

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2021 CHRT 28

Date: August 23, 2021

File No.: T2482/3920

Between:

Simon Banda

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Service of Canada

Respondent

Ruling

Member: Jennifer Khurana

BACKGROUND

[1] Mr. Banda self-identifies as a Black man of Zambian origin. He attended the Correctional Training Program (“the program”) operated by the respondent, Correctional Service of Canada (CSC), with the goal of becoming a Correctional Officer with CSC. Mr. Banda was released from the program shortly before completing it. He alleges that Staff Training Officers (STOs) and other CSC 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 or ethnic origin. CSC denies the discrimination and says Mr. Banda was released from the program because he failed the required tests.

[2] This ruling determines Mr. Banda’s request to amend his Statement of Particulars (SOP) to add the allegation that CSC evaluated and assessed him in an adverse differential manner as compared to other recruits who were not Black or did not share his national or ethnic origin. Mr. Banda submits that the proposed amendments are linked in fact and law to his original complaint and are also relevant to any remedial requests he may make.

[3] The Canadian Human Rights Commission (the “Commission”) consents to Mr. Banda’s request. CSC opposes it.

[4] For the reasons set out below, I am allowing Mr. Banda’s request to amend his SOP.

ISSUE

- 1. Should the Tribunal allow Mr. Banda’s request to amend his SOP to add the allegation that he was treated adversely in the way his performance was evaluated and assessed?**

REASONS

[5] Yes. The proposed amendment and the allegations are relevant to the issues in dispute and are closely connected to Mr. Banda’s initial complaint. Mr. Banda’s request is late, and his delays in bringing this request forward have cost the parties in terms of

resources and time. But in my view, the Tribunal can accommodate CSC's concerns about its ability to prepare for the hearing and the timing of this request.

[6] The Tribunal must provide parties with a full and ample opportunity to present evidence and make legal representations on the matters raised in the complaint (*Canadian Human Rights Act*, R.S.C. 1985, c. H-6, (the "Act") s. 50(1) and Rule 1 of the *Rules of Procedure under the CHRA* (03-05-04) (the "Tribunal's Rules").

[7] The Tribunal has the authority to grant amendments to determine the real questions in controversy between the parties provided the amendment is linked to the original complaint and does not cause prejudice to the other party (*Tabor v. Millbrook First Nation*, 2013 CHRT 9 at paras 4-6).

[8] Mr. Banda asks to amend his SOP to add allegations he says he became aware of only after receiving CSC's disclosure. According to Mr. Banda, CSC disclosed candidate assessment summary forms that show it did not record when White recruits failed initial firearms tests. Yet when Mr. Banda failed firearms tests, his marks were noted in his assessments. Mr. Banda also argues that CSC over-scrutinised him and made more notes and more detailed entries about him compared to other recruits. Mr. Banda has 17 entries on his performance evaluation, whereas he claims that White recruits typically had 4 to 9 notations.

[9] CSC opposes Mr. Banda's request. It argues it will be prejudiced by such a late amendment since the hearing is scheduled to begin in a month's time. Mr. Banda first raised this proposed amendment during a case management call almost 6 months after CSC disclosed the candidate summaries and performance forms on December 16, 2020.

[10] Mr. Banda filed lengthy reply submissions. CSC objected, arguing that they are not proper reply submissions as they raise new arguments that should have been included in the motion. It asks that I disregard all but 3 of the 33 paragraphs of reply submissions for that reason. It is not asking for the opportunity to make submissions in sur-reply because this would only delay my determination of the amendment request. Mr. Banda maintains that his reply submissions respond to the overall argument that CSC made about a party's ability to present its case fully and fairly.

[11] The reply submissions are largely repetitive and irrelevant to the limited issue that is the subject of this motion, namely whether this amendment should be allowed. At the very least, they are unfocused. I am allowing the amendment, but do not find that the paragraphs CSC takes issue with to be determinative of my ruling in any case.

[12] In my view, allowing this amendment helps the Tribunal in its task of determining the real issues in controversy between the parties. The heart of Mr. Banda's claim is that he was treated more harshly and was overscrutinised compared to White recruits. This amendment is well within the scope of Mr. Banda's claim about how his performance was judged compared to White recruits and does not significantly expand his particulars.

[13] I am also not persuaded that CSC will suffer prejudice that cannot be addressed by accommodating its concerns about timing and preparation for the hearing.

[14] It is not clear that adding this allegation will require CSC to amend its witness list. It is not apparent what additional documents would need to be produced that would not already have been disclosed as arguably relevant given the issues of performance that were at the centre of this complaint.

[15] I am also not persuaded that CSC does not know the case it has to meet. Mr. Banda's proposed amendment is set out in his motion materials, and he is directed to file his amended SOP in short order, as set out below. There should be no surprises.

[16] Finally, CSC relies on my ruling on Mr. Banda's first request to amend, in which I ordered that "[h]e may not amend his Statement of Particulars to add anything beyond [the] specific allegation" related to sick leave (*Banda v. Correctional Service Canada*, 2021 CHRT 19 at para 32). CSC suggests the order is fatal to Mr. Banda's present motion. I did not say that Mr. Banda could never make another request to amend. Rather, that sentence, if read in the context of the whole ruling, clearly intends to direct Mr. Banda to amend his SOP to reflect only the specific amendment allowed. In other words, in allowing the amendment, I was not giving Mr. Banda *carte blanche* to change his SOP in any other way beyond the specific allegation related to sick leave.

[17] Mr. Banda did not provide a reason for his delay in bringing this motion other than to say “it did take a period of time for the Complainant and his counsel” to review CSC’s disclosure. Mr. Banda is not an unrepresented litigant, and this is not even his first motion to amend his particulars. Mr. Banda has not explained why he did not raise this proposed amendment when he filed his first motion requesting an amendment, or as soon as was practicable, as the Tribunal’s Rules require (Rule 3(1)(a) of the Tribunal’s Rules).

[18] This failure has resulted in a second round of motion materials for the parties, another ruling, and ultimately, because I am allowing the amendment, a second round of amended SOPs. These types of delays cost all parties, both in terms of time and resources.

[19] Despite the late filing of this request, I am not persuaded that the hearing dates are at significant risk by allowing this amendment. I am also not persuaded that the amendment will unduly lengthen the hearing process or the parties’ preparations. The parties have not yet filed their proposed exhibits or detailed witness statements. I will provide a brief extension to the current August 27, 2021, deadline at the CMCC after I hear from the parties to ensure they have reasonable time to complete this process considering the amended particulars. But the parties should be prepared to file their materials very soon after our call. Preparations for everything except proposed exhibits or portions of witness statements relating to this amendment are not new to the parties and should already have been underway.

[20] Mr. Banda should not, however, interpret this upcoming discussion at the CMCC as an invitation or entitlement to an adjournment for the start of this hearing because of his own delays in reviewing CSC’s production. The parties are expected to prepare for the scheduled hearing dates.

[21] I have set deadlines below for the filing of Mr. Banda’s amended SOP, for any amendments to CSC’s and the Commission’s SOPs, and for any replies.

[22] The Tribunal also expects counsel for the complainant will file an amended SOP that is both limited to the specific allegations about the assessment forms set out in the motion, and that states them in a concise way. Longer is not better.

ORDER

[23] Mr. Banda's request to amend his SOP to include the allegation about his assessment summary and performance evaluations is allowed. Mr. Banda's amended SOP must be provided within 2 calendar days of the date of this ruling.

[24] If the respondent intends to file an amended SOP responding to Mr. Banda's SOP, it may do so no later than 7 calendar days following receipt of Mr. Banda's amended SOP. Amended replies from Mr. Banda and the Commission, if any, are due 2 calendar days following receipt of the respondent's amended SOP.

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

[26] The August 27, 2021, deadline previously set for the filing of witness statements and proposed exhibits will be extended and a new date will be set during the CMCC. The Tribunal will also provide further instruction regarding the conduct of the videoconference hearing to the parties.

Signed by

Jennifer Khurana
Tribunal Member

Ottawa, Ontario
August 23, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2482/3920

Style of Cause: Simon Banda v. Correctional Service Canada

Ruling of the Tribunal Dated: August 23, 2021

Motion dealt with in writing without appearance of parties

Written representations by:

Jacqueline G. Collins, for the Complainant

Ikram Warsame, for the Canadian Human Rights Commission

Barry Benkendorf and Sydney Pilek, for the Respondent