Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Ms. Z,

complainant,

and

Syndicat des communications de Radio-Canada (FNC-CSN),

respondent,

and

Société Radio-Canada,

employer.

Board File: 29649-C
Neutral Citation: 2014 CIRB **727**
May 12, 2014

The Canada Industrial Relations Board (the Board) was composed of Ms. Louise Fecteau, Vice-Chairperson, and Messrs. Daniel Charbonneau and Robert Monette, Members. A hearing was held on January 14 and 15, 2014, in Montréal, Quebec.

Appearances

Mr. François Garneau, for the complainant;

Mr. Guy Martin, for the Syndicat des communications de Radio-Canada (FNC-CSN);

Ms. Marie Pedneault, for the Société Radio-Canada.

The reasons for decision of the majority were written by Ms. Louise Fecteau, Vice-Chairperson. The dissenting opinion was written by Mr. Daniel Charbonneau, Member.

I. Nature of the Complaint

[1] On October 5, 2012, Ms. Z (the complainant) filed a duty of fair representation complaint against her union, the Syndicat des communications de Radio-Canada (FNC-CSN) (the union). The complainant alleges that the union acted in a manner that was arbitrary, discriminatory and in bad faith, in violation of section 37 of the *Code*, in that it was in a position of conflict of interest and could therefore not properly represent her in connection with her harassment grievance.

[2] The complainant's grievance relates to several allegations of harassment in the workplace by Mr. M, a fellow union member and a shop steward.

II. Background and Facts

[3] The complainant has been employed by the Société Radio-Canada (the employer) since July 20, 1989. She works as an announcer-producer with Radio-Canada International (RCI), Chinese section. She alleges that she was harassed from 2009 to 2012 by a co-worker, Mr. M, who also performed the function of shop steward.

[4] Toward the middle of May 2012, the complainant provided her employer with video evidence of the harassment to which she was being subjected by Mr. M. On May 15, 2012, the employer suspended Mr. M pending investigation and summoned him to a disciplinary meeting, which was also to be attended by a union representative. On May 17, 2012, the complainant completed a form titled "Violent Incident Report" (translation) and submitted it to the employer. The disciplinary meeting, which was also attended by Mr. Rufo Valencia, a shop steward, was held on May 23, 2012.

[5] Mr. M was called to another meeting with the employer on May 28, 2012. He was dismissed at that time. Mr. Valencia also attended that meeting. Mr. M's dismissal letter was emailed to the union that same day. The letter indicated among other things that, at the meeting of May 23, 2012, Mr. M had admitted that, starting in April 2012, he had gone into Ms. Z's work area on

numerous occasions before she had arrived for work, and he had failed to heed the employer's warnings of April and June 2011 to stop bothering his co-worker.

[6] In its response to the complaint, the union initially denied knowing the identity of the alleged harassment victim. However, this was corrected by counsel for the union a few months prior to the hearing into this matter, after he met with Mr. Valencia. The evidence shows that the complainant's name came up at least twice at the meeting of May 23, 2012, and this information was related to Mr. Ubald Bernard, a union representative, who had asked Mr. Valencia to attend the May 23 meeting with Mr. M.

[7] On June 13, 2012, the complainant filed a grievance against Mr. M, the union and the employer for psychological and sexual harassment by Mr. M (harassment grievance). In the grievance, she claimed compensation for damages both jointly and individually.

[8] On June 21, 2012, the complainant was declared unfit to work. On June 27, 2012, counsel for the complainant indicated to the union that his client would not be participating in an investigation conducted by the union to determine whether or not it should represent Mr. M. Counsel for the complainant indicated among other things that his client was taking leave from work and was not in a condition to take part in an investigation involving her answering questions that might cause her to relive traumatizing events.

[9] On July 18, 2012, Ms. Z informed her union that she was waiving the mediation-arbitration procedure provided for in article 11.7 of the collective agreement and asked that her grievance be referred to arbitration. On August 22, 2012, the union informed her that her grievance would not be sent to arbitration until such time as the steps preliminary to that procedure were completed. The union complained about her outright refusal to cooperate in an investigation of the harassment allegations set out in her grievance filed on June 13, 2012.

[10] On August 30, 2012, the union filed a grievance on behalf of Mr. M in order to challenge his dismissal. Among other things, the grievance refers to the complainant's failure to cooperate in the union's investigation. The union was seeking reversal of the dismissal and reinstatement of Mr. M. It asked for two extensions to the time limit in order to be able to file the grievance.

[11] Ms. Z filed her complaint with the Board on October 5, 2012.

[12] Of note is that, on November 19, 2013, the union sent the complainant a letter to inform her that, in regard to her grievance, the employer had agreed that the union could forego the referral to the grievance committee provided for in the collective agreement and, consequently, her grievance would be sent to arbitration. The union also informed her that it was retaining outside counsel independent of the Fédération nationale des communications (FNC) and the CSN to represent her for purposes of the said grievance, and that Mr. Ubald Bernard would assist as union representative. It also indicated that different counsel had been retained and a different union representative had been assigned to represent Mr. M for purposes of his grievance.

III. Oral Evidence

[13] Three witnesses were heard at the oral hearings: Mr. Rufo Valencia, shop steward; Ms. Z, the complainant; and Mr. Alex Levasseur, the union president. The employer did not call any witnesses.

1. Mr. Rufo Valencia

[14] Mr. Valencia is an employee of the RCI, Latin-American section. He has known the complainant since 1997 and Mr. M for as long. Mr. Valencia has been a shop steward since April 23, 2012, when he took over from Mr. Diego Medina-Creimer.

[15] Mr. Valencia admitted that he had never seen or been told about the written submissions of the parties presented in connection with this complaint, even though he had still been a shop steward at the time in question. Mr. Valencia also denied having been told about the letter dated September 9, 2013, sent to the Board by union counsel, which reads in part as follows:

> We met with Mr. Rufo Valencia, shop steward with the SCRC, on Friday afternoon, in preparation for the upcoming pre-hearing conference on September 12.
>
> At that meeting, the notes taken by Mr. Valencia at the disciplinary meeting of May 23, 2012, showed that Ms. [Z]'s name had come up at least twice at the said meeting, contradicting the information obtained from Mr. Valencia over the phone in December 2012.
>
> Consequently, a representative of the union, shop steward Rufo Valencia, was informed on May 23, 2012, that the alleged wrongdoing by Mr. [M] involved Ms. [Z].

> Those revelations therefore call into question certain paragraphs of the respondent's response to Ms. [Z]'s complaint dated December 5, 2012, as well as some paragraphs of the response to the complainant's reply.
>
> (translation)

[16] Mr. Valencia related the events or the disciplinary meetings called by the employer on May 23 and 28, 2012, which he had attended along with Mr. M. He stated that it had been the first time that he had had to deal with an employee's suspension and dismissal in his role as shop steward. He had been performing the function of shop steward for only 22 days at the time of the events in question. He indicated that he had not read any documents sent by the employer or been told about any such documents prior to May 23, 2012.

[17] According to Mr. Valencia, the meeting of May 23, 2012, lasted an hour. It seems that the employer's representative provided some background information concerning Mr. M's behaviour toward an employee in the Chinese section. Mr. Valencia stated that, after the meeting, he had reported to Mr. Ubald Bernard over the phone. He indicated that no one in the union had asked him to provide a written report following Mr. M's dismissal on May 28, 2012. According to Mr. Valencia, the complainant's name had come up twice at the meeting of May 23, 2012. He indicated that he had mentioned this to Mr. Bernard in his conversation with the latter.

[18] In regard to the letter of May 28, 2012, that is, the letter relating to Mr. M's dismissal, Mr. Valencia stated that he had learned of it only a week later, when Mr. Bernard had given it to him. He stated that he had spoken with Mr. Bernard again after the meeting of May 28, 2012, but Mr. Bernard had not asked him to contact the complainant.

[19] Mr. Valencia stressed that he had met the complainant after May 28, 2012, when they had bumped into one another in the newsroom hallway. This would have been before June 13, 2012. He indicated that it had not been a union meeting; rather, he had simply bumped into a co-worker he liked. He added that he had met with the union executive in the summer of 2012 but that there had been no discussion regarding Ms. Z or Mr. M and no one had asked him to initiate any kind of procedure for either Ms. Z or Mr. M.

[20] On cross-examination, Mr. Valencia stated that he had told the complainant how sorry he was about what she had been subjected to by Mr. M and had offered her his support in order to

mend bridges with the union. He indicated that the complainant had not wanted to discuss the matter with Mr. Wojtek Gwiazda, the local union representative who also worked at the RCI, since the latter was friends with Mr. M, also a union representative. He estimated that the meeting with Ms. Z had lasted about 45 minutes and stated that Ms. Z had not contacted him after that time.

2. Ms. Z

[21] The complainant has worked at the RCI, Chinese section, since 1989. She has been an announcer-producer since the spring of 2012. Her team comprises 13 employees. She indicated that Mr. M also works for the RCI, in the newsroom, but she had not had to work with him since 2006. The complainant indicated that Mr. M had been the union representative for the RCI for at least 15 years. She indicated that he had been harassing her on a daily basis for three years. It had started with him offering her gifts that she had refused. She had sent Mr. M a registered letter on August 2, 2010, in which she had asked him to stop harassing her and threatened to file a sexual harassment complaint and a criminal charge unless he desisted.

[22] According to Ms. Z, she had informed Ms. Sylvie Robitaille of RCI's human resources department about the situation, but the latter had said that she did not have sufficient evidence. The complainant stated that her health had declined rapidly because of Mr. M. He had followed her everywhere. She had been afraid to go to work and had been worried about her health. She also described the last incidents that had led her to install a video camera in her office one morning in early May 2012. Upon her return home, she had watched the video and confirmed that the culprit had indeed been Mr. M, whom she had long suspected. She stated that she had been in shock after seeing the video. She had contacted Ms. Hélène Parent, Director of the RCI, to give her a copy of the video.

[23] The complainant indicated that she had not been contacted by any union representative between May 23, 2012, and June 13, 2012. She had met with Mr. Valencia, but had not known at that time that he had accompanied Mr. M to the disciplinary meetings of May 23 and 28, 2012. She added that she had not sought assistance from Mr. Gwiazda as she believed him to be a close friend of Mr. M. The complainant indicated that she had been relieved to learn of Mr. M's dismissal, but had felt completely abandoned by her union. She added that she had spent three

years working "in hiding" (translation), that she had been afraid of Mr. M and that she had been worried about her health. She stated that she had suffered from major depression in the summer of 2012 and had in fact taken sick leave starting on June 21, 2012.

[24] On the morning of June 13, 2012, the last day on which she could file a grievance, she had contacted Mr. Gwiazda, as grievances had to be filed through local union representatives. In her grievance, the complainant sought compensation for damages from Mr. M, the union and the employer. The grievance read as follows:

> **Grievance / Exposé du grief**
> From the fall of 2009 to May 14, 2012, I was the victim of multiple instances of harassment, sexual harassment and discriminatory harassment by [Mr. M]…who also performed the function of union representative, right up to his dismissal on May 28, 2012.
>
> **Claim / Réclamation** That [Mr. M], the union and the employer be ordered individually or jointly to pay me monetary, moral and punitive damages; that the union be required to reimburse me for the fees of counsel of my own choosing to represent me in any proceeding under the collective agreement relating to this grievance or any grievance filed by [Mr. M].
>
> (translation)

[25] Ms. Z met with Ms. Parent of the human resources department. It seems that the meeting lasted no more than five minutes. A copy of the grievance was given to Mr. Gwiazda and Ms. Parent. Mr. Gwiazda did not ask any questions. According to the complainant, Mr. Gwiazda behaved very coldly toward her.

[26] Ms. Z indicated that, on July 18, 2012, she had asked the union to refer her grievance to arbitration. Her letter read in part as follows:

> I have already indicated to management that, given my current health, I do not wish to participate in the meeting provided for in article 11.5 of the collective agreement. I also wish to advise you that I waive the mediation-arbitration procedure provided for in article 11.7. However, and I am adamant about this, I want my grievance to be referred to an arbitrator as quickly as possible. I therefore ask that you take the necessary action to have my grievance sent to arbitration as soon as possible. At the recommendation of my counsel, Mr. Garneau, I suggest that the union propose to the employer that Mr. Serge Brault or Mr. Jean-Pierre Lussier be appointed to act as arbitrator to hear and decide my grievance.
>
> (translation)

[27] The complainant indicated that the union president, Mr. Levasseur, had denied her request on the pretext that she had refused to cooperate in the investigation into the allegations set out in

her grievance filed on June 13, 2012. The complainant indicated that she had been unable to submit to an investigation concerning the sexual harassment allegations against Mr. M as sought by the union while a criminal matter had also been underway regarding Mr. M's actions toward her. The complainant added that both she and her counsel had asked the union several times whether it had filed a grievance to defend Mr. M's interests but the union had never provided the information sought. It was not until October 30, 2012, that she and her counsel had been informed by the employer that the union had filed a grievance on behalf of Mr. M on August 30, 2012. On cross-examination, the complainant indicated that she had refused to participate in the union's investigation because she had been on sick leave and also had not known whether the union was also representing the interests of Mr. M.

[28] In regard to the union's written response in which it denied that it had known the complainant's identity prior to June 13, 2012, Ms. Z indicated that Mr. Valencia had told her at their meeting that her name had come up on May 23, 2012, and so the union was aware of her identity.

[29] The complainant added that the letter sent by counsel for the union on September 9, 2013, clearly showed that Mr. Valencia had been made aware of her identity on May 23, 2012, at the disciplinary meeting.

[30] With regard to the letter sent by Mr. Levasseur, the union president, on November 19, 2013, in which he indicated that her grievance would be sent to arbitration and that outside counsel independent of the Fédération nationale des communications and the CSN would represent her with the assistance of Mr. Bernard, a union representative, the complainant submitted that counsel retained had worked for the CSN for a long time. Additionally, Mr. Bernard had taken part in the mediation held by the Board in the matter and had represented the union's interests in the dispute between her and the union. The complainant insisted that she be represented by her own counsel for purposes of her grievance since she believed that her union was in a position of conflict of interest in this matter.

[31] The complainant also stated that she had not contacted her union to file a grievance because she had lost all trust in it. She submitted that Mr. M had used his status as a shop steward as a pretext to engage with her in her workplace or her environment even though he had had no work-

related connection with her. The complainant indicated that she had not contacted her union between 2010 and 2012 because the local representatives were Mr. M and Mr. Gwiazda, who were close friends. She added that she had made a complaint to Ms. Robitaille in the human resources department in 2010, but the latter had not acted on the complaint. She submitted that Mr. M had even called her at night. According to the complainant, she had also discussed the matter in 2011 with Ms. Lise Morin, who had suggested she discuss it with the Director, Ms. Parent. She added that Ms. Parent had subsequently met with Mr. M twice during that period and had asked him to refrain from entering into any further contact with the complainant. Mr. M had ignored Ms. Parent's instructions and had continued to harass the complainant.

[32] When asked by counsel why she had not contacted her union throughout the period in question, Ms. Z submitted that she had assumed that her union was aware of the matter. She added that Mr. M had been an important person since he had been the local union representative for the RCI, had constantly kept company with the "bosses" (translation), and had been the one to distribute information to the RCI on behalf of the union. He had been an authority figure in the complainant's eyes.

[33] With regard to the filing of her grievance, the complainant indicated that she had tried to contact Mr. Valencia on the morning of June 13, 2012, but that he had not been in his office. That was why she had contacted Mr. Gwiazda. She explained that she had met with Mr. Valencia in the afternoon, and insisted that that was the only time she had met with him.

3. Mr. Alex Levasseur

[34] Mr. Levasseur has been the president of the union since 2007. He indicated that Mr. M had been the shop steward for the RCI for several years and had been chosen by the local union. Mr. Medina-Creimer had also been a shop steward at the same time as Mr. M. He had left the RCI in 2012 and Mr. Valencia had taken over to the end of his term. Mr. Gwiazda had been the alternate.

[35] Mr. Levasseur indicated that Mr. Valencia had not received any special training when assigned to take over for Mr. Medina-Creimer in the spring of 2012. He had subsequently received some training but nothing specifically relating to harassment in the workplace.

[36] As for Mr. Bernard, Mr. Levasseur indicated that he was employed by the union as a retired representative of the SRC. He worked full time and reported to Mr. Levasseur and also to Mr. François Morin, an employee of the FNC.

[37] Mr. Levasseur admitted that he had learned that a union member was the subject of a disciplinary investigation on May 15, 2012, through an email sent to his office by the employer. Mr. Bernard and Mr. Morin also read the email message. It was on that date that Mr. M was suspended. He was later summoned to a disciplinary meeting, scheduled for May 23, 2012. Mr. Levasseur indicated that, after receiving that email, Mr. Bernard had taken matters in hand to ensure that someone from the union would accompany Mr. M to the disciplinary meeting of May 23, 2012. He confirmed that Mr. Valencia was the one who had accompanied Mr. M on both May 23 and May 28. It was also in the days that followed, that is, on May 23 or 28, that Mr. Levasseur had learned that the victim of the harassment was also a member of the union's bargaining unit. He acknowledged that Mr. Valencia had known the name of the victim as of May 23, 2012, and had orally advised Mr. Bernard of it.

[38] Mr. Levasseur stated that he had not called Ms. Z or asked Mr. Bernard or anyone else to call her after May 23. He indicated that it had really been up to the employer to look into the complainant's allegations respecting Mr. M and that, in cases of this kind, the union's participation was rather limited. Mr. Levasseur explained that Mr. Valencia had stopped playing any role in Mr. M's case as of the day after May 28, 2012, when he had asked Mr. Morin to take over Mr. M's case. Mr. Levasseur indicated that he had never asked Mr. Valencia for a written or oral report concerning the events of May 23 and 28, 2012.

[39] With respect to Mr. M's grievance filed on August 30, 2012, Mr. Levasseur stated that Mr. M himself had drafted it and asked the union to file it. Mr. Levasseur acknowledged that the union had asked the employer for two extensions to the time limit for filing a grievance on behalf of Mr. M because the employer and Ms. Z were not cooperating and it knew that Mr. M wanted to challenge his dismissal.

[40] Mr. Levasseur indicated that the union had no guidelines or policies dealing with situations such as that involving Mr. M and Ms. Z, where two members of the union had conflicting interests. He indicated that a case was opened when a member filed a grievance and that, in the

complainant's case, he had asked Mr. Morin to deal with her case when she had filed her grievance.

[41] Mr. Levasseur alleges that at no time did the complainant contact the union prior to filing her grievance. After June 13, 2012, when Ms. Z had filed her grievance, Mr. Morin entered into contact with Ms. Z's counsel to call a meeting concerning the facts set out in the said grievance. With respect to the union's written responses to Ms. Z's complaint, which it sent on December 5 and 19, 2012, and in which it denied that Ms. Z's name had come up at the meeting of May 23, 2012, Mr. Levasseur indicated that he and Mr. Morin had read those submissions. However, the submissions had been drafted by the CSN's legal department, which had been tasked with doing so on July 3, 2012. He stated that he had not spoken to either Mr. M or Mr. Valencia to verify the content of the submissions.

[42] When questioned by counsel for the union, Mr. Levasseur explained the process undertaken by the union on November 19, 2013, to separate the two grievances involving two members of the same unit, that is, the complainant and Mr. M. He stated that Ms. Z would be represented by outside counsel independent of the FNC and CSN, and would receive assistance from Mr. Bernard of the CSN, while Mr. M would be represented by counsel from an outside law firm independent of the CSN, Laplante & Associés, and would be assisted by Mr. Robert Fontaine.

IV. Arguments

A. The Complainant

[43] The complainant asks the Board to consider the way in which the union acted when it found out that Mr. M had been dismissed on May 28, 2012, particularly once she filed her grievance on June 13, 2012. She alleges that her union never got in touch with her following her reporting of Mr. M's actions to her employer in mid-May 2012 and that she herself had to file her grievance against the harassment to which she was subjected by her aggressor.

[44] The complainant considers that her refusal to cooperate in the union's investigation was completely warranted. In her view, she did not have to provide information or evidence to the union that it might use to exonerate her harasser and call her credibility into question. In her

eyes, such a request is even more questionable now that her harasser is the subject of criminal charges.

[45] The complainant stresses that her interests are irreconcilable with those of the union. To begin with, the grievance she filed is divided into three parts and has three respondents, including the union. Further, the union cannot defend both a harasser, whom it appointed as a union representative, and the victim of the harassment. The fact that they are members of the same union is irrelevant in the complainant's view. According to her, the conflict of interest arises from the fact that a union representative abused his position as a shop steward to deprive her of her fundamental rights.

[46] The complainant adds that the situation is an exceptional one and that the remedies sought are perfectly legitimate. She moreover believes that the union should assume responsibility for the costs incurred in relation to the complaint in this matter.

[47] The complainant alleges that the union in all good faith sent a "neophyte" to accompany Mr. M on May 23 and 28, 2012. According to Mr. Levasseur's oral evidence, Mr. Valencia's involvement ended right after May 28, 2012. Mr. Valencia immediately informed Mr. Bernard, a union employee, of the outcome of the May 23 meeting. Mr. Bernard therefore knew that the complainant, a member of the unit, was the victim. According to the complainant, the usual thing to do would have been for the union to get in touch with her within 24 hours of the events of May 23 or May 28, 2012. However, according to the complainant, the union did nothing to take her interests into consideration or protect them.

[48] According to the complainant, there should have been two cases opened by the union on May 23, 2012. The conflict of interest was clear. Mr. M admitted to his wrongdoing on May 23, 2012. According to Mr. Valencia's oral evidence, the meeting lasted an hour. The union should have immediately retained the services of two lawyers and withdrawn from the cases. She stresses that, in the collective agreement binding the parties, the union undertakes to refrain from discrimination in the workplace and from tolerating discrimination in the workplace (article 29.1 of the collective agreement). The complainant alleges that the union, like the employer, has an obligation to protect everyone from harassment and discrimination in the workplace.

[49] The evidence shows that, over the course of the entire summer of 2012, the complainant asked the union whether it had filed a grievance on Mr. M's behalf. The union never answered. There is also the question of why the union continued until September 2013 to deny any knowledge of the identity of the victim prior to June 13, 2012, when she filed her grievance. The union clearly knew as of May 23, 2012, that the complainant was the one who had filed the harassment complaint against Mr. M. Mr. Valencia actually informed Mr. Bernard of that fact. In the complainant's view, the case reveals negligence and bad faith on the part of the union, in violation of section 37 of the *Code*. She also insists that the solution put forth by the union in its letter of November 19, 2013, is unacceptable and repeats that the remedies sought in her complaint are justified in the present circumstances.

B. The Union

[50] The union submits that it has done nothing wrong. With regard to the statements made in the letter of September 9, 2013, that Mr. Valencia had been made aware of Ms. Z's identity on May 23, 2012, the union submits that it was not until September 2013 that Mr. Valencia informed the union's counsel that Ms. Z's identity had been revealed on May 23, 2012.

[51] The union denies any conflict of interest in terms of its representing the complainant and denies having acted arbitrarily or in bad faith toward her. It adds that, prior to receiving the complainant's grievance on June 13, 2012, it had never been informed by the complainant of what she was going through or of the complaints she had made to the employer between the fall of 2009 and June 13, 2012. It also adds that no representative of the employer had ever approached it or informed it of the circumstances during that period. The union alleges that its conduct was beyond reproach throughout the period in question.

[52] The union submits that, after May 15, 2012, it was informed that a disciplinary meeting concerning Mr. M would be held on May 23, 2012, and that it in fact asked Mr. Valencia to accompany Mr. M on both May 23 and May 28, 2012, the day he was dismissed. According to the union, it could do nothing before that time. The union states that there was no indication that the complainant wished to file a grievance from May 28, 2012, to June 13, 2012, the period during which she was entitled to do so. The union adds that, during that period, it knew that Mr. M wanted to file a grievance but did not want to cooperate with it.

[53] In regard to the complainant's grievance, the union submits that Ms. Z advised it that she would not participate in its investigation. It adds that it wanted to get the facts concerning the occurrences set out in the complainant's grievance, and that, in any event, this was the procedure followed for all employees. The union alleges that it did not breach its duty of fair representation or refuse to file a grievance. It points out that it advised Ms. Z on August 22, 2012, that it would not be referring the grievance to arbitration since it did not have the facts it needed to do so.

[54] The union points out that neither Mr. M nor the complainant, nor indeed the employer, wanted to cooperate. It states that the employer refused to send it any of the evidence gathered in its investigation, in particular the video recording produced by the complainant. It adds that, on several occasions since June 13, 2012, it sought the complainant's cooperation in order to conduct its investigations regarding both Mr. M's dismissal and her grievance, but that counsel for the complainant made it clear that his client did not wish to participate in the union's investigation or disclose her evidence.

[55] The union stresses that, since it was unable to complete its investigation because of the lack of cooperation of the employer and the complainant, it had no choice but to file a dismissal grievance on behalf of Mr. M, maintaining that the employer had refused to extend the time limit for doing so past August 31, 2012. It adds that its duty of fair representation extends to all SRC employees included in the intended scope of a bargaining unit it represents.

[56] The union adds that, pursuant to *McRaeJackson*, 2004 CIRB 290 (*McRaeJackson*), employees have an obligation to cooperate with the union in grievance procedures. It emphasizes that the union has carriage of grievances, not employees, and that in this case the complainant failed to cooperate to move the grievance forward.

[57] The union states that, contrary to what Ms. Z is alleging, there is no conflict of interest on its part, or at least no evidence was adduced in that regard. It adds that it is able to properly defend the complainant's interests at arbitration of the grievance. The union indicates that it has carriage of the grievance and that a grievance arbitrator lacks jurisdiction to issue any orders regarding Mr. M or the respondent. It also states that the remedies sought by the complainant are unwarranted and that it is able to take the necessary steps to ensure that each of its members is

provided with a full and complete defence by ensuring in particular that each member has different counsel.

[58] The union concludes by saying that there is nothing in the evidence heard to show that it breached its duty of fair representation, and asks that the Board dismiss the complaint.

C. The Employer

[59] Counsel for the employer asks the Board to proceed with caution in regard to its findings of fact in this matter given that the grievance will likely go to arbitration and the merits of the case are a matter for a grievance arbitrator.

V. Analysis and Decision

[60] The union's duty of fair representation is stated in section 37 of the *Code*:

> 37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[61] The general principles that govern the duty of fair representation were set out by the Supreme Court of Canada in *Canadian Merchant Service Guild* v. *Gagnon et al.*, [1984] 1 S.C.R. 509 (*Gagnon*) as follows:

> 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
>
> 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
>
> 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
>
> 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
>
> 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

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[62] The Supreme Court of Canada has recognized the difficulties faced by a union when different members of the same unit have competing interests. In *Gendron* v. *Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 SCR 1298 (*Gendron*), the union chose to represent three employees who had been unsuccessful in competing for a position with the employer, the Royal Canadian Mint, to the detriment of the respondent, the successful candidate. Following a reassessment by the employer, one of the three employees represented by the union was declared the successful candidate. The respondent initiated an action in the Manitoba Court of Queen's Bench.

[63] The central issue before the Supreme Court of Canada in *Gendron*, *supra*, was whether ordinary courts had jurisdiction to entertain a claim against a union based on a breach of the duty of fair representation. The Court found that the respondent's claim should have been litigated before the Canada Labour Relations Board (the predecessor to this Board). The Court also considered the principles governing a union's duty of fair representation, including the principles set out in *Gendron*, *supra*, and had the following to say concerning a situation where the union must pursue the interests of one employee to the detriment of the interests of other employees in the same bargaining unit:

> The principles set out in *Gagnon* clearly contemplate a balancing process. As is illustrated by the situation here a union must in certain circumstances choose between conflicting interests in order to resolve a dispute. Here the union's choice was clear due to the obvious error made in the selection process. The union had no choice but to adopt that position that would ensure the proper interpretation of the collective agreement. In a situation of conflicting employee interests, the union may pursue one set of interests to the detriment of another as long as its decision to do so is not actuated by any of the improper motives described above, and as long as it turns its mind to all relevant considerations. The choice of one claim over another is not in and of itself objectionable. **Rather, it is the underlying motivation and method used to make this choice that may be objectionable.**
>
> (emphasis added)
>
> (pages 1328–1329)

[64] The union may have to choose between the conflicting interests of members if the choice is based on rational and objective reasoning that takes into account all relevant considerations. As

indicated in *Gendron*, *supra*, the breach of the duty of fair representation may derive from the underlying motivation and the method used to make this choice.

[65] Aside from those principles, the Board has in its jurisprudence underscored the challenge faced by a union when it is required to represent more than one of its members in a situation involving workplace harassment. The Board has stated that, in such circumstances, the union must proceed cautiously and thoughtfully.

[66] In *Mr. G*, 2007 CIRB 399 (*Mr. G*), the employer had dismissed the complainant following complaints of harassment by three co-workers. That same day, the president of the union local contacted union counsel to discuss how the union should proceed with a dismissal grievance. Counsel then advised the union that it should proceed carefully, because the dismissal involved the concerns, interests and rights of three members of the same local, as well as those of the complainant. Counsel also advised the union to file a grievance in order to comply with the time limits under the collective agreement and to conduct an investigation of the allegations. The union asked counsel to conduct the investigation on behalf of the local and to report his findings. Following investigation, the union decided not to refer the dismissal grievance to arbitration given the slim chance of success. Upon considering the union's conduct in the matter, the Board dismissed the complaint, stating the following:

> [167] When a trade union finds that one of its members is faced with allegations of workplace harassment (sexual or otherwise) made by other employees, it is in a difficult situation. The union finds itself in the position of representing one employee against others and must proceed cautiously and thoughtfully.
>
> [168] In this matter, the union took the position that by having counsel conduct the investigation, it could rely on a degree of objectivity that it could not ensure by doing the investigation itself. The union was correct in its appreciation that it was in a difficult position. Contrary to a straightforward dismissal for cause, in this case, the union had to balance the opposing interests of the union members who complained and the union member who had been dismissed. The union was also faced with the difficult question of the internal politics of the local due to the family ties of the women with other Allied employees and the union's executive.
>
> [169] Thus, the union was wise to engage someone from the outside to review the situation. That the union chose to ask its own counsel to conduct an investigation was as good a choice as any, given that counsel had been representing the local for a number of years and was experienced in such matters. It was also appropriate to allow counsel to choose the way he would conduct the investigation so as to ensure objectivity. The panel's opinion about how counsel conducted the investigation is not relevant to this analysis. The important consideration is that the investigation was conducted by a person who was not involved in the situation and who was able to compare the facts as they were stated by the witnesses. It was within counsel's prerogative to assess those facts in accordance with his experience and to provide an opinion based on the success of similar grievance referred to arbitration.

> [170] The complainant argued that counsel did not meet personally with him as he did with the women, but dealt with him only by telephone. While the lack of face-to-face contact may appear not to have given the complainant the same advantage as the women, there is nothing to suggest that this fact by itself negatively influenced counsel's opinion. There is no evidence that the complainant asked to meet with him or that he was not given an opportunity to fully state his version of the events that led to his dismissal. If he was uncomfortable giving his statement over the telephone, he should have clearly stated so. If he disagreed with the conduct of the investigation, there was nothing to prevent him from taking the initiative of writing out a statement or bringing this to the attention of the union. He did not need outside advice to do this. There is no evidence that the interviews were otherwise conducted in an arbitrary manner.
>
> [171] It was also within counsel's charge to evaluate the credibility of the witnesses, that is, how the complainant's version of the facts would hold up before an arbitrator as compared to the testimony of the women. Credibility is a difficult call and by no means an objective science. It depends on personality, emotions, perception and experience.

[67] In *Stolp* (1998), 107 di 1; and 43 CLRBR (2d) 315 (CLRB no. 1226), the Board found that the union had acted arbitrarily and had violated section 37 of the *Code* in that it had failed to independently investigate the complaint of sexual harassment filed against the complainant. The Board stated the following in regard to a complaint brought by one member against another:

> Where the complaint is brought by one union member against another, there are profound employee interests involved on each side of the spectrum. The complainant has a personal and reputational stake in the outcome of the complaint. The alleged offender similarly has a serious job interest at stake as well as a concern with regard to his or her reputation. The Union is simply in a "no win" situation.
>
> To say the least, a union is put in a difficult position in sexual harassment complaints involving its members. The process is one that, in most cases, is determined by an employer policy directive. Often, the process is not contained in the collective agreement and the union does not have a role in its promulgation nor implementation.
>
> …
>
> Here, the complaint and investigative process are set forth in an employer directive (Exhibit 6.27) that does not provide for the confrontation of witnesses or the complainant at the committee stage, which counsel for Stolp suggested the Union should have advanced on his behalf.
>
> In our view, considering the competing interests involved, the Union did what it could for Stolp during the investigative stage of the sexual harassment complaint. Its failure to meet the requirements of section 37 lay in its representation of Stolp, and the prosecution of his grievance, following his dismissal.
>
> …

> However, the union's failure to independently investigate the sexual harassment complaint (as alluded to earlier) to examine Stolp's disciplinary record in detail, to canvass his record with him to ensure that the employer's account of the same was accurate and, finally, to properly consider the application of Article 2A.4 of the collective agreement to Stolp's record, amounts, in the circumstances of the present case to arbitrary conduct that violates section 37 of the *Code*.
>
> (pages 4, 5 and 6; and 317–318)

[68] It is evident from the decisions cited above that the union must maintain its objectivity when investigating cases of harassment involving several members of a same unit. In the Board's view, the union must also ensure objectivity when deciding whether or not to represent one or another of its members and must take care to avoid any appearance of bias in favour of one member to the detriment of another. Further, the Board considers that the union must act even more cautiously when one of the members in question is a shop steward, as is the case in the instant matter.

[69] In this matter, there is no question that, as of May 15, 2012, the union was facing what was at best a difficult and delicate situation when it was advised that Mr. M, an employee of the RCI and a shop steward, was the subject of a disciplinary investigation. The letter advising of an investigation, which was also sent to the union, reads in part as follows:

> On or around May 14, 2012, and on several occasions prior to that date, you allegedly acted in an inappropriate manner that caused distress to a co-worker.
>
> (translation)

[70] Mr. M was accordingly suspended and prevented from entering into contact with the complainant. On May 18, 2012, Mr. M was advised that a disciplinary meeting had been scheduled for May 23. The union received a copy of that email to Mr. M. Messrs. Levasseur, Bernard and Morin read the email message. Mr. Bernard made arrangements to have someone accompany Mr. M to the disciplinary meeting of May 23, 2012. He then asked Mr. Valencia, a new shop steward who had been performing the function for only 22 days and had no experience in the matter, to accompany Mr. M. The meeting lasted about an hour. The dismissal letter of May 28, 2012, to Mr. M set out the allegations made against him, which had been brought to his attention at the disciplinary meeting of May 23, 2012. The dismissal letter reads in part as follows:

> In 2010, you received a letter from your co-worker in which she beseeched you to cease your inappropriate behaviour. In April and June 2011, I demanded that you stop bothering this employee and clearly told you to stay away from her and the Chinese section.
>
> You obviously disregarded those warnings and instructions and continued to act inappropriately toward your co-worker.
>
> At the disciplinary meeting of May 22, 2012, you acknowledged that you had received clear instructions from your manager. You also acknowledged having disobeyed them.
>
> Also at the meeting of May 22, you admitted that, on numerous occasions, you had gone to your co-worker's workstation early in the morning, before anyone else had arrived for work. You admitted that you had remained there for several minutes a number of times since April 2012. You admitted that you had handled your co-worker's work equipment (telephone, mouse), but did not admit to having left a moist substance on that equipment. You made those admissions after several attempts were made to rephrase the explanations you were attempting to provide.
>
> (translation)

[71] Mr. Valencia accompanied Mr. M to his second dismissal meeting on May 28, 2012.

[72] Mr. Valencia was removed from Mr. M's case on May 28, 2012, as indicated by Mr. Levasseur. According to the latter, Mr. Valencia played a limited role in Mr. M's case. Indeed, it would seem that it was Mr. Bernard rather than Mr. Valencia who received a copy of Mr. M's dismissal letter. Mr. Levasseur asked Mr. Morin to take over Mr. M's dismissal case as of May 28, 2012.

[73] The evidence shows that, on May 23, after the disciplinary meeting, Mr. Valencia provided Mr. Bernard with an oral report over the telephone and mentioned the name of the alleged victim, Ms. Z, also a member of the union. The union therefore knew as of May 15, 2012, that its shop steward at the RCI for over 15 years was the subject of a disciplinary investigation and knew as of May 28 that he had been dismissed for harassment of a co-worker and member of the same bargaining unit. Both Mr. Valencia and Mr. Bernard knew her name as of May 23. The union also knew that Mr. M was the subject of serious charges of harassment, as indicated in the letter of dismissal, which had also been sent to the union.

[74] Did the union deal with what was at best a very delicate matter cautiously, objectively and thoughtfully when it learned that its shop steward had been dismissed following allegations of sexual harassment of the complainant?

[75] Mr. Levasseur's oral evidence is clear. The union has no guidelines or policies for dealing with a situation where two of its members are pitted against one another, as in the instant case. The union opens a case file when a member files a grievance. That is what it did when the complainant filed her harassment grievance on June 13, 2012. In other words, the union treated both Mr. M's grievance and the complainant's grievance as ordinary grievances without factoring in the competing interests of the unit's two members.

[76] Between May 23, 2012, and June 15, 2012, no one from the union, be it Mr. Bernard, Mr. Morin, or Mr. Levasseur, who according to the evidence heard knew or ought to have known that Ms. Z had filed a harassment complaint, contacted the complainant to investigate the matter or obtain her side of the story. The only person who spoke with the complainant during that period was Mr. Valencia, but their meeting was nothing more than an informal meeting between co-workers. Further, according to Mr. Levasseur's oral evidence, Mr. Valencia's involvement in the case was limited.

[77] It is curious to say the least that, in its written submissions filed on December 5 and 19, 2012, several months after Mr. M's dismissal, the union denied that the complainant's name had come up at the meeting of May 23, 2012, maintaining that it had not been until June 13, 2012, when the complainant had filed her grievance, that it had learned her name—this despite the fact that Mr. Valencia had told Mr. Bernard that the alleged victim was Ms. Z on May 23, 2012. According to the evidence, the union did not admit to the fact that the complainant's name had come up on May 23, 2012, until around September 2013, more than a year after the events of May 28, 2012.

[78] According to Mr. Levasseur, it had really been up to the employer to investigate the complainant's allegations concerning Mr. M. Mr. Levasseur indicated that, in cases such as these, the union's participation is rather limited. The Board, however, considers that, given the complexity of the case it was dealing with, which involved two of its members, one of whom was a shop steward, the union had a duty to immediately ensure the objectivity that such a case required, even if it was up to the employer to conduct the initial investigation.

[79] A complaint of sexual harassment is a serious matter that could have major ramifications for both the alleged victim and the person accused of the harassment. Yet, in the instant matter, the

union took no immediate action to ensure its objectivity. Mr. Bernard took action to protect the interests of Mr. M when he learned that he was the subject of a disciplinary investigation and sent Mr. Valencia to attend the meetings between Mr. M and the employer. Mr. Levasseur asked Mr. Morin to take on Mr. M's case as soon as Mr. M was dismissed.

[80] In this matter, the union's actions do not show that it weighed the competing interests of its two members. Even before the complainant filed her grievance, the union's actions showed a lack of objectivity. In fact, the union took several steps to protect the interests of Mr. M but did nothing to protect Ms. Z's interests when it learned her identity on May 23, 2012. It was only after the complainant filed her grievance that the union decided to contact her to investigate. And in doing so, the union failed to separate the two cases and asked the same individuals who represented Mr. M's interests to conduct the investigation into Ms. Z's case.

[81] Further, it is useful to note that the complainant also claimed damages from the union in her grievance dated June 13, 2012. Without stating a view on the validity of such a procedure, the Board finds that at the very least the fact that the union was named in the grievance added to the complexity of the situation and to the union's duty to act cautiously and handle Ms. Z's grievance objectively and separately from that of Mr. M.

[82] The union submits that the complainant failed to cooperate in the investigation of her grievance of June 13, 2012. It maintains that it sought to obtain the facts concerning the occurrences set out in the complainant's grievance, as it does for all grievances, as early as June 15, 2012, and that that was why it had told Ms. Z on August 22, 2012, that it would not be referring her grievance to arbitration. The union further submits that, since it was unable to complete its investigation given the lack of cooperation on the part of Ms. Z and the employer, it had no choice but to file a grievance to challenge Mr. M's dismissal.

[83] It is true that the union contacted the complainant's counsel toward mid-June 2012 to have the complainant take part in the investigation into the grievance she had just filed. On June 27, 2012, counsel for the complainant informed the union that his client had been declared unfit to work and that, since her grievance was against Mr. M, the employer and the union itself, she would not be disclosing her evidence against Mr. M.

[84] In *McRaeJackson*, *supra*, the Board summarized the duty of employees to cooperate with the union as follows:

> [15] The union's duty of fair representation is predicated on the requirement that employees take the necessary steps to protect their own interests. Employees must make the union aware of potential grievances and ask the union to act on their behalf within the time limits provided in the collective agreement. They must cooperate with their union throughout the grievance procedure, for example by providing the union with the information necessary to investigate a grievance, by attending any medical examinations or other assessments.
>
> [16] Employees must follow the union's advice as to how to conduct themselves while the grievance process is underway. Employees must attempt to minimize their losses, for example by seeking new employment if they have been dismissed, or attending retraining if this will increase their chances of re-employment.

[85] However, participation by the complainant is only one of the factors that the Board takes into account when considering the union's actions in connection with a duty of fair representation complaint. In fact, in *McRaeJackson*, *supra*, the Board set out other major factors, as follows:

> [36] The rights that an employee wishes enforced may at times conflict with the rights of other bargaining unit members. This may occur in cases involving seniority rights on promotion or lay-off. This also happens in cases involving a reinstatement that triggers the displacement of another employee. In deciding whether or not to refer a particular grievance to arbitration, the union must act fairly. As long as it has properly considered the interests of both sides, the union need not represent each affected employee.
>
> [37] Accordingly, the Board will normally find that the union has fulfilled its duty of fair representation responsibility if: a) it investigated the grievance, obtained full details of the case, including the employee's side of the story; b) it put its mind to the merits of the claim; c) it made a reasoned judgment about the outcome of the grievance; and d) it advised the employee of the reasons for its decision not to pursue the grievance or refer it to arbitration.

[86] In *Cadieux* v. *Amalgamated Transit Union, Local 1415*, 2014 FCA 61, the Federal Court of Appeal recently considered the issue of a complainant's lack of participation in the grievance process in connection with a duty of fair representation complaint. The Board had dismissed a complaint pursuant to section 37 of the *Code* on the basis of the complainant's lack of participation in the executive board meeting and the union members' meeting at which his termination grievance was discussed. The Court found that the Board's decision, which had been based solely on the complainant's conduct and had failed to consider the union's conduct, was unreasonable. The Court stated that, rather than merely examining the complainant's conduct, the Board was required to examine the union's conduct in order to determine whether its

investigation of the termination grievance and decision not to take the grievance to arbitration were fair and equitable:

> [33] Accordingly, when reviewing a complaint under section 37 of the *Code*, the Board must, at a minimum, examine the following issues (*Lamolinaire* v. *Communications, Energy and Paperworkers Union of Canada*, above, at paragraph 36):
>
> > (a) Did the union conduct a perfunctory or cursory inquiry, or a thorough one?
> > (b) Did the union gather sufficient information to arrive at a sound decision?
> > (c) Were there any personality conflicts or other bad relations that might have affected the soundness of the union's decision?
>
> [34] In this case, however, the Board did not address these issues at all. It was content to find that the applicant had not attended the executive board meeting and Union members' meeting at which his termination grievance was discussed. In so doing, the Board believed that it was dispensed from having to examine any other issues, including, in particular, whether the Union's inquiry into the termination grievance was thorough and whether the Union had gathered sufficient information to make a sound decision with respect to the refusal to take the grievance to arbitration.
>
> [35] Although an employee's participation in the investigative and decision-making process of his or her union is a factor that may be taken into account in the assessment of the union's conduct in the handling of a grievance, the mere fact that the employee did not fully participate in the process cannot, in and of itself, preclude the Board from finding that the union breached its duty of fair and equitable representation, particularly in a termination grievance.
>
> [36] It was in the case of *Jacques Lecavalier* v. *La Cie Seaforth Fednav Inc.* (1983), 54 di 100 that the former Canada Labour Relations Board first set out the principle of the employee's duty to provide assistance to the union throughout the grievance procedure, such as providing it with all relevant information. However, the mere fact than an employee did not fully participate in the process does not dispense the union from its duty of fair and equitable representation, as each case must be examined on its own merits: *Soufiane* v. *Fraternité internationale des ouvriers en électricité* (1991), 84 di 187. This principle had been reiterated by the Board, in particular, in *Virginia McRaeJackson et al*, above at paragraphs 15 and 16.
>
> [37] We should not lose sight of the fact that what is at issue in a complaint under section 37 of the *Code* is the conduct of the union and not that of the complainant. The conduct of the complainant during the union's investigation and assessment can certainly be taken into consideration when determining whether this process was fair and equitable; nonetheless, the onus remains on the union to fulfil its duty of representation.

[87] Thus, although the complainant's participation is a factor that may be taken into account in assessing the union's conduct, the fact that the complainant did not participate in the investigative process is not determinative in and of itself. The Board considers that, while there may be a lack of cooperation on the part of the complainant in this matter, this does not exonerate the union in terms of its conduct in handling the complainant's harassment grievance.

[88] On the basis of the evidence adduced, the Board finds that, as of May 28, 2012, the union had in its possession some major evidence that enabled it to grasp the full scope of the

allegations and the extremely delicate nature of the case pitting one member of the unit against another, who was also a shop steward. It is worth noting that Mr. Valencia met the complainant before she was declared unfit to work. Mr. Valencia also attended the meetings between the employer and Mr. M. However, it seems that the union failed to take that evidence into account in conducting its investigation. It is also worth noting that the union chose to pursue the interests of Mr. M even though it also felt that he had not cooperated with it in connection with his dismissal grievance. This shows that the union already had some major evidence and that Mr. M's lack of cooperation did not prevent it from pursuing his interests. The union merely decided to pursue Mr. M's interests on the pretext that Ms. Z had refused to cooperate, without taking into account the underlying reasons for her refusal to participate in the investigation or the evidence that it already had in its possession.

[89] The very wording of Mr. M's grievance filed on August 30, 2012, shows that the union had chosen to represent Mr. M's interests to the detriment of those of Ms. Z, on the basis of Ms. Z's lack of cooperation. The grievance reads in part as follows: "In view of the union's duty of representation, which has been met with a refusal or inability of a member of the union to participate in any way in the union investigation of the dismissal and also of her own grievance filed on June 13, 2012, regarding which the union is unable to count on any cooperation from the complainant" (translation). The Board finds that the action taken by the union shows that it placed itself in a position of conflict of interest in relation to Ms. Z by pursuing the interests of Mr. M to the detriment of the complainant, failing to take Ms. Z's interests into account and assigning the same persons who represented Mr. M to investigate Ms. Z's allegations, depriving the complainant of any guarantee of objectivity.

[90] The union ought to have known that, at arbitration, be it in regard to Ms. Z's grievance or that of Mr. M, it would have to defend the interests of both, which would have placed it in a difficult situation, if not one of outright conflict, especially given that the member accused of serious wrongdoing held the status of shop steward. Under the circumstances, it was necessary for the union to act with greater caution to guarantee the objectivity of its investigation.

[91] According to a letter it sent the complainant on November 19, 2013, the union would now like to appoint counsel to handle the complainant's grievance case and also to assign

Mr. Bernard to lend assistance. This latter person is the same person who was informed on May 23, 2012, that the alleged victim was Ms. Z and who was involved in Mr. M's case. Even though the union has taken steps to separate the two cases, assigning Mr. Bernard as the complainant's union representative shows that the union is still not guaranteeing the objectivity of the process.

[92] In light of the evidence before it, the Board considers that the union placed itself in a position of conflict of interest with regard to Ms. Z, in the face of a situation that required caution and thoughtfulness. The dispute in question not only pitted two members of a same unit against one another, but also pitted one member against another who was also a shop steward.

[93] The union's actions both before and after the complainant filed her grievance lead the Board to conclude that the union acted arbitrarily in this case and thus violated section 37 of the *Code*.

[94] As indicated previously, the union would like to assign counsel to handle the complainant's grievance case. While the Board does not doubt the skill and integrity of counsel proposed by the union to defend Ms. Z's rights, it nonetheless considers that, under the circumstances in this matter, the complainant should be represented at arbitration by counsel of her own choosing.

[95] Consequently, the Board allows the complaint and grants the complainant's request that she be represented at the arbitration of her grievance by counsel of her own choosing, at the union's expense.

[96] The Board does not consider it appropriate to order the union to reimburse the complainant for the legal fees incurred in relation to this matter.

[97] This is a decision of the majority of the Board.

Dissenting Opinion of Mr. Daniel Charbonneau, Member

[98] I have carefully read the reasons for decision of the majority in this matter. With due respect to my colleagues, I would not have allowed the complaint.

[99] Indeed, I cannot concur with the finding of the majority that the action taken by the union both before and after the complainant filed her grievance was arbitrary, discriminatory or in bad faith.

[100] Ms. Z, a victim of harassment between 2009 and 2012, alleges that the union breached its duty of fair representation.

[101] Ms. Z complained to her employer on several occasions between the start of 2010 and the month of May 2012. In August 2010, she sent Mr. M a formal demand, a copy of which was given to the employer, but not the union. The RCI's management even met with Mr. M twice in 2011, but the union was not informed.

[102] Despite the fact that, as Ms. Z admitted, nothing ever came of the complaints made to the RCI's management, the complainant never tried to approach the union, mistakenly believing that the union was aware of the situation.

[103] It was not until about mid-May 2012 that things started to change for Ms. Z. She videotaped Mr. M's actions and gave a copy of the tape to the employer. The union was never given access to the video evidence.

[104] On May 15, 2012, the union was informed by the employer that a notice of investigation had been sent to Mr. M. The latter had also been told not to report to work.

[105] The same day, the RCI's management asked Ms. Z to complete and return a form titled "Violent Incident Report." The union was not informed of the employer's action or given a copy of the form, at least not at that point in time.

[106] On May 18, 2012, Mr. M was summoned to a disciplinary meeting, scheduled for May 23, 2012. Once it was advised of the meeting, the union asked Mr. Valencia, a shop steward, to attend.

[107] On May 28, 2012, Mr. M was given his letter of dismissal in the presence of Mr. Valencia. A copy of the letter was sent to the union. The union referred Mr. M's case file to the legal department.

[108] In his oral evidence, Mr. Levasseur, the union president, recognized that it was on or around May 23, 2012, that he had learned that Ms. Z was Mr. M's alleged victim, but indicated that, at the time that Mr. M had been dismissed, the union had had little information and had needed time to conduct its investigation.

[109] On June 13, 2012, Ms. Z filed a grievance that she had prepared and drafted with the help of her spouse. In her oral evidence, she indicated that she had wanted Mr. Valencia to help her file the grievance, because she did not trust Mr. Gwiazda, the other shop steward for the RCI, given that he was too close to Mr. M. However, Mr. Gwiazda had ended up being the one to help her to file the grievance with the employer, since Mr. Valencia had been busy.

[110] It has been established that Ms. Z had no contact with the union prior to June 13, 2012, and did not ask the union to file a grievance on her behalf. In fact, the only union official who had been in touch with Ms. Z was Mr. Valencia, and she had never asked him to file a grievance.

[111] The union has been criticized for failing to contact Ms. Z between May 23, when it learned that she was Mr. M's alleged victim, and June 13, 2012, when the complainant filed her grievance. However, it is necessary to bear in mind that the union was not provided with any information by the complainant or the employer. It was therefore difficult for it to intervene. Further, there was no indication prior to her filing the grievance on June 13, 2012, that she wanted to take action against the employer. Mr. Levasseur was clear in his oral evidence: the first time he had been informed that Ms. Z wanted to file a grievance was when the grievance had actually been filed, on June 13, 2012.

[112] There is nothing in the file to show that the union refused to file a grievance on the complainant's behalf; she filed it herself. Nor did the union refuse to send Ms. Z's grievance to arbitration.

[113] In *Griffiths*, 2002 CIRB 208, the Board stated the following regarding the duty of employees when they wish to contest the employer's actions:

> [37] The onus under a section 37 complaint rests with the complainant to present evidence that is sufficient to raise a presumption that the union has failed to meet its duty of fair representation unless rebutted. In order to satisfy that onus, it is imperative that the complainant show, to the satisfaction of the Board, that the union was aware of the situation giving rise to the complainant's concerns and that the union's subsequent actions taken on behalf of the complainant, in the absence of any evidence to the contrary, were in some way arbitrary, discriminatory or taken in bad faith. Moreover, as held by the Board's predecessor, the Canada Labour Relations Board (the CLRB), in *Craig Harder* (1984), 56 di 183; and 84 CLLC 16,043 (CLRB no. 472), **there is not an obligation on the part of the union to seek out or solicit grievances from its members. The obligation to contest the employer's action rests squarely with the employee. It is, therefore, also the employee's obligation to ensure the union is aware of the circumstances.**
>
> (emphasis added)

[114] In *McRaeJackson*, 2004 CIRB 290, the Board summarized what employees must do to protect their own interests and commented on the consequences of their being neglectful:

> [15] The union's duty of fair representation is predicated on the requirement that employees take the necessary steps to protect their own interests. Employees must make the union aware of potential grievances and ask the union to act on their behalf within the time limits provided in the collective agreement. They must cooperate with their union throughout the grievance procedure, for example by providing the union with the information necessary to investigate a grievance, by attending any medical examinations or other assessments.
>
> [16] Employees must follow the union's advice as to how to conduct themselves while the grievance process is underway. Employees must attempt to minimize their losses, for example by seeking new employment if they have been dismissed, or attending retraining if this will increase their chances of re-employment.
>
> [17] **If an employee is neglectful in any of these regards, a claim before the Board will likely be unsuccessful (see *Jacques Lecavalier* (1983), 54 di 100 (CLRB no. 443).**
>
> (emphasis added)

[115] Participation is therefore a determining factor for the Board when considering the union's conduct. Complainants have a duty to inform the union of potential grievances and ask it to act within the time limits provided for in the collective agreement. The union's conduct is then

considered from the time the grievance is filed. Failure to cooperate with the union generally results in dismissal of the complaint.

[116] When Ms. Z filed her grievance on June 13, 2012, the union maintained that it contacted Mr. Garneau, the complainant's counsel, on June 15, 2012, to find out more information about the facts set out in the grievance. After some telephone conversations between the union and Mr. Garneau, the union was informed on June 22, 2012, that Ms. Z was away from work on sick leave.

[117] On June 27, 2012, Mr. Garneau wrote to the union and informed it that "[Ms. Z] will consequently not be taking part in an investigation by the union" and "[l]astly, given the grievance already filed against the employer, the union and Mr. [M], we fail to see on what basis our client should be compelled to disclose her evidence at this stage." (translation)

[118] On July 3, 2012, the union assigned Mr. Martin to handle Ms. Z's case.

[119] In his letter of August 22, 2012, Mr. Levasseur advised Ms. Z of the following:

> in view of your outright refusal to cooperate in an investigation concerning the allegations set out in the grievance you filed without consulting us, the union is unable to fulfill its duty of union representation as it cannot get the facts that gave rise to the grievance. Consequently, your grievance will not be referred to arbitration as long as the preliminary steps have not been satisfied.
>
> (translation)

[120] Ms. Z's position at that point in time was unequivocal. She did not want any meetings or any mediation; all she wanted was for the union to send the grievance to arbitration.

[121] Relations between the complainant and the union became very difficult if not irreconcilable. The filing of the grievance against Mr. M's dismissal on August 30, 2012, did not help matters.

[122] It should be borne in mind that, in regard to the duty of fair representation, the union has a duty toward all of its members to apply the general principles established by the Supreme Court of Canada in *Gagnon*, *supra*, particularly where loss of employment in involved.

[123] In *Eamor* (1996), 101 di 76; 39 CLRBR (2d) 14; and 96 CLLC 220-039 (CLRB no. 1162), the Board stated the following:

> In circumstances which involve dismissal or a matter which could have severe adverse consequences on an employee's job, a higher degree of diligence is required of the trade union. In such circumstances, the Board more carefully scrutinizes the union's representational conduct, and will apply its standards more stringently, to ensure that the duty of fair representation is met.
>
> "Where the grievance involves a dismissal, the union's obligation to represent the employee will be of a much higher standard. In such cases, the decision not to process the grievance must be based on a careful and informed study of, and conscientious attention to, the substance of the case; …
>
> (*Malcom Horton* (1993), 92 di 40 (CLRB no. 1015); page 44; see also *David Coull* (1992), 89 di 64; and 17 CLRBR (2d) 301 (CLRB no. 957); *Brenda Haley* (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304); *André Cloutier* (1981), 40 di 222; [1981] 2 Can LRBR 335; and 81 CLLC 16,108 (CLRB no. 319); *André Gagnon* (1986), 63 di 194 (CLRB no. 547); *Jerry Sabo* (1994), 94 di 24 (CLRB no. 1060), at page 27; and *Jacques Lecavalier* (1983), 54 di 100 (CLRB no. 443), at pages 124-125).)"
>
> (pages 94; 34 and 143,376)

[124] It is important to remember that the union has carriage of grievances and representation mandates. On November 19, 2013, the union referred Ms. Z's grievance to arbitration after obtaining the employer's permission to bypass referral to the grievance committee, a mandatory step under the collective agreement. It also found outside counsel independent of the union to represent Ms. Z's interests.

[125] In my view, the union was right to claim that it did nothing wrong. It never refused to file a grievance or to proceed to arbitration. It attempted to obtain the facts and investigate the matter several times, but the complainant, the employer and even Mr. M. refused to cooperate.

[126] The way in which the union proceeds is always the same. A case file is opened once a grievance has been filed. In this matter, there was no contact with Ms. Z prior to June 13, 2012, and Ms. Z failed to cooperate with the union after June 13.

[127] The union's conduct was therefore beyond reproach. It was never given the opportunity to get the facts and learn about the circumstances of the matter despite its repeated requests in that regard only.

[128] Further, there is nothing to show that the union is unable to properly defend the complainant. Indeed, independent counsel was retained to represent Ms. Z interests, and only her interests.

[129] For a violation of section 37 of the *Code* to occur, a union must act in a manner that is arbitrary, discriminatory or in bad faith. The union absolutely did not do so in this case.

[130] For all of the foregoing reasons, I would not allow the complaint and, consequently, would not grant the complainant's request that she be represented by counsel of her own choosing.