**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 Complaints about the Conduct of**

**Justice of the Peace John Guthrie**

**Before:** The Honourable Justice Peter K. Doody

 Justice of the Peace Liisa Ritchie

 Ms. Jenny Gumbs, Community Member

**Hearing Panel of the Justices of the Peace Review Council**

**DECISION ON THE REQUEST FOR A RECOMMENDATION FOR COMPENSATION OF LEGAL COSTS**

**Counsel:**

Ms. Marie Henein His Worship John Guthrie, on his own behalf

Mr. Kenneth Grad

Presenting Counsel

**DECISION ON THE REQUEST FOR A RECOMMENDATION FOR COMPENSATION OF LEGAL COSTS**

Background and Issue

1. Two complaints were made concerning the conduct of Justice of the Peace John Guthrie. A complaints committee established under s. 11(1) of the *Justices of the Peace Act* (the “*Act*”) ordered a formal hearing into the complaints under s. 11(15) of the *Act*. That hearing was to commence on June 18, 2019. On May 30, 2019, His Worship submitted written notice of his retirement from office, to be effective June 14, 2019. The hearing did not proceed because this panel had no jurisdiction, His Worship no longer occupying the office of justice of the peace.
2. His Worship incurred legal fees and disbursements in connection with the hearing. He has applied for a recommendation by this panel that he be compensated for those costs, which he submits were in the amount of $17,470.00 for legal fees, $2,412.90 for disbursements, and $2,485.99 for HST, totaling $22,368.89.
3. We have the jurisdiction under s. 11.1(17) of the *Act* to make such a recommendation. The issue is whether we should do so and, if so, in what amount.

Principles we must follow in deciding whether to make the recommendation

1. The Divisional Court has set out the principles we must follow in *Massiah v. Justice of the Peace Review Council*, 2016 ONSC 6191. In that case, a panel convened under s. 11.1 of the *Act* found that former Justice of the Peace Massiah had committed judicial misconduct and recommended that he be removed from office. The panel dismissed his request for compensation for his legal costs, holding that there was a presumption that compensation should not be made where there has been a finding of judicial misconduct and “it is only in exceptional circumstances that the public purse should bear the legal costs of a judicial officer who has engaged in judicial misconduct.”
2. The Divisional Court upheld the hearing panel’s decision recommending removal from office. However, it reversed the decision denying Justice of the Peace Massiah his costs, sending the issue back to the hearing panel for fresh determination of the issue in accordance with its decision.
3. Nordheimer J. wrote:

50  I do not accept that any such presumption exists nor do I find any cogent reasons why such a presumption should exist. Rather, there are compelling reasons for the opposite approach.

51  First, and as noted above, dismissal of a judicial officer is a matter of public importance. The considerations to be taken into account in dismissing a judicial officer include not only the conduct of the individual, but its effect on the justice system as a whole. The principal objective of the complaint process is to restore and maintain public confidence in the integrity of the judiciary, not to punish the judicial officer holder, although punishment may result.

52  Second, where a Provincial Attorney General makes a complaint against a federally appointed judicial officer, a hearing is mandatory. While the same provision does not apply in the case of judges of the Ontario Court of Justice or of justices of the peace, the prospect of a complaint emanating from the Government is, nonetheless, a real one. This possibility is of some significance given that one of the most important roles performed by a judicial officer is to stand between the state and the citizen, in terms of the application of government powers. This role is referenced in the earlier statement I quoted above from Re Therrien. Judicial officers are therefore exposed not only to the vagaries of complaints by citizens but also to those of government.

53  Thirdly, judicial office holders, by the very nature of their duties, and the decisions that they make, naturally attract criticism and animosity. It is an easy matter for someone, or some group, to make a complaint regarding something that a person, who holds judicial office, does, says, or decides. While there are screening mechanisms to ensure that only complaints that appear to have a requisite degree of validity, and that are related to judicial conduct rather than judicial decisions, are permitted to proceed beyond the stage of the initial complaint, the impact on the holder of a judicial office, where a hearing is called, is significant, as this case and others have amply demonstrated.

54  Fourthly, there is a serious risk that, if we hold to a presumption that a judicial officer holder will not be compensated for their legal expenses, where a finding of misconduct is made, those persons will then face the judicial equivalent of the Gordian Knot. On the one hand, the person can choose to defend themselves but with the knowledge that, if the adjudicator decides against them, they will not only lose their position but may effectively bankrupt themselves and their family in the process. That result arises from the reality that the legal expenses associated with responding to a complaint, and participating in such a hearing, are likely to be significant. Few judicial office holders would be able to self-fund those expenses. On the other hand, that same person, in order to avoid those dire financial consequences, may simply decide that it is easier, and financially safer, to simply resign their office. In doing so, though, they leave the allegations unanswered and consequently, in most persons' minds, admitted to. If that is the knot that a judicial officer holder faces, it means that the mere fact of a complaint becomes, in and of itself, a threat to judicial independence, because it may lead to one of two undesirable results. Either the judicial office holder, for reasons other than the merits of a particular complaint, acquiesces in their removal from office or they may choose to avoid decisions that will subject them to criticism.

55  The legal expenses issue is not a fanciful one. In this case, for example, the applicant incurred legal fees in excess of $600,000. In setting out that fact, I do not, for a moment, mean to suggest that that level of legal fees was either appropriate or justified for what took place in this case. I merely use it as an example of the type of financial consequence that may arise for a judicial officer holder, who finds her/himself in the position of having to decide whether s/he can actually afford to respond to a complaint.

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 officer holder is subject to a successful complaint, that judicial officer 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.

…

60  Before leaving this issue, I would make one further point. It should be clear that just because a hearing panel makes a recommendation for compensation for legal expenses does not carry with it any requirement that the compensation cover whatever legal expenses were incurred and at whatever level.

1. Another hearing panel of this Council, in its decision of July 17, 2017 in *Re Bisson*, added “the conduct of the hearing” to the factors set out by the Divisional Court, noting that compensation should not include costs associated with steps that the decision-maker views to be unmeritorious or unnecessary.

Application of the principles to this case

1. The alleged misconduct was summarized in the Notice of Hearing prepared by Presenting Counsel and filed December 4, 2018. It made the following allegations:
2. You engaged in a pattern of conduct that was inappropriate and which, considered cumulatively and/or individually, leads to the conclusion that your conduct is incompatible with the due execution of office and/or constitutes a failure to perform the duties of office.
3. Specifically, you engaged in a course of conduct, including comments and/or conduct, towards female court staff and counsel that constituted harassment and that was known or ought to have reasonably been known to be unwelcome or unwanted. This conduct resulted in a poisoned work environment.

1. The Notice of Hearing set out a number of particulars following an investigation of the complaints. The Notice alleged that His Worship had made inappropriate remarks and/or contact with 7 women (court staff and an articled student) in 11 separate incidents. One of the alleged incidents occurred in court. The rest were alleged to have occurred in the course of His Worship’s duties, either in the court offices or while travelling with the court.
2. The Notice also alleged that His Worship had been spoken to and advised against such behaviour twice, in July 2017 and September 2017. At least 4 of the incidents were alleged to have occurred after the July 2017 conversation, 1 of which was after the September 2017 conversation.
3. In our view, it would be inappropriate to treat these allegations as if they had been established by evidence. The purpose of the hearing was to determine whether the allegations had been established. It is therefore difficult to determine whether His Worship engaged in “conduct that any person ought to have known was inappropriate” or whether there were, in fact, multiple instances of misconduct.
4. We can, however, consider the nature of the allegations in determining whether the allegations are directly related to the judicial function. In that regard, we agree with Presenting Counsel’s submission that most of the allegations were of sexual harassment that occurred in-house or during court-related business. One of the allegations was of behaviour in court. They are therefore somewhat, but not entirely, related to the judicial function.
5. Presenting Counsel brought to our attention *Re: Whittaker*, a decision of a Hearing Panel dated September 8, 2015. In that case, the Justice of the Peace against whom the complaints had been made gave notice of his resignation approximately 2 months before the hearing date. It was effective 2 weeks before the hearing date. The Panel recommended that he be compensated for $4,668.75 plus HST for fees, rather than the amount of $5,737.50 plus HST which had been sought. The Panel disallowed fees for correspondence vaguely described and fees incurred after the date the Notice of Hearing was provided to him, noting that by that date he had full disclosure of the evidence that would be called if the hearing proceeded and stating:

We are mindful of the concern raised by Presenting Counsel that the compensation regime should not be applied in such a way that it can be perceived as encouraging judicial officers to retire at the latest opportunity – and thereby continue to receive a salary, benefits and accumulate a pension as long as possible – while ultimately avoiding a public hearing where evidence can be presented about the allegations and a determination would be made as to whether there was judicial misconduct. Recommendations for compensation should take into account whether the retirement is made at the earliest opportunity, or at least in a timely manner that would not contribute to a loss of public confidence.

…

In our view, His Worship could have retired and left office at an earlier opportunity and avoided unnecessary expenditures of public funds.

1. In our view, the facts in the case before us do not support a conclusion that His Worship was intentionally dragging out the process in order to continue to receive a pension as long as possible, only to retire on the eve of the hearing.
2. His Worship has told us that he had always intended to attempt to come to an agreement with Presenting Counsel on an Agreed Statement of Facts, and then take part in a hearing to determine the appropriate resolution, without the necessity of hearing witnesses. He has said that he did not understand, until two weeks before the hearing, that all of the allegations would be made public at the hearing. When he learned this, he decided to retire in order to avoid putting his family through the stresses of a public hearing.
3. We accept this. The documentary evidence supports it. The detailed accounts from His Worship’s lawyers show that they were working on the Agreed Statement of Facts in March, April and May 2019. Drafts were exchanged with Presenting Counsel. Mr. Gover, senior counsel on the defence team, is noted to have reviewed a “further draft of ASF” on May 17, 2019. There would have been no need to work on an Agreed Statement of Facts if His Worship’s intention had been to simply wait as long as possible and then retire before the hearing.
4. Furthermore, the *Whittaker* decision was made before the Divisional Court decision in *Massiah*. In our view, the activities of His Worship’s lawyers in giving His Worship advice, and in attempting to reach agreement on the facts and prepare for submissions as to penalty were completely consistent with the policy underlying the compensation of judicial officials for costs related to disciplinary hearings, as set out by Justice Nordheimer.
5. It is appropriate that judicial officers receive legal advice before deciding on the appropriate response to a complaint. As Justice Nordheimer noted at paragraph 54 of his decision, if they were not relatively sure of being compensated for the cost of that advice, they may choose to resign rather than face financial ruin, even if the complaints were not well founded. That would impinge on judicial independence. The public interest is best served by supporting legal advice for judicial officials in such situations, even if they decide to resign after obtaining advice.
6. The public interest is also served by achieving resolution of complaints without a hearing, even if that is achieved by a resignation where appropriate. Legal advice often facilitates resolutions.
7. Agreement on the facts, if possible, is to be encouraged. It removes the necessity of putting witnesses through the inconvenience and potential emotional trauma of testifying and being cross-examined. It saves time and public money because hearings can be much shorter. It achieves certainty as to the facts, removing a basis for criticism of any decision. All these things serve the public interest.
8. His Worship has had no prior findings of misconduct.
9. We have reviewed the accounts submitted for reimbursement. In our view, the time spent by counsel was appropriate. No unnecessary steps were taken. Senior counsel involved himself only where necessary, leaving the bulk of the work to be done by his associate at a significantly lower hourly rate.
10. The time spent and the fees charged were reasonable, considering the number of allegations and the potential consequences to His Worship.
11. The hourly rate charged by the lawyers did not, except for one lawyer, exceed the maximum rate normally paid by the Government of Ontario. One lawyer, called to the bar in 2018, charged an hourly rate of $225.00 for .7 hours (42 minutes) of time. The maximum hourly rate normally paid by the Government of Ontario for lawyers of that experience is $175.00. Thus, the amount charged of $175.00 should be reduced by $52.50.
12. We recommend that His Worship be compensated for the entire amount of fees requested, less $52.50, plus HST.
13. His Worship seeks compensation for total disbursements of $2,412.90.
14. Of that, $2.90 was photocopying charges, which is reasonable.
15. $760.00 was the cost to His Worship of 8 sessions between April 20, 2019 and May 30, 2019 with a psychologist who acted as a “boundaries coach” for him. The total cost was more, but the balance of the psychologist’s fees for these sessions were covered by his insurance.
16. Presenting Counsel submits that these sessions were not “part of the cost of legal services incurred in connection with the hearing.”
17. His Worship submits, however, that the psychologist would have testified as a witness at the hearing about his improved understanding, as a result of the coaching sessions, of why his actions were not received favourably by the complainants. This would have been relevant evidence to be considered by us if we had been required to consider the appropriate disposition after the hearing.
18. It is clear from the invoices from His Worship’s lawyer that the psychologist was intended to provide evidence at the hearing. There are a number of references in the accounts to communication with her. Two entries – one on October 21, 2018 and one on May 26, 2019 – refer to receipt of and review of her draft report.
19. The psychologist was an expert witness who would have given relevant opinion evidence based on her observations of His Worship. In our view, her fees were costs incurred in connection with the hearing. We recommend that His Worship be compensated for them.
20. We have come to a different conclusion about the cost of an online program completed by His Worship on sexual harassment in the workplace. The program cost $1,650.00 plus HST. There is no suggestion that the provider of the program was going to be a witness at the hearing. Furthermore, all judicial officers should be aware of these issues. If they are not, they should educate themselves about them. We have concluded that this expenditure was not a “cost of legal services incurred in connection with the hearing.” We recommend that His Worship not be compensated for this cost.

Conclusion

1. We recommend that His Worship be compensated for the following expenses, under s. 11.1(17) of the *Act*:
2. For legal fees, $17,087.50 plus HST;
3. For disbursements, $762.90 plus HST.

Dated: September 16, 2019

HEARING PANEL:

The Honourable Justice Peter K. Doody, Chair

Justice of the Peace Liisa Ritchie

Ms. Jenny Gumbs, Community Member