Citation: Walter Schredl (Re)
2024 BCEST 86

EMPLOYMENT STANDARDS TRIBUNAL

An application for reconsideration
pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Walter Schredl
("Mr. Schredl")

- of a Decision issued by -

The Employment Standards Tribunal

PANEL:	Shafik Bhalloo, K.C.
SUBMISSIONS:	Walter Schredl, on his own behalf
FILE NUMBER:	2024/091
DATE OF DECISION:	September 12, 2024

DECISION

OVERVIEW

1. Pursuant to section 116 of the *Employment Standards Act* (*ESA),* Walter Schredl ("Mr. Schredl"), a former director of Canada Pet Health Technology Inc. ("CPHT"), seeks reconsideration of a decision of the Tribunal issued on June 18, 2024 ("original decision").

2. The original decision considered an appeal of a determination made by Mathew Osborn, a delegate ("Adjudicative Delegate") of the Director of Employment Standards ("Director"), on January 16, 2024 ("Section 96 Determination").

3. The Section 96 Determination followed a prior determination referred to as the Corporate Determination, which awarded Charity Tonkin ("Ms. Tonkin") compensation for her length of service ("CLOS") with CPHT and imposed an administrative penalty on CPHT. The Section 96 Determination concluded that Mr. Schredl, who was identified as a director of CPHT at the relevant time, had authorized, permitted, or acquiesced in CPHT's non-compliance or contravention of the *ESA* provisions, making him personally liable for both the CLOS and the administrative penalty.

4. In the appeal of the Section 96 Determination, Mr. Schredl contested this conclusion on the grounds that the Director had erred in law and that new evidence had become available that was not available at the time the Section 96 Determination was being made. More specifically, Mr. Schredl presented several documents he claimed were new evidence, arguing that these demonstrated CPHT's financial status and his personal circumstances in a way that should alter the Section 96 Determination. He argued that CPHT was in receivership, which would exempt him from personal liability under section 96(2)(a)(i) of the *ESA*.

5. More specifically, in his appeal, Mr. Schredl submitted documents including a desk memo dated December 17, 2022, showing the effective date of receivership, and various memos and documents indicating that he was on leave from CPHT due to a motor vehicle accident from June 3, 2022. He also provided a memorandum indicating that a receiver had decided to terminate all employees, including Ms. Tonkin. Mr. Schredl contended that these documents demonstrated that CPHT was indeed in receivership at the relevant time, and that his personal accident should have affected his liability as he was not able to act in the director capacity.

6. The Adjudicative Delegate, however, found that these documents, while presented as new evidence, did not meet the criteria for being considered as such. The Delegate noted that the documents were dated prior to the Section 96 Determination and could have been submitted during the initial investigation of Ms. Tonkin's complaint. Additionally, the documents did not sufficiently prove that CPHT was in receivership or that Mr. Schredl was not a director when CLOS became payable. The Adjudicating Delegate also highlighted that a search of the Superintendent of Bankruptcy's records did not reveal any information about CPHT being in receivership.

7. Furthermore, the Adjudicative Delegate found that even if Mr. Schredl had merely been forwarding termination notices, he still bore responsibility if he had authorized, permitted, or acquiesced to CPHT's non-compliance with the *ESA*.

8. The Tribunal Member was unable to decide the appeal without further submissions from the parties. Consequently, the Member invited both Mr. Schredl and Ms. Tonkin to submit their arguments. The Tribunal Member considered these submissions when reaching the original decision.

9. In upholding the Section 96 Determination and confirming that Mr. Schredl was a director at the time the wages (i.e. CLOS) were due and that the new evidence did not meet the criteria required to alter the Section 96 Determination, the Tribunal Member reasoned as follows:

> 32. As noted above, the Appellant provided a number of documents with the appeal as "new evidence." While I accept that these documents were not before the Delegate when the Section 96 Determination was issued, I am not persuaded that these documents could not have been presented during the investigation, or in any event prior to the Section 96 Determination being issued.
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> 33. The documents provided are dated June 3, December 17, and 21, 2022, along with an undated excerpt from the website of the Canada Revenue Agency. While the Appellant appears to suggest that more specific requests by the Investigating Delegate would have resulted in the disclosure of these documents earlier, it is incumbent on a party responding to a complaint to provide any documents relevant to that complaint, or their defence to it.
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> 34. Further, while the Appellant suggests that these documents would have "definitively led the director to a different conclusion," I agree with the Delegate's submissions, that, first, these documents in fact lend more, not less, confusion as to when the Appellant was or was not a director. Based on the evidence before him, the Delegate reached the factual conclusion that the Appellant was a director at the material time, and I am not persuaded there is any basis before me to interfere with that finding.
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> 35. In addition, while the Appellant maintains that CPHT was in receivership at the relevant time, the Corporate Determination demonstrates that this issue was canvassed, and that a search of the records of the Superintendent of Bankruptcy revealed no results in relation to CPHT. In addition, the Section 96 Determination confirms that CPHT was dissolved voluntarily on August 28, 2023.
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> 36. Even if I were to accept that, for some reason, these "new documents" were not available or could not have been provided prior to the Section 96 Determination being issued, to the extent the Appellant submits that these new documents demonstrate that CPHT was in receivership at the relevant time, I am not persuaded this is the case.
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> 37. The documents consist of a desk memo and a legal memo prepared by T.J. Jesky, which, on their face describe the financial viability of the entity the Appellant contends is the parent company of CPHT; however, while they make reference to a Pet Health Technology division, I agree with the Delegate's contention that they are not sufficiently probative of the issue of whether CPHT was in receivership to be considered under this ground of appeal. While the Appellant makes assertions with respect to ownership and control of a Canadian Corporation, the Delegate was not, nor am I, persuaded that the materials before the Director, or included with the appeal, support such a finding.
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> 38. Another of the documents, as noted, is a memo indicating that the Appellant was on a leave of absence as a result of a motor vehicle accident in June 2022. While it indicates he would be vacating his operational position until he is deemed fit by his doctor to

> return, it makes no reference to his status as a director. Further, while I infer that the Appellant may be asserting in his submissions that he did not have legal capacity to be a director or officer of CPHT, I am not persuaded, in the absence of medical evidence, that such a conclusion was available to the Director.
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> 39. For these reasons, I am not prepared to admit the documents presented as new evidence, but in any event would not have been persuaded that they would have changed the outcome of the Section 96 Determination.

10. The Tribunal Member reviewed Mr. Schredl's claim of error of law on the part of the Director in making the Section 96 Determination, referencing the BC Court of Appeal's definition from *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 Coquitlam),* 1998 CanLii 6466 (BCCA). In concluding that that the Director had not committed any error of law, the Tribunal Member reasoned as follows:

> 41. While the Appellant asserts that the Investigating Delegate did not specify or request any evidence related to or supporting the company being in receivership, it is clear on the Record that the Investigating Delegate did, in fact, speak to, and request any relevant documents from, the law firm identified as responsible for the dissolution of the companies.
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> 42. Further, it is evident on the face of the Record that both Mr. Schredl and the law firm were provided with the Investigation Report and given an opportunity to respond. Neither provided any response to the Investigation Report.
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> 43. This notwithstanding, I am not persuaded that the Delegate acted without evidence. The Determination was issued based on all of the information available, which included the absence of any records related to CPHT held by the Superintendent of Bankruptcy, and the Registry record of voluntary dissolution dated in August 2023.

11. The Tribunal Member also upheld Mr. Schredl's administrative penalty, stating that it was based on factual findings supported by the evidence available to the Director at the time of the Section 96 Determination. The Tribunal Member did not believe the decision was unsupported by evidence or based on an unreasonable interpretation of the facts adduced.

RECONSIDERATION APPLICATION

12. The statutory deadline for filing an application for reconsideration of the Section 96 Determination was 4:30 p.m. on July 18, 2024. Mr. Schredl submitted an incomplete application by email after this deadline on July 18. The Tribunal considered the application as received on the next business day, July 19, 2024, noting that it was missing the Applicant Contact Information and the Reconsideration Application Form.

13. On July 23, 2024, the Tribunal contacted Mr. Schredl by email, requesting that he provide the Applicant Contact Information, the Reconsideration Application Form, and written reasons explaining why his reconsideration application was not filed before the statutory deadline.

14. On July 23, 2024, the Tribunal received an email from Mr. Schredl containing the requested Applicant Contact Information and Reconsideration Application Form. Additionally, Mr. Schredl included a previously submitted letter from Susan Smith that was part of his initial late reconsideration

application. He also requested an extension until August 8, 2024, to complete his submissions and arguments.

15. On July 26, 2024, the Tribunal granted Mr. Schredl's request for an extension, allowing him additional time to provide further reasons, arguments, and supporting documents for reconsideration.

16. On August 8, 2024, the Tribunal received an email from Mr. Schredl with additional submissions attached.

17. On August 19, 2024, the Tribunal informed the parties that a Panel has been assigned to decide Mr. Schredl's application for reconsideration, and if the application is not dismissed, the Tribunal will seek submissions on the merits of the application from the Ms. Tonkin and the Director. If the Panel determines all or part of the application for reconsideration should be dismissed, the Panel will issue a decision.

ISSUE

18. In any application for reconsideration, there is a threshold, or preliminary, issue of whether the Tribunal will exercise its discretion under section 116 of the *ESA* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether this panel of the Tribunal should vary or cancel the original decision.

SUBMISSIONS OF MR. SCHREDL

(i) Submissions in support of the late Reconsideration application

19. Mr. Schredl presents two primary reasons for the late filing of the reconsideration application. First, he states that he encountered technical difficulties on July 18, 2024, while attempting to submit the application before the deadline. Although he tried multiple times to send the email, he only discovered after 4:30 PM that it had not gone through, and emails were eventually delivered within 10 minutes after the deadline.

20. He claims that he sustained a brain injury from a motor vehicle accident on June 1, 2022, which has impaired his cognitive functions and limited his ability to participate effectively in the Employment Standards case. Although he notified both the Investigating Delegate and the Tribunal Member of his condition, he alleges that they did not accommodate his medical incapacity. He acknowledges that at the time, neither the Investigating Delegate nor the Tribunal Member received medical documentation from his healthcare providers. However, he asserts that they had a responsibility to follow up with the medical practitioners to request the necessary documentation. According to him, their failure to do so resulted in a procedurally unfair decision.

21. Additionally, Mr. Schredl argues that the Tribunal misapplied Canadian bankruptcy laws to his case, neglecting the US receivership laws that should have relieved him of personal financial responsibility. As a result, he contends that his human rights have been violated and requests either an extension of the timeline or the dismissal of the case.

(ii) Submissions on the merits received on July 19 and August 8, 2024

22. Mr. Schredl's submissions on the merits received on July 19, 2024, by the Tribunal and his subsequent further submissions on August 8, 2024, to some extent, reiterate the submissions he has made in support of his late reconsideration application in (i) above.

23. Mr. Schredl contends that the Director and the Tribunal Member violated the duty to accommodate under Canadian law by failing to address his medical incapacity. He claims to have informed both parties of his brain injury, which he reiterates rendered him medically incapable of engaging with the investigation. Mr. Schredl argues that the Director did not fulfill their due diligence by neglecting to consider or follow up on this information, thereby breaching both legal and ethical obligations to handle his disability appropriately in the investigation.

24. Due to his medical condition, Mr. Schredl asserts that he was unable to read or respond to communications from the Director regarding the investigation. He emphasizes that he was also unaware of or unable to present evidence in his appeal, nor could he monitor the responses from the lawyers or receivers for RCMW Group, and its subsidiary CPHT. This inability, he argues, further supports his claim that the Director and the Tribunal did not exercise fairness and due diligence, which impacted the integrity of the investigation.

25. He argues that the lack of consideration for his medical incapacity and the failure to include all relevant evidence resulted in procedural unfairness. He references *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, for the proposition that administrative bodies must consider the circumstances of all parties involved. He argues that these procedural flaws and incomplete information undermine the fairness of the decision and meet the statutory grounds for appeal.

26. Mr. Schredl also submits that the documents he provided in the appeal are reliable and probative. These documents, prepared by TJ Jesky, a registered lawyer in Illinois, are part of the corporate legal files and are consistent with other evidence. The documents are intended to prove three key points: first, that Mr. Schredl's resignation as a director was effective five days before the employees were dismissed; second, that he was medically unfit to function as a director, officer, or manager and thus could not engage with the investigation; and third, the accurate status of CPHT's receivership.

27. Mr. Schredl also challenges the Tribunal Member's conclusion that his resignation was effective as of December 21, 2022, as incorrect. He provides evidence showing that his resignation and the receivership status of RCMW and its subsidiary CPHT were effective as of December 17, 2022. The documents include a memorandum from June 3, 2022, notifying staff of his medical incapacity and a desk memo from December 17, 2022, which documented his resignation and the receivership status. According to Mr. Schredl, a subsequent legal directive on December 21, 2022, confirms that the receiver-manager made the decision to cease operations and release staff, a decision over which Mr. Schredl says he had no influence.

28. Mr. Schredl also argues that CPHT was in receivership as of December 17, 2022, based on the legal requirements outlined in *ESA* section 96(2)(a)(i), which applies to companies in receivership. He asserts that the December 17, 2022, desk memo from TJ Jesky meets the legal test for receivership. He states that according to the UNCITRAL Model Law on Cross-Border Insolvency, a Canadian

subsidiary under receivership proceedings of its U.S. parent company is considered in receivership as well. Mr. Schredl contends that the BC Registry records, which show RCMW as the 100% owner of CPHT, affirm that the receivership of RCMW applies to CPHT. He also argues that the absence of records with the Superintendent of Bankruptcy does not affect CPHT's legal status of receivership, asserting that no additional criteria apply under *ESA* section 96(2)(a)(i).

29. Mr. Schredl's additional submissions dated August 8, 2024, merely reiterate and reinforce the arguments presented in his earlier submissions, which I have already summarized above. I have reviewed these subsequent submissions thoroughly and find no necessity to restate them here.

30. The Tribunal will decide Mr. Schredl's reconsideration application based on his written submissions, the submissions on the appeal file, the original decision, and the section 112(5) record. If the application is not dismissed, the Tribunal will seek submissions from Ms. Tonkin and the Director on the merits of the application. Alternatively, if the Tribunal determines all or part of the application should be dismissed, the Tribunal will issue a decision.

ANALYSIS

31. Section 116 of the *ESA* delineates the Tribunal's statutory authority to reconsider any order or decision of the Tribunal:

> **Reconsideration of orders and decisions**
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> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
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> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.
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> (2) The director or a person served with an order or a decision of the tribunal may make an application under this section.
>
> (2.1) The application may not be made more than 30 days after the date of the order or decision.
>
> (2.2) The tribunal may not reconsider an order or decision on the tribunal's own motion more than 30 days after the date of the decision or order.
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> (3) An application may be made only once with respect to the same order or decision.

32. A review of the decisions of the Tribunal reveals certain broad principles applicable to reconsideration applications have consistently been applied. The following principles bear on the analysis and result of this reconsideration application.

33. Reconsideration is not an automatic right of any party who is dissatisfied with an order or a decision of the Tribunal. That said, reconsideration is within the sole discretion of the Tribunal, and the Tribunal must be very cautious and mindful of the objects of the *ESA* in exercising its discretion. (see *Re: Ekman Land Surveying Ltd.*, BC EST # RD413/02)

34. *In Director of Employment Standards (Re Giovanno (John) and Carmen Valoroso),* BC EST # RD046/01, the Tribunal explained the reasons why it should exercise reconsideration power with restraint:

> . . . the *Act* creates a legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute.
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> There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the "winner" not be deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a Tribunal process skewed in favour of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

35. In *Re: British Columbia (Director of Employment Standards) (sub nom) Milan Holdings Ltd.),* BC EST # D313/98, the Tribunal delineated a two-stage approach for the exercise of its reconsideration power under section 116. In the first stage, the Tribunal must decide whether the matters raised in the application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include:

(i) whether the reconsideration application was filed in a timely fashion;

(ii) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the adjudicator;

(iii) whether the application arises out of a preliminary ruling made in the course of an appeal;

(iv) whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases;

(v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. If the applicant satisfies the requirements in the first stage, then the Tribunal will proceed to the second stage of the inquiry, which focuses on the merits of the original decision.

36. If the Tribunal, after weighing the factors in the first stage, concludes that the application is not appropriate for reconsideration then the Tribunal will reject the application and provide its reason for not reconsidering. However, if the Tribunal finds that one or more issues in the application is appropriate for reconsideration, the Tribunal will proceed to the second stage in the analysis. The second stage in the analysis involves a reconsideration of the merits of the application.

37. Having delineated the parameters governing reconsideration applications, both statutory and in the Tribunal's own decisions, there is a preliminary question in this case, namely, whether the Tribunal should extend the statutory reconsideration period.

38. Section 116(2.1) provides that an application for reconsideration must be filed within 30 days of the date of the order or decision. The original decision was issued on June 18, 2024, thus setting the deadline for the reconsideration application as July 18, 2024. On July 18, 2024, Mr. Schredl

submitted an incomplete application via email after 4:30 p.m. The Tribunal treated the application as received on the next business day, July 19, 2024, and noted its deficiencies, specifically the absence of the Applicant Contact Information and the Reconsideration Application Form. These required forms were subsequently provided by Mr. Schredl on July 23, 2024, along with his written submissions supporting the late application. He also requested and was granted an extension until August 8, 2024, to submit additional materials, which he provided by that date.

39. Effectively, Mr. Schredl's completed reconsideration application was approximately 3 weeks past the statutory reconsideration period.

40. Section 109(1)(b) of the *ESA* provides that the Tribunal has the power to extend the time period for requesting an appeal or applying for reconsideration even though the period has expired. However, extensions are not granted as a matter of course, but only for compelling reasons with supporting evidence.

41. In *Inderjit Aulakh*, 2021 BCEST 19, the Tribunal considered the decision in *Serendipity Winery Ltd.*, BC EST # RD108/15, and stated:

> The Tribunal approaches requests for extensions of the reconsideration time period consistent with the approach taken to extensions of time in appeals. In *Serendipity Winery Ltd.*, … the Tribunal stated:
>
> > I see no reason to deviate from the criteria [set out in *Re Niemisto*, BC EST # D099/96] when considering requests for an extension of the time period for filing reconsideration applications. However, the question of whether there is a strong *prima facie* case must take into account that the Tribunal's discretionary authority to reconsider under section 116 of the *Act* is exercised with restraint – see *The Director of Employment Standards (Re Giovanni (John) and Carment Valaroso* [*sic*]), BC EST # RD046/01 – and must remain consistent with the approach taken by the Tribunal in deciding whether reconsideration is warranted. (at para. 21)

42. The burden is on the applicant or the appellant to demonstrate the reconsideration period should be extended. In determining whether to extend the appeal period, the Tribunal considers the following factors (see *Niemisto, supra*):

a) whether there is a reasonable and credible explanation for the failure to file the completed appeal on time;

b) whether there has been a genuine and ongoing *bona fide* intention to appeal the determination;

c) whether the respondent party and the Director have been made aware of the intention to appeal;

d) whether the respondent party will be unduly prejudiced by granting the extension; and,

e) whether there is a strong *prima facie* case in favour of the appellant.

43. This is not an exhaustive checklist of factors. In determining whether to extend the statutory time limit, the Tribunal will consider and weigh all salient factors and evidence together in the

circumstances (see *Re Patara Holdings Ltd. (cob Best Western Canadian Lodge and/or Canadian Lodge)*, BC EST # D010/08; reconsideration dismissed BC EST # RD053/08).

44. In this case, while I *might* acknowledge that Mr. Schredl's failure to file the reconsideration application in a timely manner could be reasonably attributed to technical issues with emailing, and that he demonstrated a genuine and ongoing *bona fide* intention to appeal, and that Ms. Tonkin would not suffer undue prejudice from a short extension, the decisive factor in denying an extension of the statutory period for reconsideration is the absence of a strong *prima facie* case in favor of Mr. Schredl. My reasons for so concluding are also consistent with my alternative reasoning outlined below.

45. Even if I had not dismissed the reconsideration application based on untimeliness, I would have dismissed the reconsideration application based on the merits. More particularly, Mr. Schredl's application fails to meet the requirements in the first stage of the analysis in *Milan Holdings Ltd., supra*. The application fails to make out an arguable case of sufficient merit to warrant a reconsideration; it does not raise any important questions of law, fact, principle, or procedure of importance to the parties and/or their implications for future cases. It also does not show *any* error in the original decision, or present other circumstances that requires this panel to intervene.

46. For the same reasons provided by the Tribunal Member in the original decision (and set out in paragraphs 9 and 10 above), I find the Section 96 Determination to be correct. There is nothing in Mr. Schredl's application for reconsideration that calls into question the correctness of either the Section 96 Determination or the original decision. Both align with the *ESA*'s provisions on the personal liability of corporate officers for employee wages and are consistent with how those provisions have been interpreted and applied in cases such as this.

47. In *Milan Holdings*, the Tribunal advised against entertaining reconsideration applications that merely reargue the case without presenting new, compelling evidence or arguments. The current application is, on its face, an attempt to reargue the case submitted on appeal without introducing any new evidence. I find this is not a suitable case for the Tribunal to exercise its statutory discretion to extend the appeal period, and secondly, the application, on its merits, has no reasonable chance of succeeding.

48. Finally, I would be remiss not to address Mr. Schredl's claim that he suffered a brain injury in his motor vehicle accident and is still recovering from it and receiving professional treatment and unable to cognitively function. He contends that the Director during the investigation of the complaint (and/or the Tribunal Member during the appeal) failed to seek out and consider medical information about his incapacity, which he had previously disclosed. He asserts that his medical condition prevented him from fulfilling his role as a director of CPHT, a claim he says is supported by a letter of July 18, 2024, from his medical practitioner, Ms. Smith, a Certified Canadian Counsellor, which he has included with his reconsideration application. He contends that the Director should have requested this medical evidence during the investigation, which would have clarified his inability to serve as a director of CPHT. He believes this oversight violated principles of natural justice and procedural fairness, resulting in an erroneous conclusion based on incomplete evidence.

49. First, it is not the responsibility of the Director or the Tribunal Member to seek out medical evidence regarding Mr. Schredl's incapacity, which is private and personal to him. It is Mr. Schredl's responsibility to obtain and present any evidence of his personal incapacity during the investigation

or appeal of the Section 96 Determination. Second, the information in Ms. Smith's letter is not accepted as "new evidence" in the reconsideration application. It does not include evidence that could not, with due diligence, have been discovered and presented to the Director during the investigation or adjudication of Ms. Tonkin's complaint prior to the Section 96 Determination. Third, based on the preponderance of evidence, I am not convinced of the probative value of Ms. Smith's letter. Despite Mr. Schredl's claims, based on Ms. Smith's letter, about cognitive deficits affecting his ability to work and respond to the Employment Standards case, I have reviewed the record and found that Mr. Schredl made robust and substantial submissions in the appeal of the Section 96 Determination and in the reconsideration application, which exceed the typical submissions presented by many laypeople before the Tribunal. In any event, I find the letter of Ms. Smith is not "new evidence" and I do not consider it here.

ORDER

50. Pursuant to section 116(1)(b) of the *ESA*, the original decision, 2024 BCEST 57, is confirmed.

Shafik Bhalloo, K.C.
Member
Employment Standards Tribunal