

Federal Court



Cour fédérale

Date: 20190606

Docket: T-1183-17

Citation: 2019 FC 791

Ottawa, Ontario, June 6, 2019

PRESENT: Madam Justice Elliott

BETWEEN:

SIMON BANDA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] This is an application for judicial review by the Applicant, Simon Banda [Mr. Banda] of a decision by the Canadian Human Rights Commission [the Commission] dated June 28, 2017 to dismiss his complaint [the Decision] pursuant to subparagraph 44(3)(b)(i) of the *Canadian Human Rights Act, RSC 1985, c H-6* [the *CHRA*] because, “having regard to all the circumstances of the complaint, an inquiry by a Tribunal is not warranted.”

[2] Mr. Banda seeks to have the Decision set aside and his complaint referred back for a fresh investigation by a different Investigator.

[3] For the reasons that follow, the application is granted. The Commission failed to accord procedural fairness to Mr. Banda through its investigatory process and in rendering the Decision without addressing any of the extensive submissions he made on the Investigator's report.

II. **Background Facts**

[4] Mr. Banda was participating as a recruit in the Correctional Training Program [CTP] which is run by the Correctional Service of Canada [CSC] at the Royal Canadian Mounted Police Base in Regina, Saskatchewan. Completion of the CTP was a prerequisite for his becoming a Correctional Officer with the CSC. Shortly before completion, he was released from the program.

[5] Mr. Banda says he was released because of discriminatory and adverse differential treatment by the CSC trainers which he experienced because of his race and ethnic origin as a Black person who was born in Zambia.

[6] The CSC says Mr. Banda was released because he failed the program which has a strict "three strikes" and out policy. He failed three separate tests each of which is counted as one strike. Therefore, he was released from the program. The CSC denies any discriminatory or adverse differential treatment of Mr. Banda.

[7] Mr. Banda began the program as a recruit on April 2, 2014. He was released on June 19, 2014 after completing 11 weeks of the 12 week training program.

[8] On June 11, 2015, the Commission received a complaint from Mr. Banda alleging he was discriminated against on the basis of his race and colour which resulted in adverse differential treatment and the termination of his employment. On July 19, 2016, Mr. Banda amended his complaint to add the ground of discrimination based on national or ethnic origin.

III. **The Investigation of Mr. Banda's Complaint**

[9] An Investigator was assigned to assess Mr. Banda's complaint on March 31, 2016. The investigation was completed on February 1, 2017.

[10] The Investigator interviewed the manager of the CTP and seven of the staff training officers [STOs] who were directly involved with Mr. Banda. In addition, the Investigator spoke with the CSC staff person who arranged Mr. Banda's flight from Regina to Winnipeg on the day he was released from the CTP. The underlying record contains the interview notes of each of these nine people.

[11] The Investigator also interviewed Mr. Banda. No interview notes of Mr. Banda on the substance of his complaint are found in the underlying record.

[12] What the record does contain is the Investigator's notes of her discussion with Mr. Banda about his amended complaint and the Respondent's objection as well as the Investigator's subsequent discussion with Mr. Banda about the process of addressing the objection.

[13] On March 1, 2017, the Investigator's report [Report] was provided to the parties for comment.

[14] Mr. Banda provided ten pages of written submissions responding to the Report. He also provided twenty-three pages in response to, and disagreeing with, the CSC submissions to the Investigator.

[15] The CSC provided a short letter agreeing with the Investigator's conclusion and correcting four relatively minor factual errors or misstatements in the Report. It provided no response to Mr. Banda's responding submissions.

[16] In his response, Mr. Banda provided the names and contact details for several other recruits whom he recommended the Investigator interview as they were present when certain incidents occurred.

[17] None of the recruits who were put forward by Mr. Banda were contacted by the Investigator. Nor did the Investigator of her own volition seek out any recruits to interview.

IV. **The Commission's Decision**

[18] In arriving at the Decision, the Commission had before it Mr. Banda's complaint form, the Report and the submissions from the parties with respect to the Report.

[19] The Respondent had objected to Mr. Banda's amended application on the basis that it violated paragraphs 41(1)(d) and (e) of the *CHRA*. The Commission determined that it would deal with the complaint because it had decided that, pursuant to subsection 41(1) of the *CHRA*, it was not plain and obvious that the complaint was trivial, frivolous, vexatious or made in bad faith. The Commission also found that the Respondent had not demonstrated that Mr. Banda's

delay in reporting the allegations in his amended complaint had seriously prejudiced its ability to respond.

[20] Turning to the merits, the Commission dismissed Mr. Banda's complaint as further inquiry was not warranted.

[21] No reasoning was provided by the Commission in the Decision. The Commission upheld the recommendation of the Investigator against referring the matter to the Tribunal, so the Report stands as the reasons of the Commission: (*Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 37 [*Sketchley*]).

V. **Issues and Standard of Review**

[22] The parties agree, as do I, that there are two issues in this matter:

1. Whether the Decision is reasonable; and,
2. Whether the process was procedurally fair.

[23] Mr. Banda submits that the investigation was procedurally unfair as it was neither neutral nor thorough and, the Commission in rendering the Decision, did not comment upon his extensive submissions.

[24] Mr. Banda also submits that the Decision was unreasonable because it relied upon the Investigator's analysis which was deficient.

[25] The Respondent agrees that the investigation must be neutral and thorough but submits that the Decision was both procedurally fair and reasonable based on the evidence in the record.

[26] As previously stated, I have found that the investigatory process was procedurally unfair to Mr. Banda. As a result, it is not necessary to consider the reasonableness of the decision. A decision which has been arrived at in a procedurally unfair manner is inherently unreasonable.

[27] Mr. Justice Rennie recently reviewed and confirmed the core principles of procedural fairness in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 (CanLII) [CPR]. He concluded that whether there has been procedural fairness does not require a standard of review analysis but “a court must be satisfied that the right to procedural fairness has been met” and, “a reviewing court [. . .] asks with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed.”: *CPR* at paras 49 and 54.

VI. Analysis

[28] The parties agree that the Report must be neutral and thorough. They each agree that the failure to investigate obviously crucial evidence fails to meet the test of thoroughness: *Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574 at para 57 [*Slattery*].

[29] In support of his arguments, Mr. Banda raised a number of incidents as examples of the differential conduct by the CSC. In each such case, the CSC had a different version of the events, which the Investigator accepted.

[30] As discussed in more detail below, Mr. Banda argues that the Investigator did not interview any of the other 26 recruits, particularly those whose names he provided to her as

potential witnesses. Mr. Banda says that two of the witnesses were present at a particular event and four of whom could have attested to his differential treatment in another event.

[31] The Respondent but submits that based on the evidence in the record of what other recruits might say it would not have been enough to change the result of the investigation.

[32] Mr. Banda says there was no overt discrimination. Rather, there was a pattern of differential treatment that he says he experienced because he is a black man. He provided lengthy submissions to the Investigator including articles and jurisprudence addressing racialization and the fact that racist views often operate subconsciously on the basis of negative racial stereotypes. There may be no direct evidence that race played a part of any decision.

[33] Three incidents in particular have been relied upon by Mr. Banda to support his argument that the investigation was neither thorough nor neutral:

1. He was treated differently than other recruits who failed to complete a homework assignment;
2. He was falsely accused by a training officer of taking cell phone photos on the gun range, contrary to the rules. That officer subsequently failed Mr. Banda on the test that resulted in his “third strike”;
3. When he was released from the program he was escorted off the premises by two officers but two other recruits who failed were not escorted by anyone.

[34] Each of these incidents will be discussed in turn.

[35] The Respondent says that although the Investigator did not interview the recruits, as suggested by Mr. Banda, this did not amount to ignoring crucial evidence. In that respect, in

addition to a discussion of the three substantive allegations, Facebook messages that Mr. Banda and other recruits exchanged and that he mentioned in his complaint will be reviewed.

A. *Failure to Complete a Homework Assignment*

[36] Mr. Banda was told two days after he handed in his homework that he had received a negative performance evaluation because it was incomplete. He alleged that he was the only recruit singled out for that infraction although others did not complete their homework.

[37] In his amended complaint form, Mr. Banda provided the names of four other recruits with whom he had spoken before handing in the homework assignment. He stated that each of them told him that they too had not completed all the sections of the homework assignment.

[38] The Investigator interviewed the STO who had spoken with Mr. Banda. The STO could not recall if she had made similar notations on other evaluations but told the Investigator that, if Mr. Banda was the only one to receive a write up, it was because the assignments of the other recruits were mostly complete.

[39] To explore the issue further, the Investigator spoke with another STO who said he did not have a clear, independent recollection of Mr. Banda but remembered meeting with him and believed that Mr. Banda said that others did not complete their assignments but that he alone received a notation in his file.

[40] Although the Investigator was aware that Mr. Banda had provided her with the names of four recruits and the nature of the evidence they might provide, she did not pursue the matter further. She apparently did not attempt to contact any of them.

[41] The conclusion drawn by the Investigator was that Mr. Banda may have been treated differently because his homework was less complete. She acknowledged that he maintained he was singled out because he is black but found that the evidence gathered did not link the STO's actions to his race, colour or national and ethnic origin.

[42] I find that there are two problems with the Investigator's conclusion.

[43] One problem is that differential treatment is at the core of Mr. Banda's complaint. Yet, the Investigator did not make a clear finding as to whether he did or did not receive differential treatment with respect to the incomplete homework assignment.

[44] Mr. Banda provided copious materials to the investigator to support his submissions. He included scholarly articles and jurisprudence. At page 453 of the record, Mr. Banda explained why he believed there was a link between his alleged treatment and his race and colour. In his answer, he set out the following extract from the Ontario Human Rights Commission's Policy and Guidelines on racism and racial discrimination [OHRC Policy and Guidelines]:

Subtle forms of discrimination can be often detected upon examining all the circumstances. Individual acts themselves may be ambiguous or explained away, but when viewed as part of the larger picture and with an appropriate understanding of how racial discrimination takes place, may lead to an inference that racial discrimination was a factor in the treatment an individual received.

Ontario Human Rights Commission's Policy and guidelines on racism and racial discrimination, 2005 (online) at page 21.

[45] The Investigator is presumed to have considered all the evidence before her. She is also an investigator for the Commission and therefore presumably aware of the difficulty in proving

racial discrimination. From the Report, it appears that the Investigator simply accepted that there was no link between the homework incident and Mr. Banda's allegation of differential treatment.

[46] That leads to the other problem with the conclusion; the Investigator arrived at her conclusion without completing her investigation of the incident.

[47] It is clear from the Report that neither of the two STOs with whom the Investigator spoke had specific recollections of the event, nor would one expect them to have such recollection some two years later. The STO who wrote the performance evaluation could only speculate as to whether or not other recruits had been written up. The other STO seemed to recollect Mr. Banda contemporaneously mentioning that others had handed in incomplete assignments.

[48] It is clear that Mr. Banda said he specifically spoke with four other recruits at the time he handed in his assignment. They confirmed to him that they had not completed their homework either.

[49] As Mr. Banda provided their names, it would have been relatively simple for the Investigator to contact one of the other recruits in an effort to resolve or clarify the disputed facts. Yet, she did not contact anyone else.

B. *Cell Phone Pictures*

[50] Another incident involved an accusation, as Mr. Banda perceived it, that he was using his cell phone to take photographs. Taking pictures during training is prohibited. Mr. Banda described the incident in his complaint as follows:

. . . Between 12 and 14 of June 2014, while we were at the gun range, by then (*sic*) recruit Tysonn Ray and Ryan Coens were seated next to me this was a practice session. Mrs. Davie called me and started telling me to stop taking pictures, I was surprised because she did not even ask me what I was doing, and all she said was stop taking pictures. I told her I was not taking any pictures and I did not even had (*sic*) my cell phone with me at that moment. I told her to ask the two people who were seated next to me but she did not. I got back and told classmate Tysonn and Ryan that the reason Mrs. Davie called me was to tell me to stop taking pictures, I then asked them if they saw me take any pictures and they all said no and were a (*sic*) somehow surprised to hear that.

[51] In the ongoing evaluation notes which are written by the instructors for each cadet, there is no mention of the cell phone/picture taking incident. When the Investigator interviewed the instructor in question about whether she accused Mr. Banda of taking pictures the Investigator's notes say that:

Ms. Davie denied having told him to stop taking pictures, she said she did not accuse him of taking pictures, she asked him if he had a camera. When he said he did not, that was the end of it.

[. . .]

She said that one of his tendencies was to raise things that had no relevance to the situation. She said often he confused things or connected things that did not go together, like linking his flight arrangements to her or the camera incident to the shotgun failure.

[52] The Investigator's conclusion with respect to the possible picture taking incident was this:

Given the minor nature of the event in which no action was taken, it cannot be concluded that Ms. Davie's actions were linked to a prohibited ground of discrimination. Therefore, this allegation need not be further analysed.

[53] While it was a “minor incident” to the Investigator and possibly to the instructor, it was not perceived that way by Mr. Banda. He perceived it as one more example of differential treatment that, when considered with his other allegations, might lead to an inference of racial discrimination.

[54] There is a difference between being accused of having a camera and being accused of taking pictures. The two recruits who were not interviewed could have attested to what Mr. Banda was actually doing at the time. In the Report, the Investigator wrote that the STO said that Mr. Banda was “standing behind a wood table and the way he (*sic*) standing and had his hands, it looked like he had a camera.” The other two recruits might have been able to confirm whether Mr. Banda was sitting with them or standing behind the table. Did he have a camera or a cell phone? Was he taking a picture?

[55] The other two recruits also might have been able to speak to the fact that Mr. Banda was called away to speak to Ms. Davie and, importantly, what Mr. Banda said to them, if anything, when he returned from speaking with her. They may have been able to indicate what demeanour and tone of voice Ms. Davie used with Mr. Banda.

[56] The problem is that the Report contains no such details.

[57] Mr. Banda says that the two recruits were present at the beginning and end of the incident. The Investigator had the contact details for the recruits. There is no evidence that she attempted to contact them to reconcile the conflicting statements of “had a camera/taking a picture” and “standing behind a table/sitting with two other recruits”. It would be useful to know which version of events was the more accurate one.

C. *Mr. Banda is escorted off the premises*

[58] The third incident was on June 19, 2014, the day Mr. Banda was released from the CTP and sent home. The same supervisor who had accused him of taking pictures marked him as failing the shotgun test at the gun range. As that was his third strike, he was told he was released.

[59] Mr. Banda's allegation of differential treatment concerns the manner by which he was escorted back to his room and supervised while he packed his belongings and returned his training materials. He alleged that two other recruits who were released were not escorted to their room or observed while packing their belongings.

[60] In his complaint, Mr. Banda describes his removal this way:

. . . [Ms. Davie] ordered three (3) instructors . . . To escort me to my room and observe my packing and taking back of the training materials to the office and see me off the campus. I was treated more like a thief or criminal who cannot be trusted to go pack these materials and bring them to the office like what recruit Mercedes did. . . . I had a chance to communicate with Mercedes May on Facebook when I told her about my story especially with regard to being escorted she was surprised and said "*They did not let you take anything back by yourself?*" its (sic) clear because in her case no one escorted her.

[Emphasis in the original]

[61] To substantiate his claims, Mr. Banda provided in his amended complaint the names of the two previously released white recruits who were allegedly treated differently. The Investigator was not able to obtain information regarding one of those recruits. In the Report, she acknowledged that Mr. Banda provided her with email correspondence from the other recruit that confirmed that she was not observed while packing her belongings.

[62] The CSC provided the Investigator with the regulations, policies and procedures to be followed when a recruit is released from the training program. They include taking the RCMP base requirements that the recruit be taken to the dorm and instructed to separate and box up personal items from training items. After the training items are returned, the recruit is to be escorted to the departure vehicle.

[63] It is well known that policies are not always followed. The email correspondence provided to the Investigator confirmed that at least one other recruit was released without the policy being applied. While a loose application of policies would not be determinative of whether there was discriminatory conduct on the part of those enforcing the policies, that picture changes when a discrimination complaint is lodged. In that context, it is incumbent on the Investigator to get to the root of how the policy is enforced and why it was stringently applied in a particular context. In this case, such analysis is simply absent, which renders the investigation incomplete.

D. *Facebook Messages with Other Recruits*

[64] The three incidents reviewed above each contain conflicting stories between the parties. Mr. Banda urged the Investigator to consider that individual acts may be ambiguous or explained away but when considered as a whole they could lead to an inference that racial discrimination was a factor in his treatment.

[65] Mr. Banda specifically drew the Facebook messages to the attention of the Investigator in the context of rebutting some of the comments made in the evaluation form.

[66] If Mr. Banda's version of events was substantiated by other recruits or other evidence then that would cast significant doubt on the information provided to the Investigator by one or more of the STO's. In the record, there are printouts of several Facebook messages between Mr. Banda and other recruits.

[67] In a June 21st message, Mr. Banda sent to another recruit an image of a long evaluation note written by Ms. Davie on June 13th, which described events around the final written security test. The note referred to Mr. Banda "studying the material" but later finding "on further investigation" that Mr. Banda's classmates had been given extra time to study. To that, the other recruit replied "Yeah that is bs" and underneath he added "we were talking about that last night. I cannot believe that."

[68] In a June 22nd message, Mr. Banda mentioned he would "not accept coming back to re do Stage 3 at RCMP DEPOT" and mentioned that there were still some places he could go. The reply from the other recruit was "that is good news I hope you get back in and get trainers who are fair."

[69] On June 23rd, Mr. Banda had a separate Facebook exchange with one of the two white women who were also released. At the end of that exchange when Mr. Banda wrote, referring to Ms. Davie, "she failed me on shotgun manipulation..." the response was "Oh wow. That is not fair at all."

[70] Other Facebook messages in the record indicate that Mr. Banda's fellow recruits were sorry to see him leave, thought he deserved to graduate and was a bright guy with a good head on his shoulders.

[71] While those Facebook snippets in and of themselves might not have affected the outcome of the investigation they clearly indicate that other recruits were aware of various events involving Mr. Banda. They had opinions about Mr. Banda's ability and personality as well as his treatment by the CSC.

[72] As the recruits were neither contacted nor interviewed, there is no basis for the conclusion put forward by the Respondent that not interviewing them did not amount to ignoring crucial evidence. Such a conclusion is speculative.

[73] Given the tone and content of the Facebook messages, it is entirely possible that had the Investigator interviewed the recruits who authored those messages, she would have gained an insight as to the nature of the treatment Mr. Banda experienced. The outcome of the investigation could have been affected.

E. *Mr. Banda's Submissions to the Investigator and to the Commission*

[74] Mr. Banda's written submissions in response to the Investigator's report totalled 220 pages including accompanying exhibits.

[75] As set out in the Certificate of the Commission issued pursuant to rule 318(1)(a), the Commission had before it 53 pages:

1. Investigation Report dated February 1, 2017 (pages 1 to 17);
2. Revised Summary of Complaint, revised July 19, 2016 (page 18);
3. Revised Summary of Complaint, revised July 19, 2016 (page 19);
4. Letter from Simon Banda dated April 10, 2016 (pages 20 to 22);
5. Summary of Complaint (page 23);

6. Complaint Form dated June 1, 2015 (pages 24 to 28);
7. Submission of Simon Banda, with attachments (pages 29 to 39);
8. Submission of Correctional Service Canada dated March 22, 2017 (pages 40 and 41);
9. Submission of Simon Banda in response to the submission of the respondent, with attachments (pages 42 to 52);
10. Submission of Correctional Service Canada dated April 28, 2017 (page 53)

[76] Mr. Banda submitted to the Commission that the Investigator did not interview any of the witnesses he identified but interviewed nine CSC witnesses. He addressed the lack of neutrality by the Investigator by citing *Hughes v Canada (Attorney General)*, 2010 FC 963 [*Hughes*] in which Madam Justice Heneghan found there had been an imbalanced investigation when the investigator there interviewed only the complainant and four employees of the CBSA. He specifically set out Madam Justice Heneghan's statement at paragraph 59:

I question whether a neutral investigation of alleged systemic discrimination can be conducted by primarily interviewing the alleged discriminator, that is the employer.

[77] He also submitted that the Investigator had not properly applied the legal test for discrimination as he had dismissed Mr. Banda's allegations because he had no direct evidence linking his treatment to a prohibited ground of discrimination. By doing so, the Investigator also either ignored or failed to address his submission that often discrimination can only be proven by inference.

[78] The Commission dismissed the complaint without providing any additional reasons other than that further inquiry was not warranted. It did not address in any way the critical submissions that Mr. Banda put forward concerning the investigation itself.

[79] Mr. Banda's submissions responding to the Report and to the CSC submissions raised a number of issues that ought to have been addressed by the Commission. They were substantial enough that they warranted more than the usual form letter.

[80] It has been held that where submissions, such as those made by Mr. Banda, allege substantial material omissions in the investigation and provide support for those assertions, the Commissioner must refer to those discrepancies and indicate why it is of the view that they are either not material or are not sufficient to challenge the recommendation of the Investigator; otherwise one cannot but conclude that the Commission failed to consider those submissions at all: *Herbert v Canada (Attorney General)*, 2008 FC 969 at para 26 [*Herbert*].

[81] The Respondent submits that while the Investigator's report was not perfect, the conclusion was based on the whole of the evidence and there was no evidence that the Commission ignored any crucial evidence.

[82] I disagree.

[83] The most glaring problem in the investigation is the failure of the Investigator to interview anyone other than the CSC employees involved in the incidents. That failure is inexplicable. The Investigator was faced with conflicting statements between the parties. Mr. Banda provided evidence, both tangible and personal, that needed to be considered to resolve the differences in stories. It was crucial that the Investigator do a thorough investigation. That in turn required not only interviewing recruits identified by Mr. Banda who were present at critical

events or experienced differential treatment but also considering other evidence such as the Facebook messages provided by Mr. Banda.

[84] By not interviewing any of the witnesses who could support Mr. Banda's version of events, the Investigator, in effect, only heard one side of the story.

[85] The Commission should not have been satisfied with such a result. If it was satisfied, then considering Mr. Banda's extensive submissions critiquing the Report and the evidence, the Commission ought to have provided reasons so Mr. Banda could understand why his submissions were not accepted.

[86] The facts of Mr. Banda's case bear more than a passing similarity to those in *Tahmourpour v Canada (Solicitor General)*, 2005 FCA 113 where Mr. Justice Evans found that an investigator's failure to interview any other cadets in Mr. Tahmourpour's RCMP class about his allegation was unjustifiable since they were a potentially important source of information. He concluded that the investigation failed to meet the test of thoroughness when obviously crucial evidence, including interviewing the cadets, was not undertaken.

[87] In *Sketchley*, the Federal Court of Appeal at paragraph 112 stated the inevitable result of such an investigation:

Where a proper inquiry into the substance of the complaint has not been undertaken, the Commission's decision based on that improper investigation cannot be relied upon, since a defect exists in the evidentiary foundation upon which the conclusion rests.

[Emphasis added]

[88] I find that to be the case here.

[89] I hasten to add that my remarks should not be taken as an indication of whether any of the instructors, or Mr. Banda, should be believed or disbelieved. That is to be determined after a proper investigation. I have provided various examples of problems merely to show the extent of the divergence in viewpoints.

[90] My criticism is that the Investigator failed to pursue, without comment or explanation, any of the possibly corroborating evidence that Mr. Banda put forward.

VII. **Conclusion**

[91] It is not Mr. Banda's job to interview his fellow recruits to determine what evidence they would provide. He did what he was supposed to do. He provided to the Investigator the contact information for possible witnesses. The Commission's Investigator should take it from there.

[92] Faced with two conflicting stories and despite being provided with contact details for recruits who were present during many of the incidents, the Investigator only interviewed the CSC employees. Her notes of interviews do not include those from her discussion with Mr. Banda. Not only does that raise a further question as to the neutrality of the Report, it begs the question of how thoroughly the investigation was conducted.

[93] The evidentiary basis for the Decision was the Report. Unfortunately, as set out above, the Report suffers from a number of significant defects in the fact gathering process. The conclusion drawn by the Investigator was based on untested and largely unexamined evidence provided by the CSC.

[94] Returning to the question of whether the investigation was procedurally fair, I am satisfied that it was not. I am unable to conclude that Mr. Banda's right to procedural fairness has been met. Considering the nature of Mr. Banda's substantive rights to be free from discrimination and to have his complaint thoroughly investigated and, taking into consideration that the consequences to Mr. Banda are that his complaint will not be adjudicated by the Tribunal, I find that a fair and just process was not followed.

[95] The Decision is set aside and the matter will be returned to the Commission so that a fresh investigation into Mr. Banda's complaint can be undertaken by a different investigator.

[96] Mr. Banda has been successful. He is awarded costs. If the parties cannot agree on the amount of costs within 30 days of the date of this judgment then either party is at liberty to apply for an assessment of costs in accordance with the *Federal Court Rules*, SOR/98-106 [Rules].

JUDGMENT in T-1183-17

THIS COURT'S JUDGMENT is that

1. The application is granted and the Decision is set aside.
2. The matter is returned to the Commission for a fresh investigation by a different investigator.
3. Costs to the Applicant. If the parties cannot agree on the amount of costs within 30 days of the date of this judgment then either party is at liberty to apply for an assessment of costs in accordance with the *Rules*.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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