

# Employment Disputes Liability

## Policy

Lumley, a business division of IAG New Zealand Limited, Lumley Centre, 88 Shortland Street, PO Box 2426, Auckland 1140, New Zealand  
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### Introduction

In consideration of payment of the premium and in reliance on the statements made in the Proposal (which is made a part of this Policy), Lumley and the Insured agree to abide by the limitations, conditions, provisions and other terms of the following contract of insurance.

All sections of the printed Policy wording and the Schedule must be read as if they are one and the same document.

Marginal notes and headings are only used to help you read this Policy and do not form part of this Policy.

### Section 1: Definitions

#### 1.1 Claim

'Claim' means any written or verbal communication (including notice of any proceedings, investigations or raised personal grievance) to the Insured which alleges a Wrongful Act.

#### 1.2 Costs and Expenses

'Costs and Expenses' means that part of Loss consisting of reasonable costs, charges, fees and expenses (including but not limited to lawyers' fees, investigators' fees and experts' fees) incurred in the defence or investigation of Claims and any amount required to be paid as security for costs. Costs and Expenses do not include charges for time spent by directors or employees of the Insured or reimbursement of any form of remuneration for such people.

#### 1.3 Employee

'Employee' means any person who is or was (or who alleges that but for the Wrongful Act would have been) an employee (as defined in the Employment Relations Act 2000) of the Insured. Employee does not mean: any person who is or was a director, principal or partner of the Insured or any person providing services for labour only under contract for services to the Insured.

#### 1.4 Insured

'Insured' means:

- (a) the person, persons, partnership, company, corporation or other entity specified as the Insured in the Schedule including their predecessors in business and subsidiaries; and
- (b) any person who is or becomes, during the Period of Insurance, a principal, partner, director or employee of the Insured; and
- (c) any former principal, partner, director or employee of the Insured; and
- (d) the estate, heirs, legal representatives or assigns of any Insured in the event of the death or incapacity of that Insured but only if such persons observe and are subject to the terms and conditions of this Policy.

#### 1.5 Interrelated Wrongful Acts

'Interrelated Wrongful Acts' means all Wrongful Acts that have a common nexus any fact, circumstance, situation, event, transaction, cause or series of related facts circumstances, situations, events, transactions or causes.

#### 1.6 Limit of Liability

'Limit of Liability' means the amount in the Schedule.

#### 1.7 Loss

'Loss' means any amount which the Insured becomes legally obligated to pay an Employee on account of any Claim made during the Period of Insurance period. Such Claim must be made against an Insured for Wrongful Acts for which cover applies, including, but not limited to, damages, judgments, settlements and Defence Costs. Loss does not include:

- (a) any amount for which the Insured is absolved from payment;
- (b) taxes, fines or penalties imposed by law;
- (c) the multiple portion of any multiplied damage award or punitive or exemplary damages;
- (d) any other amount which is uninsurable under the law of New Zealand;
- (e) any private mediator's or arbitrator's costs that may arise out of a contractual alternative dispute resolution provision.

#### 1.8 Lumley

Lumley means Lumley, a business division of IAG New Zealand Limited.

#### 1.9 Period of Insurance

'Period of Insurance' means the period shown in the Schedule, unless terminated earlier.

#### 1.10 Wrongful Act means:

'Wrongful Act' means actual or alleged conduct of the following kind against an Employee by the Insured, or by another Employee in the course of that other Employee's employment with the Insured:

- (a) unjustifiable disadvantage, unlawful discrimination, wrongful unjustifiable demotion, or unjustifiable failure or refusal to promote;
- (b) actual or constructive termination of an employment agreement, in breach of the law;
- (c) misrepresentation or defamation;
- (d) the infliction of emotional distress;
- (e) harassment (sexual or racial or otherwise);
- (f) failure or refusal to hire a potential employee;
- (g) invasion or breach of the right of privacy as provided in the Privacy Act 1993.

## Section 2: Insuring clause

In consideration of payment of the premium and subject to the terms, definitions, conditions, exclusions and Limits of Liability contained herein, Lumley will pay on behalf of the Insured all Loss arising from any Claim first made against the Insured during the Period of Insurance and notified to Lumley during the Period of Insurance by reason of any Wrongful Act committed subsequent to the Retroactive Date as shown in the Schedule.

## Section 3: Exclusions

Lumley will not be liable for Loss on account of any Claim:

#### 3.1 Bodily injury

arising from death or physical injury to the body, or any illness attributable to direct physical injury to the body;

#### 3.2 Defamation

arising from the publication of material known by the Insured to be false or misleading or defamatory. This exclusion will not apply to any Insured who did not know (or could not reasonably be expected to have known) that the material was false or misleading or defamatory;

#### 3.3 Deliberate act

arising out of the Insured deliberately committing a Wrongful Act;

#### 3.4 Employee entitlements

for payment to any Employee of any amount which the Insured was obligated (whether under any statute or any express or implied term of any employment agreement or otherwise) to pay prior to the Wrongful Act being committed;

#### 3.5 Employee remuneration

for the payment of any remuneration or benefit to any Employee who has been reinstated into their former position after a Wrongful Act;

#### 3.6 Fines and penalties

for the payment of fines or penalties (whether criminal, civil or pecuniary) imposed by law or for punitive or aggravated or exemplary or multiple damages or matters uninsurable under the laws of New Zealand;

#### 3.7 Industrial action

arising from Wrongful Acts committed during any lockout, strike, picket, stand-down or suspension, or other industrial dispute;

#### 3.8 Known Claims and circumstances

- (a) made against or intimated to the Insured prior to the commencement of the Period of Insurance;
- (b) notified under any previous Policy; or
- (c) arising out of or connected with any facts or circumstances which:
  - (i) the Insured was aware of prior to commencement of the Period of Insurance; and
  - (ii) a reasonable person in the position of the Insured would have considered may give rise to a claim against the Insured.
- (d) arising from any litigation or inquiry that was either in progress or pending prior to the Period of Insurance;

#### 3.9 Modifications to workplace

for the cost of physical modifications to the Insured's workplace, or the cost of changes to workplace procedures;

#### 3.10 Non-compliance

for non compliance with any judgment, award, determination or demand against the Insured issued or published by the Employment Relations Authority, Employment Court, Court of Appeal, Human Rights Commission, Complaints Review Tribunal, Privacy Commission, or Labour Inspector employed by the Department of Labour or any other statutory body;

### **3.11 Nuclear**

arising out of or connected with:

- (a) ionising radiation or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel; or
- (b) the radioactive, toxic, explosive or other hazardous properties of any explosive assembly or its nuclear components;

### **3.12 Property damage**

arising from or in consequence of loss of or damage to tangible or intangible property;

### **3.13 Redundancy compensation**

for failure by the Insured to pay adequate redundancy compensation or benefit to any Employee dismissed by reason of redundancy that the Employee was entitled to receive;

### **3.14 Retroactive date**

arising out of or connected with the Insured's activities carried out prior to the retroactive date, if any, specified in the Schedule, provided that nothing contained within this exclusion is interpreted as releasing the Insured from their obligation to disclose as a material fact all details of Claims made or outstanding or events likely to give rise to a Claim;

### **3.15 Statutory liability**

arising under any statute relating to workers compensation, accident compensation or occupational health and safety;

### **3.16 Territorial limits**

brought about by a Wrongful Act committed wholly outside New Zealand or to which the laws of New Zealand do not apply;

### **3.17 War**

Personal injury or property damage arising out of or connected with war, invasions, acts of foreign enemies, hostilities or warlike operations (whether war be declared or not), civil war, rebellion, revolution, insurrection, civil commotion assuming the proportions of or amounting to an uprising, military or usurped power, expropriation, confiscation, nationalisation, destruction or damage to property by or under the order of any government or public or local authority;

### **3.18 Terrorism**

or arising from or in any way related to death, injury, illness, loss, damage, liability, cost or expense of any nature directly or indirectly caused by, resulting from or in connection with, any act of terrorism regardless of any contributing cause or event.

For the purpose of this exclusion, terrorism means an act, including but not limited to the use or threat of force or violence, by any person or group of persons, whether acting alone or on behalf of or in connection with any organisation or government, which from its nature or context is committed for or in connection with political, religious, ideological, ethnic or similar purposes or reasons, including the intention to influence any government and/or to put the public or any section of the public in fear.

This Policy also excludes death, injury, illness, loss, damage, liability, cost or expense of any nature directly or indirectly caused by, resulting from, or in connection with, any action taken in controlling, preventing, suppressing or in any way relating to the above exclusions.

## **Section 4: Claims conditions**

### **4.1 Reporting of Claims**

Irrespective of the quantum, the Insured shall give to Lumley notice in writing as soon as practicable of:

- (a) any Claim made against them; or
- (b) the receipt of notice from, or information as to any intention by, any party to claim against them.

### **4.2 Notification of circumstances**

If, during the Period of Insurance, the Insured becomes aware of any circumstances that may give rise to a Claim and gives written notice to Lumley of such circumstances during the Period of Insurance, then any Claim subsequently arising from such circumstances is deemed to have been made during the Period of Insurance in which the circumstances were first reported to Lumley.

### **4.3 Defence and settlement of Claims**

The Insured shall not admit liability for or settle any Claim or incur any Costs or Expenses in connection therewith without the prior written consent of Lumley, such consent not to be unreasonably withheld.

Lumley is entitled at any time to conduct, in the name of the Insured, the investigation, defence or settlement of any Claim.

### **4.4 Legal counsel**

Lumley shall not require the Insured to defend any legal proceedings in respect of any Claim against the Insured, nor shall the Insured require Lumley to defend, on its behalf, any legal proceedings in respect of any such Claim unless a legal counsel (to be mutually agreed upon by the Insured and Lumley) shall advise that such proceedings should be defended.

In formulating such advice, counsel shall take into consideration the economics of the matter, having regard to the damages and costs that are likely to be recovered by the Employee, the likely costs of defence and the prospects of the Insured successfully defending the action. The cost of counsel's opinion shall be regarded as part of the Costs and Expenses of any Claim.

In the event that counsel advises that, having regard to all the circumstances, the matter should not be defended but should be settled,

provided that settlement can be achieved within certain limits that in counsel's opinion are reasonable, then the Insured shall co-operate with Lumley to effect such settlement in accordance with this Policy.

#### **4.5 Insured's right to contest Claims**

Provided always that if the Insured does not agree with a decision by Lumley to settle a Claim, the Insured can elect to contest the Claim at its own expense but the liability of Lumley will not exceed the amount for which the Claim could have been settled in the opinion of counsel appointed under Claims condition 4.4 (Legal counsel). Lumley shall pay all Costs and Expenses incurred up to the date the Insured notifies Lumley in writing of its election under this clause, and shall pay the Insured (subject to the excess) the amount for which the Claim could have been so settled. The Insured expressly agrees that Lumley's liability in respect of such Claim shall then be at an end.

If Lumley believes that the Claim will not exceed the excess, Lumley may instruct the Insured to conduct the investigation, defence and settlement at the Insured's expense. Should the Claim subsequently exceed the excess, Lumley agrees to reimburse the reasonable Costs and Expenses incurred by the Insured in excess of the excess, or pay on behalf of the Insured any additional Costs and Expenses, but not exceeding the Limit of Indemnity.

#### **4.6 Claims co-operation**

The Insured agrees to use its best endeavours to avoid or diminish a Claim and will provide at their own cost all information and assistance to Lumley as is required to determine liability under the Policy and investigate, defend and settle a Claim.

Upon receipt of notice from the Insured of any request for indemnity under this Policy, Lumley may take whatever action it considers appropriate to protect the Insured's position in respect of the Claim against the Insured, including appointing solicitors to represent the Insured. Such action by Lumley shall not be regarded in any way as prejudicing its position under the Policy and shall not be an admission of the Insured's entitlement to indemnity under the Policy.

Solicitors retained by Lumley to act on behalf of the Insured in relation to any Claim against the Insured shall at all times be at liberty to disclose to Lumley any information obtained in the course of so acting, whether from the Insured or howsoever. The Insured hereby waives all claims to legal professional privilege that it might otherwise have as between itself and Lumley in respect of such information.

#### **4.7 Other insurance**

Upon giving notice of any Claim, the Insured agrees to provide to Lumley written details of any other insurance that may cover or partially cover that Claim. In the event that the Insured holds other insurance cover with another insurer in respect of any Claim then the indemnity under this Policy shall not be available until the limit of indemnity under any other policy has been exhausted.

#### **4.8 Subrogation**

Lumley is entitled to all of the Insured's rights of recovery (before a Claim has been paid and whether or not the Insured has been fully compensated for their actual loss) and the Insured will do everything necessary to secure and preserve such rights. This will include but not be limited to the execution of documents necessary to allow Lumley to take any legal action in the name of the Insured. However, Lumley shall not exercise any subrogated rights of recovery against any Employee of the Insured unless the Claim has been brought about or contributed to by the dishonest, fraudulent, criminal or malicious act or omission of the Employee. In the event that a recovery is made, the amount recovered shall be applied first to the costs of effecting the recovery, then the balance shall be paid to Lumley and the Insured pro rata in proportion to the insured and the uninsured losses (excluding the excess) of Lumley and the Insured respectively. Any balance shall be paid to the Insured in respect of its excess.

#### **4.9 Payment of sum insured**

Lumley may at any time pay the Limit of Indemnity applying to any one Claim or series of Claims (after deduction of sums already paid) or any lesser amount for which such Claims can be settled and shall then be under no further liability in connection with such Claims except for its proportion of Costs and Expenses incurred prior to the date of payment.

## **Section 5: General conditions**

#### **5.1 Limit of liability**

The total liability of Lumley under this Policy shall not exceed the Limit of Indemnity for any one Claim, including Costs and Expenses. Lumley's aggregate liability in respect of all Claims, including all Costs and Expenses, shall not exceed the Limit of Indemnity.

#### **5.2 Excess**

In respect of each and every Claim the amount of the excess specified in the Schedule must be paid by the Insured. The excess applies to the Costs and Expenses.

The excess does not apply to any Costs and Expenses incurred by Lumley to determine indemnity under the Policy.

All Claims brought by the same Employee arising out of Interrelated Wrongful Acts shall be deemed to be one Claim, and only one excess shall be payable.

Claims brought by more than one Employee arising out of Interrelated Wrongful Acts shall be deemed to be separate Claims, and a separate excess is payable in respect of each Employee's Claim.

#### **5.3 Alteration to risk**

The Insured must give notice in writing to Lumley as soon as practicable of any material change to the risk. A material change to the risk includes without limitation activities that are materially different from those declared in the Proposal.

#### **5.4 Reasonable precautions**

The Insured shall take all reasonable precautions to comply with and ensure that the Insured's principals, partners, directors or employees comply with all statutory obligations. It is expressly agreed that the Insured will not undertake any disciplinary investigation nor terminate any Employee's employment for any reason without first seeking legal advice from a qualified employment law practitioner or recognised professional body.

#### **5.5 Fraudulent Claims**

If the Insured or any person who is entitled to indemnity under this Policy makes any application for indemnity under this Policy, knowing that such application for indemnity is false or fraudulent, this Policy shall be void ab initio.

#### **5.6 Cancellation**

(a) Method of cancellation:

- (i) The Insured may cancel this Policy at any time by notifying Lumley in writing.
- (ii) Lumley may cancel this Policy at any time by giving 30 days' notice in writing to the Insured of the date from which cancellation is to take effect. Such notification is to be delivered personally or posted by registered mail to the Insured at the address last notified to Lumley. Proof of mailing is sufficient proof of notification.

(b) Adjustment of premium:

- (i) After cancellation by the Insured, Lumley will retain or be entitled to the premium for the period during which this Policy has been in force based on Lumley's cancellation rates.
- (ii) After cancellation by Lumley, the Insured is entitled to a pro-rata refund of the premium.

#### **5.7 GST**

Where the Insured is liable to pay tax under section 5 (13) of the Goods and Services Tax Act 1985 (or any statutory amendment or re-enactment of the section or Act) upon receiving any indemnity payment under this Policy, Lumley will indemnify the Insured for the costs of that tax. The indemnity under this clause is payable by Lumley in addition to the Limit of Indemnity.

#### **5.8 Policy disputes**

This Policy shall be governed by the laws of New Zealand whose courts shall have exclusive jurisdiction in any dispute arising herein.

#### **5.9 Insured's warranty**

It is agreed between the Insured and Lumley that the written Proposal provided by the Insured forms the basis of this Policy and shall be considered as incorporated in and constituting part of this Policy. The Insured warrants the truth of all statements made therein.

#### **5.10 Notice**

All notices, including notification of Claims, shall be sent to Lumley in writing at the address or to the facsimile number stated on this Policy.

#### **5.11 Interpretation of words**

Words referring to persons shall include companies and other legal entities. The singular includes references to the plural and vice versa and any gender includes reference to all other genders.

#### **5.12 Breach of conditions**

Where the Insured's breach of any condition of this Policy has resulted in prejudice to the handling and/or settlement of any Claim, which in all other respects qualifies to be indemnified under this Policy, the indemnity afforded by this Policy in respect of such Claim shall be reduced to such sum as would have been payable by Lumley in the absence of such prejudice.