



EMPLOYMENT TRIBUNALS (SCOTLAND)

PRACTICE DIRECTION IN CONNECTION WITH THE USE OF WITNESS STATEMENTS IN EMPLOYMENT TRIBUNAL CASES TO BE HEARD IN SCOTLAND

Introduction

1. Regulation 11 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 allows the President to make Practice Directions about the procedure of Employment Tribunals in the area for which the President is responsible.
2. This Practice Direction pertains to the procedure which will apply in connection with the use of witness statements (other than witness statements/expert reports produced by individuals whom the Employment Tribunal accepts as expert witnesses) in Employment Tribunal hearings which take place in Scotland. It applies to all hearings in which evidence is to be led by any party, scheduled to take place on or after 1 October 2022.
3. Nothing in this Practice Direction affects the powers and duties of Employment Tribunals under the provisions of the Employment Tribunal Rules of Procedure and in particular rules 2, 41, 43 and 44.
4. This Practice Direction should be read in conjunction with the Presidential Guidance issued in connection with the preparation and use of witness statements in Employment Tribunal proceedings in Scotland.

Definitions

5. (1) 'Regulations' means the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013;
- (2) 'Rules' means the Employment Tribunals Rules of Procedure (set out in Schedule 1 to the Regulations), and 'rule', followed by a number, means the rule bearing that number in the Rules;
- (3) 'tribunal' means an Employment Tribunal established in accordance with Regulation 4 of the Regulations and in relation to any proceedings means the tribunal responsible for the proceedings in question. Any reference to an Employment Tribunal or to a tribunal includes a reference to an Employment Judge alone, whether carrying out case management functions or hearing a particular case;
- (4) 'witness statement' means a document which purports to set out evidence of a witness in writing which would otherwise be

evidence given orally as that witness's evidence in chief at a hearing;

- (5) 'relevant party' means the party who submits (whether directly or through a representative) the witness statement as part of the evidence to be considered in that party's case';
- (6) 'professional representative' means a person falling within the definition of a legal representative under rule 74(2) or a lay representative, within the definition of rule 74(3) of the Rules (i.e. a person who is not a legal representative but who charges for representation in the proceedings), and includes any person who works under the direction of a legal or lay representative, as defined in rule 74, and who is the person with overall responsibility for the production of any witness statement and for ensuring that the witness understands the purpose of the witness statement, what it should and should not contain and proper practice in relation to its preparation;
- (7) 'agreed statement of facts' is a document in which both/several parties in a case set out in writing facts relevant to the dispute between them which are not in dispute and which would otherwise require to be the subject of oral or witness statement evidence;
- (8) An 'in person' hearing is a hearing which takes place with all the participants physically present in an Employment Tribunal hearing room;
- (9) A 'hybrid' hearing is a hearing which takes place where one or more of the participants is physically present in an Employment Tribunal hearing room and one or more of the participants joins the hearing by video link or telephone;
- (10) A 'remote' hearing is a hearing at which all the participants take part in the hearing by video or telephone link;
- (11) The 'participants' means the parties, representatives and witnesses;
- (12) 'evidence in chief' is evidence given by a party, or any witnesses called by that party, in support of that party's case and which is given before the party or their witnesses and is subject to cross examination/questioning by the opposing party or their representative;
- (13) 'file of documents' means the documents produced to the tribunal (referred to legally in Scotland as 'the productions'), either separately or jointly, in connection with the case;
- (14) 'overriding objective' means the overriding objective in rule 2;
- (15) 'taken as read' means a witness statement is accepted as evidence in chief without it having to be read aloud at the tribunal hearing;

- (16) 'the Presidential Guidance' means the Presidential Guidance in connection with the preparation and use of witness statements in Employment Tribunal proceedings in Scotland.

Presumption with regard to oral evidence in Scotland and orders in connection with use of witness statements

6. Where evidence in chief is to be given by a witness to an Employment Tribunal in Scotland there is a presumption that such evidence will be given orally, without the use of a witness statement.
7. Notwithstanding the provisions of paragraph 6 a tribunal may order, of its own motion or on application by a party or parties, that all or part of one or more witnesses' evidence in chief may be given by means of a witness statement but will only make such an order following consultation with the parties in the case.
8. Before reaching a decision that one or more witnesses will give their evidence in chief by means of a witness statement the tribunal must consider whether the interests of justice would be equally well or better served by an order that the parties should produce an agreed statement of facts, and if that is so then such an order should be made.
9. If an order is made under the provisions of paragraph 7 the tribunal will provide reasons, in writing, as to why it is in accordance with the interests of justice, bearing in mind the provisions of the overriding objective, and the presumption at paragraph 6 above, for one or more witnesses to be allowed to give evidence in chief (in whole or in part) by means of a witness statement.
10. If a party wishes to make an application that one or more witnesses should be allowed to give all or part of their evidence in chief by means of a witness statement they should:
 - (1) make that application to the tribunal as early in the proceedings as possible;
 - (2) explain why they consider it would be in accordance with the interests of justice for the application to be granted; and
 - (3) copy the application to all other parties in accordance with rule 92.
11. Irrespective of whether one or more witnesses will be giving all or part of their evidence in chief by means of a witness statement, and whether or not the hearing is in person, hybrid or remote, all witnesses (other than parties) will remain outside of the tribunal hearing room (actual or virtual) until they are called to give their evidence, unless, in exceptional circumstances, permission is given for a witness to be inside the room prior to giving their evidence.
12. In the event that a witness refuses to comply with an order that their evidence in chief is to be given by witness statement, the party who seeks to lead evidence from that witness should notify the tribunal, and all other parties, as soon as possible after the difficulty arises and make

any submissions they consider appropriate as to further procedure in the circumstances.

13. Unless the tribunal agrees otherwise every witness for whom a witness statement is submitted must attend the tribunal hearing so that they may (a) take the oath or affirm in connection with the truthfulness of their statement and (b) be subject to cross examination and questioning by the tribunal. In the event that a witness statement is submitted to the tribunal for a particular witness, but that witness does not attend the hearing, then that statement will normally be excluded from consideration, unless the tribunal agrees to do otherwise, having considered submissions from all parties.

Information about how the witness statement was taken

14. Each witness statement should describe in an introductory paragraph how it was taken (for example, by face to face interview between (a) the witness and representative or (b) the witness and the party who is calling the witness; by exchange of emails or other documents between the witness and the party/representative calling the witness to give evidence; by a written statement prepared entirely by the witness without involvement of any other person; in writing in response to specific questions; in writing from the party/representative to the witness etc).

Format of witness statements

15. Insofar as possible witness statements should be in a format which accords with paragraph 7 of the Presidential Guidance.

Format of files of documents when witness statements are being used

16. Unless an Employment Judge orders otherwise, each file of documents presented as part of a case in which witness statements are used will number each page in the file consecutively and contain an index of documents at the front of the file which describes each document and specifies the page numbers where the document is located. For example document 5 may be a copy of a letter of dismissal which is located at pages 15-17 in the file. The index should record the document number (5), describe it and give the pages where it can be found (15-17) in the file.

References to documents in witness statements

17. If a witness gives evidence in a witness statement which refers to a particular document, or if they looked at one or more documents at the time the witness statement was being prepared, then, subject to the rights arising from the doctrine of professional/legal privilege, the statement must:

- (1) if the document has been included in a file of documents presented as part of the case, identify that document by document number in the index (in the example above **doc. 5**), give the page numbers where the document can be found (in the example above, **pages 15-17**) and if reference is made to a specific page, state which page (for

example 'at page 16'). Any such reference should normally be in brackets at the relevant point and if typed, be in **bold** or, if handwritten, be underlined. (If the witness statement has been prepared and signed before the documents have been numbered then best efforts should be made to insert document reference numbers into the statement when they become known in the right-hand margin at the relevant points in the statement);

- (2) if the witness had not seen the document in question at the time of the events about which they are giving evidence, explain how and when they became aware of the document to which they now refer;
- (3) in the event the witness referred, or was referred, to any documents not produced to the tribunal in the file or files of documents, describe the documents in a list at the end of the witness statement and explain why they are not included in the relevant document file;
- (4) no documents or exhibits of any kind should be appended to a witness statement, other than a list which describes the documents to which reference is made in the witness statement, in accordance with paragraph 7(10) of the Presidential Guidance.

18. Documents falling within the scope of paragraph 17(3) must be available for inspection on request by the tribunal and other parties from the date witness statements are exchanged, or such other date as may be directed by an Employment Judge, although this requirement does not affect rights arising from the doctrine of professional/legal privilege.

What a witness statement should contain, its general style and preparation.

19. The purpose of a witness statement is to set out in writing the evidence in chief that a witness of fact would give, and would be allowed to give, if the witness had been called to give oral evidence at the hearing, without having provided the statement. It should not be used to comment upon the evidence it is thought another party or witness might give, the perceived weaknesses of a party's case, make generalised assertions designed to denigrate the other party/their witnesses, make submissions to the tribunal about the evidence it should or should not accept or refer to statutory or case law.

20. A witness statement should be as succinct as possible and contain only:

- (1) evidence as to matters of fact that need to be proved by the evidence of witnesses in relation to one or more issues of fact or mixed fact and law to be decided at the **hearing in question** by the tribunal. If the hearing is dealing only with a preliminary issue (for example, whether the claim is time barred) then the evidence in the witness statement should pertain only to that issue;
- (2) the evidence as to such matters that the witness would be asked by the relevant party to give, and the witness would be allowed to give, in evidence in chief, if they were called to give oral evidence at the hearing in question;

(3) evidence about matters of fact of which the witness has personal knowledge (which can include what they were told by another person) that are relevant to the issues to be determined at the hearing.

21. A witness statement should be drafted in the first person and be written using the witness's own words¹. If the witness statement will be prepared in a language other than English then specific directions will be given by an Employment Judge about how a translated version of the statement is to be produced, bearing in mind the importance of ensuring that the statement in English accurately reflects the evidence of the witness, without influence from any other party.

22. A witness statement should not deliberately mislead the tribunal whether by the omission of information or otherwise.

23. In so far as possible a witness statement should be prepared in accordance with the Presidential Guidance.

Exchange of witness statements and how they will be used in proceedings

24. If witness statements are to be used in a case where **both/all parties are represented** (whether professionally or by a person who is not charging for their services) then, unless the Employment Judge decides the interests of justice will be best served otherwise, and gives reasons for varying the following direction:

- (1) at the time the judge orders that statements will be used, the judge will also state in that order that witnesses for a party are not to see the witness statements of any other witnesses for the same party prior to giving their evidence to the tribunal;
- (2) the judge will issue ancillary orders setting out the procedure which is to apply to the exchange and use of witness statements, including in connection with (but not limited to) the following matters:
 - a. Whether witness statements are to be exchanged between the parties prior to them being lodged with the tribunal and, if so, when that is to occur;
 - b. Whether the witnesses for one party are to see the witness statements of the witnesses for the other party and, if so, the earliest point at which that is allowable. The default position is that no witness can see the statement of any witness for the other party until they have finalised and signed their own witness statement; any variation from that position must be specifically ordered by an Employment Judge;
 - c. Circumstances in which supplementary statements and additional oral evidence in chief may be given, bearing in mind the guidance given by the Employment Appeal Tribunal in the

¹ For further information about what this means refer to paragraph 11 of the Presidential Guidance.

case of *Mehta v Child Support Agency* [2011] I.R.L.R. 305, [2011] ICR D7²;

- d. Whether witness statements will be taken as read at the hearing, in accordance with the default position set out in rule 43 and the guidance given in the case of *Mehta*;
 - e. In the event that the hearing is to take place in public, subject to rules 50 and 94, the arrangements to be made in order that the evidence in the witness statements can be made known to members of the public (including members of the press) in a manner which ensures the hearing has taken place in public and in compliance with rule 44.
 - f. The timescale for the production of joint or individual files of documents and its interrelationship with the timescale fixed for the production and exchange of witness statements, bearing in mind what is said at paragraph 17 above regarding reference to documents in witness statements.
25. Where, exceptionally, a witness finalises a statement (other than a supplementary statement) after the exchange of statements of other witnesses, the relevant party should write a letter to the tribunal either (i) confirming that the witness has not seen or been informed of the evidence of others, or if they have (ii) specifying the statements which the witness has seen or been told about and the circumstances in which that occurred.
26. If one or more parties are representing themselves then the provisions of paragraph 24 above apply except for those in paragraph 24(1) and (2) b. which will be varied as needs be by a judge to accommodate the fact that an unrepresented party is likely to be both a witness in their own case and involved in the preparation and submission of the witness statements of any witness they will be calling in support of their case.
27. In the event that, following an exchange of witness statements, one party wishes to submit that a fundamental legal issue affecting the admissibility of any statement arises then they should notify the tribunal, and all other parties, of this in writing as soon as they become aware of the issue. Less important issues of admissibility will be dealt with in light of the Presidential Guidance.
28. In the event that, following an exchange of witness statements, a party considers that it may be in the interests of justice for one of their witnesses to give evidence about a matter which the witness has not covered in their witness statement, but about which they have direct knowledge and which is relevant to the issues to be determined at the hearing, an application can be made to the tribunal to allow that person to give such evidence orally at the hearing or by means of a supplementary statement.

² Guidance about the case of *Mehta*, and its practical implications, is provided in paragraphs 14-17 of the Presidential Guidance.

Confirmation to be included in witness statements and signed by the witness

29.A witness statement must contain the following confirmation and statement of truth from the witness which they must sign and date:

“I understand that the purpose of this witness statement is to set out matters of fact of which I have personal knowledge. This witness statement does set out only my personal knowledge and recollection, in my own words.

I have not been asked or encouraged by anyone to include in this statement anything that is not, to the best of my ability and recollection, my own account, in my own words, of events I witnessed or matters of which I have personal knowledge.

I understand that I can be cross examined on the contents of this statement and that, if the hearing is in public, my witness statement will be available for inspection by members of the public at the hearing, unless the tribunal orders otherwise.

I believe that the facts stated in this witness statement are true. I understand that at the Employment Tribunal hearing I will be required to swear or affirm, by taking the oath or affirmation, that the evidence I have given in this statement is the truth, the whole truth and nothing but the truth and that the law relating to perjury applies to Employment Tribunal proceedings.”

Confirmation to be included at end of witness statements when a professional representative has been involved in the preparation of the statement

30. When a witness statement has been prepared with the assistance of a professional representative, after the statement referred to at paragraph 29, a statement in the following terms, signed and dated by the representative, must be appended at the end of the witness statement:

“I hereby certify that:

1. I am the professional representative within the meaning of paragraph 5(6) the Practice Direction in connection with the use of witness statements in Employment Tribunal cases to be heard in Scotland.
2. I am satisfied that the purpose and proper content of witness statements, as set out in the Practice Direction, and the terms and effect of the witness confirmation required by paragraph 29, have been discussed with and explained to [name of witness].
3. I believe this witness statement complies with the provisions of the Practice Direction and that it has been prepared taking into account the Presidential Guidance in connection with the preparation and use of witness statements.”

Commencement

31. This Practice Direction has been approved by the Senior President of Tribunals and the Lord Chancellor under section 7A(2C) of the Employment Tribunals Act 1996. It applies to all hearings scheduled to take place on or after 1 October 2022.

Susan Walker

President of Employment Tribunals (Scotland)

3 August 2022