

Unlocking Performance: How Psychological Safety Mitigates Legal Risks in Organizations with David Dilger

00:02.346-00:17.336 Announcer: You're listening to the HR Mixtape, your podcast with the perfect mix of practical advice, thought-provoking interviews, and stories that just hit different so that work doesn't have to feel, well, like work. Now, your host, Shari Simpson.

00:17.776-00:35.409 Shari Simpson: Joining me today is David Dilger, director and co-founder at Edge Legal. David leads an Australia-based employment and safety law firm, helping businesses navigate complex workplace challenges with practical legal solutions. David, thank you so much for jumping on the podcast with me.

00:36.229-00:37.070 David Dilger,: My pleasure, Shari

00:37.830-00:56.961 Shari Simpson: We are very blessed to have you, because you are calling in from Australia. It is very early where you're at, so I have lots of appreciation for your country. It is on my bucket list, as I was sharing a little bit offline, to see before the end of time for me. So I'm so glad that you were able to do this.

00:57.481-00:59.623 David Dilger,: Well, we would be glad to see you down under.

01:00.390-01:08.917 Shari Simpson: I love it. Let's start with you maybe sharing a little bit about your background. I think it's pretty fascinating, you know, kind of the marriage of legal and HR.

01:09.946-02:27.931 David Dilger,: Yeah, so I started off as a lawyer, but I always was fascinated with the HR, the employment and safety side. So I did my early time as a lawyer, then I went into an employer organisation where we just provided employment, legal assistance just to employers. Then I went into an HR role. worked my way up into a couple of those, moved into a CEO role, then came back into an HR role and then I I went into private practice again and then I was an equity partner of about a hundred employee type firm. And then one of my business partners and I decided to just create our own business. And our whole reason for being was we wanted to work with managers. to try and train them to be the types of managers we would like our kids to work for. And we said, so that's basically what EDGE does. We work predominantly with HR managers, general counsel in bigger organizations, and we got them through all the legal aspects of managing people.

02:29.043-03:02.444 Shari Simpson: I love that. And it's so needed. You know, every major HR publication this year has continued to put leadership development as one of the top priorities for 2025. So you're definitely in that sweet spot of the work that needs to be done. You know, I wanted to center our conversation around psychological safety, but from a little bit of a different perspective than I've talked about it before on the podcast. So let's start with this. What are some of the legal risks that start to rise when employees feel unsafe to speak up or share their concerns at work?

03:03.564-04:10.080 David Dilger,: So your main legal risks of this, you get workers' compensation is a big one, adverse action, anti-discrimination. You've got your work health and safety laws generally,

and that's probably the area, particularly in Australia, where most of the prosecutions come from. Breach of contract, unfair dismissal, privacy laws, and bullying. Throw all of that, and then you've got what you call your respective work changes, which are things like sexual harassment, sex-based harassment, victimization, sex discrimination, and hostile work environment. It's just a plethora of types of legal risks that you can just sort of intermingle, and so what we find is Managers get really worried about the broad types of claims that could be made against them without really realizing that the fix is with them and they can actually minimize their risk by just managing their people with a people-first approach.

04:11.431-04:55.969 Shari Simpson: I've seen this before when I've talked to managers about somebody who's having a performance problem. And they typically, in those conversations, have gone down a very stringent, authoritative route in their communications with those employees. And sometimes it leaves the employee feeling like, man, I can't be honest, I can't have a tough conversation, I can't ask questions necessarily. How have you helped managers find that sweet spot where they can still be a genuine human being, have genuine empathy, but also protect themselves, right? Because ultimately we don't want to put ourselves in a situation where we become too friendly, you know, and can't set the expectations that we need for our organizations.

04:56.650-09:19.699 David Dilger,: Yeah, good rule of thumb, be friendly, not friends. And Brene Brown said it best when she said clear is kind, unclear is unkind. So what we've found, I understand what managers say, right? They say all of the hyperbole around, you know, nasty boss got this, a nasty boss. The biggest sort of claim I tend to see in my job, and I do this full time, it's avoidance management that is your biggest risk. So it's managers not managing the problem. Don't worry so much about overstepping. your biggest risk is your avoidance. And so I have four main principles. I always go, try and characterize most of your behavioral issues as performance. What we tend to say is managers look for the silver bullet. And that is they try and go for a misconduct, which is a breach of your policies, a breach of the contract, breach of your enterprise agreement, all these breaches. And what that does is it says, I'm looking for an easy win to solve this problem. Whereas if you characterize most issues as behavioral and as performance, what you're saying as a manager is, hey, this is a slippage issue. You are here. I need to get you to here. And I'm the person that can get you there. Right. And so what we talk about is we're in it together. And we're going to solve this problem and it is solvable. Then the second principle is balancing what I call get on your seesaw of competency and care. And what that means is the law of itself actually takes that into consideration. So sometimes you may be dealing with exactly the same issue. Person does a safety breach, one of them is 25 years old, been there for three years, done all the training. The other one is a 65-year-old veteran, English as a second language, four dependent kids, and a very sick wife in hospital or something like that. Now the

issue there is when people come in and go, you've got to do everything exactly the same. Now the law says, no, you balance the competency and the care. For one of them, you're going to slip into your sort of your seesaw and go really heavy on that care side first. and actually look at that, whereas the other one, you're going, no, no, there are no other issues that I need to be aware of. You treat those two scenarios exactly the same, and you are lining yourself up for some type of action. And I sort of gave you the list of where it will come from. So that's the second one. The third one is always focus on reasonable management action in a reasonable manner. Now, again, Most people go, oh, too many legal words. No, it's not. It's judging the circumstances that you're in, and it's generally not what you do. It's how you do it. So you're absolutely allowed to call out behavior. You're absolutely allowed to call out poor performance. It's just that we just don't want the yelling, the shouting, the name-calling, and all that that goes with it. And then finally, when considering termination, always show cause people, and that is build it up into one good piece of documented, consolidated type of letter, and give that person the opportunity to respond. Nobody likes a surprise termination. Now, ultimately, you might think, oh, they deserve it. I'm not so worried about them. I'm worried about the message it sends to everyone else, that then what they tend to do is go, oh, I might be next. And a great guy out of Stanford Uni, Bob Sutton, says this, your team is watching you eight more times than you think they are, right? So when you're being nasty, when you're being obnoxiously aggressive, you are basically undermining you as a manager and people won't trust you in that circumstance.

09:20.964-10:14.762 Shari Simpson: Those are such good four points. I feel like we could spend a podcast on each one of them in-depthly. So I really was taking notes as you were talking. So hopefully our listeners are doing the same thing. How do you, how do you think managers end up at the spot where they are so adverse to that You know, I've run into this many times in coaching managers, and I'm sure those listening have run into the same scenario where you have a manager that comes to you and says, Hey, I'm having this performance concern. I need to terminate this person. And then you're like, Okay, well, tell me about the conversations you've had. Well, they're like, they should know what they need to do. Okay, show me the documentation. Well, I sent them an email six months ago that said they needed to do this, and they haven't done it since. There is such a fear of confrontation. Why do you think that's happening? And then as a follow-up, how do we get them over that?

10:15.836-15:12.362 David Dilger,: All right, so firstly, there's something biologically going on here, right? We all do it. In your brain, you've got a couple of great little things that are happening. You've got your frontal cortex does heaps of rational higher order thinking. You've got your thalamus, kind of like a trio centre, which takes in all the information from your senses. And then you've got this great little thing called the amygdala, right? And the amygdala is what got us here today. It got you here today, got everyone here.

It senses risk. Now, the problem with that is when your amygdala fires, it's not rational. It just senses danger. So when you're hearing all those stories about, oh, they might make a claim or people won't like me, that's your amygdala taking over. And when your amygdala takes over, it gives you four main responses, fight, flight, freeze, or form. So some managers come out fighting, okay, I'm going to take you on. I'm going to tell you your fortune. Some managers do the flight, and that's the avoidance. I run away. I hope it doesn't come back. I just don't talk about it. Some people go into freeze, which is the play dead mentality, and that is, we just won't even raise this issue and then other people fawn and fawning is I'm just going to be overly nice to you and that's what Scott in a great book Radical Candid talks about ruinous empathy right and so I'm just so nice to you because I'm scared you might make a claim. Now when all of that's happening your logical your prefrontal cortex isn't operating, so you're missing out on all of your EQ, your rational thinking, and really all you need to be doing is managing that person. Now, I've got a seven-point plan that I say every manager should know this. Once you know this, you could manage absolutely any employee, from neurodivergent to your A-grade student, to your long-termer, to your new starter, to any of those. That is, you have to know, when are you at your best? When do you shine? When are you in flow? What are you good at, right? And are you fulfilled by that? Because lots of people like a good at something, but it's actually not fulfilling. And that can be a problem. And the other one is reverse it. What actually fulfills you? And then are you good at it? Because there's plenty of people who go and I'll give you a good example. I love playing acoustic guitar and singing typically 90s Australiana. It fulfills me. My wife and kids would say I'm not that good at it. Right. I like it. Right. So then we've got to know what are the practices and preferences that works for us? Do you want me to email you? Do you want me just to come in? Do you want me to not give you the five o'clock Friday? Or do you want me to wait to the end of the day? Do you want me to send it all to you on email so you can have a look at it? Or do you just want to barge in and say, hey, Shari, we're going to talk like everyone will have that that position. Now with that, you're also dealing with someone who equally has an amygdala and when you come in and you get the wrong mechanics, the practices, the preferences, their amygdala fires and then you're going to get one of those responses. Then the fifth one is I want to know when you've been successful in a past relationship and how does that help? How are you a part of that? And then finally, tell me about a past relationship that didn't work, and what was your part in it? Because everyone can say, I had a terrible boss, but I want to know, well, what were you doing with that? Because there's got to be a bit of self-responsibility with that. And then the final one, which probably covers it all anyway, is, hey, if this thing breaks, how do we fix it? And so we work out in advance so that when we're having that fixing discussion, no one's going, how did we get here? What's this all about? We know this was coming. We've talked about it. And that will

calm your amygdala down, will allow you to get what Dan Siegel talks about of that optimal zone, where you're not over-regulated or under-regulated, and your prefrontal cortex, you're actually the smart person of yourself there. Your amygdala's not giving you the four responses. It's actually going, hey, David, work your way through this. Logically, we can deal with it without the amygdala firing off. 15:14.159-16:07.494 Shari Simpson: There was so much value there. I have heard that conversation around the different parts of your brain and how you're reacting and how the amygdala can influence you so much. And I think it's why there has been so much focus, especially in the HR space, about mindfulness practice and those types of things to help get you in the right mindset. But I love your seven step approach. I think that provides the landscape for managers to really think about how they're showing up. Let's say that you have gone through some of the training that you've done. You're using the seven step approach. You're bringing psychological safety to your organization. But you have an employee who you can tell is abusing that relationship. I'm kind of flipping the script there. How do we handle those employees? Because we are showing up in such a great way for them already.

16:08.697-19:59.816 David Dilger,: Yeah, look, the whole thing, and I'll give you a great, great, great quote from Bob Sutton again, who I just love. They asked him, hey, if you could just have one rule to manage your whole team, what would it be? And he said, no, it's false, right? And Bob Sutton did some great research and he said, here's what happens. You get used to that toxic employee, that toxic rock star. And he said, what will happen is you kind of get addicted to what they deliver, because they're probably hitting their KPIs, but guess what? their behaviour is completely non-aligned to what we're trying to do. And then what will happen is all of the performance will plateau and you'll never be able to reach higher performance from there. Then he says this, the organisations who took the courage to terminate that employee, and I'm saying you do it fairly, and it's built up with a long series of conversations and notes and stuff, and I'll come back to the notes in a minute, But then he said, you'll actually take a little dip. And he said, and in that situation, you as the manager is going to go, oh no, I've made a mistake. He said, but hey, stay the course, because he said the metadata shows that once you get over that, like the stock market, your performance will rise above its previous high. And you'll look back and go, you know what? thought of, you know, remove that toxic rock star earlier, here's all the performance I missed out on, because your team will level up and reach their true potential. So it's a hard one. But when you look at the data, you're going, that's what I need to do. Now, in that, I also say this, Don't over worry about beautifully written letters and people telling you, particularly big law firms are saying, oh, you've got to have all these things that you don't. I've spent a lot of time in courtrooms dealing with this. And what the commissioner or the judge really wants to see is authentic discussions going on. So things like notes in a daybook, a long email train, just where you're responding.

Write a note on a napkin and take a picture of it, right? Send yourself an email. They are the things that actually demonstrate, hey, I just didn't wake up one day and go, you had to go. This will be no surprise. And we talked about that earlier. That is, we've talked about your behavioural expectations. And I say, when you're working out whether you're going to keep someone or not, Ask yourself first, is this a skill or is this a real issue? Are they just deliberately doing it or are they just not up to where we need them to be? Ask yourself, am I maintaining the organizational standards? Because, hey, here's an inconvenient truth for you. You get the culture you deserve. So what I mean by that is the stuff that you let go on and on, might be the eye rolling, might be the tut-tutting in a meeting, that then escalates and it says, this is what I will accept, okay? Then what you get to is, can we move you, scaffold you, right? Are there any options that we can take your really good points and scaffold those weaknesses somewhere else? And if you can't, If you've looked at all of those, the only answer is termination.

20:00.177-20:17.649 Shari Simpson: And if you're doing it right, like you said, it shouldn't be a surprise to that employee by the time you get to that point. It should be a much, much easier conversation that's more about how do we help you transition out of the organization rather than this fight necessarily.

20:18.379-20:52.456 David Dilger,: Yeah, if you want. I mean, generally, if you do this well, there's a meeting of the minds that this just isn't working. And what it'll actually show the individual is they go, you know, the best way out, because everyone will default to their self-interest. The best way out of here is sort of that inglorious resignation where You know, I get to say, hey, I'm leaving. And you get to say, hey, thanks for your time, Shari. And, you know, let's have a morning tea. And everyone just sails off into their respective sunsets.

20:53.376-21:14.101 Shari Simpson: I love that. You know, as we wrap up our conversation, I'm curious what your advice is to HR professionals who want to start making this transition in their organizations to be having more honest and forthright conversations about psychological safety. Where do they start? What's the one nugget that they should walk away from this conversation to implement in their works?

21:14.901-23:00.411 David Dilger,: Okay, so the one nugget comes from Amy Cuddy in her fantastic book, Presence, right? And she basically is trying to work out, you know, why does good stuff happen? And she first thinks, is it all based on competence? Because she's going, theoretically, the smartest people, your top five in your class should go on and do this really well. She said, that's just not the case. Humans are a little bit different to that. And she said, the number one thing you have to have before people can utilize your competence is trust. And if they don't trust you, it doesn't matter how good you are, what your title is, what training you've done, none of it will work. And here's the ultimate elevator test, right? To work out when people go, well, how do we measure trust, David? Because I get it.

It's a nebulous concept. But I put it down to this. If I say, go into a room and I go, hey, Shari, come into my office right now. Now ask the rest of the team what they think. If they all go, ooh, Shari's in trouble. You haven't got trust. If they go, what's happened with Shari? And they go, she's just with her manager. I don't know what they're talking about. Probably, you know, could be anything from the latest stats, could be anything from, you know, the end of year function. That's the test. That's when people go, a manager and the employee can have conversations as it should be. And if you're not there, then it doesn't matter what type of competence or how smart you are, none of it will actually connect.

23:01.049-23:19.514 Shari Simpson: David, such good advice. Thank you for taking some time out of your early morning to sit down and chat with me about this really important topic. And if you want to get in touch with David, I'm going to put all of his details in the show notes, including email, website links, and all those goodies. So David, thank you so much.

23:19.874-23:25.352 David Dilger,: Thanks for having me. I hope you enjoyed today's episode.

23:25.672-23:33.358 Announcer: You can find show notes and links at thehrmixtape.com. Come back often and please subscribe, rate, and review.