
CANADA / JUDGMENT

L.K.A. v. J.A.H.

2022 BCSC 1548

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Supreme Court of British Columbia

DECIDED

2 September 2022

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2022 BCSC 1548 L.K.A. v. J.A.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.K.A. v. J.A.H.,

2022 BCSC 1548

Date: 20220902

Docket: E51169

Registry: New Westminster

Between:

L.K.A.

Claimant

And

J.A.H.

Respondent

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for the Claimant:

G.K. Thomas

Counsel for the Respondent:

D.H. Goodwin

Place and Date of Hearing:

New Westminster, B.C.

September 9, 2021

Place and Date of Judgment:

New Westminster, B.C.

September 2, 2022

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Introduction

- [1] These are reasons in response to an application brought by the respondent in this proceeding for variation of an order for child and spousal support made by the Hon. Justice Morellato on June 15, 2018 ("the Morellato Judgment"). The claimant opposes the application on the basis there has been no change in circumstance that would justify the variation sought.

Background

- [2] The parties commenced cohabitation in January 2010. The parties were married on April 23, 2011 and then separated in April 2016. There were two children of the marriage. For the purposes of these reasons I will refer to the children by their initials only in order to preserve their privacy. The eldest child is "AJ" born in 2012 and "PJ" born in 2014.
- [3] The children live with the claimant full-time and the respondent has parenting time with the children from every second Friday at 4:00 PM to the following Sunday at 4:00 PM.

Circumstances of the claimant

- [4] The claimant was born on the 23 of June 1979 and was 43 years old at the date of the hearing of this application.
- [5] The claimant is qualified with a Red Seal certificate as a chef. However, since the birth of the children, she has been their primary care giver and as a result has been unable to work in any full-time position, particularly as a chef which would require working after 5:00 PM in hours when she is the care giver for two children. She works as café aide in School District 42 in Maple Ridge, B.C. The Covid-19 pandemic has had a significant impact on her employment reducing working hours since 2018. Hours were reduced in 2019. That year her employment income was \$25,302.74 to which was added Employment Insurance ("EI") income of \$3,638, and retroactive and current year support payments of \$46,754. In 2020, the claimant's working hours were further reduced from 27.5 hours per week to 23 hours per week. Her hourly rate of pay is \$23.00 per hour.
- [6] In 2020, the employment income of the claimant was \$23,726.98, EI benefits received were \$6,811 and support payments were \$15,984. Total income of the claimant for 2020 was \$46,661.00.
- [7] The claimant also provided an explanation with respect to her income for 2021 in the Form F8, sworn September 1, 2021. Noting that from January 2021 until the end of June that year her hours worked totalled 23 hours per week. Based on her explanation she anticipated that due to fewer paydays between September and the beginning of the winter break her income for 2021 would be lower than 2020 in addition it was noted that EI receipts were lower than 2020. On the basis of the foregoing, the claimant estimated her employment income for 2021 at 23 hours per week because of Covid-19 restrictions, not personal choice, and in September of 2021 available work hours increase to 27.5 hours (the maximum hours posted for her current position) will total \$22,000 approximately with a further \$6,000. in EI receipts, plus bank interest of \$140.12, less union dues of \$473.81, for a total \$27,666.31 or \$2,305.53 per month.
- [8] Her monthly expenses include \$2,287.30 per month for rental housing (including property insurance and water, sewer and garbage of \$87.30), utilities at \$480.00 per month, and household expenses are \$950.00 per month for a total of \$3,717.30 per month or \$44,607.60 per annum, a sum well in excess of the income of the claimant. The claimant borrows from her bank savings account and line of credit to pay expenses when expenses exceed her monthly income.

Circumstances of the respondent

- [9] The respondent was born on October 17, 1975 and was 46 years old at the date of the hearing of this application.
- [10] The respondent, as noted, has not paid support as ordered and is in arrears in the amount of \$5,385.24 as at April 2, 2020 (see Family Maintenance Enforcement Program statement at Exhibit "E" of the Affidavit of the claimant made on August 19, 2021).

- [11] At para. 13 of the fourth affidavit of the respondent, made on July 29, 2021, at para. 13 the respondent refers to his employment by Kaefer Industrial Services Ltd. for the period from November 10, 2017 to April 16, 2018 in exhibit "G". In that exhibit respondent is shown to have worked as a "journeyman sheet-metal" from November 11, 2017 to April 16, 2018. The same exhibit states his number of total insurable hours was 827 hours and the total insurable earnings were \$49,501.34. Dividing the total insurable earnings by the total insurable hours resulting in earnings per hour of \$59.86.
- [12] The respondent at exhibit "H", also referred to at para. 13, refers to the respondent earning \$45.71 per hour regular time. That reference leaves out other payments including overtime hours, at time and ½ and double-time, so that on a year-to-date basis, in exhibit "H" the respondent is shown to have 559.50 earning units or hours, and have been paid \$35,043.15 for those hours. Dividing \$35,043.15 by 559 ½ hours indicates an hourly rate of \$62.63 per hour, a sum well in excess of \$45.71.
- [13] In exhibit "I" the respondent is paid for 653 insurable hours in the amount of \$26,211.48 or \$40.14 per hour. Continuing in this affidavit, exhibit "J", the respondent is shown to have been credited with 1079 insurable hours for which he was paid insurable earnings of \$50,561.34 or \$46.86 per insurable hour.
- [14] Again, in exhibit "K", the plaintiff claims earnings of \$38.51 per hour regular time. That said while he worked 80 hours at regular time, he also worked another 64 hours at time and ½ (40 hours) and double-time (24 hours). The respondent was paid substantially more in overtime than he was at regular time. On pg. 14 of exhibit "K", the actual hourly rate including overtime and other adjustments was \$7549.48 for 144 hours or \$52.43 per hour.
- [15] While the statement by the respondent that he was earning \$38.51 per hour "regular time" is correct, that figure does not provide a relevant basis for calculating Guidelines Income pursuant to the Child Support Guidelines or the Spousal Support Advisory Guidelines on the "with child formula".
- [16] Unfortunately, the respondent continued to use calculations of regular time hours only throughout the balance of the evidence about income presented in his 5th affidavit.
- [17] The relevant provisions for determining income are set out in ss. 16 to 20 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. At *S.L.D. v. W.A.D.*, 2021 BCSC 942, the Court states "Pursuant to s. 16, the calculation commences with total income from line 150 (now line 15000) of a spouse's personal tax return and is adjusted in accordance with Schedule III: *Brown v. Brown*, 2014 BCCA 152 [Brown] at para. 16; *Vincent v. Vincent*, 2012 BCCA 186 at para. 35. The court must then consider if the circumstances in ss. 17 to 20 are present and whether there should be an adjustment to arrive at the fairest determination of income available for support. Income based on "regular time" alone is not line 1500 income, the actual income of the respondent.

- [18] The onus of proof is on the payor spouse to provide clear evidence that a corporation's pre-tax income is not available for support: *Hausmann v. Klukas*, 2009 BCCA 32 at paras. 51-52. The court should not have to ferret out the necessary information from inadequate or incomplete financial disclosure. The respondent in this case must also meet the onus of proof of his line 1500 income and not of some other figure which satisfies his views. The same principles that apply to corporate pre-tax income apply to the personal income of an individual taxpayer.
- [19] It is noteworthy that the claimant filed incomplete 2019 and 2020 tax returns and assessments for those years. The respondent attached incomplete tax returns, that is, without attachments. The respondent did not file any income tax assessments for any of the years referred to in his F8, thereby preventing the court from determining the response of the CRA to the respondent's income tax filings.
- [20] At para. 63 of the *Morellato* Judgment the following appears "Having considered the record before me, I am of the view that additional income ought to be imputed to Mr. Healey for 2017 in assessing the quantum of retroactive spousal support. In so deciding, I have considered not simply what Mr. Healey has actually earned, but also his capacity to earn income. This principle that I ought to consider not only the amount of income a spouse payor as actually earned, but also the amount of income a spouse could earn if working to capacity is well-established: see *Marquez v. Zapiola*, 2013 BCCA 344 (B.C.C.A.) ["Marquez"] at para. 37; *Van Gool v. Van Gool* (1998), 64 B.C.L.R. (3d) 94 (B.C.C.A.); *Barker v. Barker*, 2005 BCCA 177 (B.C.C.A.) at para. 19.
- [21] There then follows in the *Morellato* Judgment, a discussion of the legal principles described by Martinson J. in the case of *Hanson v. Hanson*, (1999) 92 A.C.W.S. (3d) 1024 (B.C.S.C.) in relation to imputing income, as follows:
- (a) Section 19(1) of the Guidelines allows the Court to impute such an amount of income to a parent as it considers appropriate in the circumstances.
 - (b) Imputing income is the way in which the court gives effect to the legal requirement that a parent must earn what the parent is capable of earning.
 - (c) The court must consider not only the amount of income a spouse actually earns, but the "amount of income a spouse could earn if working to capacity."
 - (d) Bad faith is not required. The parent required to pay is intentionally underemployed if that parent chooses to earn less than he or she is capable of earning.
 - (e) when imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as the availability of work, freedom to relocate and other obligations.

- [22] Also at para. 65 of the Morellato Judgment, it was noted that at para. 38 of Marquez, the British Columbia Court of Appeal explained that the test for imputing income for under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of age, education, health, work history and work availability.
- [23] In *Shapiro v. Simpson*, 2016 BCSC 211 at para. 176, Justice Adair summarized the approach taken in the cases that have considered this issue. She stated:
- [176] The basic principles concerning imputing income to a parent, where it appears that the parent is underemployed, are well-known, and include the following:
- (a) there is a duty to seek employment where a parent is healthy and there is no reason why the parent cannot work;
 - (b) when imputing income on the basis of intentional unemployment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work and other obligations;
 - (c) a desire simply to stay home with a child is not sufficient to invoke the exception in s. 19(1) (a) of the Guidelines. A parent who chooses to work less than full-time must justify that choice by evidence of the needs of the children;
 - (d) bad faith is not required, and a parent is intentionally underemployed if the parent chooses to earn less than he or she is capable of earning.
- [24] In the fourth affidavit of the respondent in paras. 8-25 the respondent reports to set out income he has received between 2016 and 2021 at the various employment positions he held. He has repeatedly referred to his "regular time" hourly payments but made no mention of overtime payments which per hour are 1 ½ times the regular time rate; double overtime which is twice the regular hourly rate nor Covid-19 payments or payments for work on statutory holidays, all of which the respondent received.
- [25] It was simply not reasonable for the respondent to rely on reference to "regular time" hours only when the respondent's history reflects extensive periods of over time hours.

Positions of the parties

The position of the Respondent/Applicant

- [26] The respondent/applicant submitted that based on "regular time" income only, reciting the contents of exhibits "B" through to exhibit "X" submitted on a 40 hour week, demonstrated that the respondent's income should be averaged to \$100,877.00 and his spousal and child support payments should be adjusted downward accordingly. The "regular income" amounts sought to be used by respondent are not coincident with the actual income of the respondent, nor do the "regular income" amounts coincide with the income that the respondent could have earned and the court is not required to (as noted above) "to ferret out

the necessary information from inadequate or incomplete financial disclosure".

- [27] The respondent argued that the economy of Alberta has declined in the past few years but offered absolutely no evidence to support a decline in the Alberta economy, except his own experience. The court cannot give effect to submissions unsupported by expertise or evidence.
- [28] The respondent asserts that he has been paying child and spousal support in circumstances where the claimant is working full-time. The evidence before this court is that the claimant cannot work full-time as she has no financial capacity to pay for childcare, and as result, she does not have sufficient earned income to be self-supporting. She has produced a complete and thorough statement of financial disclosure in her Form F8. The respondent has provided no evidence which would support a finding there has been a change in circumstance and there is no basis to alter or otherwise amend the Morellato Judgment in this regard.
- [29] The respondent submits that his expenses exceed his income each month. This submission is based on the respondent properly reporting his income which he has not done, by relying on "regular hours", which is not coincident with his actual income nor as noted by Morellato J. the income the respondent was able to earn.

The position of the claimant/respondent

- [30] The claimant notes of the children have grown since the prior court appearance and, without surprise, now consume more food at greater expense than they did in 2018. The claimant also asserts that the respondent does not see the children more frequently now that he is working only in British Columbia, then he did when he was only working in Alberta. This evidence was not challenged nor disputed in any way. The claimant continues to be the primary caregiver for the children. This is made more difficult because the respondent does not pay support or childcare expenses on time or as required by the Morellato Judgment, thereby limiting the claimant's ability to be self-sufficient. She is not now self-sufficient.
- [31] It is puzzling that the respondent, while demanding that the claimant rely on her Red Seal qualification, refuses to make the effort to obtain a Red Seal qualification in his own field, which well might lead to increased income.
- [32] The parties agreed that the claimant would remain at home as the principal caregiver for the children until the children were attending school. The problems the claimant faced was that when the children were enrolled in school (1) the parties were hoping for a further pregnancy which did not occur; and (2) thereafter upon separation she could not afford childcare to allow full-time work. The respondent expressed a belief about the claimant's ability to obtain full-time work. This was a belief, not a fact, and not supported by the evidence.

- [33] Counsel for the claimant relied upon the Supreme Court of Canada decision in *Moge v. Moge*, 1992 CanLII 25 (S.C.C.) where it is stated:

The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.

If childcare responsibilities continue past the dissolution of the marriage, the existing disadvantages continue, only to be exacerbated by the need to accommodate and integrate those demands with the requirements of paid employment."

- [34] There follows a long quotation cited with approval from *Brockie v. Brockie*, (1987) CanLII 989 (M.B.Q.B.), 5 R.F.L. (3d) 440 (Man. Q.B.), aff'd (1987), 1987 Can Lii 141 (MBCA), 8 R.F.L. (3d) 302 (Man. C.A.), at pp. 447- 48 which spoke to the difficulties encountered by a custodial parent and special attention required to be paid to the needs of young children all the while restricting employment opportunities of the custodial parent.
- [35] As noted in the *Morellato* Judgement, the respondent has a capacity to earn income but he is not working to capacity. The respondent has continued the work in the same manner, he did before the *Morellato* Judgment He has the obligation to meet the threshold requirements to establish before this court that his ability to earn income has diminished; that threshold was not satisfied before *Morellato J.* in 2018 and has not been satisfied on this application. Setting out records of employment for a forty hour week, without regard for overtime hours, does not meet the threshold when the facts of actual employment are different and demonstrate a much higher ability to earn income.
- [36] As noted above in *Marquez* at para. 37, the test for imputing income for intentional under-employment or unemployment is reasonableness, considering the capacity of the parties to earn income in light of their age, education, health, work history and work availability. The respondent is forty-six years old, has decades of experience in construction, is healthy, has a long work history where he has learned a trade by the "hands on" method. He clearly has work available which produces significant numbers of overtime hours. At para. 37 of *Marquez*, the court also states: "A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool* (1998), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378 at para. 46".
- [37] The claimant's counsel noted that contrary to the respondent's assertion he was not a union member, at Tab 4 pgs. 19 and 26, it is indicated that in 2017, the respondent was the member of a trade union paying union dues of \$590.90. In the respondent's income tax return for the year 2018, set out in Tab 4 at pg. 32, line 212, union dues of \$940.18 were deducted from the respondent's income. The same deduction is also noted at Tab 4, pg. 47, under the heading of "Taxable annual union or professional dues" with Sheet Metal at \$300.00 and Allied

Workers at 640.18 for a total of \$940.18.

- [38] For the respondent's tax return in 2019, also under Tab 4 at pg. 64, union dues of \$90.00 are deducted. At pg. 81, the same sum is noted as union dues beside the title "Sheet Metal".
- [39] In the 2020 tax return of the respondent, there is no indication of payment of union dues by the respondent which counsel for the claimant argued was an indication that the respondent had resiled from union membership to reduce his capacity to earn income.
- [40] Counsel also noted the "search for work" referred to in para. 12 of the affidavit of the respondent at Tab 3, made on July 29, 2021, is not accompanied, by any evidence of the search. There were no application forms, lists of potential employers or other documents which would evidence any search effort. This is the same practice commented on by Morellato J. because serial records of employment do not indicate any impact by a matter beyond his own control. There was nothing in the record to indicate when the respondent knew that he was going to be laid off.
- [41] At para. 66 of Morellato Judgment, the court stated:
- "While I was provided with a description of Mr. Healey's actual employment situation in 2017, I was not provided with a clear or substantive explanation that persuaded me his reduced income was likely to continue or reflected a diminished capacity to earn income in the future. Mr. Healey is a healthy 42-year-old man with over 20 years experience in the construction. His income earning potential has, with the exception of 2017, been rising over recent years upwards of \$120,000. As such I agree with counsel for Ms. Agar's submission that Mr. Healey's income does not reflect his actual capacity to earn income."
- [42] In para. 30, counsel again noted a conclusionary statement by the respondent concerning the amount of money that he was earning in 2015 and 2016 and that he was no longer able to earn such sums. Problematically, the income of the respondent and number of overtime hours worked in 2015 and 2016 is not before the court. Likewise, there was no evidence to support the hearsay statement "the economy of Alberta has declined in the past few years". The respondent is not an economist and does not have an academic background to present an opinion about the economy of Alberta.
- [43] Counsel for the claimant also noted that the affidavit of Susan Marie Healey, at Tab 7 of the Application record, where it is stated she had provided the respondent a total of \$101,000 in loans over the last five years to assist the respondent in meeting living expenses and paying legal fees. Five years earlier would be the year 2016 when the respondent earned a total of \$130,000. Also several times during that same five years, he has taken funds from his RRSP, and he is also continually in arrears with his family support payments. The amount of expense claimed against the substantial income and loans is simply not reliable.
- [44] Counsel also noted that because of the circumstances of continual arrears of family support payments, the court has a discretion to refuse to hear an application to vary an order which order the applicant has breached. The claimant is not self-sufficient and this was noted in

the Morellato Judgment describing efforts to become self-sufficient but in that regard the claimant has been obliged to work available hours so she can drop the children off for the opening of the school day and be at home when the children return home from school each day, and attend them if they become ill. The claimant maximizes the hours of work but must work around the schedules of the children as she has no money to pay for child care. The claimant's mother also provides child care on occasion without charge but charity is not a substitute for proper support.

Conclusions

- [45] The test for altering the imputation of income requires sufficient evidence from the respondent that there has been a material change. The facts under consideration include the credibility of the respondent presented by incomplete disclosure of income tax returns, a lack of disclosure of job searches noted in para. 40 above, which provide a basis for this court to find that the question of whether the respondent has been "reasonably unemployed" or under-employed must be answered in the positive (see *K.P.B. v. A.S.R.*, 2016 BCCA 382 at paras. 24-25). Ultimately, the respondent must establish that the circumstances that have transpired after trial were materially different than the situation prevailing when the Morellato Judgment was made. The respondent has not met this onus.
- [46] I find that the situation is not materially different from the scenario anticipated in the Morellato Judgment. It is evident that Morellato J. found that the respondent was deliberately under-employed and was attempting to avoid his financial obligations arising from the separation and the divorce. The Morellato Judgment notes that the respondent is avoid disclosure of actual income and had engaged in that practice before the trial.
- [47] Over the past four years, the respondent's actions have mirrored the trajectory that was anticipated in the Morellato Judgment. I have every confidence that if Morellato J. were faced with this application, with the clarity of hindsight, she would find nothing that unfolded in the intervening years to be surprising.
- [48] For these reasons, I find that there has not been a material change of circumstances since the Morellato Judgment. The respondent has not met the evidentiary burden placed upon him. I dismiss the application to vary the orders contained in the Morellato Judgment relating to the imputed income of \$123,910 per year.
- [49] The claimant is awarded the costs of this application payable by the respondent forthwith after assessment or consent, pursuant to Appendix "B" of the Supreme Court Family Rules.

"Ball J."

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Prepared on 29 October 2026 · Esheria