

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 Claire Winchester**

Before: The Honourable Justice Martin Lambert, Chair
Her Worship Kristine Diaz, Justice of the Peace Member
Ms. Leonore Foster, Community Member

REASONS FOR DECISION ON DISPOSITION

Counsel:

Mr. Matthew Gourlay
Presenting Counsel

Mr. Donald Bayne
Ms. Michelle O'Doherty
Counsel for Her Worship

INTRODUCTION

1. On February 19, 2020, we made a finding that Justice of the Peace Winchester committed judicial misconduct on June 27, 2018 when she closed bail court early in the afternoon knowing that a young defendant, whom she was told had no criminal record, was in the courthouse and was releasable. Her Worship relied on the Cornwall Bail Protocol to close court early, depriving the defendant of his right to reasonable bail, fair treatment in accordance with the law, due process and his right to liberty. Among other observations, we concluded that she acted in an impetuous fashion without due regard to the rights of the defendant and that some of her comments in the course of the brief hearing were flippant. We found it troubling that Her Worship appeared to shift the blame to other participants in the system including Crown counsel, duty counsel and the special constable. We also found Her Worship's position during the hearing troubling, in that she seemed to believe that the Bail Protocol should somehow take precedence over the *Charter of Rights and Freedoms* and caselaw relating to bail. She also did not seem to appreciate that there were other options available to her other than closing court when the Informations could not be readily located.
2. The Hearing Panel was pleased to see that, following the finding, Her Worship spent some time with the Honourable Jack Nadelle, a well-respected retired judge of the Ontario Court of Justice in Ottawa, to discuss the law of bail and her obligations as a justice of the peace in general.
3. On March 18, 2020, we were to convene in Toronto to hear oral submissions on disposition from counsel but during the course of a conference call on March 13, 2020, the parties submitted, and the Hearing Panel agreed, that submissions should be made in writing, given the then developing Covid-19 crisis.
4. We have concluded that the following disposition is appropriate in this case:
 - (a) that Her Worship be reprimanded;
 - (b) that Her Worship apologize in writing to the defendant; and
 - (c) that Her Worship be suspended without pay, but with benefits, for a period of five days.

The following are our reasons in support of that disposition.

LEGISLATION AND GENERAL PRINCIPLES

5. After a finding of judicial misconduct is made, subsection 11.1 (10) of the *Justices of the Peace Act*, in conjunction with the case law, mandates a Hearing Panel to decide which disposition, or combination of dispositions, is required to restore public confidence in Her Worship specifically and the judiciary in general. Public confidence in the justice system and in the judiciary in particular is at the very heart of a hearing into judicial misconduct. We have already concluded that Her Worship's behavior has resulted in the erosion of public confidence, to some extent, in Her Worship, in the judiciary and in the justice system generally. Our task now is to impose a disposition that can be expected to restore public confidence in Her Worship, in the judiciary and in the justice system. It is important to stress that the Hearing Panel's task is not punitive but remedial. In other words, how can public confidence be restored when it comes to the conduct of Her Worship and the justice system?
6. Subsection 11.1(10) of the *Justices of the Peace Act* provides as follows:
 - (10) After completing the hearing, the panel may dismiss the complaint, with or without a finding that it is unfounded or, if it upholds the complaint, it may,
 - (a) warn the justice of the peace;
 - (b) reprimand the justice of the peace;
 - (c) order the justice of the peace to apologize to the complainant or to any other person;
 - (d) order that the justice of the peace take specified measures, such as receiving education or treatment, as a condition of continuing to sit as a justice of the peace;
 - (e) suspend the justice of the peace with pay, for any period;
 - (f) suspend the justice of the peace without pay, but with benefits, for a period up to 30 days; or
 - (g) recommend to the Attorney General that the justice of the peace be removed from office in accordance with section 11.2. 2006, c. 21, Sched. B, s. 10.
7. The Hearing Panel may adopt any combination of the above sanctions, except that a recommendation for removal cannot be combined with any other sanction.
8. The disposition must be proportionate to the misconduct and damage done to the administration of justice. The Ontario Judicial Council decisions in *Re Baldwin (OJC, 2002)* and *Re Zabel (OJC, 2017)* make it clear that we must consider each available

disposition in ascending order of seriousness. Consistent with the principle that the process is not punitive but remedial, we must consider the least serious disposition(s) first, before moving to the more serious dispositions and impose only what is necessary to restore public confidence in the justice of the peace, in the judiciary and in the administration of justice generally without going any further than is necessary to accomplish that objective.

9. In determining the appropriate disposition, we must consider both aggravating and mitigating factors. Such factors, which had been identified in *Re Chisvin (OJC, 2012)* have now been codified in JPRC Procedural Rule 17.3, which provides as follows:

17.3 Factors that may be relevant to an assessment of the appropriate sanction for judicial misconduct include, but are not limited to:

- i. Whether the misconduct is an isolated incident or evidences a pattern of misconduct;
- ii. The nature, extent and frequency of occurrence of the act(s) of misconduct;
- iii. Whether the misconduct occurred in or out of the courtroom;
- iv. Whether the misconduct occurred in the justice of the peace's official capacity or in his private life;
- v. Whether the justice of the peace has acknowledged or recognized that the acts occurred;
- vi. Whether the justice of the peace has evidenced an effort to change or modify his conduct;
- vii. The length of service on the bench;
- viii. Whether there have been prior findings of judicial misconduct about this justice of the peace;
- ix. The effect the misconduct has upon the integrity of and respect for the judiciary; and
- x. The extent to which the justice of the peace exploited his or her position to satisfy his or her personal desires.

10. Presenting Counsel and Her Worship agree on the following:

- (i) factually, there is no prior judicial discipline case that is particularly similar to this one;

- (ii) this is not a case in which removal of Her Worship is warranted as there is no suggestion that there was any irremediable compromise of personal integrity that would justify removal;
- (iii) the applicable caselaw supports the proposition that cases of misconduct that involve errors in judgment without an element of dishonesty or unscrupulousness are more likely to receive a disposition geared towards rehabilitation;
- (iv) the capacity for remediation is a powerful factor in determining what disposition is necessary to restore public confidence and evidence of concrete steps already taken toward that objective can significantly mitigate the harshness of the penalty required;
- (v) the acceptance of responsibility for the misconduct and the judicial officer's reputation, personal qualities and judicial track record can make an important difference in the choice of a less serious disposition to restore public confidence;
- (vi) the three previous judicial misconduct cases that share the most features with this case are *Re Romagnoli* (JPRC, 2018), *Re Chisvin* and *Re Johnston* (JPRC, 2014), with counsel for Her Worship also adding *Re Kowarsky* (JPRC, 2011), as all of these cases represent dispositions in "hasty, in-court, error of judgment situations".

RELEVANT CASELAW

11. The Hearing Panel accepts that there is no prior judicial discipline case that is exactly like this one but that *Re Romagnoli*, *Re Chisvin*, *Re Johnston*, *Re Kowarsky* are instructive when deciding what disposition to impose. We are of the view that *Re Welsh* (JPRC, 2018) also provides guidance.
12. In *Re Romagnoli*, the justice of the peace was found to have committed misconduct by failing to know, maintain competence in, and apply the law. Of note, Her Worship Romagnoli admitted before the hearing that misconduct had occurred, and she had undertaken legal training with a respected jurist. There was a joint submission for a reprimand coupled with a remedial measure contemplated by section 11.1(10)(d), which was that she be mentored by a qualified person.
13. In *Re Johnston*, His Worship had dismissed an entire docket for want of prosecution. He admitted the misconduct at the hearing, apologized and underwent counselling but the Panel still imposed a seven-day suspension and ordered him to write a letter of apology. The Panel was of the view that, given the clear misconduct, he should have shown remorse much earlier in the process.

14. Much like *Re Johnston*, the judge in *Re Chisvin* was presiding in a plea court where Crown counsel was a few minutes late returning after a recess at which point His Honour dismissed all *Criminal Code* charges on the docket for want of prosecution. It took much time, energy and expense to undo what the judge had hastily done in a few seconds. In this case as well, His Honour admitted that his actions amounted to judicial misconduct and significant mitigating evidence was presented at the hearing. The Hearing Panel was of the view that a formal reprimand was all that was required to restore public confidence in His Honour and in the justice system as a whole.
15. In *Re Kowarsky*, His Worship admitted that on one occasion he made a sexually inappropriate comment to a female clerk when court was in session. The Panel characterized this as an ill-conceived attempt at humor. There were two other incidents with the same clerk which was agreed by the parties not to constitute judicial misconduct but which would remain relevant when considering the disposition. His Worship apologized to the complainant and a psychological report submitted to the Panel concluded that His Worship was thoughtful and completely remorseful and would likely never engage in similar conduct again. In other words, he took full responsibility for his inappropriate behavior early on in the process, which was a true indication of remorse. In the end, the Panel concluded that a reprimand was sufficient to restore confidence in the administration of justice.
16. In *Re Welsh*, as in this case, the justice of the peace's misconduct resulted in a loss of the liberty of an individual. His Worship Welsh unilaterally changed the return date that had been set in court for a defendant, and did so when the parties and the matter were no longer before the court. His Worship agreed that he did so without notice to the accused person and/or counsel. His Worship testified that he had a practice of after-the-fact out-of-court communications with counsel to advise them of such changes but he did not inform counsel in this instance. As a result of His Worship changing the court date in that way, on the next court date, when no-one attended for the defendant's matter, a bench warrant was issued for the arrest of the defendant. His Worship's conduct resulted in a significant deprivation of liberty for the defendant: 24 days. In that case, the Panel concluded that the misconduct had a very negative impact on the integrity of, and respect for, the judiciary and the administration of justice as a whole in that it resulted in the deprivation of a person's liberty. His Worship had a prior history of misconduct. The presiding Hearing Panel determined that the appropriate disposition was a reprimand, a written apology, additional judicial education or training, and a suspension without pay, but with benefits, for a period of ten (10) juridical days.
17. In the five cases summarized above, the judicial officer admitted the misconduct and there was a clear indication of remorse. There may also be a genuine acceptance of responsibility and remorse following a finding of judicial misconduct; however, this does not appear to have occurred in this proceeding. For example, in the document called

“Impact of Non-Presiding Order’ prepared by Her Worship and attached as Appendix “B” to her counsel’s written submissions, Her Worship makes the following comments:

I am sorry that the panel members interpreted my description of what occurred in court on June 27 as “blaming” others in court. That was not my intention or the meaning of my words. I intended just to try and explain my mistaken decision to close the court. I am sorry that people for whom I have great respect will now think that I attempted to blame them.

Her Worship also indicates that she was relieved when the “attempted suicide” was in fact not deemed to be an attempted suicide. Quite apart from whether or not there was an attempted suicide, the fact remains that a young person with no prior record who was clearly releasable lost his liberty for one day because of Her Worship’s hasty decision to close court early when there was no urgency to do so.

DECISION

18. We will now consider the factors set out in JPRC Rule of Procedure 17.3 which are also known as the *Chisvin* factors:

(a) Whether the misconduct was an isolated incident or evidenced a pattern of misconduct

At paragraph 39 of our Reasons for Decision, dated January 22, 2020, we said the following:

Further, while we conclude that there was no judicial misconduct on May 23, 2018 and therefore the allegation of a “pattern” of judicial misconduct cannot be established, Her Worship’s actions on May 23, 2018 and her subsequent conversation with RSJP Leblanc provide us with some context in which to consider her conduct on June 27, 2018.

While a pattern of misconduct has not been established, because we dismissed the May 23, 2018 allegation, we are of the view that the history is still relevant when we consider disposition. We concluded that Her Worship’s conduct on May 23, 2018 was clearly inappropriate but in the particular circumstances did not cross the line into judicial misconduct, although similar conduct may very well be found to constitute misconduct in the future, as the expectations of justices of the peace have now been made clear by the decisions in this hearing. The fact remains that May 23 is an instance where Her Worship closed court early to the detriment of a member of the public. The consequences of failing to serve that member of the public were not as severe as with the June 27 allegation but it is another serious misapprehension of her role as a public servant.

We agree with Presenting Counsel that although the finding of judicial misconduct on June 27, 2018 is an isolated incident and thus a mitigating factor, that mitigation is qualified due to Her Worship's actions on May 23, 2018.

(b) The nature, extent and frequency of occurrence of the acts of misconduct

This is a single act of judicial misconduct which is obviously a mitigating factor, subject to what we have indicated above.

(c) Whether the misconduct occurred in or out of the courtroom

The misconduct occurred in the courtroom which is an aggravating factor. The fact that someone was deprived of his liberty, albeit for one night, as a result of the judicial misconduct, makes it extremely serious. Judicial officers must be seen to jealously guard the rights of individuals when their liberty is at stake. Her Worship failed to do so in this instance, given her slavish adherence to a Bail Protocol. Had this incident occurred closer to 5:00 p.m. at the end of a busy day, the outcome may have been different, but Her Worship chose to close court for the day shortly after 2:00 p.m., after being in court for 9 minutes.

(d) Whether the misconduct occurred in the justice of the peace's official capacity or in her private life

The misconduct was committed by Her Worship while she was exercising a judicial function in the courtroom which makes it an aggravating factor.

(e) Whether the justice of the peace has acknowledged or recognized that the acts occurred

There was never any question that the incident occurred, as it is set out in black and white in the transcript, and we concluded that it amounted to judicial misconduct. Despite Her Worship taking responsibility for her actions in her initial written response to the complaints committee, she took a much different position at the hearing claiming that her initial response had been written under "emotional duress."

It is true that she has undergone training and mentoring with the Honourable Jack Nadelle but, as we stated in paragraph 16 above, she is very sorry that we interpreted her actions as blaming others; however, that is exactly what she did at the hearing. Her insistence at the hearing in not taking full responsibility for her actions on June 27 is certainly troubling. Having said that, we trust that she now fully understands the impact of her judicial misconduct and that there will be no repetition of this type of behavior.

(f) Whether the justice of the peace has evidenced an effort to change or modify her conduct

We have already indicated that we were pleased to see that Her Worship took remedial steps by completing sessions with Mr. Nadelle and she completed the document called "Educational Sessions - A Reflection" which shows that she was

engaged in the process and has benefited from the wise advice of Mr. Nadelle also confirmed in his report that she was fully engaged in the process.

Undertaking this concrete step is obviously an important mitigating factor which we must keep in mind in arriving at an appropriate disposition that will restore confidence in the judiciary and in the administration of justice.

(g) The length of service on the Bench

Her Worship was appointed on May 25, 2011 and had served for roughly seven years and four months when a decision was made by the Regional Senior Justice to accept an interim recommendation of the complaints committee to non-assign her pending the final disposition of the complaint. Other than the blemishes which were the subject of this hearing, it would appear that Her Worship enjoyed a reputation as a hard-working, respected member of the Bench. We agree with her that her creditable years of service are a mitigating factor.

(h) Whether there have been prior complaints about this justice

There have been no prior complaints about Her Worship, which amounts to a mitigating factor.

(i) The effect of the misconduct on the integrity of and respect for the judiciary

In our view, this is the most aggravating factor. As counsel for Her Worship properly sets out in his submissions, the test is set out in *Re Zabel* as follows: “What would an informed person, viewing the matter realistically and practically- and having thought the matter through - conclude?”

We have no difficulty in concluding that such a person would be shocked by Her Worship’s behaviour. This is a situation where the court was hastily closed by Her Worship shortly after 2:00 p.m., after she had been informed that the young person was releasable, because the proper Informations could not be located. The afternoon proceedings lasted all of nine minutes. Her Worship did not have other pressing judicial obligations to which she needed to attend. She said as follows during the court proceeding :

“So, I’m not willing to wait here until everybody finds their way through the system...”.

What Her Worship failed to recognize is that she is part of the “system” and that she has an obligation to serve the public. Things may have been different if this was a very busy bail court and other individuals in custody were waiting to be dealt with, but such was not the case. There was a lot of time to locate the missing documents and the obvious remedy testified to by some of her colleagues at the hearing was to take a short break and have things sorted out. She failed to do so and displayed unacceptable impatience when a young man’s liberty was at stake.

This type of behaviour by a judicial officer can only lead to an erosion of the public's trust in the judiciary and in the administration of justice and explains, in part, why we have concluded that a five-day suspension without pay is warranted, in addition to other sanctions, in order to restore the public's confidence in Her Worship, in the judiciary and in the administration of justice in general.

(j) The extent to which the justice of the peace exploited her position to satisfy her personal desires

We agree with Her Worship that she did not exploit her position to satisfy her personal desires. There was no evidence that she closed court early to attend to personal affairs. It was a display of impatience which had a great impact on a young person but there is no evidence that it occurred to advance her own interests.

19. We agree with counsel for Her Worship that she enjoys a good personal and professional reputation and track record and that is a mitigating factor. Prior to being appointed a justice of the peace, she held various high-level positions in the educational sector and other fields and contributed to her community by sitting on various boards. Her personal and professional accomplishments no doubt led to her appointment in 2011. She has since enjoyed a good reputation amongst her colleagues as was indicated by Justices of the Peace Rozon, Bourbonnais and Johnson. There is no doubt that she is a good person who has done much public good, but she made a very serious error on June 27, 2018 which has seriously eroded the public's confidence in the judiciary and in the administration of justice.
20. Counsel have agreed that there are no prior judicial discipline cases similar to this one. We have concluded that a combination of dispositions, including a reprimand, an apology from her to the defendant and a five-day suspension without pay, are required to restore the public's confidence in Her Worship, in the judiciary and in the administration of justice in general. We have remained troubled by Her Worship's serious misunderstanding during the hearing of her role as a justice of the peace, especially in her disregard for the law on bail. In cross-examination, she refused to accept that she made a serious mistake or that she was completely wrong in her approach. We trust that her view has changed after taking note of our decisions and after having the benefit of education from Mr. Nadelle.
21. This Panel reprimands Her Worship Winchester, reminding her of our findings in our earlier *Reasons for Decision* that her conduct in bail court on June 27, 2018 disregarded the constitutional, procedural and fundamental rights of a defendant who was in custody. Her Worship failed to uphold and maintain judicial integrity, and undermined public confidence in the integrity of her judicial office and in the administration of justice.
22. This Panel reminds Her Worship that as a justice of the peace, she is entrusted with important responsibilities in the administration of justice. Her conduct fell far below the

high standard of conduct expected of judicial officers. She failed to safeguard the trust and responsibility placed upon her by the public. In the future, Her Worship will be expected to carry out her judicial duties diligently and in a manner that does not compromise the integrity of her office.

23. Her Worship is to apologize in writing to the defendant who was the subject of the bail matter on June 27, 2018. The letter of apology and the defendant's address are to be provided by counsel for Her Worship to the Registrar, who will forward the letter to the defendant. Given that this is a public hearing, the apology letter, except for the name and address of the defendant, will be a public document.
24. Notwithstanding the remedial actions taken since our decision, we are of the view that a five-day without pay suspension must be imposed, not to punish Her Worship because that is not our role, but to restore the public's confidence in the judiciary and in the administration of justice.
25. Pursuant to section 11.1(17) of the *Act* provides that the Panel shall consider whether the justice of the peace should be compensated for all or part of the cost of legal services incurred in connection with all the steps taken in the investigation and in the hearing. Her Worship is to apply in writing by August 14, 2020, including a Statement of Account that details the services provided. Presenting Counsel may file a response no later than August 28, 2020.
26. In closing, we wish to thank all counsel involved for their professionalism and assistance in this proceeding.

Dated at the City of Toronto in the Province of Ontario, July 24, 2020.

The Honourable Justice Martin Lambert, Chair

Her Worship Kristine Diaz, Justice of the Peace Member

Ms. Leonore Foster, Community Member