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EMPLOYER HIDING BEHIND A TRUST CURTAIN? - THIS DOES NOT ABSOLVE THEM OF THEIR OBLIGATIONS

There are various reasons for setting up a Trust including, to manage and protect assets or to protect yourself from the risks associated with owning a business.

A Trust can operate a normal business and can operate an employee and employer relationship. However, this relationship becomes murky when the Trust is the employer.

For example, Henry (the employer) entered into an employment contract with Geoff (the employee). In the employment agreement Henry failed to note his capacity as Trustee of the Trust or that his liability was limited to that capacity. A few years down the track the Trust's business was not doing so well and decided to dismiss Geoff without cause. As the Trust had no assets (so Henry thought) Henry expected to be protected personally through the Trust as at that stage the Trust had nothing.

The Employment Court found in favour of Geoff and held Henry personally liable for the costs awarded against the Trust. Henry had to mortgage his personal home to pay for these costs awarded against the Trust. In this case the Trust did not protect Henry against personal liability.

We sometimes think of a Trust as a corporate entity being afforded the protections as if they are one. This is a misguided thought.

In the case of *NZHB Holdings Limited v*

Bartells the legal position of a Trust was made even clearer where the court explained:

"A Trust is not a legal person recognised as distinct from the humans who direct their affairs".

What this means for an employment contract is the Trustee or Trustees are entering into the employment contract in their personal capacity and are therefore personally liable to the extent the law permits.

The Trustee or Trustees of a Trust will incur unlimited personal liability in relation to an employment agreement unless appropriate language is used in the agreement to limit that liability.

Simply stating that the employer signs the employment agreement in their capacity as Trustee is insufficient to exclude their personal liability. The easy way to avoid personal liability in this context is by having your lawyer look over the employment agreement.

Whether you are a Trustee of a Trust who employs someone or you are an employer needing advice please give our team a call we would be happy to assist and give you that peace of mind.

20 MINUTE FREE

WANT to review your Family Trust structure?
THEN call us and take advantage of our 20 Minute Free interview