

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2021 CHRT 19

**Date:** May 7, 2021

**File No.:** T2482/3920

**Between:**

**Simon Banda**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Correctional Service of Canada**

**Respondent**

**Ruling**

**Member:** Jennifer Khurana

## **BACKGROUND**

[1] Mr. Banda, the complainant, self-identifies as a Black man. He attended the Correctional Training Program (CTP) operated by the respondent, Correctional Service of Canada (CSC), from April to June 2014, when he was released shortly before completing the programme. Mr. Banda alleges that Staff Training Officers (STOs) and other CSC employees singled him out and treated him differently than White recruits in the CTP, at least in part due to race, colour or national or ethnic origin.

[2] This ruling determines Mr. Banda's request to amend his Statement of Particulars (SOP) to add the allegation that he was treated differently than other recruits when CSC denied his request for medical leave. Mr. Banda also wants the Tribunal to order CSC to strike the parts of its SOP that state that he pointed a shotgun at an STO at the end of a firearms evaluation.

[3] CSC and the Canadian Human Rights Commission (the "Commission") consent to the amendment request. CSC opposes Mr. Banda's request for an order to strike parts of its SOP. The Commission takes no position on this request.

[4] For the reasons that follow, I am allowing the requested amendment to Mr. Banda's SOP and denying his request for an order to strike parts of CSC's particulars.

## **ISSUES**

1. Should the Tribunal allow Mr. Banda to amend his SOP to add the allegation that he was treated adversely in being denied his sick leave request?
2. Should the Tribunal order CSC to strike paragraphs of its SOP that allege that Mr. Banda pointed a shotgun at an STO following a firearms evaluation?

## REASONS

### **Issue 1: Should the Tribunal allow Mr. Banda to amend his SOP to add the allegation that he was treated adversely in being denied his sick leave request?**

[5] Mr. Banda's request is allowed. Both CSC and the Commission consent to the requested amendment. CSC already had notice of the allegation that Mr. Banda was treated differently from White recruits when he requested medical leave. It was part of the Commission's SOP and it was also before the Commission at the investigation stage. I do not find there is any prejudice caused to CSC in allowing the amendment.

[6] Mr. Banda does not ask to include this allegation as a separate allegation of discrimination. Rather he seeks to add it "as part of the factual context and background which underpins his complaint as an additional example of discrimination" in support of his claim that he was failed on the shotgun test at least in part due to a protected characteristic.

[7] I have set deadlines below for the filing of Mr. Banda's amended SOP, for any amendments to CSC's and the Commission's SOPs, and for any replies. This is not a blanket order to amend Mr. Banda's SOP, but is limited to the specific allegation related to Mr. Banda's request for sick leave.

### **Issue 2: Should the Tribunal order CSC to strike paragraphs of its SOP that allege that Mr. Banda pointed a shotgun at an STO following a firearms evaluation?**

[8] No. CSC is entitled to defend itself against all allegations made by Mr. Banda. Particulars filed by parties are not agreed statements of facts. This is a dispute and an adversarial process. Parties therefore take different positions and have opposing views on some or all the facts underlying the complaint. CSC's particulars are not limited by what was raised during the Commission's investigation of this complaint.

[9] The Tribunal has the authority to amend, clarify or determine the scope of the original discrimination complaint, provided that no prejudice is caused to other parties (*Connors v. Canadian Armed Forces*, 2019 CHRT 6 [*Connors*] at paras 6-7). As part of that authority to determine the scope of the complaint, the Tribunal has the power to strike portions of SOPs

that exceed the proper scope of the complaint (*Richards v. Correctional Service Canada*, 2020 CHRT 27 [*Richards*] at para 85).

[10] In exercising the power to strike particulars on a preliminary basis in advance of a full hearing, the Tribunal must do so cautiously and only in the "clearest of cases" (see for example, *Richards* at para 86, *Beattie v. Aboriginal Affairs and Northern Development Canada*, 2015 CHRT 16 at para 14).

[11] Mr. Banda is asking the Tribunal to order CSC to strike the following sentences from CSC's SOP:

- (i) "This included pointing his shotgun at STO Davie" (para 32); and
- (ii) "... had pointed a shotgun at said staff member, and another had to step forward and remove the shotgun from him" (para 34).

[12] According to Mr. Banda, allowing CSC to include prejudicial assertions about him in its SOP would be a "serious issue of natural justice and procedural fairness". Mr. Banda says that he did not have the chance to respond to this claim about the shotgun during the Commission's investigation of his complaint. He argues that if he had pointed a firearm at an STO, the manager or other staff present would have been required to report and document the incident in keeping with CSC's Commissioner's Directive on the Use of Firearms and its disciplinary code, particularly as the incident may even have constituted a criminal offence. According to Mr. Banda, no written report or account of the alleged incident was disclosed by CSC.

[13] Mr. Banda also argues that the Tribunal has no jurisdiction to hear evidence of this alleged incident because it did not form part of the materials that were referred by the Commission for an inquiry by the Tribunal.

[14] Finally, Mr. Banda argues that this allegation is further evidence of a discriminatory mindset on the part of CSC, reflecting a prejudicial view that Black men are prone to violence.

[15] The respondent opposes Mr. Banda's request to strike any portion of its SOP. It argues that the sentences Mr. Banda seeks to strike are appropriate, relevant and

responsive to Mr. Banda's SOP and that they relate to material facts that CSC intends to prove.

[16] I agree with CSC. The Tribunal must provide parties with a full and ample opportunity to present evidence and make legal representations on the matters raised in the complaint (*Canadian Human Rights Act*, R.S.C. 1985, c. H-6, (the "Act") s.50(1) and Rule 1 of the Tribunal's Rules of Procedure).

[17] The purpose of an SOP is to put the other party on notice about the case it intends to make, the kind of evidence it proposes to introduce at the hearing, and the case the opposite party will have to meet (see *Carpenter v. Navy League of Canada*, 2015 CHRT 8 at para 48). A party's SOP is required to set out "the material facts that the party seeks to prove in support of its case" (Rule 6(1)(a) of the Tribunal's Rules of Procedure).

[18] CSC denies that it is raising the issue of Mr. Banda pointing a shotgun at a staff member for the first time in its SOP. In my view, whether CSC explicitly raised this assertion about Mr. Banda during the Commission's investigation, or whether there is documentation supporting CSC's account of this alleged incident, is not determinative.

[19] The Commission's investigation and decision to refer a complaint do not predetermine or dictate the scope of CSC's response to a complaint before this Tribunal. The Commission is not even required to conduct an investigation before referring a complaint to the Tribunal. At any stage after the filing of a complaint, the Commission may request the Chairperson of the Tribunal to institute an inquiry into the complaint (*Connors* at para 40 and s.49(1) of the Act).

[20] The Commission is a screening body that makes its own determinations under the Act. It accepts, manages, and processes complaints of discriminatory practices (*Canadian Human Rights Commission v. Lemire and al*, 2012 FC 1162, also cited as *Canada (Human Rights Commission) v. Warman*, 2012 FC 1162 at para 55).

[21] The Commission's role can be described as that of an administrative gatekeeper for complaints under the Act, or as a screening body (see *Karas v Canadian Blood Services*

*and Health Canada*, 2021 CHRT 2 at paras 15-16). The Commission decides whether there is a reasonable basis to refer a complaint to the Tribunal for an inquiry.

[22] But the responsibility for making the necessary factual findings to determine whether there has been discrimination within the meaning of the Act rests exclusively with the Tribunal (see *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at para 27).

[23] Mr. Banda has not provided any authority to support his position that CSC is precluded from raising a material fact that it intends to prove in support of its case because of what occurred during Commission's investigation. He neither presented any support for his position that the Commission's referral – and the Tribunal's jurisdiction – are limited to facts for which a respondent has provided documentation. Accepting Mr. Banda's arguments would also mean that a respondent who did not cooperate at the investigation stage would not be able to raise anything in its SOP or before the Tribunal.

[24] The Tribunal has issued a number of rulings dealing with challenges to the scope of a complaint, usually brought by respondents who seek to limit or clarify what is before the Tribunal for an inquiry, and often following a request to amend a complaint (see, for example, *Torraville v. Jazz Aviation LP*, 2020 CHRT 40; *Casler v. Canadian National Railway*, 2017 CHRT 6; *Connors*). While these cases provide guidance on the need for a sufficient nexus with the factual foundation of the original complaint, they do not tell respondents how – or what – they can say in response to allegations of discrimination.

[25] I also do not accept Mr. Banda's claim that there is any breach of procedural fairness in allowing CSC to include these statements in its SOP. Mr. Banda has had the chance to reply to CSC's SOP. He responded to CSC's claims around this alleged incident at paras 15-40 of his Reply.

[26] Mr. Banda argues that these paragraphs have the potential to confuse, mislead or prejudice the inquiry and ought to be struck by the Tribunal, relying on *Murray v. Immigration and Refugee Board*, 2018 CHRT 32 [*Murray*] at para 70. He argues that the prejudicial effect of this assertion about the firearm outweighs its probative value and that this serious

allegation against him has been raised by CSC solely for the purpose of misleading and prejudicing the inquiry.

[27] But *Murray* does not help Mr. Banda's request. In *Murray*, the Tribunal agreed to strike portions of the complainant's SOP that the Commission did not refer for inquiry because they would otherwise confuse, mislead or prejudice the inquiry. That is entirely distinguishable from what Mr. Banda is requesting in seeking to limit what the respondent can raise in defending against allegations of discrimination. As the Tribunal explained in *Murray*, "it will be for the Tribunal to hear the evidence presented by all the parties ... so as to give them a full hearing" (*Murray* at para 71).

[28] The statements made by the respondent in its SOP are not evidence. I have not heard any evidence, and the hearing has not started. I am not weighing prejudice versus probative value as Mr. Banda suggests.

[29] The parties do not have to agree with the particulars, the perceptions contained in the particulars or what arguments they believe will be derived from the particulars (see *Leung v. Canada Revenue Agency*, 2012 CHRT 7 at para 29).

[30] Mr. Banda is on notice about the kind of evidence CSC proposes to introduce at the hearing. If he wishes to contest the respondent's claims about the firearm incident or address the timing of when this allegation was first raised, or whether it was documented, he is free to do so. He can cross-examine the respondent's witnesses or refute CSC's evidence with his own. But he cannot dictate the terms of CSC's response to his complaint, particularly before the hearing has even begun. Limiting CSC's ability to make a defence and making an order limiting its response would be procedurally unfair.

[31] In his reply on this motion, Mr. Banda argues that CSC should be required to produce any documentation surrounding the use of firearms and a code of conduct. If Mr. Banda has not already made specific requests for disclosure, he is urged to do so immediately. The Tribunal previously set dates for the parties to file any motions requesting an order for production. Those dates have passed and the parties have not indicated that there are any outstanding disclosure issues.

**ORDER**

[32] Mr. Banda's request to amend his SOP to include the allegation regarding sick leave is allowed. He may not amend his SOP to add anything beyond this specific allegation. Mr. Banda's amended SOP must be provided within 7 calendar days of the date of this ruling.

[33] If the respondent intends to file an amended SOP responding to Mr. Banda's SOP, it may do so no later than 7 calendar days following receipt of Mr. Banda's Amended SOP. Amended replies from Mr. Banda and the Commission, if any, are due 7 days following receipt of the respondent's Amended SOP.

[34] Mr. Banda's request that the Tribunal order CSC to strike portions of its SOP is dismissed.

[35] The Tribunal's Registry will contact the parties to schedule a case management conference call to prepare for the hearing of this matter.

*Signed by*

Jennifer Khurana  
Tribunal Member

Ottawa, Ontario  
May 7, 2021



## **Canadian Human Rights Tribunal**

### **Parties of Record**

**Tribunal File:** T2482/3920

**Style of Cause:** Simon Banda v. Correctional Service Canada

**Ruling of the Tribunal Dated:** May 7, 2021

**Motion dealt with in writing without appearance of parties**

**Written representations by:**

Jacqueline G. Collins, for the Complainant

Ikram Warsame, for the Canadian Human Rights Commission

Barry Benkendorf and Sydney Pilek, for the Respondent