

DECISION OF ADJUDICATOR
IN THE MATTER OF AN ADJUDICATION
PURSUANT TO SECTIONS 2-75 and 4-6 OF
THE SASKATCHEWAN EMPLOYMENT ACT



APPELLANTS:

(Employer)
(Directors)

119076 Alberta Inc. o/a The Lone Star Hotel
Baljit Sihota and Jarnail Sihota

RESPONDENT:

(Employee)

Thomas Schwab

Paul DeBruin, Employment Standards Officer, appearing for Government of Saskatchewan,
Ministry of Labour Relations and Workplace Safety, Employment Standards Division

DATE OF HEARING:

October 30, 2017, 10:00 a.m.

PLACE OF HEARING:

Conference Room
Kramer Building
1146-102nd Street, North Battleford

I. INTRODUCTION

This is an appeal by the Employer, 119076 Alberta Inc. o/a The Lone Star Hotel, from a Wage Assessment in the amount of \$5,427.32 in favour of the Employee, Thomas Schwab, dated August 3, 2017.

Thomas claims his employment at the Lone Star Hotel was terminated without notice and he is entitled to eight weeks of pay in lieu of notice pursuant to s. 2(60) of *The Saskatchewan Employment Act*.

The Employer's position is that Thomas quit the employment without notice and is not entitled to any compensation.

The Ministry provided information in advance of the Hearing confirming the Employer's appeal and appeal deposit were received within the time requirements in s. 4-4(4) and s. 4-5(1)(b) of *The Saskatchewan Employment Act*.

II. EVIDENCE

Four witnesses testified on behalf of the Employer:

- Jarnail Sihota, owner and director of the company which owns the hotel;
- Kathie McNabb, a long-time hotel employee;
- Arslan Saeed (Sunny) who does accounting for the parent company and assists Mr. Sihota with communications; and,
- Anubhav Mittal, the current manager of the Lone Star Hotel.

Thomas Schwab and former hotel employee Ellie Mae Bishop testified for the Employee.

Mr. Sihota owns and operates Sher Hospitality – a company which manages several properties in Canada and the U.S., including strip malls and a hotel in Texas.

The Lone Star Hotel is the latest incarnation of a business that has operated in North Battleford for several decades. When Mr. Sihota's company purchased it in 2004 or 2005 it was called the Super 8 Motel; the name changed briefly to the Great Hotel in 2014, then to the Lone Star Hotel in 2015.

Thomas Schwab began working at the business in approximately 2005. When the Employer purchased the property, Mr. Schwab was a night clerk. The existing manager left shortly after the purchase and in 2006 Mr. Sihota promoted Mr. Schwab and fellow employee Kathie McNabb to manage the business. He thought they would do so together, but the two employees decided Mr. Schwab would be the manager and Ms. McNabb would act as his assistant, as she did not want to travel to take the necessary management training.

As manager, Mr. Schwab was responsible for staff issues, including scheduling, hiring, and setting wages, marketing, and looking after the building. He remained in that position until September 2016. He was paid \$18.50/hour with no overtime pay, although he testified that as a manger he frequently worked longer hours. His last day of work was October 17, 2016.

The hotel was closed for a portion of 2006 during renovations. In 2010 another building was added to enlarge the hotel capacity from 39 to 73 rooms. Both projects increased business, and in 2010 room revenue more than doubled from the previous year (Employee Exhibit #2). Mr. Schwab testified this increase resulted in part from his efforts, and, he reported to management, was representative of an unusual year, as several major construction projects were ongoing in the Battlefords at that time, resulting in a higher than normal occupancy rate.

The hotel never matched the 2010 revenue or occupancy levels in the following years, and in particular, suffered an over 20% drop in revenue from 2014 to 2015 (Employee Exhibit #3). The occupancy rate also declined to the lowest level since the 2006 renovations. At the Hearing,

Mr. Schwab testified he believed this was in part a result of changing the name from “Super 8” to “Lone Star” in 2014.

Mr. Sihota was concerned with the decline in profitability through 2015 and 2016. He asked Mr. Schwab to obtain a comparison to other hotels in North Battleford. Mr. Schwab provided this information (Employee Exhibit #9), and noted that 2014 was also an unusual year because of construction projects in the Battlefords. He felt that a decrease in occupancy and revenue in 2015 was to be expected. After reviewing the comparison information, Mr. Sihota determined the Lone Star Hotel showed a greater decline than the other hotels, and was losing market share.

The two men had ongoing discussions about how to increase business. Mr. Sihota testified that Mr. Schwab was resistant to Mr. Sihota’s suggestions. In particular, the owner wanted the hotel to provide a hot breakfast and prepare snacks in the evening. To that end, Mr. Sihota hired Anubhav Mittal as a cook, starting in June 2016. Mr. Mittal came to North Battleford from Calgary. He had extensive experience in the hospitality industry, including a Bachelor of Science in Hotel Management from a university in India, hotel experience in India, managed a coffee shop in Calgary, and worked as a head chef in a restaurant in Calgary for several years. Mr. Mittal testified his salary at the Lone Star Hotel was similar to what he was earning in Calgary: \$5,000/month.

Both Mr. Sihota and Mr. Mittal testified Mr. Schwab was unhappy with Mr. Mittal’s arrival, perhaps thinking he was a ‘spy’ for Mr. Sihota. They also speculated that Mr. Schwab was upset at how much more Mr. Mittal was earning than Mr. Schwab: \$5,000 vs. approximately \$3,200 a month.

Mr. Mittal stated he was hired as a cook, to do the marketing for the business, and to learn how to manage the hotel; he said he was not promised the manager’s job *per se* but “they would see what would happen”. He was to learn about the management of the hotel from Mr. Schwab, and would have a future opportunity to move into management at one of Mr. Sihota’s businesses, not necessarily at this hotel. To his knowledge, there was no intent to terminate Mr. Schwab’s employment after Mr. Mittal was hired. At the Hearing, Mr. Schwab testified he had never been told he was to train Mr. Mittal in management duties – only that he was a cook.

In July 2016, Mr. Sihota met with Thomas Schwab and Ellie Mae Bishop at the hotel to discuss what he described as the “drastic” drop in business. The Employer said Mr. Schwab objected to any new ideas and kept blaming the economy for the decline. Mr. Sihota told Mr. Schwab staff hours would need to be reduced if revenue remained low. He testified Mr. Schwab stated he would tell the employees to ‘go to the Labour Board’ if hours were reduced. Mr. Sihota felt this was an inappropriate reaction for a manager. During the discussion, he noted complaints about housekeeping were up and more attention needed to be paid to cleaning and maintenance.

Mr. Sihota summed up his recollection of the meeting in an email dated July 26, 2016 (Employee Exhibit #5) (spelling and punctuation errors have been left as is):

Hi Mr Thomas Schwab,

Over 2 weeks ago, i spoke to you regarding such drastic drop in revenue. We reviewed the reviews on different booking forum and we are not having good reviews as much as having Canadian Hotel.

After having a conversation with you, you were trying to defend all kind of reasons for revenue drop especially when you start telling me you are not be able to bring more people.

I don't like to hear these kinds of statements and explanations for dropping the revenue from \$90-\$100 to \$37000, also i did not see any kind of concrete moves how to bring the reviews back up or any plans to improve the revenue. If you think that's the best you can do and you are happy with the outcome, i am force to make some changes and i consider you are not capable to do your job. If there is anything you want to say please send me in writing. Thanks
[sic]

After receiving the email Mr. Schwab prepared a six page hand-written report on what he and the local Hotel Association were trying to do to increase business. The report was faxed to Mr. Sihota but was not produced at the Hearing.

The parties met several times over the next few months. At a meeting in August or early September, Jarnail Sihota, Thomas Schwab and Ellie Mae Bishop were again all present. The participants differed somewhat in their recollection of the conversation. Mr. Schwab testified Mr. Sihota told him he would be fired if business did not improve. Mr. Sihota testified Thomas asked whether he should go and work where he would be better appreciated. Ellie Mae could not recall what was said exactly, but confirmed it was implied by Mr. Sihota, if not stated overtly, that if Mr. Schwab could not do his job, Mr. Sihota would find someone who could.

Also during this time frame, Mr. Schwab told Mr. Mittal he had over 150 customers who were loyal to him and would change the hotel they used if he changed jobs. Mr. Sihota also testified that Thomas frequently mentioned conversations with the owner/manager of a nearby hotel, who allegedly said Thomas was not being treated right and could make more money if he worked elsewhere.

Mr. Sihota summarized these issues in an email to Mr. Schwab dated September 13, 2016 (Employee Exhibit #6). He chastised Mr. Schwab for his failure to increase business, reluctance to implement changes, stance on reduced staff hours and perceived threat to take customers away from the business if he changed jobs. Another email followed on September 19, 2016 which stated in order to cut costs, employee health benefits were being cancelled, and the management position was being eliminated (Employee Exhibit #7). The email is signed by Sunny (Arslan Saeed). Mr. Saeed testified that he in fact acted as 'scribe' for Mr. Sihota and typed most of the emails at Mr. Sihota's direction.

Through discussions with Mr. Mittal or Mr. Sihota (the evidence at the Hearing was unclear) Mr. Schwab agreed around the time of the September 19 email that he would work at the front desk one shift per day: a regular work week. He stated he no longer wanted all the responsibilities of a manager, although he continued to do some manager tasks.

Mr. Schwab produced a photocopy of his business card (“General Manager”) and Anubhav Mittal’s business card (“Manager”) from September 2016. (Employee Exhibit #8) Why, he asked, if the position was being eliminated was Mr. Mittal given the title of Manager?

Mr. Mittal testified at the Hearing that he took over as manager of the hotel in September 2016.

Kathie McNabb made up the monthly schedule for the workers, and scheduled Mr. Schwab to work Monday – Friday 7:00 a.m. – 3:00 p.m. In October 2016 he was scheduled to work October 3-7, 11, 13, 17-21 and 24-28. (Employee Exhibit #12)

During the evening of Monday October 17 Thomas called the hotel to say he was sick and would not be in to work the next day. He testified he was contacted at home by phone on Tuesday and asked if he would be sick the next day. He replied that he didn’t know if he would still be sick. He reported that he received another telephone call on Wednesday October 19 telling him not to come in. A series of emails between him and Sunny (Arslan Saeed) ensued (Employee Exhibit #10). Sunny wrote at approximately 3:00 p.m.:

Tom,

As per our phone conversation today, You had 2 questions:

- 1) Jarnail was there over the weekend to Fire you but why he does not fire you?
- 2) You want us to give you 2 weeks notice to quit work?

In reponse to both of your confusion, we have only issues with your performance and there is nothing personal against you.

Since you have reduce your responsibility other than working at front desk and we do recognize you with us for long time and thats why we were trying to keep you in our staff. However you don’t think same way but we are still willing to give you better salary then any other front desk employee which will be \$14/Hr, if that does not work with you and you can move on as you mentioned there are other jobs opportunity in Town but let us know ahead of time.

Please don’t do what you are doing now, you left message on Monday night that you will not be here and Kathy had to be call 6 in the morning to cover your shift.

Second day you were not sure if you can or can not work. I think all of that causing hardship for in scheduling our staff. It is a humble request that if you are not willing to continue work with us, kindly let us know in writing and in advance.

[sic]

Thomas Schwab replied at 3:24 p.m.:

first off you have to get stories straight.

I was not reduced in responsibilities. all that was done is the title of general manager was dissolved. (who do you think still looks over month end, does payroll, files ansd scans bills, and markets the hotel, and attends hotel association meetings., check over accts billings before sending out. –its still me) next when reducing wages labour law says you must provide me with notice ahead of time.- this i have not seen.

on Tuesday morning i phoned in sick(not monday night),and gave instructions, law says when your sick you need to inform employer you cant be fired for been sick.-and as for been caught off guard that's what i have been dealing with for years and i made it all work.

and yes i do think like you, trying to get more people,you just dont like my suggestions you dont want to address issues like insulation between floors,flat screen tvs(i took care of)noise is a big problem.then send sneaky sales people to sell us over priced light bulbs.

and yes i never did anything wrong or personally, its just you dont like my ideas.and you guys phoned and told me not to come today.so it sounds like jarnail doesnt want me there he dosent have to give two weeks notice just pay in luiw of. but non the less it sounds like he dosent want me here.so i will start tomorrow looking else where for where im appreciated.i can drop my keys off tonight if you wish.

[sic]

Sunny replied:

After reading your email, yes you are right. You want to end it lets just end it. Please hand over keys to Front Desk. Thanks

[sic]

Mr. Schwab returned to the hotel to drop off his keys.

During his testimony, Mr. Schwab admitted he took advances on his holiday pay from the safe, and signed a receipt for the funds. He testified that this was not an uncommon practice at the business. Mr. Sihota mentioned this during his evidence as well; he thought the amount was around \$5,000. The timing of these advances was not clarified.

In closing, Mr. Schwab argued he did not quit his employment, but was fired. He needed the job. He admitted he went to work for a competitor across the street but that position was terminated shortly after.

Mr. Sihota maintained he believed Mr. Schwab intended to quit; he said he would move on to where he was appreciated, then left his keys.

III. ANALYSIS

The disputed issue is whether on October 19, 2016 Thomas Schwab was fired by the Employer, and so entitled to pay in lieu of notice, or, he quit his job and is not entitled to notice.

In the months preceding the events of October 2016 tensions arose between Mr. Schwab and Mr. Sihota. Occupancy rates and profit at the hotel had declined significantly over the previous two years. Mr. Sihota felt Thomas was under-playing his role in this decline, and resisted the Employer's suggestions on how to improve business.

Mr. Schwab felt Mr. Sihota did not give enough weight to the general economic decline occurring through this time period, and, in turn, was not receptive to Thomas's ideas. Mr. Schwab thought his eleven years of experience with the company was being ignored.

The situation was aggravated in June 2016 when Mr. Sihota brought in Mr. Mittal from Calgary at a salary significantly higher than any other hotel employee. Mr. Schwab was told Mr. Mittal was going to cook a free breakfast for customers, and also offer some light fare over the supper hour and early evening.

Mr. Schwab felt undermined and feared Mr. Mittal was brought in to replace him. Given Mr. Mittal's university education, extensive experience in the hospitality industry, and his substantial salary, these fears were not unfounded. Mr. Mittal acknowledged in his testimony that he was supposed to be training for a management position, although this was apparently never communicated to Mr. Schwab.

Mr. Sihota struck me as an experienced and competent business manager, and I find it more likely than not that he was considering replacing Mr. Schwab with Mr. Mittal. Nevertheless, Mr. Sihota continued to work with Mr. Schwab through the summer of 2016 to come up with ways to increase business. Given their differing testimony of their meetings, and the July 26 email from Mr. Sihota, this did not produce positive results. Among other things, the email said, "If you think that's the best you can do and you are happy with the outcome, i am force to make some changes and i consider you are not capable to do your job." [sic]

Mr. Schwab knew his job was in jeopardy, although Mr. Sihota never clearly stated 'you must do this or you will be fired'. In his email of September 13 (Employee Exhibit #6), Mr. Sihota wrote, "May be it will be much better to let us handle and figure out what we have to do with this property.... I think you should tell me what i will do with your job because i am determine to bring hotel back to fair share with other hotels which are taking way more occupancy then us and some fresh eyes may see it what is the problem." [sic]

Then in the September 19 email to all hotel employees, Mr. Sihota stated that "we are eliminating management position." Most people receiving this communication would think their employment had ended. But some arrangement must have been made between Mr. Schwab and his employer, because he continued to work at the hotel and was paid the same hourly wage of \$18.50 hour, although he now was scheduled to work Monday to Friday, 7 a.m. to 3 p.m.

Although the management position was supposedly eliminated, Mr. Schwab's replacement was already on site; Mr. Mittal testified he began to work as manager in September 2016, and a copy of his business card was produced to confirm his title.

The dispute came to a head beginning October 17 when Mr. Schwab phoned in that evening to say he was sick and would not be coming in to work the next day. The Employer emphasized at the Hearing that Mr. Schwab's absence was a great inconvenience as other staff had to be scheduled to replace him at work. Certainly this was an annoyance, but a common occurrence in a workplace, especially a small business.

The next day Mr. Schwab said he was 'not sure' he would be in the following day. At the Hearing, Mr. Schwab testified this was because he was not sure if he would still feel sick and so unable to work. The Employer interpreted this comment as a refusal to work. There was no evidence presented at the Hearing to suggest Mr. Schwab was staying at home for any reason other than illness.

The Employer may have had suspicions that the Employee was being sulky or obstreperous, but a doctor's note could have been requested. Instead the two parties devolved into an exchange of hostile emails which resulted in the Employer's request that Mr. Schwab turn in his keys.

The Employer argues that the emails, coupled with Mr. Schwab's behaviour and comments over the previous few months, prove that he quit.

The courts have held that a resignation by an employee must clearly and unambiguously show an intention to resign. The test to determine if an employee has quit or been terminated from their employment is whether a reasonable person in the circumstances would have understood the employee to have unequivocally resigned.

Skidd v. Canada Post Corporation, [1997] O.J. No 712 (QL) (Ont. C.A.)

Kieran v. Ingram Micro Inc., 2004 CanLII 4852 (ON CA), 33 C.C.E.L. (3d) 157 (Ont. C.A.)

On reviewing the emails and hearing Mr. Schwab's testimony at the Hearing, I find that Mr. Schwab never clearly expressed in words or actions an intent to resign his position at the hotel.

His comments allegedly made in conversation with Mr. Sihota that maybe he should go work somewhere where he would be appreciated were in reply to what he perceived as Mr. Sihota's threats to fire him. They cannot be construed as an unequivocal intent to resign.

The emails of October 19 provide further evidence that the employee was being fired. He had already been demoted and had his benefits removed (email of Sept. 19, 2016, Employee Exhibit #7), but according to the October 19 email from Sunny, Mr. Schwab's wages were now to be reduced from \$18.50 to \$14 an hour. The demotion and pay decrease made by the Employer unilaterally changed the basic terms of the employment contract between the two parties. Even if the Employer had not demanded Mr. Schwab turn in his keys, the Employer constructively dismissed the Employee.

Potter v. New Brunswick Legal Aid Services Commission, 2015 SCC 10 (CanLII)

Farber v. Royal Trust Company, 1997 CanLII 387 (SCC), [1997] 1 S.C.R. 846

I therefore hold Mr. Schwab did not quit his job at the Lone Star Hotel, but that the Employer fired him.

IV. DAMAGES

Mr. Schwab is entitled to pay in lieu of notice pursuant to *The Employment Standards Act*. He worked for the Employer for more than eleven years, so pursuant to s. 2-60(1) he is entitled to eight weeks.

The amount of the Wage Assessment was not disputed at the Hearing: **\$5,131.28** (8 weeks' pay) + **\$296.04** (holiday pay) = **\$5,427.32**.

One week after the Hearing the Employer forwarded information to me by email stating \$2,512 in cash advances were taken by Mr. Schwab, and claimed a total of \$678.20 in federal tax, CPP and EI was not deducted. The advances were alluded to in evidence at the Hearing, and Mr. Schwab acknowledged taking them, but there was no evidence produced on the exact figure, or the dates when the advances were taken by Mr. Schwab.

The information in the email was not presented at the Hearing and no undertakings to provide additional evidence were entered into at the Hearing.

I forwarded the email to the Employee and the Employment Standards Officer but the parties did not agree on the dollar figure or the admission of evidence after the close of the Hearing.

The Employer was in possession of this knowledge prior to the date of Mr. Schwab's dismissal, had an opportunity to provide it to the Employment Standards Officer when the Wage Assessment was being investigated, could have included it in its appeal of the Wage Assessment, and could have entered it into evidence during sworn testimony at the Hearing. It did not do so.

Therefore, this material will not be considered.

V. CONCLUSION

I dismiss the Employer's appeal and order it to pay to the Employee the Wage Assessment of \$5,427.32.

Dated at North Battleford, Saskatchewan: November 13, 2017.

Original signed by
Karen C. Ulmer
Adjudicator

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LRB File 183-17

EXHIBITS – employee

1. Corporate Registration search results
2. Spreadsheet with hotel yearly revenue, occupancy and average daily rate, 2006-2011
3. Spreadsheet with hotel yearly revenue, occupancy and average daily rate, 2010-2016
4. Emails September 16, 2015 and October 6, 2015 regarding Ms. Halyna
5. Email from Jarnail Sihota to Thomas Schwab, July 26, 2016
6. Email from Jarnail Sihota to Thomas Schwab, September 13, 2016
7. Email from Jarnail Sihota to Thomas Schwab, September 19, 2016
8. Photocopy of business cards
9. Monthly comparison of hotel revenue for 6 hotels, January 2013 – December 2015
10. Emails between Sunny (for Jarnail Sihota) and Thomas Schwab, October 19, 2016
11. Statement of Earning and Deductions for Thomas Schwab dated October 31, 2016
12. Work Schedule for October 2017

The Parties are hereby notified of their right to appeal this decision pursuant to Sections 4-8, 4-9 and 4-10 of *The Saskatchewan Employment Act* (the "Act").

The information below has been modified and is applicable only to Part II and Part IV of the Act. To view the entire sections of the legislation, the Act can be accessed at www.saskatchewan.ca.

Right to appeal adjudicator's decision to board

4-8(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

(3) A person who intends to appeal pursuant to this section shall:

(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and

(b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(4) The record of an appeal is to consist of the following:

(a) in the case of an appeal pursuant to Part II, the wage assessment or the notice of hearing;

(c) the notice of appeal filed with the director of employment standards pursuant to Part II;

(d) any exhibits filed before the adjudicator;

(e) the written decision of the adjudicator;

(f) the notice of appeal to the board;

(g) any other material that the board may require to properly consider the appeal.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

(6) The board may:

(a) affirm, amend or cancel the decision or order of the adjudicator; or

(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board

Appeal to Court of Appeal

4-9(1) With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.

(2) A person, including the director of employment standards, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.

(3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

Right of director to appeal

4-10 The director of employment standards has the right:

(a) to appear and make representations on:

(i) any appeal or hearing heard by an adjudicator; and

(ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and

(b) to appeal any decision of an adjudicator or the board.