

ONTARIO JUDICIAL COUNCIL

WARNING

The Hearing Panel hearing this matter under section 51.6 of the *Courts of Justice Act* directs that the following notice be attached to the file:

The Hearing Panel has ordered that there shall be no publication of any information that identifies or tends to identify the child or children or any family member involved in any child protection matter.

ONTARIO JUDICIAL COUNCIL

**IN THE MATTER OF A HEARING UNDER SECTION 51.6 of the
COURTS OF JUSTICE ACT, R.S.O. 1990, c. C. 43, as amended**

**Concerning a Complaint about the Conduct of
the Honourable Justice John Keast**

Before:

Justice Eileen E. Gillese, Chair
Court of Appeal for Ontario

Justice Lise S. Parent
Ontario Court of Justice

Mr. Christopher D. Bredt
Lawyer Member

Ms. Judith A. LaRocque
Community Member

Hearing Panel of the Ontario Judicial Council

REASONS FOR DECISION – Compensation for legal costs

Counsel:

Ms. Marie Henein, Mr. Scott Hutchison and Ms. Christine Mainville,
Presenting Counsel

Mr. Paul Stern, counsel for Justice Keast

Mr. Chris Kinnear Hunter, counsel for the Children's Aid Society of the Districts of
Sudbury and Manitoulin

Mr. Sean A. Moreman, counsel for the Canadian Broadcasting Corporation

REASONS FOR DECISION – Compensation for legal costs

OVERVIEW

[1] Justice John Keast is a judge of the Ontario Court of Justice (the “OCJ”) in the North East Region. A complaint of judicial misconduct against Justice Keast led to a hearing (the “Hearing”) under s. 51.6 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the “Act”).

[2] In reasons for decision dated December 15, 2017 (the “Decision”), this hearing panel (the “Panel”) of the Ontario Judicial Council (the “Council”) found that certain conduct on the part of Justice Keast between January 8 and March 17, 2016, constituted judicial misconduct warranting a disposition under s. 51.6(11) of the Act.

[3] In these reasons, the Panel deals with Justice Keast’s request that, pursuant to section 51.7 of the Act, the Council recommend to the Attorney General that he be compensated for his costs for legal services incurred in connection with the complaint and Hearing process (the “Legal Costs”).

[4] Justice Keast seeks compensation for Legal Costs of \$149,585.92.

[5] For the reasons that follow, the Panel recommends that Justice Keast be given \$50,000 compensation for Legal Costs.

BACKGROUND

[6] Between January 8 and March 17, 2016, Justice Keast exchanged text messages with a long-time friend who worked for the CAS, in which he acted contrary to the standard of conduct expected of a judge and to the *Principles of Judicial Office* for judges of the OCJ, established and approved pursuant to s. 51.9 of the Act. This Panel found that Justice Keast's actions were a serious breach of the standards of judicial conduct that had an adverse impact upon public confidence in the judiciary and the administration of justice.

[7] At para. 28 of the Decision, we gave the following summary of the improprieties revealed through the text messages. Justice Keast improperly:

- communicated confidential information to a party;
- used his friendship with the recipient of the text messages to gain access to confidential information;
- expressed his views about a CAS matter of which he was seized;
- made inappropriate comments that could be perceived as indicating bias against the CAS, an institution that regularly appeared before him;
- provided legal advice to his friend; and,
- sought to conceal the text messages from those who might be affected by the exchange of information which they contained.

[8] The Panel also concluded that the text messages created an appearance of bias in relation to the CAS, an institution that appeared regularly before Justice Keast (at para. 51(ii) of the Decision).

[9] The Hearing took place over approximately six days between April and November 2017. The majority of the Hearing time was devoted to motions brought by Justice Keast.

[10] Justice Keast brought a partially successful confidentiality motion. In the confidentiality motion, Justice Keast sought to have treated, as confidential, his name, the details of the complaint, and all related documents.

[11] The Panel accepted that the privacy interests of a child or children involved in child protection matters engaged by these proceedings had to be protected and made various orders accordingly. One such order was a publication ban decreeing that there be no publication of any information identifying, or tending to identify, the child or children of any family member involved in any child protection matter. The Panel also made an interim sealing order in respect of certain materials filed to that point in the process. The purpose of the interim sealing order was to protect those with affected privacy interests.

[12] Apart from the orders made to protect those with affected privacy interests, the confidentiality motion was unsuccessful.

[13] Justice Keast's later motion seeking to have the interim sealing order remain in effect was dismissed. The Panel found that clear and convincing evidence had

not been adduced to show that restrictions in addition to the publication ban were necessary. We also ordered that the interim sealing order be lifted.

[14] Justice Keast's motion to have the Hearing held in private was dismissed. In dismissing the motion and ordering that the Hearing be held in public, the Panel noted the strong presumption in favour of openness and public accessibility in the hearing of a judicial misconduct complaint.

[15] Justice Keast's *Charter* application to exclude the text messages from evidence was also unsuccessful, for reasons set out in the Decision.

THE ISSUE

[16] The issue for this Panel is whether to recommend that Justice Keast receive compensation for his Legal Costs and, if so, in what amount (the "Issue").

THE LEGAL FRAMEWORK THAT GOVERNS

[17] The legal framework governing the Issue comes from the relevant legislation and case law.

[18] Because there was a finding of judicial misconduct in this matter, the relevant legislative provisions are ss. 51.7(1), (4), (7) and (8) of the Act. The effect of these provisions can be summarized as follows.

[19] The Panel must consider whether Justice Keast should be compensated, in whole or in part, for his costs for legal services incurred in relation to the complaint process, including the Hearing. If the Panel is of the opinion that

Justice Keast should be compensated for his Legal Costs, it shall make a recommendation to the Attorney General to that effect, indicating the amount of compensation. The Attorney General shall pay compensation in accordance with the recommendation.

[20] The relevant provisions read as follows:

51.7(1) When the Judicial Council has dealt with a complaint against a provincial judge, it shall consider whether the judge should be compensated for his or her costs for legal services incurred in connection with all the steps taken under sections 51.4, 51.5 and 51.6 and this section in relation to the complaint.

(4) If the Judicial Council is of the opinion that the judge should be compensated, it shall make a recommendation to the Attorney General to that effect, indicating the amount of compensation.

(7) The amount of compensation recommended under subsection (4) or (5) may relate to all or part of the judge's costs for legal services, and 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 Attorney General shall pay compensation to the judge in accordance with the recommendation.

[21] *Massiah v. Justices of the Peace Review Council*, 2016 ONSC 6191 (Div. Court) provides guidance on how this Panel should approach the Issue. In *Massiah*, the judicial officer in question was a justice of the peace, rather than – as in this case – a judge of the OCJ. The principles enunciated in *Massiah* are, nonetheless, relevant to this case.

[22] In *Massiah*, the Divisional Court heard a judicial application from the decisions of the Justices of the Peace Review Council (the “JPRC”) removing

Errol Massiah from the office of justice of the peace and denying him compensation for the legal expenses he incurred through the complaints process.

[23] Justice Nordheimer (as he then was), writing for the Divisional Court, upheld the JPRC removal decision but set aside its decision on compensation and remitted that matter to the JPRC hearing panel for reconsideration. At para. 49 of *Massiah*, Nordheimer J. states that the JPRC started from a flawed presumption in making its compensation decision. The JRPC's flawed presumption was that because it had made findings of judicial misconduct, a recommendation for compensation should not be made.

[24] At para. 56 of *Massiah*, Nordheimer J. states that when deciding the matter of compensation for Legal Costs, the decision-maker should start from the premise that the costs of ensuring a fair, full and complete process ought usually to be borne by the public purse (the "Starting Premise"). This is the proper starting point because it is the public interest that is being advanced and maintained by the complaint process and because it is in the best interests of the administration of justice that the judicial officer subject to a complaint has the benefit of legal counsel.

[25] The Starting Premise rests on the principal objective of the complaint process, which is to restore and maintain public confidence in the integrity of the judiciary, not to punish the judicial officer holder (*Massiah*, at para. 51). The

Starting Premise operates regardless of whether there has been a finding of judicial misconduct on the part of the judicial officer (*Massiah*, at para. 49).

[26] However, as *Massiah* makes clear at para. 57, compensation for Legal Costs in cases of successful complaints is not automatic. The decision whether to recommend compensation must be made after due 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.

[27] Further, the decision-maker may include in its recommendation that compensation should not include the costs associated with steps which the decision-maker views as unmeritorious or unnecessary (*Massiah*, at para. 60).

APPLICATION TO THIS CASE

[28] In accordance with *Massiah*, the Panel began its deliberations from the Starting Premise that it should recommend payment of the Legal Costs.

[29] With the Starting Premise squarely in mind, the Panel then considered: (a) the nature and seriousness of the misconduct, (b) the connection of the misconduct to the judicial function; (c) whether the conduct was such that any person ought to have known it was inappropriate; (d) whether the misconduct consisted of a single instance or multiple instances; (e) whether there had been prior instances of misconduct; and (f) whether steps taken in the Hearing process were unmeritorious or unnecessary (the “conduct of the Hearing”).

[30] **Nature and seriousness of the misconduct** – In terms of the nature of the misconduct, it is important to note that the misconduct in this case was not of a single type. Justice Keast’s acts constituted various types of misconduct. As summarized above, through the text messages that Justice Keast sent to his friend, he improperly:

- communicated confidential information to a party;
- used his friendship with the recipient of the text messages to gain access to confidential information;
- expressed his views about a CAS matter of which he was seized;
- made inappropriate comments that could be perceived as indicating bias against the CAS, an institution that regularly appeared before him;
- provided legal advice to his friend; and,
- sought to conceal the text messages from those who might be affected by the exchange of information which they contained.

[31] Further, as the Panel concluded at para. 51(ii) of the Decision, the text messages created an appearance of bias in relation to the CAS, an institution that appeared regularly before Justice Keast.

[32] It will be readily apparent that each of these forms of misconduct is serious. The Panel viewed the misconduct as constituting such a serious breach of the standards of judicial conduct that the only real choice when deciding sanction was between the first and second most serious sanctions available – either a recommendation for removal from office or suspension without pay for 30 days (at para. 53 of the Decision).

[33] **Connection of the misconduct to the judicial function** – The misconduct did not take place in the courtroom nor did it occur in Justice Keast's judicial capacity. The text messages arose from a situation in Justice Keast's personal life and the text messages were exchanged with his personal friend, a CAS employee, by means of Justice Keast's personal cell phone.

[34] However, the situation in which the misconduct took place did blur the lines between Justice Keast's judicial and personal lives. This was so because Justice Keast's personal situation related to a CAS matter and, as a judge, Justice Keast routinely heard CAS matters. Indeed, one act of misconduct related to a CAS matter of which Justice Keast was then seized (he expressed his views of that matter to his friend).

[35] **Whether the conduct was such that any person ought to have known it was inappropriate** – In our view, it is self-evident that any person ought to have known that it was inappropriate to improperly communicate confidential information and gain access to such information. Any person ought also to know that it is inappropriate to use derogatory language when describing individuals and institutions. Given that Justice Keast himself sought to conceal the text messages and urged the recipient of those messages to keep them confidential, there can be little doubt that he knew the text messages were inappropriate.

[36] In the circumstances of this case, we think the following is also relevant as part of this consideration. The nature of the misconduct is such that any judge would have known it was inappropriate. Judges know that immediately upon appointment, they may no longer give legal advice. They know that they cannot express, to members of the public, their views about a matter of which they are seized. They know the strictures governing access to, and disclosure of, confidential information.

[37] **Whether the misconduct consisted of a single instance or multiple instances** – The misconduct was not a single instance. While it all flowed from a single, ongoing personal situation, there were multiple acts of misconduct committed over a three-month period.

[38] **Whether there had been prior instances of misconduct** – There are no prior findings of misconduct in relation to Justice Keast.

[39] **The conduct of the Hearing** – The Hearing process did not begin with an admission of misconduct. On the first day of the Hearing, on the consent of the parties, the Panel ordered that certain steps were to be taken to protect the affected privacy interests. The balance of the Hearing was largely devoted to hearing motions brought by Justice Keast, described above. It was only after the Panel ruled that the text messages were admissible that the Agreed Statement of Facts was tendered into evidence and Justice Keast admitted before the Panel that his actions constituted judicial misconduct.

[40] In our view, the steps that Justice Keast took prolonged the Hearing – certainly, they did not expedite it. However, given the complexity of the issues and the privacy interests involved, we do not view them as unmeritorious or unnecessary.

CONCLUSION

[41] The Panel began with the Starting Premise. That premise, it will be recalled, is that the costs of ensuring a fair, full and complete complaint process ought usually to be borne by the public purse because that process advances the public interest and because it is in the best interests of the administration of justice that the judicial officer in question has the benefit of legal counsel during the process. However, after weighing the particular circumstances of this case within the context of the objective of the complaint process, we have concluded that the

appropriate recommendation is that Justice Keast be given approximately one-third of his Legal Costs.

[42] As we explain above, the first three considerations speak against a recommendation for a full, or even substantial, indemnity of the Legal Costs.

[43] First, Justice Keast committed a number of different types of serious misconduct. Second, the misconduct was not directly related to his judicial function. It arose from a situation in his personal life and it took place in his personal life. While there was a connection to his judicial function, the acts were largely connected to his personal life. As *Massiah* indicates at para. 57, because the judicial misconduct in this case was not directly related to the judicial function, it is less deserving of a compensation order. Third, the fact that any person ought to have known that the acts were inappropriate also makes this case one that is less deserving of a recommendation for compensation.

[44] We weighed against those considerations, Justice Keast's otherwise lengthy, distinguished and unblemished judicial record.

[45] Finally, we treated as neutral the conduct of the Hearing process. Justice Keast did not acknowledge his misconduct in the Hearing process until after the Panel determined the text messages were admissible. That, combined with the largely unsuccessful motions that he brought, prolonged the Hearing process. However, the motions cannot be said to have been unmeritorious or unnecessary. And, as we learned after the Agreed Statement of Facts was

entered, on learning of the complaint, Justice Keast had immediately acknowledged to the Council that his actions constituted misconduct.

THE RECOMMENDATION

[46] For these reasons, the Panel recommends, to the Attorney General, that Justice Keast be given \$50,000 compensation for Legal Costs.

Released: this 6 of February, 2018.

“Justice Eileen E. Gillese”

“Justice Lise S. Parent”

“Mr. Christopher D. Bredt”

“Ms. Judith A. Larocque”