

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2024 CHRT 89

**Date:** July 12, 2024

**File No(s):** T2482/3920

**Between:**

**Simon Banda**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Correctional Services Canada**

**Respondent**

**Decision**

**Member:** Jennifer Khurana

## **I. OVERVIEW**

[1] Simon Banda attended the Correctional Training Program (“the Program” or “CTP”) operated by the Respondent, Correctional Services Canada (CSC) from April 2 to June 19, 2014, with the goal of eventually working as a Correctional Officer with CSC. After completing 11 of the 12 weeks scheduled for training, Mr. Banda was released from the Program and sent home.

[2] Mr. Banda self-identifies as Black and is of Zambian origin. He alleges that CSC training officers and other employees singled him out and treated him more severely than White recruits in the Program, at least in part due to his race, colour or national and/or ethnic origin contrary to section 7(a) or 7(b) of the *Canadian Human Rights Act* (the “Act”). Mr. Banda also alleges that this discrimination culminated in his release from the Program, just days before his expected graduation.

[3] CSC is the federal government agency that administers correctional sentences of a term of two years or more. It manages correctional facilities of various security levels and supervises offenders under conditional release in the community. As part of its recruitment process for potential correctional officers, CSC operates the CTP to determine the suitability of a candidate for a career in corrections.

[4] CSC denies that Mr. Banda was singled out for adverse differential treatment based on a protected characteristic. It says Mr. Banda was released from the Program because he failed the required tests.

[5] The Canadian Human Rights Commission (the “Commission”), acting in the public interest, participated in the hearing.

## **II. DECISION**

[6] Mr. Banda’s complaint is dismissed. He has not established that it was more likely than not that he suffered adverse differential treatment or that CSC subjected him to adverse

differentiation at least in part due to his race, colour or national and/or ethnic origin. Mr. Banda is not entitled to any remedy under the Act.

### **III. CONTEXT**

[7] Mr. Banda is a graduate of the University of Winnipeg with a Bachelor's in Business Administration. He applied to work for CSC as a Correctional Officer. Correctional Officers maintain the safety and security of federal penitentiaries, along with other front-line staff who work with offenders. To become a Correctional Officer, candidates are required to complete all three components of the CTP.

[8] CSC training consists of three stages: 1) online learning; 2) pre-session learning and workbook assignments; and 3) on-site class learning and testing. Stages 1 and 2 of the Program mainly involve individual learning and preparation, whereas stage 3 has a blended learning approach with both individual study and in-class training. It is largely practical and skills-based in nature.

[9] Acceptance into the CTP is not an offer of employment with CSC. A candidate must successfully complete the CTP and meet all conditions before an offer, including the start date and location of employment, is confirmed. If a recruit does not complete the CTP, they may reapply and, if accepted, can attend the Program again. Throughout the CTP, recruits are expected to learn the skills necessary to carry out the duties of a Correctional Officer.

[10] For Mr. Banda, stage 3, consisting of in-class training, was held at the CSC National Training Academy at the Royal Canadian Mounted Police (RCMP) Depot in Regina, Saskatchewan. He was part of CTP 26, which ran from April 2, 2014, until June 25, 2014. Mr. Banda was the only Black recruit in the group of 27 recruits who participated in CTP 26.

[11] The training at the National Training Academy covered topics such as law and policy, use of firearms, chemical and inflammatory agents, fire safety, self-defence, arrest and control techniques, defensive techniques and suicide prevention. Recruits were continually assessed and provided with feedback throughout the training. They were also formally evaluated on a number of theories and skills areas and required to achieve a minimum grade or standard on each test. Recruits could be released from the training program at any time.

## **Weapons testing in the CTP**

[12] Recruits were tested on three firearms: a 9mm pistol, a C8 carbine and a 12-gauge shotgun. Weapons tests followed the same format, namely: a) dry manipulation (without live ammunition); b) accuracy (with live ammunition); and c) manipulation (with live ammunition).

[13] In dry manipulation, recruits were required to show that they can operate the gun safely. In the live range area, recruits were given a scenario describing a threat, and the recruit was required to perform immediate actions to reduce the threat. Trainers would complete score sheets and deduct marks if the recruit missed part or all of a step. In the accuracy portion, performed at the same time as the live manipulation, recruits were required to hit three out of four headshots and 16 body shots. Instructors watched to ensure the manipulation was correctly performed. Certain actions could result in an immediate failure.

[14] CTP tests are standardised, and automatic marks are assigned for each skill. For the accuracy portion, the silhouette of a person is marked with scoring rings. For the manipulation aspect, the recruits were required to put on their safety.

[15] The parties dispute whether there is a place for subjectivity in assessing these tests. CSC acknowledges there is an observable component, but Mr. Banda argues that CSC trainers judged him more harshly in grading his skills and unfairly evaluated him in his final assessment, resulting in his release from the CTP.

## **The “Three-Strikes” or Re-test Policy**

[16] Upon their arrival, new recruits were provided with a CSC Welcome Package that outlined the rules, regulations, policies and procedures that applied at the CSC National Training Academy at the RCMP Depot. These included a re-test policy that applied to all formal theory or skills tests. The policy states that, when recruits arrive at the National Training Academy, they are given two re-test credits for the entire Program. The policy allows one re-evaluation of the same test following a failure on the initial test. If the recruit passes the re-evaluation, they can continue in the Program. If they fail the re-evaluation,

they are released from the Program and eliminated from the staffing process. Failure on any third evaluation would also result in the recruit being released from the Program. The Re-test Policy is sometimes referred to as the “Three Strikes” Policy because after three strikes the recruit is immediately released from the Program and is “out”.

[17] Recruits were required to pass all tests to complete the Program, though the Re-test Policy did not apply to all tests. In other words, not all failures of a test or assessment were counted as a “strike”.

[18] Staff Training Officers (STOs) monitor and record a recruit’s performance and assess recruits to determine whether they are the right fit for a career in corrections. They are instructed to note personal suitability concerns or interactions with a recruit as a result of a complaint, observation or performance issue and/or failure, in the recruit’s training file.

## **CTP 26**

[19] The manager of CTP 26 was Albert Boucher. Julia Schepers was the training assistant. Mr. Banda’s complaint also relates to his involvement with a number of other training officers, namely Angela Davie, Jennifer Brooks (formerly Jennifer Brand), Brian Brooks, Martin Lamarche, Charlene Byfield, Mr. Chinn and Mr. Seems. Ms. Byfield and another instructor, Mr. Parent, are Black. All the other trainers or instructors are White. Ms. Brooks, Ms. Davie, Mr. Brooks, Mr. Boucher, Mr. Lamarche, Ms. Byfield and Ms. Schepers testified at the hearing.

[20] Mr. Banda successfully completed stages 1 and 2 and all other interviews and testing and received a conditional offer of employment from CSC. He was released from the Program on June 19, 2014, and was one of three recruits released due to the Re-test Policy.

## **First Strike**

[21] On April 23, 2014, Mr. Banda failed the Self-Defence Theory exam, a 10-question multiple-choice exam, with a score of 60%. There is no dispute that Mr. Banda failed to achieve the minimum score of 70% to pass and that this counted as his first strike under the

Re-test Policy. Mr. Banda acknowledges that he failed this test and that this was not based on any discriminatory conduct or practice. Mr. Banda attended a remedial session and on April 28, 2014, completed and passed the re-test with Ms. Davie.

### **Second Strike**

[22] On June 12, 2014, Mr. Banda failed the initial qualification in the 9mm Pistol test with Mr. Parent. Mr. Banda made four head shots but did not hit all required body shots. He attended a remedial session and was successful on the re-test. This counted as his second failure or strike under the Re-test Policy. Mr. Banda does not dispute that he failed the 9mm Pistol test and does not allege that this was due to discrimination.

### **Third Strike**

[23] The parties dispute what happened at Mr. Banda's Shotgun Initial Qualification Standard test on June 19. According to CSC, Mr. Banda did not meet the minimum requirements on safety and handling because he repeatedly failed to apply the safety selector on his firearm. This counted as Mr. Banda's third strike, resulting in his release from the Program.

[24] Mr. Banda alleges that he should have passed the test and that he failed due to Ms. Davie's discriminatory evaluation. My findings on this allegation are set out below.

### **Failure of non-strikable assessments**

[25] Mr. Banda also failed non-strikable assessments, namely the Sudden in Custody Death Syndrome theory test on May 2, 2014, and the Search and Seizure quiz. He passed the re-tests for both but neither counted as a failed test under the Re-test Policy.

## **IV. ISSUES IN DISPUTE AND SCOPE OF THE COMPLAINT**

[26] At the outset of the hearing, I asked the parties to confirm my understanding of the issues that I would have to determine in this proceeding. I detailed the list of allegations that

were before me, and I asked the parties for their input. They agreed with my characterisation of the issues in dispute, set out below.

[27] Mr. Banda relies on a number of incidents that begin on or around May 6, 2014, and end on June 19, 2014, when he was released from the Program following the Shotgun Qualification Standard test. He relies on these incidents in support of his claim that he was treated unfairly and unjustly compared to White colleagues and was subject to racial stereotyping, contrary to the Act. His allegations relate to the following incidents or issues:

- 1) Notation regarding incomplete homework assignment;
- 2) Allegation regarding photos on the gun range;
- 3) Denial of a sick leave request;
- 4) Shotgun testing and release from the Program;
- 5) Escort and release from the premises;
- 6) Booking of flight; and
- 7) Enhanced documentation, scrutiny and monitoring;

[28] In general terms, CSC argues that Mr. Banda has failed to establish a *prima facie* case of discrimination but that, even if he did meet this onus, it has provided a reasonable explanation for each and every incident of alleged discrimination.

## **V. ISSUES**

[29] I have determined the following issues in relation to each of the specific allegations set out in paragraph [27] above. I address them in turn in my analysis below.

1. Has Mr. Banda established a *prima facie* case of discrimination under section 7 of the Act because CSC subjected him to adverse differential treatment, at least in part due to his race, colour or national and/or ethnic origin?
2. If yes, has CSC established a valid justification for its otherwise discriminatory actions?

3. If CSC cannot establish a justification, what remedies should be awarded that flow from the discrimination?

## VI. REASONS AND ANALYSIS

### Legal Framework

[30] Mr. Banda alleges discrimination in relation to employment based on race, colour or national and/or ethnic origin, contrary to section 7 of the Act. There are two parts to proving discrimination in the employment context.

[31] The complainant has the onus of proving the existence of a *prima facie* case. The use of the expression “*prima facie* discrimination” must not be seen as a relaxation of the complainant’s obligation to satisfy the Tribunal in accordance with the standard of proof on a balance of probabilities, which they must still meet (*Québec (C.D.P.D.J) v. Bombardier Inc.*, 2015 SCC 39, at para. 65 (“*Bombardier*”).

[32] To establish a *prima facie* case, the complainant has to prove that it is more likely than not that they meet all three parts of this test: 1) they had a characteristic protected from discrimination under the Act; 2) they experienced an adverse impact with respect to employment; and 3) the protected characteristic was a factor in the adverse impact (*Moore v. B.C. (Education)* 2012 SCC 61, at para. 33).

[33] The protected characteristic does not have to be the only factor in the adverse treatment and no causal connection is required (see, for example, *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 [FNCFCSC] at para. 25).

[34] In determining whether discrimination occurred, the Tribunal may consider the evidence of all parties. The respondent can present evidence to refute an allegation of *prima facie* discrimination, put forward a defence justifying the conduct under s. 15 of the Act, or do both (see *Bombardier* at paras. 64, 67, 81; *Emmett v. Canada Revenue Agency*, 2018 CHRT 23 at paras. 61, 63-67).



[35] If the complainant establishes a *prima facie* case of discrimination, the respondent must justify its decision or conduct based on the exemptions set out in the Act or developed by the courts (*Bombardier, supra*, at para. 37).

[36] Racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices (*Radek v. Henderson Development (Canada) Ltd.* (2005 BCHRT 302 at para. 482)). In determining whether an inference of racial discrimination is more probable than the explanation offered by the respondents, I need to be mindful of the nature of racial discrimination as it is understood today and that it will often be the product of learned attitudes and biases and often operates on an unconscious level (*Shaw v. Phipps*, 2010 ONSC 3884 at para. 75). In a case where direct evidence of discrimination is absent, “it becomes necessary ... to infer discrimination from the conduct of the individual or individuals whose conduct is at issue. ... The conduct alleged to be discriminatory must be analyzed and scrutinized in the context of the situation in which it arises” (*Basi v. Canadian National Railway Company*, 1988 CanLII 108 (CHRT) at pages 10-16 [*Basi*]).

## **FINDINGS OF CREDIBILITY**

[37] Much of this case turns on my findings of fact with regard to the alleged incidents and on my assessments of credibility. In some instances, the parties presented starkly divergent accounts of what happened, and, where it was necessary to resolve a conflict in the evidence, I have set out my reasons below.

[38] In assessing credibility and reliability in this case, I have applied the traditional test set out by the British Columbia Court of Appeal in *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354. When making credibility findings, I have tried to determine which account of the facts in relation to each issue is “in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable” in the circumstances.

[39] I have considered the following factors in assessing whether a witness’s testimony is in “harmony with the preponderance of the probabilities”:

- The internal consistency or inconsistency of evidence;

- The witness's ability and/or capacity to apprehend and recollect;
- The witness's opportunity and/or inclination to tailor evidence;
- The witness's opportunity and/or inclination to embellish evidence;
- The existence of corroborative and/or confirmatory evidence;
- The motives of the witnesses and/or their relationship with the parties; and
- The failure to call or produce material evidence.

(see *McWilliam v. Toronto Police Services Board*, 2020 HRTO 574 (CanLII), at para 50, citing *Shah v. George Brown College*, [2009 HRTO 920](#) at paras. [12-14](#); *Staniforth v. C.J. Liquid Waste Haulage Ltd.*, [2009 HRTO 717](#) at paras. [35-36](#)).

[40] Where credibility is concerned with a witness's sincerity, reliability is concerned with the accuracy of a witness's testimony. The accuracy of a witness's testimony involves considering issues such as their ability to accurately observe, interpret and recount events. See *McWilliam v. Toronto Police Services Board*, 2020 HRTO 574 (CanLII), at para. 51.

[41] In general terms, Mr. Banda's evidence in chief was given freely and directly, but, on cross-examination, it was not. He was not forthright in his answers, and I have concerns about his credibility.

[42] I found Mr. Banda evasive when pressed in cross-examination. He would often avoid answering the question asked. For example, when challenged with a piece of evidence or about his account of an entry in his performance appraisal, he would not respond directly. He did not admit basic facts freely and did not readily acknowledge or concede statements that he did eventually concede when pressed. This did not bolster his credibility or my assessment of his version of events. Mr. Banda also refused to admit statements where they did not support his premise, even when they were not particularly controversial. For example, he refused to concede that he could not have taken a specific flight because it would have required him to get to the airport at least an hour ahead of time.

[43] I also have concerns about Mr. Banda introducing new versions of events for the first time at the hearing. This complaint has been ongoing for many years, and the fact that salient aspects of the alleged incidents only arose for the first time at the hearing affects my evaluation of Mr. Banda's evidence where his account of events diverges from the Respondent's. For example, Mr. Banda conceded that he had reviewed his performance evaluation many times, even a hundred or more times, yet mentioned for the very first time in these proceedings that the reason he wanted a sick note when he was supposed to be

writing an exam was because of physical pain or an injury. This was never mentioned in any of the materials prior to the hearing. In another example, he testified for the first time at the hearing that he had reviewed two White recruits' homework assignments, which was not previously mentioned in these proceedings. When asked why this was the first time these points were being raised, he responded "no one asked me about them". He categorically denied for the first time in these proceedings that an entire practice session with Mr. Brooks occurred on June 19.

[44] I agree with CSC that these are not the hallmarks of a credible witness.

[45] The Respondent's witnesses generally testified openly, candidly and plainly and when tested on cross-examination were not defensive. Much of Mr. Banda's complaint relates to what he says was a pattern of discrimination set off by Ms. Brand and perpetuated by the other instructors, particularly Ms. Davie whose assessment of his Shotgun Qualification Standard test resulted in his release from the Program.

[46] I found Ms. Davie's evidence about the events of June 19 candid and open, particularly when challenged about the alleged aggressive behaviour Mr. Banda was said to have exhibited on the range. While in some cases Respondent witnesses could not recount details from 2014, they admitted what they could or could not recall and I would expect there to be challenges with reliability for both Mr. Banda and CSC's witnesses given the passage of time. Where the parties' evidence was entirely divergent, multiple witnesses from CSC testified and corroborated their version of events. Although Mr. Banda had intended to call some former recruits who could have said otherwise, he did not do so.

[47] My detailed findings with respect to each alleged incident are set out below. I have integrated my findings of fact with my legal findings for each of the allegations, including my consideration of the alleged cumulative impact of the alleged incidents.

*Issue 1: Has the Complainant established a **prima facie** case of discrimination under section 7 of the Act?*

**(a) Does the Complainant qualify for protection from discrimination because he has a protected characteristic?**

[48] Yes. There is no dispute that Mr. Banda has a characteristic protected under the Act and therefore qualifies for protection from discrimination. CSC did not argue that Mr. Banda does not fall with the ambit of the protections of the Act.

**(b) Did the Complainant suffer an adverse impact with respect to employment?**

**(c) Was the Complainant's race, colour or national and/or ethnic origin a factor in the adverse treatment, including his release from the program?**

[49] Mr. Banda has failed to meet the requirements of the second and/or third parts of the *prima facie* test for all of the incidents he alleges were discriminatory. In some cases, I do not find that he has established that he suffered an adverse impact or adverse differential treatment. For those incidents where he has satisfied this part of the test, I do not find that he established a link with a protected characteristic. I have set out my findings below under each alleged incident of discrimination in analysing the second and third parts of the test.

**1) Notation regarding incomplete homework assignment**

[50] On or about May 6, 2014, the recruits in CTP 26 were required to hand in their Arrest and Control Theory homework assignment. Self-study homework assignments were intended to help prepare recruits for exams, and recruits kept their copies to help them study.

[51] Mr. Banda alleges that STO Brand told him on May 8 that she had noted that he did not complete his homework in his performance evaluation. According to Mr. Banda, he was the only recruit singled out for not completing the homework assignment and knew that four White recruits did not receive performance notations for their incomplete homework

assignments. Mr. Banda also maintains that he had completed half or three quarters of the assignment.

[52] Ms. Brand's May 8 entry in Mr. Banda's performance evaluation reads as follows:

On 2014-05-06 Recruit Banda handed in his Arrest and Control Theory Assignment with less than half of the assignment completed. When asked he indicated that he needed more time. The assignment was given to them on May 1<sup>st</sup>. There was a weekend over this period in which it could have been completed. I, instructor Brand, met with Banda on May 8<sup>th</sup> to discuss the concern of his homework not being complete. He indicated that he had  $\frac{3}{4}$  of the work completed, however he writes it on his own notes and then transcribes it to his homework sheets. He does this because he wants to put it in his own words rather than copy "word for word". I indicated to him that it would be preferable if he knew the material more "word for word", as it helps with test writing and ensuring that he receives full marks. The discussion then led to his difficulties with testing, when there is a large amount of reading to be done. He said that he has looked into getting a doctor's note that would enable him to have more time to do testing, however he does not want to miss class time to get this done. It was suggested to him that he does not want to fail another "striking" test because of time frames. It was further suggested to him that if he needed to take time off of class for a doctor's appointment, that would be a reasonable excuse [sic] for missing class. It was also suggested that classmates could assist him in catching up in anything that he missed. Also, that I would help coordinate with him a day that would be best for him to miss. It was left up to Banda to decide what he wanted to do.

[53] Mr. Banda denies that he asked Ms. Brand about a doctor's note or said that he had difficulty with tests where there was a lot of reading.

[54] There was no formal complaint process in place at the time, so Mr. Banda reviewed the Welcome Package for new recruits which provided that if a recruit felt harassed or discriminated against in training, they should speak with a trainer or the manager of the Learning Center. Mr. Banda met with another trainer as well as Mr. Brooks to share his concerns about Ms. Brand's entry in his performance evaluation. Mr. Brooks told Mr. Banda not to worry about what other recruits had done and to concentrate on his own work. Mr. Banda felt CSC was dismissive of him as it took no further action to address his concerns about the homework notation.

[55] According to Mr. Banda, when he spoke to Ms. Brand, this was the beginning of the end for him in CTP 26. Following that discussion, Mr. Banda claims Ms. Brand began to

wage a campaign against him to have him removed from the Program and that what had been a previously friendly atmosphere changed for the worse. This incident led to other STOs giving him negative and inaccurate performance evaluations, which ultimately led to his release from the Program. Mr. Banda said that he avoided dealing with Ms. Brand as he learned that she was in a personal relationship with Mr. Brooks. Mr. Banda also alleges that Mr. Brooks' name is listed in the entry because of his relationship with Ms. Brand.

[56] Ms. Brand was new to the CTP, and Mr. Banda's class was her first training program as an instructor. She testified that she was trying to find her way and make a good impression because she hoped to get an indeterminate position with CSC. She did not review all homework assignments but did spot checks of the recruits' homework to make sure they were on track, though their homework was not marked or graded.

[57] Ms. Brand testified that she noted that Mr. Banda had completed less than half of his homework, which she discussed with him. She made the May 8 entry to document the conversation and the fact that he had admitted some issues with testing. She explained that she could not randomly allow a recruit extra time, but if Mr. Banda got a medical note, he might be able to get more time to complete the assignment, and she could arrange his schedule so that he would have the time to see a doctor. Ms. Brand testified that she wanted to fix things and get Mr. Banda what he needed, especially as she had already seen that he had failed a test.

[58] CSC argues that Mr. Banda experienced no adverse impact as a result of this notation which was only an account of the conversation with Ms. Brand and had no impact on his release from the Program. Mr. Banda conceded in cross-examination that the May 8 entry was not the reason he was released from the Program.

[59] While the May 8 notation is not why Mr. Banda was released from the Program, I agree with Mr. Banda that an entry in a performance evaluation about a failure to complete an assignment or suggesting that a recruit is having difficulty reading large volumes of work can leave a negative impression for a supervisor or potential employer, even if it is merely an "administrative" or internal document as CSC contends. The fact remains that failing to

complete homework would not be perceived as positive by a supervisor in the workplace, and an entry to that effect in a performance evaluation is not neutral.

[60] While I accept that the notation had an adverse effect, the evidence does not allow me to infer a link between the May 8 notation or the questions about homework and a protected characteristic. Mr. Banda must demonstrate something more than his own belief that Ms. Brand made the notation or asked about his homework at least in part because of his race, colour, national and/or ethnic origin.

[61] I acknowledge that Mr. Banda's allegation about the May 8 notation is that this is one of many examples of hypervigilance or over monitoring, as the only Black recruit. But the evidence does not support his allegation of a link to a protected characteristic. I am not persuaded that Ms. Brand focused more on Mr. Banda or was stricter in her review of his assignment compared to the other recruits because there was no evidence presented to compare similar assignments. While Mr. Banda relies on the fact that none of the White recruits had notations in their performance evaluations about homework, Ms. Brand did not review all of them, and Mr. Banda admitted in cross-examination that he did not know whose assignments Ms. Brand had reviewed. He acknowledged that the assignments were reviewed by several instructors.

[62] While Mr. Banda disputes Ms. Brand's claim that he had completed less than half of the assignment, he did not produce his homework, nor did Mr. Banda call any of the recruits whose homework he maintains was also incomplete to support his claim. If Mr. Banda had called the other recruits, or I had evidence that Ms. Brand had reviewed White recruits' homework assignments that were similarly incomplete such that Ms. Brand had chosen to only focus on Mr. Banda and make a notation, that may have allowed some inference to be drawn. But none of that was before me, and Mr. Banda's allegations are speculative.

[63] Further, I do not find the fact that the May 8 entry in Mr. Banda's performance evaluation lists the names of both Ms. Brand and Mr. Brooks to assist Mr. Banda in his claims that this event was discriminatory. Mr. Banda testified that the notation is wrong as only Ms. Brand was present. When asked about this at the hearing, Ms. Brand did not recall why both names were listed, and Mr. Brooks testified that he could not remember but

thought he might have been the instructor or had something to do with the topic. In any event, the fact that Ms. Brand and Mr. Brooks were partners does not support a finding that it was more likely than not that there is a link between the May 8 notation and a protected characteristic. The suggestion that their names appearing on the entry together reflects some concerted effort to harm Mr. Banda because of his race is without evidentiary foundation.

[64] I also do not accept Mr. Banda's claim that Ms. Brand set out to wage a campaign against him to have him removed from the Program. In cross-examination, Mr. Banda admitted that Ms. Brand did not have anything to do with his strikable tests. Ms. Brand wanted to secure a permanent job, and the evidence does not support this claim as being anything more than speculative. The tenor of Ms. Brand's entry does not align with Mr. Banda's claim. I find that the notation reflects a level of concern for Mr. Banda and an attempt to set him up for success.

[65] I will address this more fully below in my findings about the alleged cumulative impact of the individual alleged incidents of discrimination.

## **2) Allegation regarding photos on the gun range**

[66] Mr. Banda alleges that, on or about June 12–14, 2014, he was seated between two other recruits on the gun range when Ms. Davie gestured to him, called him over and asked if he was taking photos. He was the only one Ms. Davie asked, despite the fact that one or both of his fellow recruits had previously been written up for having taken photos and for inappropriate conduct. Mr. Banda explained that they were seated on the bench in an open area where his hands and legs would have been visible. Mr. Banda told Ms. Davie that he had not taken photos and that she should ask the other recruits. Ms. Davie did not apologise to Mr. Banda or give any explanation for her question.

[67] Recruits were strictly prohibited from taking photos, and CSC's Training Academy Rules, Regulations, Policies and Procedures only allowed cellphones to be used by recruits in uniform in exceptional circumstances and with prior approval of the STO.



[68] CSC argues that there was no adverse impact associated with the event. Mr. Banda was not in earshot of the other recruits, no one heard what was being discussed, and there was no entry on Mr. Banda's performance evaluation as a result of the incident.

[69] STO Davie acknowledged at the hearing that she called over Mr. Banda and asked him if he had been taking photos. She indicated that something caught her eye and that she believed Mr. Banda was standing, such that he was in position to take photos, whereas the two other recruits were seated. According to Ms. Davie, there had been issues of recruits taking selfies or other photos of themselves with firearms, which was strictly prohibited. When asked why she called over Mr. Banda, rather than the other two recruits who had previously been spoken to or disciplined for taking photos, Ms. Davie said that she did not consider their past actions. Her reason for calling over Mr. Banda was only motivated by the fact that he was standing. The seated recruits would not have had a good view to take photos of the range. Ms. Davie testified that she did not document the question or the incident on Mr. Banda's performance evaluation because nothing noteworthy occurred.

[70] I acknowledge that one of the most significant effects of anti-Black racism can include the over-monitoring or heightened scrutiny of Black men, as Mr. Banda argues relying on *Adams v. Knoll North America*, 2009 HRTO 1381 at paras. 45-47. However, even if I accept that the very asking of the question singled out Mr. Banda and that he suffered some adverse impact from having been called over to speak to Ms. Davie in front of the other recruits, I am not persuaded that he has made out a link to a protected characteristic in any event.

[71] I find that it was a fair question, given the strict policy against photos, and I am not persuaded that Mr. Banda has established a link to a protected ground to support his claim of discrimination. While discrimination on the grounds of race or colour can be subtle and requires an analysis and scrutiny of the context of the situation in which it arises, there must be something more than abstract belief or suspicion to link Ms. Davie's question to a prohibited ground of discrimination (see *Dulce-Crowchild v Tsuut'ina Nation*, 2020 CHRT 6 at para. 91).

[72] Ms. Davie asked Mr. Banda a question, he answered it, and she was satisfied with his response. This minor interaction and her question were reasonable in the context of a school or training setting where discipline and rules are important and instructors are required to strictly enforce them. Further, Ms. Davie asked Ms. Miller, a White recruit, the same question on April 15, 2014, and that recruit was asked to remove her cellphone when she had it in class on the parade floor. In contrast to the incident with Mr. Banda, Ms. Davie noted the incident in Ms. Miller's performance evaluation.

[73] Mr. Banda also alleges that this incident was part of Ms. Davie trying to get even with him and is linked to his failure of the Shotgun Standard Qualification test, which I will address below.

### **3) Denial of sick leave request**

[74] Mr. Banda went to see Ms. Davie in the afternoon of June 13, 2014, with a sick leave form, just as he was supposed to start an exam. He told Ms. Davie that he wanted to take the afternoon off to go to the medical clinic. Rather than approving his leave, Ms. Davie referred Mr. Banda to Mr. Boucher, the National Training Academy Manager, because the recruits were having a final test that afternoon. According to Mr. Banda, Ms. Davie told him that he was trying to buy time because he was worried about the test.

[75] Mr. Banda alleges that Ms. Davie denied a request he made for sick leave at least in part because of his race, colour or national and/or ethnic origin whereas other recruits were routinely granted leave without question.

[76] Ms. Davie's June 13 entry in Mr. Banda's performance evaluation notes that he approached her with a leave form stating that he wanted to take the afternoon off as he did not feel well, and that, upon further discussion with Mr. Banda and Mr. Boucher, "Simon indicated that he was not in the right frame of mind to write the test as he had failed the 9mm Pistol test yesterday. It was pointed out to Simon that he had shown considerable improvement on the range earlier in the day and that he should be focusing on the positives rather than the negatives". The notation goes on to say that Mr. Banda was placed in the staff board room to settle himself and that, when Ms. Davie checked in with him, he was

studying the material. He was given more time to prepare and to get into the right frame of mind to write the final security test. Another STO, Mr. Lamarche, testified that, when Mr. Banda was in the boardroom, Ms. Davie asked him to look in on Mr. Banda to make sure he was OK.

[77] Ms. Davie testified that she referred Mr. Banda to see Mr. Boucher because she had never had a recruit request sick leave immediately before a test. She also testified that Mr. Banda told her he did not feel well enough to write the test and wanted more time. He wanted the weekend to prepare, and she did not feel it was fair for him to have an extra weekend to study. Ms. Davie explained that there is a procedure for receiving accommodation and that Mr. Banda would require a doctor's note or some other documentation if he was going to make the request.

[78] Mr. Boucher testified that Mr. Banda said he was concerned about the exam, felt unprepared and did not want to write it, and was quite nervous about it. Mr. Boucher explained that he tried to reassure Mr. Banda that he was ready for the test and decided to place him in the staff boardroom to give him time to settle and to have some time alone before writing the test.

[79] Mr. Banda alleges that two trainers were present when he wrote his test, Mr. Lamarche and Ms. Brand, and that he believed a trainer was sent to check on him, to see what he was doing. Ms. Davie told Mr. Banda that a male trainer was there in the event he needed to use a washroom and that the trainers were not there to give him answers. Mr. Banda testified that, when a White recruit was given leave and wrote a test separate from the other recruits, he only had one trainer present. Mr. Banda ultimately wrote the test and passed it.

[80] Mr. Banda conceded in cross-examination that he was hoping to be on leave that afternoon. This coincided with when he was supposed to be writing his final security exam with the other recruits. That exam was a strikable test, the failure of which would have resulted in him being released from the Program.

[81] In my view, Mr. Banda has failed to establish that he was subject to any adverse differential treatment by being denied his sick leave request. On the contrary, Mr. Banda,

received *preferential* differential treatment, having been given time to settle his nerves and to quietly prepare, which led to him passing a strikable test. In cross-examination, Mr. Banda admitted that he had time to review his notes, that he ultimately passed his test with a score of 42/50, and that he was informed at the end of the exam that he was successful.

[82] While Mr. Banda admits he was successful on the test, he maintains that the adverse differential treatment he suffered was not being able to attend the medical centre when he wanted to go. Mr. Banda does not, however, claim that his medical issue persisted or that he was denied the ability to go to the medical centre at a later stage. In cross-examination, Mr. Banda admitted that he did not return to see a doctor in relation to the injury and says that some of his other recruits gave him painkillers.

[83] Where Mr. Banda's account conflicts with that of Mr. Boucher and Ms. Davie, I prefer CSC's version of events. I have significant concerns with the credibility of Mr. Banda's evidence about this incident. At the hearing, he testified that the reason for his request for medical leave was because he had pulled his arm while in the gym practicing self-defence tactics the day before, that his hand was a little twisted, and that he was feeling pain in his shoulder and back. Mr. Banda did not mention that pain was the reason he needed to go to the medical centre in his original complaint, his revised complaint, his interview with the Commission investigator, his Statement of Particulars (SOPs), his amended SOPs, his Reply or his Amended Reply. In cross-examination, when confronted with this new version of what motivated the sick leave request, Mr. Banda said he could not recall when he twisted his hand, perhaps a day or a few days prior to the date he wanted to go to the medical centre.

[84] Yet, as his performance evaluation indicates, Mr. Banda was able to complete the 9mm Pistol test the previous day and does not note any impairment or physical pain. Mr. Banda also completed the 9mm remedial session the very same morning that he requested sick leave, apparently due to physical pain. Ms. Davie's notation in his performance evaluation refers to some improvement in his performance. No mention is made of any complaint of physical pain or of any difficulty in completing the 9mm Pistol remedial session a short time before.

[85] While Mr. Banda wants me to find Ms. Davie's evidence not to be credible because he says she had no authority to refuse his sick leave request, in my view, Ms. Davie's actions in referring Mr. Banda to see Mr. Boucher were reasonable in the circumstances, particularly given the timing of the sick leave request. She referred Mr. Banda to Mr. Boucher who ultimately allowed Mr. Banda the benefit of more time to review his notes before writing the exam. While Mr. Banda now suggests there was a physical cause behind his sick leave request, I do not accept his version of events.

[86] In attempting to establish a link with the alleged adverse differential treatment and a protected characteristic, Mr. Banda compared his sick leave request shortly before an exam to leave requests that were approved for two other recruits. These are not appropriate comparators, and this is like comparing apples to oranges. One of the recruits made a request for leave more than a month in advance to attend his own wedding. Another recruit requested leave on May 1 for the morning of May 20. I agree with CSC that those are very different circumstances compared with Mr. Banda's request for leave immediately preceding a final test, particularly as Mr. Banda had failed his second strikable test the day prior on June 12, 2014. The timing of his request reasonably gave the instructors pause. In cross-examination, Mr. Banda would not concede that there is a distinction between the two situations—namely one recruit requesting leave for his wedding, weeks ahead of time, and another making a last-minute sick leave request before an exam. This did not bolster his credibility either.

[87] Further, Mr. Banda does not allege that he was denied access to see a doctor for a health concern. When asked what he did about the physical pain he testified about at the hearing, Mr. Banda said some of the other recruits gave him painkillers.

[88] I accept CSC's argument that it was reasonable for Mr. Boucher and Ms. Davie to discuss the leave request with Mr. Banda in light of the timing and circumstances surrounding the request. He had failed the second strikable test the previous day on June 12, 2014, and it was reasonable to infer that he would be nervous about facing an exam on the afternoon of June 12, 2014.

#### 4) Shotgun Testing and Release From the Program

[89] The parties spent considerable time in their evidence on the circumstances surrounding Mr. Banda's Shotgun Qualification Standard test on June 19, including the practice testing that preceded the alleged discriminatory scoring of Mr. Banda's test by Ms. Davie. This context is relevant to my findings about alleged discrimination in the scoring of the June 19 Qualification Standard Shotgun test.

##### *The practice sessions*

[90] On June 18, Mr. Banda scored a 23 out of 24 on the Shotgun theory test. The same day he successfully completed a dry practice qualification test with Mr. Seems, scoring 58/70. The passing grade was 49. Ms. Davie testified that the dry practice qualification test is the easiest as it is done without a stressful situation and without live ammunition. Mr. Banda does not take issue with Mr. Seems' scoring of the dry practice test.

[91] In cross-examination, CSC put to Mr. Banda that, of the 24 recruits, only two scored lower than he did in the dry test. Ten scored a perfect 70 out of 70, and the class average without Mr. Banda was 64. Mr. Banda would not readily acknowledge that he performed worse than most of his classmates on the dry practice test, though he eventually admitted that he scored third from the bottom.

[92] The parties' evidence diverges on what happened next. Mr. Lamarche testified that recruits were given 20 practice rounds of live fire to get familiar with, 20 to practice the course of fire, and then 20 to do the actual test. Mr. Lamarche said that he did the first 20 rounds with Mr. Banda, then Mr. Banda worked with Mr. Brooks, and then Ms. Davie conducted the Qualification Standard Shotgun test for the final 20 rounds.

[93] Mr. Lamarche testified that Mr. Banda had difficulty in his practice round. According to Mr. Lamarche, the shotgun is not easy for everyone. There is a lot of manipulation required, and it can be hard to remember what to do. He made an entry about Mr. Banda's difficulties as part of his June 26 entry in Mr. Banda's performance evaluation.

[94] Mr. Banda acknowledged that he had a practice session with Mr. Lamarche but denied that he was slow on his manipulations and lacked confidence.

[95] Mr. Brooks testified that on June 18 he coached Mr. Banda through a practice 20-round live fire course with the 12-gauge shotgun. He completed an entry to that effect on June 19 in Mr. Banda's performance evaluation. According to Mr. Brooks, Mr. Banda had several shortcomings in his manipulation of the shotgun, including an inability to reload and keep up with the course of fire and challenges with accuracy and remembering to apply the safety. Mr. Brooks also wrote that he informed Mr. Banda of these shortcomings and that if it had been an actual course of fire, he would have failed.

[96] At the hearing, Mr. Banda denied this session with Mr. Brooks ever took place. He said he was 100% certain he only did a practice session with Mr. Seems who did not give him any negative feedback at all. He said that, after the May 8 incident with Ms. Brand, he avoided Mr. Brooks because of how he was treated with respect to his homework assignment.

[97] I have significant concerns with Mr. Banda's evidence about the practice sessions for a number of reasons. First, the hearing is the first instance Mr. Banda categorically denied the practice session with Mr. Brooks occurred. As CSC argued, Mr. Banda never mentioned this in his complaint, amended complaint, SOPs, amended SOPs, judicial review affidavit, or statements to the Commission investigators. In my view, it is not plausible that Mr. Banda would omit such a significant inaccuracy in a document he has reviewed so minutiously.

[98] I do not accept Mr. Banda's account about the practice sessions and do not find it credible in light of the evidence about the sessions and the other oral evidence I heard from Mr. Brooks and Mr. Lamarche. Mr. Brooks made a detailed notation in Mr. Banda's performance appraisal on June 19 describing the practice session and difficulties he observed Mr. Banda having with the shotgun. Yet Mr. Banda did not previously contest this entry as being entirely fabricated, despite having challenged most others in his performance evaluation, including those that objectively were far less damning in terms of assessing his performance. Further, when asked why he did not previously take issue with what he

maintains is a false entry in his performance appraisal given that he had reviewed the document likely hundreds of times and noted inaccuracies in many other entries, Mr. Banda responded: “No one asked me about it. If somebody had asked me, I could have answered”.

[99] There is no evidentiary basis or foundation to support Mr. Banda’s implausible version of events. I prefer Mr. Brooks and Mr. Lamarche’s evidence to that of Mr. Banda and therefore find that the practice sessions occurred as they described both in their oral evidence and in their contemporaneous notations. Mr. Banda had difficulty during both of their practice rounds.

[100] To prefer Mr. Banda’s version of events is to accept that Mr. Brooks lied about the practice round and devised a false entry in Mr. Banda’s performance evaluation for a training session that never occurred. It similarly means accepting that Mr. Lamarche wrote a false account of what transpired at the practice session in his June 26 entry. Mr. Banda says that because Mr. Lamarche’s session was not documented in a timely manner, I should not find it credible. I reject this argument. Mr. Lamarche admitted candidly that he did not fill it out as soon as he should have, and, while this may not have been a good practice, this does not undermine his credibility about the event he described.

[101] Accepting Mr. Banda’s evidence about not having the session with Mr. Brooks also means accepting Mr. Banda’s explanation or suggestion that recruits could simply “avoid” a trainer assigned to conduct a practice session with them, which is not supported anywhere in the evidence. Other witnesses testified that trainers and instructors were generally assigned at random, so even if Mr. Banda wanted to avoid Mr. Brooks because of what happened with his homework assignment and Ms. Brand, this is not how the CTP functioned.

#### *The Qualification Standard Shotgun test*

[102] During the Qualification Standard Shotgun test on June 19, recruits were given a scenario. According to Mr. Banda, he was directed to Ms. Davie for testing, though he would have preferred a different instructor. CSC’s position is that Mr. Banda did not meet the minimum standard for safety and manipulation of the weapon and therefore failed the



Qualification Standard Shotgun test. This was his third strike under the Re-test Policy, and as a result he was released from the CTP.

[103] I find that Mr. Banda suffered an adverse impact by failing the Qualification Standard Shotgun test. He was released from the Program shortly before graduation and was not able to start a position as a Corrections Officer in July. Mr. Banda testified about how difficult it was for him given his plans to start work shortly thereafter, and several officers testified that it was particularly hard on recruits to have to leave so close to the end of the Program.

[104] I do not, however, find that Mr. Banda has established that it is more likely than not that his release from the Program was linked in some way to a protected characteristic. I find that Mr. Banda's test was properly scored as a failure by Ms. Davie and do not accept that Ms. Davie inaccurately marked Mr. Banda to terminate him from the CTP.

[105] Mr. Banda alleges that there was a lack of precision in CSC's marking standards, and that there was no proper basis for his Qualification Standard Shotgun test results. He wants me to find that Ms. Davie scored him incorrectly because she intended for him to be terminated from the CTP due at least in part to his race, colour, or national and/or ethnic origin. According to Mr. Banda, Ms. Davie's involvement in the sick leave request and camera incidents addressed above supports a finding of her discriminatory conduct on June 19.

[106] CSC argues that Mr. Banda objectively failed the test and was properly released. It submits that I must either find that the test was properly found to be a failure by Ms. Davie or that her entire scoring was a fraud and fabricated to justify a failure, due in part to discriminatory grounds. I agree with this characterisation.

[107] In my view, Mr. Banda's allegations about the June 19 test are without evidentiary foundation. Where accounts of what transpired diverge, I prefer the Respondent's evidence for a number of reasons, as I explain below. I find that the evidence overwhelmingly supports CSC's account of what transpired before, during and after the test, and I accept CSC's explanations for what happened.

[108] First, I also do not find that Ms. Davie deliberately selected Mr. Banda for testing. Ms. Davie, Mr. Boucher, Mr. Brooks and Mr. Lamarche all testified that Ms. Davie did not select Mr. Banda and that recruits would be randomly assigned. I find that Mr. Banda was assigned to be tested by Ms. Davie and was not specifically selected by her.

### **The scorecard**

[109] Mr. Banda alleges that his scoring was unfair and inaccurate. We spent significant time at the hearing examining the scorecard, and I heard evidence from Mr. Banda and several CSC witnesses on it.

[110] Mr. Banda's Shotgun Qualification Checklist scorecard sets out the scoring system, including what qualifies as a major error and how many points are to be deducted. A major error requires a deduction of 10 points. One incorrect step would result in a 5-point deduction, a minor error would result in a 2-point deduction, and negligent discharge would be a failure.

[111] The scorecard also includes notations made by the instructors who scored the dry practice test and the qualification test. Ms. Davie signed as the instructor for both sections of the card that pertained to the qualification test on June 19, namely "During the Course of Fire" and "Accuracy".

[112] The passing grade was 21/30. Mr. Banda scored 20/30 on the section entitled "During the Course of Fire" and received the notation DNQ (did not qualify) because he did not achieve the minimum score to pass. This failure constituted his third strike, meaning that, on that basis alone, he would have been released from the Program. However, as Ms. Davie testified, Mr. Banda also failed the "Accuracy" portion, which in effect could be considered an additional, or fourth, strike.

[113] Ms. Davie made the following notations on Mr. Banda's scorecard, which she clarified at the hearing:

- A) "didn't give DO's"
- B) "missed directions"

- C) Required prompts to continue
- D) Had to be told to listen to commands
- E) Safety left "off" X 3 (-10)

[114] Ms. Davie testified that Mr. Banda failed to give direct orders (DOs) and missed directions from the training officer who was calling out instructions. She had to prompt Mr. Banda to ensure that he kept moving through the test. He also had to be told to stop and listen to commands so that he knew what the next step was. She explained that these comments provide a bigger picture about the areas where Mr. Banda was struggling and that she could have deducted additional points but did not do so because it can be difficult for a recruit to recover from such a low score. On the marking sheet, Ms. Davie also indicated that Mr. Banda did not put his safety on three times despite her reminding him to do so after his first error. At the bottom of the form, she wrote "very slow at firing/following commands".

[115] The third column in the scorecard is entitled "Accuracy", where the qualification standard or passing grade was 14/20. Ms. Davie wrote "didn't shoot" and deducted 4 points for a missed target and four points for a wrong target, as well as one point for a time violation. Mr. Banda's score was listed as 1/20. When asked why Mr. Banda got 1 out of 20, Ms. Davie testified that that number was not accurate and that she started to write the total and stopped as Mr. Banda had already failed the test. He would also have failed the Accuracy section had she continued to tally his score, but she said there was no need to do so.

[116] Mr. Banda testified that, in addition to Ms. Davie, Mr. Lamarche and Mr. Seems were present for his test and had scorecards as well. A fourth person was present who was giving instructions throughout the scenario. Mr. Banda acknowledged he may well have missed four targets, though he maintains that Ms. Davie never went through the scorecard to review his results with him and that he was only told that he failed the test without further explanation.

[117] CSC's position is that there is an objective, reasonable basis to the scoring of Mr. Banda's Qualification Standard Shotgun test. Five points were to be deducted for an error like leaving off the safety. The scoring sheet indicates that two or more incorrect steps is -

10, which is what Ms. Davie scored for Mr. Banda. Mr. Banda failed to put the safety on three times and therefore failed the test, falling below the 21 points required to pass.

[118] I find that the release is therefore fully justified as this constituted the third “strike” according to CSC’s Re-test Policy. Mr. Banda did not adduce evidence to support his claim that leaving the safety off should only be a 2-point deduction. Ms. Davie, Mr. Brooks and Mr. Lamarche testified that it was standard to deduct five points for failure to apply the safety unless a recruit immediately caught themselves and corrected the error, in which case only two points might be deducted.

[119] According to Mr. Banda, he should have scored 14 out of 20 on the Accuracy portion of the test, and that, when his scorecard is compared to the notations in his performance evaluation, there is an inconsistency. Mr. Banda testified that the notations in the performance evaluation say that he failed to put on his safety and that the instructors were concerned about muzzle control, there is nothing on the scorecard about this. He also says that, while there is a notation that he was very slow to respond to commands, there is no scoring or grading for that and that this is not connected to time violations. In my view, Mr. Banda’s claims about the scoring of the Accuracy portion are unsupported and are just his own. Any minor inconsistencies between what was documented in the performance evaluation versus the scorecard are not determinative in any case, and Ms. Davie’s evidence was persuasive on these points and the appropriate method of scoring the accuracy portion of the test. In any event, it is clear that Mr. Banda had already failed the test, separate and apart from what he may have achieved on the Accuracy portion.

[120] Mr. Banda wants the Tribunal to accept his account of events over that of Ms. Davie for a number of reasons. He argues that because Ms. Davie stopped deducting points such that her scoring did not reflect his true performance her evidence is not credible. He also submits that if he had really done so poorly on the test as CSC contends, he should have been removed from the range for safety reasons as was the case with another recruit.

[121] In my view, these examples from Ms. Davie’s evidence do not impugn her credibility. When asked in cross-examination why Mr. Banda was not removed if there were safety concerns, Ms. Davie candidly admitted that in hindsight she should have removed Mr.

Banda from the range, but she was trying to give him the benefit of the doubt so that he could complete the test. She was hoping he would improve after having given him an initial prompt.

[122] Ms. Davie also acknowledged that her score of 1/20 in the third column was an error but said more than once in direct and in cross-examination that she did not think it was right to keep deducting points when it was obvious a recruit failed because it was not good for them and that she did not bother scoring that part because Mr. Banda had already failed. She also testified that had she deducted points for all of the mistakes Mr. Banda had made, his score would be lower than it was.

[123] I accept CSC's argument that Mr. Banda's failure does not come out of nowhere. The errors noted by Ms. Davie are the same areas Mr. Banda struggled with in practice, and my findings on the practice sessions have informed my evaluation of the evidence on the June 19 test. I accepted Mr. Brooks' evidence that he coached Mr. Banda through a practice 20 round live fire course with the shotgun and that Mr. Banda struggled with reloading and keeping up with the course of fire, accuracy and remembering to apply the safety. Mr. Lamarche similarly testified that Mr. Banda had difficulty in his practice rounds. Mr. Banda acknowledged that he received one of the lowest scores in the class on the shotgun dry manipulation with Mr. Seems.

[124] In closing submissions, counsel for Mr. Banda argued that, after his test, Mr. Banda immediately disputed the number of times he failed to put his safety on, as indicated in his performance evaluation. But that argument is at odds with Mr. Banda's own evidence at the hearing that he should have been deducted six points (two for each time he left the safety off) and with the June 19 entry in the performance evaluation. Mr. Banda therefore acknowledged that he left the safety off three times, but rather takes issue with the scoring of that error.

[125] The entry for June 19 states that "[w]hen informing Mr. Banda of the failure he began to dispute the scoring of the number of times he had failed to put his safety on. One of the times Simon had failed to put his safety on I had informed him so that he would put it on as

he had began his to [sic] unload and I was concerned about the muzzle control. Simon felt that each of his mistakes should have been pointed out to him”.

[126] As CSC submits, Mr. Banda did not dispute that he failed to put the safety on or even that he failed to put it on three times. Rather, he argued that Ms. Davie improperly *scored* him. The Commission also acknowledges this in its closing submissions in stating that the parties disagree about the scoring of the Qualification Standard Shotgun test. Mr. Banda argues that Ms. Davie should have deducted two points for each of the three failures to put the safety on, rather than deducting five points. He felt he should only have had six points deducted, not 10, but his claim is not supported anywhere else in the evidence. In my view, the errors were properly scored, and Mr. Banda’s admission about the number of errors is fatal to his argument about the scorecard. Based on the evidence about his other errors, Mr. Banda’s score should have been lower than it was, but Ms. Davie stopped deducting at a certain point when it was clear Mr. Banda had already failed.

[127] In sum, Mr. Banda’s evidence and argument about the June 19 test is fraught with problems. While I accept Mr. Banda’s submission that there is a subjective element to any observable assessment or evaluation, his claim that Ms. Davie was motivated by a protected characteristic is not supported by the evidence. I accept Ms. Davie’s evidence that Mr. Banda failed the test because he did not put the safety on three times, had issues following commands and was struggling, and that in reality he would have had four strikes, as he was unsuccessful in both areas of testing. This failure follows practice sessions where Mr. Banda struggled with many of the very same skills. Finally, Mr. Banda was not the only recruit to fail the test. It is uncontested that two White recruits were also released from the Program, albeit before Mr. Banda. Another White recruit failed the Qualification Standard Shotgun test as well and was removed from the range, though he was successful upon retesting.

*After the Qualification Standard Shotgun test*

[128] Mr. Banda testified that, after he completed his test, he unloaded the shotgun, proved the weapon safe and returned the shotgun to the table. He said he heard Mr. Lamarche, Mr.

Seems and Ms. Davie speaking and that they sounded like they were having a disagreement.

[129] Ms. Davie testified that she spoke with the other instructors and that they were both in absolute agreement that Mr. Banda had failed the test as it had been very obvious. According to Ms. Davie, whenever there is a potential failure, the tester always checks with the other trainers present to make sure everyone is on the same page. If there had been a disagreement about the result, they would have discussed it, but Ms. Davie explained that generally with the Qualification Standard Shotgun test, it is pretty obvious when a recruit has failed. Mr. Lamarche testified that, after the test, he agreed that Mr. Banda was not successful and that the instructors went to inform him that he failed.

[130] According to Ms. Davie, when she informed Mr. Banda that he failed, he got upset and started arguing with her, closed in on the space between them and called her a liar. This made her nervous. He brought up the cellphone incident, and she explained that this had nothing to do with his Qualification Standard Shotgun test. Mr. Lamarche also testified that Mr. Banda started getting upset and clenching his fists and that he put himself between Mr. Banda and Ms. Davie. They wanted to try to calm him down.

[131] Mr. Banda argues that there is no mention of his alleged aggressive behaviour until July 14, 2015, and that the timing of this suggests that these comments were made solely in response to the human rights complaint being filed. Mr. Banda and the Commission also take the position that CSC engineered this narrative about Mr. Banda being aggressive after the fact to justify their decision about the escort, which I address below.

[132] Mr. Banda denies that he raised his voice. He admitted in cross-examination that he disagreed with the test result and brought up the cellphone incident but only argued for about a minute or two. He denies that Mr. Lamarche stepped in between him and Ms. Davie but admits Mr. Lamarche said, "let's go".

[133] Mr. Banda also testified that he had Facebook conversations with some of his former classmates, excerpts of which he introduced at the hearing. In general terms, the messages, while brief, reflect that his classmates had not heard about the claims that Mr. Banda had been aggressive on the shotgun range upon learning that he failed and was being released.

They also say that they thought he was a good classmate, that it was too bad that he did not complete the CTP with them, and that they hoped he would get back in and be fairly assessed. Some express surprise that he was escorted off the premises. Mr. Banda did not call any of those individuals who could have corroborated his account of events, and I do not put any weight on these messages. Although the Tribunal can accept hearsay evidence, in my view, the messages, beyond being brief excerpts of what may have been more complete exchanges, do not provide a solid evidentiary basis to assist me in determining whether Mr. Banda was fairly assessed in the Program. Further, without being able to hear evidence from the individuals who wrote them, these messages, on their face, could be expressions of support for Mr. Banda without displaying any real knowledge of what transpired on the range or following the Qualification Standard Shotgun test.

[134] Ms. Davie was asked in cross-examination why she did not document Mr. Banda's behaviour if she perceived it as aggressive or threatening. She responded that she did not want to pile on Mr. Banda, as she felt he had enough to deal with and she did not think it was necessary. When challenged by both counsel for Mr. Banda and the Commission about this, she said she did feel threatened, it was a scary moment with firearms around and that it was a natural reaction to feel scared. When pressed about why she did not report it, she responded that she did report it and called Mr. Boucher who made the decision about having two people escort Mr. Banda. Ms. Davie acknowledged it would be important to document aggressive behaviour but said that, as of the time Mr. Banda was released, he was no longer a recruit. She said that she felt Mr. Banda was having a hard enough time dealing with everything and that she understood that he would be angry at failing and did not want to add to his troubles. However, when she was asked about the incident when Mr. Banda filed his human rights complaint, she explained it, as it did happen.

[135] I found Ms. Davie's evidence at the hearing to be candid and her explanation sincere and reasonable. She explained that she did not think it was necessary at the time of Mr. Banda's release to add to the challenges he was already dealing with at the time. While I acknowledge that Mr. Lamarche did not document this allegedly aggressive behaviour and could have done so and said he did not because of his language, this is not enough to discount Mr. Lamarche's evidence and that of Ms. Davie as Mr. Banda submits. I heard from



both Ms. Davie and Mr. Lamarche about the actual behaviour on the range and found those accounts consistent and credible. Mr. Boucher similarly testified about speaking with Ms. Davie and how she was upset about what happened on the range, which led to his assessment of the decision and his decision about the escorts, which I address below.

[136] I do not, however, find that Mr. Banda pointed a gun at Ms. Davie as CSC initially alleged in its SOPs or that he had to have the shotgun removed from him. None of CSC's witnesses testified that this occurred or that this is what motivated Ms. Davie's call to Mr. Boucher or his decision to have escorts for Mr. Banda. Mr. Banda testified that there was no reference to him having pointed a gun at Ms. Davie prior to 2016. He first learned of it after his complaint was filed. CSC also acknowledged that the issue of whether Mr. Banda had a shotgun in his hands when he was told about the failure was raised in their pleadings based upon some of the Commission interviews.

#### **5) Escort and release from the premises**

[137] According to Mr. Banda, Ms. Davie's bias against him is why three STOs were involved in escorting him to pack his belongings and monitored him throughout his release.

[138] After Mr. Banda was informed that he had failed the Qualification Standard Shotgun test and was being released from the Program, he was transported by van from the range to the main building. Ms. Schepers, the training assistant, met him there and told him that they would be taking an inventory of CSC equipment. He was told he would be accompanied to the dormitories to collect his belongings.

[139] Mr. Banda alleges that CSC deviated from its own policy when it escorted him off the premises. According to Mr. Banda, he was subject to a different procedure than two White recruits, Ms. Graham and Ms. Taylor, who were also released from the Program.

[140] Mr. Brooks and Mr. Lamarche testified about their return to the National Training Academy from the range, and Ms. Schepers and Mr. Boucher testified about what happened when they were back at the National Training Academy. Mr. Brooks testified that, when he escorted Mr. Banda, he was visibly upset, was in tears and did not say much over the course

of 25-to-30-minute drive back. Mr. Lamarche said that Mr. Banda was calmer on the ride home than he had been on the range.

[141] CSC submits that the decision to appoint two escorts was reasonable given Mr. Banda's emotional state upon his release. Both Ms. Davie and Mr. Boucher testified that it was not Ms. Davie's decision to have Mr. Banda escorted but that this was Mr. Boucher's decision.

[142] Mr. Boucher explained that based on a recruit's behaviour on the range he may direct to have one or two people with the recruit and that this has happened with other recruits who have been released as well. Mr. Boucher directed that Mr. Banda be escorted by two instructors due to Mr. Banda's behaviour on the gun range upon learning of his failure. Ms. Davie had contacted Mr. Boucher after the test. She was upset because she said Mr. Banda had challenged her and was argumentative to the point that Mr. Lamarche had to place himself between Ms. Davie and Mr. Banda. Mr. Boucher denies that race or colour had anything to do with his decision to assign two officers to be with Mr. Banda.

[143] Mr. Lamarche also testified that if someone is unsuccessful and is released from a program, they generally send two officers to escort them to avoid a "he-said, she-said situation" and for everyone's protection, including the recruits.

[144] According to Mr. Banda, Ms. Davie made the decision to have him escorted to the dorms. Yet, in cross-examination, Mr. Banda admitted that she was not there and remained on the range. He says Ms. Byfield and Mr. Chinn took him back to get his materials and that he was asked to return his swipe card and keys. Ms. Brand had also been involved in the escort but had to leave, and Mr. Chinn stepped in for her.

[145] Ms. Byfield testified that there was no reason for her to make an entry in the performance appraisal about escorting Mr. Banda because there was nothing out of the ordinary about the escort process. She explained that she has escorted many recruits since Mr. Banda's release and that it was generally protocol to have two people escort a recruit who has been released.

[146] Mr. Banda testified that, when Ms. Graham, a fellow recruit, was released from the Program a few days earlier, she just picked up her items and left. He also testified that he watched Ms. Graham walk away for three or more minutes, without an escort. Mr. Banda admitted that he was not present when Ms. Graham spoke to Mr. Boucher, Ms. Schepers, or Ms. Davie, nor was he in the dorm area when Ms. Graham was packing her items. He did not call Ms. Graham and relied only on a brief Facebook message in which Ms. Graham says she walked on her own back to her dorm, on which I place no weight.

[147] I find that Ms. Davie did not have anything to do with the decision to have two escorts for Mr. Banda and that, in my view, Mr. Banda has not established any adverse differential treatment. Several CSC witnesses testified that this was Mr. Boucher's decision, that it was not out of the ordinary, and that it was the recommended practice if a recruit was released.

[148] While he relies on a Facebook post in which Ms. Graham says she went alone to her dorm room, I put no weight on this. Mr. Banda did not call Ms. Graham or any other recruit who had been released to support his claim that he was treated differentially from other recruits who had been released and to counter the evidence from multiple CSC witnesses who testified about what occurred. In any event, given my findings about what transpired at the gun range, I find Mr. Boucher's decision to have more than one escort reasonable in the circumstances. Mr. Banda has not established that it was more like than not that race or another protected ground was a factor in this decision, and it was not discriminatory.

## **6) Flight booking**

[149] Mr. Banda alleges that CSC deviated from its own policy and that Ms. Davie failed to consult him regarding his flight itinerary when his return flight to Winnipeg was booked after he was released from the Program. Mr. Banda left Regina at 19:15 on June 19 and landed at his final destination in Winnipeg just over five hours later, with a connecting flight through Calgary.

[150] Mr. Banda relies on a CSC document that addresses the release process for a recruit. The policy states that, after a recruit is released, if they live more than 40 km outside the training site, "travel to your region of departure will be coordinated in consultation with

you within two business days of this release". Mr. Banda alleges that he was not consulted about the choice of his flight, whereas the White recruits who were released from the CTP got a say in which flights were booked.

[151] According to an email exchange between Headquarters and Ms. Schepers, there were three options that administrative staff in Ottawa identified for Mr. Banda's return to Winnipeg. The first option left Regina at 19:15 the same day on a flight through Calgary, arriving in Winnipeg at 00:23. The second option left Regina at 05:00 the following morning on a direct flight to Winnipeg, and the third left Regina at 13:20, arriving in Winnipeg at 15:36.

[152] According to CSC, the general practice was to book a flight the same day the recruit was released from the Program, unless no reasonable options were available. Ms. Schepers said that the recruits generally did not have a say in picking the flights. She testified that she approached Mr. Banda and advised him that she would be booking the same-day flight but that he was unresponsive. She would generally have the recruit in her office and would go through the inventory and walk the recruit through the release process, but that did not happen because Mr. Banda was not responding well. Eventually Ms. Schepers advised Mr. Banda of his flight itinerary, but he did not ask any questions about it or suggest he wanted another flight. Mr. Banda's position is that Ms. Schepers did not ask him which flight he preferred and should have.

[153] Ms. Schepers testified that she was generally the one involved in making travel arrangements, though if she was not available, Mr. Boucher would contact Ottawa. The standard procedure was to book the soonest available option to leave the National Training Academy in the event a recruit was released so they could return home to their family and could move past any failure. She said that the same-day option was selected for Mr. Banda because it was reasonable, and he had plenty of time to get to the airport.

[154] Mr. Boucher testified that in selecting flights they would typically consider the duration of travel and where the recruit resides, as well as try to find something reasonable. He testified that Ms. Graham's and Ms. Taylor's flights were selected because of what was reasonable, namely that Ms. Graham was not expected to spend a night at the airport and

that her destination changed. Ms. Taylor would have had eight minutes to get to the airport, so the second option, a direct flight leaving the following day, was the best option.

[155] In my view, Mr. Banda has not established that he experienced any adverse impact as a result of the return flight itinerary that was selected for him. Mr. Banda has not established that he suffered any adverse differential treatment from having been booked on a flight returning to Winnipeg the same day he failed the Qualification Standard Shotgun test, even if it landed after midnight. I am not persuaded that arriving home to his family the same day he was released adversely impacted Mr. Banda, and Mr. Banda admitted in cross-examination that he was able to make arrangements to be picked up in Winnipeg upon his arrival. The other option would have been to leave for the airport very early in the morning for a 5:00 flight or to wait until 16:00 to return home. Further, Mr. Banda did not complain or request a specific itinerary at the time his flight was booked about this choice.

[156] However, even if he had not been explicitly and formally consulted or asked about options, Mr. Banda has not established how he experienced adverse differential treatment compared to the other recruits who were also released. Although Mr. Banda alleges the two White recruits were consulted prior to having their flights booked, he did not support his claims about the treatment of these other recruits with sufficient evidence. One of the recruits, Ms. Taylor, was put on a flight leaving the day after her release. Mr. Boucher and Ms. Schepers both testified that she was released at 16:30 and could not be booked on the 17:30 return flight because she would not have time to pack her belongings, change and arrive at the airport to make the flight. Ms. Graham's itinerary was changed because her final destination changed, and she flew back the same day that she was released. In direct examination, Mr. Banda claimed that Ms. Graham left a day or two after her release, but in cross-examination, when confronted with the emails regarding her flight return, Mr. Banda admitted that he did not know when Ms. Graham left.

[157] Finally, I find that Ms. Davie did not have anything to do with the flight selection. Ms. Davie, Mr. Boucher and Ms. Schepers all testified that instructors were not involved in booking flights, and Mr. Banda's claims to the contrary have no basis in the evidence.

[158] When asked in cross-examination whether he had any evidence that Ms. Davie had any input into his flight, Mr. Banda said that he did but could not point to anything beyond stating that Ms. Davie was the person who made the decision that he be released from the CTP. To the extent that Mr. Banda maintains that Ms. Davie was also part of the reason why he received his flight itinerary, this allegation is entirely speculative and inconsistent with any reasonable interpretation of events.

### **7) Enhanced documentation, scrutiny and monitoring**

[159] Mr. Banda alleges that he was subject to more notations in his performance evaluation, compared to any other recruit. According to Mr. Banda, Ms. Davie had it in for him and was trying to get even with him. He also alleges that his Candidate Assessment Summary (CAS) includes the initials of the trainers that completed his testing and his scores on the 9mm Pistol test, whereas the CAS of other recruits do not include those notations.

[160] CSC submits that the way Mr. Banda's CAS was filled out is not adverse differential treatment. I agree. The CAS had no bearing on Mr. Banda's release from the Program. Further, Mr. Banda's CAS has remained in a training file, and he did not demonstrate how he has suffered any disadvantage from the way it was filled out. Ms. Schepers testified that she typically filled them out at the end of a CTP and that she would transfer marks from a spreadsheet to the CAS. These documents were sent to Ottawa and entered into a recruit's employment file. As Mr. Banda did not complete the CTP, his CAS was not shared with an institution. Ms. Schepers testified that Mr. Banda's CAS was filled out correctly, whereas the other recruits' forms were not. She was very busy at the time as the only assistant to multiple staff and recruits across multiple CTP, and she did not capture all the details as she perhaps should have done.

[161] CSC acknowledges that Mr. Banda had more notations in his performance evaluation compared to his fellow recruits but maintains that the number of entries is not evidence of adverse differential treatment. While there may be differences among the recruits' evaluations, CSC submits that Mr. Banda did not experience burdens, obligations

or disadvantages as a result of the number of entries in his performance evaluation, which are not the reason he was released from the Program.

[162] I agree. Not all the entries are negative, and I am not prepared to accept that a count alone is enough to make a finding of adverse differential treatment. In any event, even were I to accept that Mr. Banda had more entries than other recruits and that this caused him some disadvantage, he has not demonstrated that it is more likely than not that this is due in part to a protected characteristic.

[163] Mr. Banda argued in closing that CSC did not offer any explanation for why there were so many entries in his performance evaluation. He also submits that the only distinguishing difference between he and his classmates was race, such that race was a factor in the excessive documentation.

[164] I reject this argument. Mr. Banda's race was not the only difference. Mr. Banda failed more tests than anyone else and had discussions about needing more time for testing, asked for sick leave, argued about his failure on the Qualification Standard Shotgun test, and was released.

[165] Mr. Boucher testified that the purpose of the performance evaluation was to track how people were doing throughout the training and to note a pattern of behaviour. The performance evaluations could also assist in completing the course summary or reports on individuals if needed. Instructors would note if recruits were having difficulty or if they were doing well. Ms. Davie also testified that the purpose of the performance evaluation was to note issues with a recruit, including whether remedial training or retesting was needed. When asked why her name appears in some of the entries such as the June 12 Pistol test even though she was not the instructor, she explained that she was likely doing the notes for all recruits that day.

[166] I reviewed the performance evaluations of the other recruits that were introduced at the hearing. While I agree that Mr. Banda has significantly more notations than other recruits (17) in his performance evaluation compared to the next highest number for a recruit (8), I have also considered the level of detail and tone and nature of the comments in other recruits' evaluations. Mr. Banda's classmates do not escape scrutiny or critical comments

and the level of detail is comparable. For example, some recruits had notations for their failure to shave correctly, falling asleep in class, not removing piercings, not paying attention in class, having a phone in their pocket, being seen on base without a headdress, being instructed to show up for remedial drill, unsafe handling of the C8 firearm, not being clean-shaven, not shooting from the correct position, and taping another recruit's uniform to the dorm ceiling.

[167] In cross-examination, Mr. Banda admitted that he failed more tests than anyone else in CTP 26, including another recruit, Ms. Miller, who was also released from the program,. Mr. Banda also admitted that other recruits received notations for issues with their performance.

[168] CSC called witnesses to speak to each of the entries in Mr. Banda's performance evaluation, and I agree that a reasonable explanation was provided for each one. For example, the first two entries were written by Ms. Byfield, and Mr. Banda takes no issue with them.

[169] In cross-examination, Mr. Banda admitted that some of the entries do not reflect that Ms. Davie had it "in for him" or were in fact accurate. For example, on April 28, Ms. Davie wrote "Recruit Banda was re-tested for Self Defence Theory and received 100% on his test". On May 29, Ms. Davie wrote that "Recruit Banda requested to talk to Mr. Chinn regarding the performance entries above. It was explained to him that the entries are only to document that the process has been explained to him and that he understands it. Simon stated that he understood this now." On June 12, Ms. Davie wrote "Recruit Banda failed to meet the minimum score required for the 9mm pistol. Simon was informed that the remedial will be Jun 13 at 1100hrs and retesting will be June 16 at 0800 hrs". Mr. Banda eventually admitted in cross-examination that this entry was accurate. Mr. Banda also eventually admitted that the June 17 entry in which Ms. Davie wrote, which stated that "Recruit Banda was successful in the retest of the pistol 9mm", was accurate.

[170] Mr. Banda's evidence on disputed notations was not persuasive. On June 13, Ms. Davie wrote: "Recruit Banda attended remedial where some improvement was seen". Mr.



Banda testified that this was a negative entry and evidence of discrimination because Ms. Davie only wrote that “*some* improvement was seen” [emphasis added].

[171] In my view, the entries are not individually discriminatory, nor is the sum total of their impact discriminatory. In some cases, Mr. Banda has not even established any adverse effect. He conceded that some entries are accurate or takes no issue with them. Mr. Banda has not made out a link to a protected characteristic for these entries. I neither accept that their existence in one document, namely Mr. Banda’s performance evaluation, is reflective of a concerted CSC effort to ensure Mr. Banda’s failure or that this reflects a pattern of discrimination against Mr. Banda.

### **The cumulative impact of the alleged incidents of discrimination and racial stereotyping**

[172] Mr. Banda alleges that some of the adverse treatment he experienced set off a chain of other events, including over-scrutiny of his performance and unfair assessments on evaluations, all of which ultimately resulted in him being released from the Program. Allegations of this nature cannot be parsed out in isolation, and I have considered the potential cumulative impact of the alleged discriminatory conduct.

[173] The Commission argued that even if CSC could explain away each of the incidents individually, the Tribunal must examine all of the circumstances of the case holistically and consider that Mr. Banda was treated differently on the grounds of his race. Mr. Banda’s allegations are also that CSC employees displayed a pattern of differential treatment that he experienced because he is a Black man.

[174] CSC submits that Mr. Banda is asking the Tribunal to believe that Ms. Brand, Mr. Brooks, Mr. Boucher, Ms. Davie, Mr. Lamarche, Ms. Schepers and Ms. Byfield are all lying with respect to material parts of their evidence. CSC argued that it is not an indivisible entity and that it is the sum of decisions made by individual actors. Either those individual actors acted in concert to conspire to discriminate against Mr. Banda or each actor made decisions independent of the other actors. According to CSC, it therefore logically follows that any discriminatory decision made by one actor does not increase the chance of a separate

discriminatory decision and that discriminatory decision cannot be used to colour another event as discriminatory.

[175] I agree with this characterisation and find that Mr. Banda has not made out his case individually or cumulatively, even if I consider how the events taken together may have impacted him and his ultimate release. I do not accept that the STOs involved with Mr. Banda during his time at CTP26 acted in concert to either subconsciously or consciously remove him from the Program because of his race, colour or national and/or ethnic origin. As I have found above, Mr. Banda was properly released because of his third strike at the Qualification Standard Shotgun test, and the events leading up to that day are not discriminatory. The evidence does not support a finding that Mr. Banda's initial interactions with Ms. Brand or Ms. Davie, or indeed any of the other trainers, set off a chain or pattern of discriminatory conduct that led to his release or discriminatory treatment leading to his release from the Program.

[176] Mr. Banda's claims that Ms. Brand or Ms. Davie were out to wage a campaign against him are speculative and without any evidentiary foundation. Ms. Brand testified at the hearing that she was trying to secure an indeterminate job and had no reason to get Mr. Banda kicked out of the CTP. Further, she had no influence on the multiple-choice test, the 9mm Pistol test or the Qualification Standard Shotgun test which Mr. Banda failed and which constituted the three "strikes" against him that ultimately led to this release. Mr. Banda does not even claim that the first two strikes were due to any discrimination and accepts that he failed them. Similarly, I did not find that Ms. Davie's actions with respect to the cellphone incident and sick leave request were discriminatory and do not accept that she was trying to get even with Mr. Banda or to make entries in his performance evaluation with a view to his release from the Program.

[177] When asked in cross-examination whether there was communication between instructors given Mr. Banda's allegation that a number of instructors were out to get him, he admitted he did not have any knowledge of conversations among the instructors to conspire against him. He only noted that Ms. Brand and Mr. Brooks shared an office and were in a personal relationship.

[178] Neither do I accept that the impact of each of the individual alleged events is discriminatory, even when taken together. Some of the events do not even involve adverse differential treatment, as I determined above. If Mr. Banda was released from the program, or needed to complete his homework, this is due to his own conduct and failures, and the evidence does not allow me to conclude that an inference of discrimination is more probable than the explanations provided by CSC.

[179] In reaching these conclusions, I have been informed by the authorities that the Commission and Mr. Banda rely on about the prevalence, nature and pernicious effects impacts of racism and regarding the pervasiveness of particular negative stereotypes, particularly with respect to anti-Black racism.

[180] Decision-makers can take judicial notice of the existence of racial prejudice and the fact that anti-Black racism, with particular impacts on Black males, can lead to heightened monitoring and racial stereotyping (*R. v. Williams*, [1998] 1 S.C.R. 1128 at paras. 21-22 at 54; *Sinclair v. London (City)*, 2008 HRTO 48 at para. 17; *Turner v. Canada Border Services Agency*, 2020 CHRT 1 at para. 49).

[181] While this background context does not answer the question of whether there has been discrimination in any particular case, it can help the analysis by identifying relevant factors or considerations that might otherwise appear neutral, without an awareness of broader social phenomena (*Nassiah v. Peel Regional Police Services Board*, 2007 HRTO 14 at para. 131).

[182] I acknowledge that racism is not easy to establish. As Mr. Banda submits, there are no overt racially discriminatory comments alleged in his case. I also acknowledge that racial bias is not often openly displayed, which can make it all the more insidious. I recognise that biases, stereotyping and prejudice persist and, as the jurisprudence and case law have long recognised, Black men are particularly vulnerable to the impacts of stereotyping (see *Bayega v Dyadem International*, 2010 HRTO 1589 at paras. 129-131).

[183] But it does not mean that I can simply impute a racially motivated reason or factor to a negative situation or one that Mr. Banda perceived as negative during his time in the CTP in the absence of the evidence required to draw a reasonable inference from proven facts.

[184] CSC relies on *Mitchell White v The Roxy Cabaret (No.3)*, 2012 BCHRT 196 at para. 97 in support of its argument that while racial stereotyping will usually be the result of subtle unconscious beliefs and biases, neither is prejudice to be presumed and the Tribunal must look to the evidence. In considering circumstantial evidence, the British Columbia Human Rights Tribunal held that the Tribunal may hypothesize about how the individual may have been treated had they not possessed the protected characteristic that underlies the complaint.

[185] To that end, I have scrutinised and considered each of the incidents of alleged discrimination Mr. Banda has made in this complaint. I have considered all of the circumstances to determine whether Mr. Banda was subject to the subtle scent of discrimination, including how they could potentially reflect a pattern of discriminatory conduct. But Mr. Banda's evidence falls well short of establishing a link to a protected ground or, in some cases, even any adverse treatment. Further, while racial stereotyping and biases are important contexts to consider in analysing a possible link between adverse treatment and a protected characteristic, Mr. Banda has failed to establish how this context applied to specific interactions he had with the instructors, particularly as in some situations Ms. Brand and Ms. Davie's evidence displayed an element of concern for Mr. Banda, rather than animus against him.

[186] As Mr. Banda argues, relying on *Clarke v. Nuform Building Technologies*, 2017 HRTO 1254 (CanLII), it is the Tribunal's role to consider all of the relevant contextual evidence in order to determine whether there is a sufficient evidentiary support to draw an inference that race was a factor in how a racialized employee has been treated.

[187] But this is Mr. Banda's problem with respect to all of the alleged incidents of discrimination, taken individually or as a whole. He has not marshalled "sufficient evidentiary support" to permit the Tribunal to draw an inference with respect to any of his allegations.

[188] In closing submissions, Mr. Banda argued that his case resembles that of *Tahmourpour v. RCMP*, 2008 CHRT 10, arguing that because his evaluations were inaccurate and improper it is reasonable to infer that such conditions eroded his confidence and ability to perform well. Beyond the fact that the facts of *Tahmourpour* are entirely

distinguishable from Mr. Banda's complaint, this argument is at odds with the rest of Mr. Banda's claim that he did not have any problems in the practice shotgun rounds, that Ms. Davie inaccurately scored him, and that he was scored more harshly than other recruits. Either he performed well, or he didn't.

[189] In addition, Mr. Banda admits that the first two strikes he got were due to his own failings, and his allegations do not even start until the May 8 homework incident, by which time he had failed one strikable test and at least one non-strikable assessment. Any claim that the rest of the notations, the incidents involving the sick leave form, or the cellphone question on the range were the cause of his poor performance later on in the program are without basis or foundation. There were three alleged incidents of discrimination prior to Mr. Banda's Qualification Standard Shotgun test. I have already found that Mr. Banda did not establish he experienced an adverse impact with respect to the sick leave form and the incident involving the question about photos on the range. I find no basis to conclude that entries in his performance evaluation and the unfinished homework assignment are what caused him to perform poorly or fail his Qualification Standard Shotgun test.

[190] Mr. Banda has not made out his case and has not discharged his onus. And while Mr. Banda and the Commission have relied on a number of authorities in support of their arguments that the evidence supports a finding of discrimination, it would be an error in fact and law to simply impute a link between the alleged incidents in light of this social context and the realities of persistent stereotyping and anti-Black racism, even for those allegations where I have found Mr. Banda experienced an adverse impact. I cannot presume prejudice. The mere fact that some adverse effect has been caused to a person protected by the Act is insufficient to make a finding of discrimination. Mr. Banda has failed to establish that it was more likely not that an inference could be drawn between the adverse treatment he experienced and his race, colour or national and/or ethnic origin. Mr. Banda's claim is therefore dismissed in its entirety. Human rights protections and the Act are not intended to remedy every disadvantage or differentiation.

**VII. ORDER**

[191] Mr. Banda's complaint is dismissed.

*Signed by*

Jennifer Khurana  
Tribunal Member

Ottawa, Ontario  
July 12, 2024

# Canadian Human Rights Tribunal

## Parties of Record

**Tribunal File:** T2482/3920

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

**Decision of the Tribunal Dated:** July 12, 2024

**Date and Place of Hearing:** Ottawa, Ontario

September 27, 28, 29, October 1, 4, 5, 6, 7, 2022

### Appearances:

Jacqueline Collins, for the Complainant

Ikram Warsame, for the Canadian Human Rights Commission

Barry Benkendorf and Sydney Pilek, for the Respondents