Article: III **Tab No.:** 3

Subject: MANAGEMENT RIGHTS **Page 1 of 13**

Text:

ARTICLE III – MANAGEMENT

Section 1:

The Management of the operation and the direction and promotion of the Employees are vested exclusively in the management, provided however that this will not be used for the purpose of discrimination against the employees.

Guidelines:

ARTICLE III – MANAGEMENT

Section 1:
This section spells out the right of management to make appropriate decisions and apply direction of the workforce in order to operate the business in an efficient manner.

In the application of management rights, close attention must be paid to ensure obligations under the terms of the Collective Agreement are met, along with applicable legislative and other general legal requirements.

A common Canadian Labour Arbitration reference, ***Brown & Beatty***, provides further context for the explanation of Section 1 with a general overview of management rights:

> "… Traditionally, it was said that management is free to do as it sees fit subject to any express terms providing otherwise, and subject to any estoppel which may arise, and so long as it acts in good faith and in a manner which does not jeopardize the integrity of the bargaining unit."

An example from the CONIFER membership to illustrate this principle is contained in the case of Dunkley Lumber Ltd. and USW, Local 1-424 as circulated under Arbitration Circular 01-04. This decision supported management's right to supervise and direct the workforce and manage job assignment issues. (*See Case Reference #1*)

In exercising management rights, employers are reminded of their obligations outlined under Article I (Tab 1), Bargaining Agency.

Employers should be mindful that arbitrators have been granted legal latitude to interpret and apply employment legislation in arbitration decisions. Statutes that are most applicable in the employment relationship include:

- Employment Standards Act
- Human Rights Code
- Labour Relations Code
- Workers' Compensation Act (& Occupational Health and Safety Regulation)
- Privacy Legislation

- **Employment Standards Act**
  This Act sets the minimum standards for wages and conditions of employment in BC. The following excerpt from the Employment Standards Act "Part I, Introductory Provisions, Section 3, Scope of This Act, outlines the interrelationship between the Act and where a collective agreement exits. Upon return to government in 2017, the NDP amended the Act to re-introduce what is referred to as the "meet or exceed" provision. Simplistically stated, the implication of the scope section means (with respect to certain contents of the Act) that if a collective agreement contains provisions, when considered altogether, "meet or exceed" the requirements of the Act, then the collective agreement provisions are deemed to replace the corresponding Part or section of the Act.

  Section 3, Scope of the Act is reproduced here for ease of reference.

3 Scope of this Act

(1) Subject to this section, this Act applies to all employees other than those excluded by regulation.

(2) If a collective agreement contains any provisions respecting a matter set out in column 1 of the following table, and the provisions, when considered together, meet or exceed the requirements, when considered together, of the Part or section of this Act specified opposite the matter in column 2 of the table, those provisions of the collective agreement replace the requirements of that Part or section of the Act in respect of employees covered by the collective agreement:

Column 1 Matter	***Column 2 Part or Section***
Special clothing	*Section 25 (1) or (2)*
Hours of work or overtime	*Part 4*
Statutory holidays	*Part 5*
Annual vacation or vacation pay	*Part 7*
Seniority retention, recall, termination of employment or layoff	*Section 63*

(2.1) Despite subsection (2), any provisions of a collective agreement respecting statutory holidays only replace the requirements of Part 5 of this Act as that Part applies to statutory holidays other than the National Day for Truth and Reconciliation.

(3) If a collective agreement contains no provisions respecting a matter set out in column 1 of the following table, or contains any provisions respecting a matter set out in column 1 that, when considered together, do not meet or exceed the requirements, when considered together, of the Part or section of this Act specified opposite the matter in column 2 of the table, that Part or section of the Act is deemed to be incorporated in the collective agreement as part of its terms:

Column 1 Matter	***Column 2 Part or Section***
Special clothing	*Section 25 (1) or (2)*
Hours of work or overtime	*Part 4, except section 37*
Statutory holidays	*Part 5*
Annual vacation or vacation pay	*Part 7*
Seniority retention, recall, termination of employment or layoff	*Section 63*

For any clarification on the applicability of the Employment Standards Act, contact the staff at CONIFER. In addition, information is available from the Ministry of Labour, Employment Standards Branch, in Prince George at (250) 612-4100 or toll free at 1-800-663-3316. A great deal of useful information can also be found on their website at: www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards

- **Human Rights Code**

Section 13 of the BC Human Rights Code prevents management from discriminating against employees in the application of management rights.

The Human Rights Code, Section 13, outlines discriminatory practices prohibited. Specifically, the Code prevents employers from discriminating against a person regarding employment or any term or condition of employment because of the Indigenous identity, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

Employers are advised to discuss any situation with Human Rights Code applicability with the staff at CONIFER and/or legal counsel.

A well-established principle in the employment relationship that stems primarily from the prohibition to discriminate on the grounds of physical or mental disability is the duty to accommodate. This duty is also applicable in other areas where discrimination is prohibited (i.e.: religion). This duty is applicable to both employers and unions. It is not an absolute obligation, but a requirement to try (up to the point of undue hardship) to accommodate people who face obstacles in employment because of disability, family status, religious belief, et cetera. The duty to accommodate is a complex issue whereby the employer must analyze each circumstance on a case-by-case basis. Please contact CONIFER if you require more information on this topic or encounter a situation that may require a duty to accommodate.

- **Labour Relations Code**

This legislation establishes the framework and prescribes the rules regarding unionization, collective bargaining, and formal labour relations processes.

COMMON ISSUES UNDER MANAGEMENT RIGHTS:

- **Work now, grieve later principle:**

This concept originates from a large volume of labour jurisprudence that requires an employee to comply with an employer's direction or instructions. In the event an employee questions the contractual validity of the employer's direction then they may subsequently grieve, after the fact. However, this work now, grieve later principle is not applicable in instances whereby an employee legitimately feels that their safety or the safety of another is at risk, or if they may be subject to some illegal conduct. Canadian Labour Arbitration reference ***Brown & Beatty*** clearly outlines the meaning of the principle:

> "Some men apparently think that, when a violation of contract seems clear, the employee may refuse to obey and thus resort to self-help rather than the grievance procedure. That is an erroneous point of

> view."… "an industrial plant is not a debating society. Its object is production. When a controversy arises, production cannot wait for the exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And some one must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision."

Employers are well advised not to abuse or to take advantage of this principle.

- **Requirement for presence of a shop steward**
  There is a common perception amongst employees that representatives of the company cannot request a meeting or initiate a discussion with an employee without a shop steward present, if requested. This is not necessarily the case.

  However, be advised that if the meeting is clearly for the investigative purposes in a discipline context or is for the purpose of conveying a disciplinary decision, then the right to request the presence of union representation exists. An amendment to Article XVI - General Provisions, Section 12: Disciplinary Action, was agreed to in negotiations giving rise to the 2018-2023 collective agreement. That content now states, "*For discipline investigative meetings, or where a verbal warning, written warning, suspension or termination is being issued, the employee shall have the option of requesting Union representation*". Refer to Tab 16 (Article XVI, Section 12) for a more thorough explanation.

  There are times when it makes good labour relations sense and improves communication to invite a shop steward to an interaction not related to disciplinary actions when it is appropriate to do so. In such a circumstance it should be stressed to the shop steward that they are an observer. It should be noted that individual company policies differ on this matter in terms of practice at the operation.

- **Work/Shift assignments**
  Employers should keep in mind their right, in the absence of some express agreement to the contrary, to assign employees (especially tradespeople) in a

fashion that maximizes efficiency of operation. In a coastal case a company switched the assignment of two heavy duty mechanics from their respective assignments in "woods" and "dry land sort/shop" areas. *(See Case Reference #2)*. The arbitrator ruled the company could do this, as its management right to assign people accordingly was not estopped due to a consistent past practice.

- **Employee Access to Employment Files**
  Under the *Personal Information Protection Act* ("PIPA"), employees have a right to access their own personal information that has been collected by the Company. This right is subject to several exceptions, which are set out in PIPA. Before providing an employee with access to records containing their personal information, the employer should review the records to determine whether any of their contents should be withheld pursuant to an exception. If an employer refuses to allow access, an employee has a right under PIPA to seek access through an application to the Office of the Information & Privacy Commissioner.

  For more information regarding access requirements and exemptions, please refer to the "Employee Access to Personal Information" memo available upon request.

Case References:

(1) DUNKLEY LUMBER LTD., AND USW, LOCAL 1-424
ARBITRATOR: JOHN MCCONCHIE, NOVEMBER 5, 2004
Click here to read this case reference

CONCLUSION: This case reinforces management's unfettered right to supervise, direct and assign work and duties to employees at management's discretion, providing there is not any restrictive language in the Collective Agreement or ancillary documentation or policy limiting these management rights and management's intent is not discriminatory or unlawful.

(2) MACMILLIAN BLOEDEL AND IWA 1-363
ARBITRATOR: JUDI KORBIN, AUGUST 6, 1993
Click here to read this case reference

CONCLUSION: Employer's right to assign tradespersons to a particular work area was maintained. There was no express agreement or entrenched past practice which precluded the employer from doing so.

TEXT:

ARTICLE III - MANAGEMENT

Section 2:

The Company shall have the right to select its employees and to discipline them or discharge them for proper cause.

Guidelines:

ARTICLE III – MANAGEMENT

Section 2:
The Company has the right to select (hire) employees, however, several considerations should not be overlooked when doing so:

- Article VIII, Section 7, Hiring Preference
- Human Rights Code
- Employment Standards Act

- **Article VIII, Section 7 (Hiring Preference)**
  The obligations of the company under this section are elaborated on under Tab 8 of this manual. In short, previous employees of an operation and other laid-off USW members must be afforded preferential consideration when hiring. The onus is on the individual to ensure their application is active on file to be considered on a preferential basis.

- **Human Rights Code**
  Obligations of employers regarding selection of employees is outlined under Section 13 of the code, and has been explained under Article III, Section 1 guidelines. Employers can not discriminate in the selection process on any of the prohibited grounds (i.e.: race, religion, age, et cetera.)

- **Employment Standards Act**
  An employer is prevented from making false representations and may not try to hire a person by misrepresenting what job is available, wages to be paid, type of work to be done, or other terms of employment.

The Company has the right to discipline employees or discharge them for proper cause. The ultimate test at arbitration of the decision to discipline or discharge stems from the principles established in the infamous William Scott case. The questions that arbitrators now routinely pose as a result are:

1. Has the grievor given just and reasonable cause for some form of discipline from their employer?
2. If the answer to question 1 is "yes", was the discipline imposed an excessive response in all the circumstances of the case?
3. If the answer to question 2 is "yes", what alternative measure should be substituted as just and equitable?

It should be thoroughly understood that disciplinary action is applicable to culpable behaviour. Culpable behaviour is defined as "behaviour that is within the control of the employee", or "blameworthy" conduct. Examples of culpable (blameworthy) behaviour that may warrant discipline include insubordination, lateness, sabotage, theft, and illegal work stoppage. Examples of non-culpable (non-blameworthy) behaviour include illness and illness/injury related absenteeism and failure to meet job requirements due to aptitude/capability. The strategy to correct undesirable non-culpable behaviour is distinctively different from that used to address or correct culpable behaviour. *(See Case Reference #1*) Problems typically arise when the employer uses one strategy to address both types of problems. (*See Case Reference* #2) A CONIFER member consent award clearly delineates the principles applicable for termination for non-culpable absenteeism. (*See Case Reference* #3)

In order to be well poised for success subject to the analytical questions that flow from the William Scott case (outlined above), companies should understand and consistently apply the doctrine of progressive discipline. Canadian arbitration reference, ***Brown & Beatty***, explains the need and logic for progressive discipline:

> "very simply, by progressively increasing the severity of the discipline imposed for persistent misconduct it is expected that the employee will be given some inducement and incentive to reform his/her conduct."

Administration of progressive disciplinary action should be presented to the employee in a corrective, rather than a punitive context. Inappropriate incidents of culpable behaviour do not need to be of the exact same nature to warrant an increase in severity of the corresponding corrective disciplinary action. Article XVI, Section 12 of the collective agreement allows the employee to request union representation for formal disciplinary procedures. Contact the staff at CONIFER if assistance is required in the administration of progressive discipline.

Although somewhat dated, an ideal case to illustrate the principles required to demonstrate "for proper cause" is that of BCFP Limited and IWA 1-367 (*See Case Reference #4*). In this discharge case the arbitrator states:

> "It is clear in this case that the Company, by use of progressive discipline, attempted to lead, guide, and educate the Grievor in respect of an acceptable standard of performance and behaviour in this workplace."

The case is a good example of appropriate application of progressive discipline, thorough documentation, and the doctrine of culminating incident. A more recent CONIFER member company case example that reinforces these principles can be found in (*Case Reference #5).*

Arbitrators are inclined to consider an employee's post disciplinary behaviour as a mitigating (or exacerbating) factor in assessing the "William Scott" Question #2: … "was the discipline imposed an excessive response in all of the circumstances of the case?" (*See Case Reference #6)* In this case, Arbitrator Sullivan states at page 11,

"Unfortunately for the grievor, the mitigating factors that support his case are greatly outweighed by the factors against his reinstatement.", and at page 17, "In my view the grievor's testimony under oath at these proceedings was a watershed moment in the case and it constituted the tipping point where it became clearly evident that the employment relationship could not be restored."

Case References:

(1) CIPA LUMBER COMPANY LTD. AND IWA 1-80
ARBITRATOR: JUDI KORBIN, FEBRUARY 16, 1994
Click here to read this case reference

- GRIEVANCE OF DAN BINGHAM
  Termination altered to conditional reinstatement. This case outlines criteria to be met in non-culpable (absenteeism) scenario.

(2) MILL AND TIMBER PRODUCTS LTD., IWA 1-3567
ARBITRATOR: STEPHEN KELLEHER, FEBRUARY 6, 1995
Click here to read this case reference

- GRIEVANCE OF BALBIR SIDHU
  Company addresses non-culpable absenteeism behaviour with culpable (i.e.: progressive discipline) strategy. Employee reinstated with full seniority, pay, and benefits.

(3) TOLKO QUESTWOOD DIVISION, USW LOCAL 1-424 (CONSENT AWARD)
ARBITRATOR: ROBERT BLASINA, MAY 4, 2005
Click here to read this case reference

- This award clearly delineates principles applicable in termination for non-culpable absenteeism.

(4) BRITISH COLUMBIA FOREST PRODUCTS LIMITED (HAMMOND DIVISION) AND IWA LOCAL 1-367
ARBITRATOR: CLIVE MCKEE
Click here to read this case reference

- GRIEVANCE OF PAT DEROSIA
  CONCLUSION: Termination upheld by arbitrator.

(5) WINTON GLOBAL INC., AND USW LOCAL 1-424.
ARBITRATOR: ROBERT BLASINA, MAY 19, 2005
Click here to read this case reference

- CONCLUSION: Termination upheld. Principles of progressive discipline, culpable versus non-culpable behavior, and culminating incident are explained.

(6) TOLKO INDUSTRIES (QUESTWOOD DIVISION), AND USW LOCAL 1-424.
ARBITRATOR: CHRISTOPHER SULLIVAN, NOVEMBER 24, 2014
Click here to read this case reference

- GRIEVANCE OF R. SHAVER
  CONCLUSION: Termination upheld by arbitrator.