interest and inconsistent with the objectives of this process.

[24] In our view, Mr. Massiah is a vexatious litigant who has demonstrated no insight into his behavior, the nature and objective of this process, and his role as a justice of the peace within the justice system.

DECISION

[25] The Decisions and Rulings of the 2012 Hearing Panel provide a clear history of these proceedings. After consideration of the submissions of counsel for Mr. Massiah and those of Presenting Counsel, as well as the guidance provided by the Divisional Court in *Massiah v. Justices of the Peace Review Council*, 2016 ONSC 6191 (Div. Court), the

Panel dismisses Mr. Massiah's request for a recommendation that he receive compensation for the costs of legal services incurred in connection with the hearing.

Dated this 29th day of March, 2018

HEARING PANEL:

The Honourable Justice Diane M. Lahaie, Chair

Her Worship Liisa Ritchie, Justice of the Peace Member

Ms. Jenny A. Gumbs, Community Member

ADDENDUM

Response to Correspondence from Mr. Guiste

1. On December 19, 2017, on the instructions of the Hearing Panel, the Registrar sent the letter referred above to Presenting Counsel and Mr. Guiste. The letter clearly stated: “I have been asked to write to you on behalf of the Hearing Panel that has been established by Chief Justice Lise Maisonneuve to determine the question of whether to recommend to the Attorney General that Mr. Massiah should be compensated for his legal fees incurred by the JPRC hearing.”
2. Mr. Guiste then sent a letter, dated December 21, 2017, to this Hearing Panel asserting: “By letter dated December 19th the Registrar and Counsel to the Justices of the Peace Review Council delivered what appears to be her decision on how the rehearing of the compensation issue ordered by the Divisional Court ought to proceed.” The letter continued: “My client takes issue with the actions of the Registrar and Counsel for the JPRC making the decisions which she purports to make in this letter.” Mr. Guiste also states in his letter that “...my client will have to rely on her [the Registrar’s] goodwill and judgment to furnish you with all of the documentary evidence necessary for you to conduct your work. My client is not required to do this.”
3. Mr. Guiste also alleges in his letter: “The Registrar and Counsel for the JPRC who is a party to the lis before them has no juris to dictate the scope and terms of the rehearing – especially when she is the complainant on a complaint to the Law Society of the Ontario against counsel for the J.P...”.
4. The letter sent on December 19, 2017 on behalf of the Hearing Panel makes it very clear that the letter was sent “on behalf of” and “FOR: Hearing Panel of the Justices of the Peace Review Council”.
5. Further, Mr. Guiste would have received a copy of the publicly available Addendum to the *Decision on the Request for a Recommendation for Compensation of Legal Costs*

issued by the Hearing Panel that presided over the hearing leading to the recommendation for removal from office of Mr. Massiah. The Addendum makes it clear that the Hearing Panel was the complainant to the Law Society and the Registrar merely transmitted the Addendum on its behalf:

6. In our view, comments such as those cited above, were unprofessional and inappropriate and exemplified conduct which did nothing to advance Mr. Massiah's defence. We did not consider the inappropriate conduct or comments of Mr. Guiste in deciding the issues in this hearing or in our reasons on the request regarding compensation. However, this judicial disciplinary process plays an important role in preserving and restoring public confidence in the administration of justice. Such conduct and comments from a lawyer cannot be overlooked. This Panel directs the Registrar to provide a copy of this Addendum to the Law Society of Upper Canada for its consideration.
6. Mr. Guiste informed this Panel in his letter of December 21, 2017 that his client had an ongoing Rule 59 motion before the Divisional Court seeking an Order "setting aside liability and penalty". He requested in his letter that this Hearing Panel hold matters in abeyance pending a decision by the Divisional Court. No proper motion was before this Panel and we made no decision on the request included in Mr. Guiste's letter. Had a motion been filed, we would have agreed with the Hearing Panel in *Re Foulds; Motion for Disclosure and Motion for a Temporary Stay/Adjournment of the Disciplinary Hearing* (JPRC, 2017) when that Panel said: "Until such an order is issued by the Divisional Court, in order to preserve public confidence in this complaints process, we conclude that it is imperative that our legislated mandate under the *Act* continue..".
7. On February 16, 2018, when the parties were aware that this Hearing Panel was still deliberating on its decision on whether to recommend compensation for Mr. Massiah, Mr. Guiste sent an email to the judicial secretary of the Chair of the Hearing Panel, copying Presenting Counsel, the Registrar and Mr. Massiah. The email was directed to the Chair and members of this Hearing Panel referring to his desire to see the original record of the hearing. The correspondence provided by Mr. Guiste showed that the issue of what should constitute the hearing record was, at the time when he

sent his letter, the subject of a Rule 59 motion brought by Mr. Massiah in the Divisional Court. Mr. Guiste included other correspondence with his letter, including a letter, dated February 15, 2018, from the Registrar to him requesting that he direct matters related to the ongoing court proceedings to counsel retained to represent the Review Council in the proceedings.

8. This Panel is not prepared to acquiesce to Mr. Guiste's request that we engage in his discussion of what constitutes "the original record" in circumstances where the matter is an issue in ongoing litigation, initiated by his client, before the Divisional Court.
9. In response to Mr. Guiste's correspondence to this Hearing Panel, on February 16, 2018, Mr. Gourlay, Presenting Counsel, wrote an email to Mr. Guiste, copied to the Registrar, Presenting Counsel and Mr. Massiah. Mr. Guiste forwarded that email to the Chair of the Panel through an email to her judicial secretary. Mr. Gourlay informed Mr. Guiste: "It is highly inappropriate for you to attempt to contact the chair of the hearing panel while the panel is deliberating. This has occurred more than once in this process already. I trust that you will make no further such communications and if you have conveyed your letter to the Chair's office already, you will ask for it to be returned to you unread."
10. Mr. Guiste did not comply with Mr. Gourlay's request. Instead, he sent a further email, addressed to Presenting Counsel and Justice Lahaie, in which he infers that Presenting Counsel and the Hearing Panel have been engaging in inappropriate *ex parte* communications:

"I do not have knowledge as to what the Hearing Panel is doing at the moment. I do not understand why it is that you are aware of their every move. I do not understand why it is that you are aware of their every move. Your office is not supposed to be in contact with them."
11. This Panel has not engaged in any inappropriate *ex parte* communications with Presenting Counsel. Further, it is clear from Mr. Gourlay's email that he is referring to publicly known information that the Panel was at the time deliberating.

12. The objective of this process is to preserve and restore public confidence in the judiciary and in the administration of justice. The Panel notes that a lawyer has a professional responsibility to encourage public respect for the administration of justice. A lawyer is expected to refrain from making irresponsible, meritless allegations that could weaken or destroy public confidence in the Review Council as it carries out its legislative responsibilities.
13. The Panel notes that comments, even baseless allegations, made by a lawyer about the Hearing Panel of the Review Council, Council staff and Presenting Counsel may be given more weight and credibility by members of the public who expect that a lawyer will act with integrity. The Panel is concerned that Mr. Guiste appears to be willing to advocate to any length to achieve his client's goals, including resorting to frivolous, meritless allegations about the Registrar, Presenting Counsel and the Hearing Panel. Such actions on the part of a lawyer may bring the administration of justice and the legal profession into disrepute. We have addressed his allegations here to mitigate against such harm, as it is our role to preserve public confidence in the judiciary and in the administration of justice.

Dated this 29th day of March, 2018

HEARING PANEL:

The Honourable Justice Diane M. Lahaie, Chair

Her Worship Liisa Ritchie, Justice of the Peace Member

Ms. Jenny A. Gumbs, Community Member