



EMPLOYMENT TRIBUNALS (SCOTLAND)

PRESIDENTIAL GUIDANCE IN CONNECTION WITH THE PREPARATION AND USE OF WITNESS STATEMENTS IN EMPLOYMENT TRIBUNAL PROCEEDINGS IN SCOTLAND

Introduction

1. Under Rule 7 of the Employment Tribunals Rules of Procedure a President may publish guidance as to matters of practice in the Employment Tribunals in the area for which the President is responsible.
2. This Guidance applies to cases which are being managed, prepared for hearing and heard by an Employment Tribunal in Scotland. It should be read in conjunction with the Practice Direction in connection with the use of witness statements in Employment Tribunal cases to be heard in Scotland.
3. Employment Judges and Employment Tribunals are expected to have regard to this Guidance but they are not bound by it.
4. This Guidance has been prepared to assist parties, when witness statements have been ordered to be used, to prepare and utilise such statements in accordance with good practice, and in a manner which best serves the interests of justice. However, it is important to acknowledge that witness statements are not routinely ordered in Employment Tribunal proceedings in Scotland. There are many good reasons why this is so, not least the reduction in the level of risk, when oral evidence is given, that witness evidence may be influenced directly or indirectly by the manner in which evidence is elicited; for example a tribunal may find it difficult to ascertain whether evidence in a witness statement has been elicited by a series of leading questions being asked whereas it will be able to intervene if leading questions are being used to elicit oral evidence in chief. Similarly, when witness statements are used there is a greater risk of witness collusion, through exchange of drafts between witnesses, before their evidence is finalised. While this Guidance is not an appropriate vehicle to rehearse the pros and cons of their use¹ nothing

¹ The research of Dr P Cooper and Dr M Mattison, set out in their report 'Witness Statements for the Employment Tribunal in England and Wales – What Are the Issues?' provides many helpful insights into why witness statements may not always contain evidence which comes close to being capable of being considered to be 'best evidence'.

<https://eprints.bbk.ac.uk/id/eprint/43778/1/31032021%20FINAL%20Cooper%20%26%20Mattison%20Witness%20Statements%20for%20the%20Employment%20Tribunal.pdf>

in this Guidance should be read as supporting a change in the well established Scottish legal practice of preferring oral evidence over written evidence in most circumstances.

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 of 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) the 'Practice Direction' means the Practice Direction in connection with the use of witness statements in Employment Tribunal cases to be heard in Scotland;
- 5) '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;
- 6) a 'leading question' means a question that expressly or by implication suggests a desired answer or puts words into the mouth, or information into the mind, of a witness.
- 7) '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 is subject to cross examination/questioning by the opposing party or their representative;
- 8) '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;
- 9) 'overriding objective' means the overriding objective set in rule 2.

- 10) '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 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.

Relevant factors when considering whether witness statements should be ordered

6. There are many factors which will be relevant to considering whether it is appropriate to order that witness statements should be used. They include, but are not limited to:
 - 1) Whether parties have expressed a preference one way or the other and, if so, the reasons given to support their views. There is a risk that ordering witness statements may present a practical and/or psychological hurdle in the Employment Tribunal process, which may be more difficult for some parties to surmount than others, for a range of reasons, and result in some parties (particularly unrepresented claimants) being deterred from proceeding further;
 - 2) Whether ordering the use of one or more witness statements will assist the tribunal in connection with its duty to make reasonable adjustments or accommodate the particular needs of one or more witnesses including witnesses for whom English is not a first language;
 - 3) Whether all parties are professionally represented - cross examination may play a particularly significant role when witness statements are used and a skilled legal representative is likely to find that task easier to perform than an unrepresented party, thereby giving the represented party an advantage;
 - 4) The capacity of parties to produce witness statements – some unrepresented parties may find it difficult to set out their own evidence in writing for a variety of reasons, let alone take witness statements from others in a manner which reflects good practice and serves the interests of justice;
 - 5) The practical resources available to parties including access to word processing and email facilities, supplies of paper (if hard copies are to be used) etc.;

- 6) Whether there are factors which suggest there is a risk of evidence being influenced, whether deliberately or otherwise, by the process of it being collected for inclusion in the witness statement;
- 7) The front loading of expense, which is routinely associated with the use of witness statements, and the impact of that on parties;
- 8) Whether the circumstances suggest that ordering witness statements is likely to impact on the ability of the tribunal to ensure, so far as practicable, that parties are on an equal footing, that the case is dealt with in a proportionate manner, that delay is avoided and/or expense is saved, all with a view to dealing with the case fairly and justly, in line with the overriding objective in rule 2;
- 9) The nature of the case, including (but not limited to):
 - The extent to which the facts are at issue – the use of witness statements may involve less risk to evidential quality where many of the key facts are not in dispute, although if that is so then, in accordance with the Practice Direction, consideration should be given to an agreed statement of facts being ordered;
 - The complexity of the case - witness statements may have a role to play where evidence is particularly complicated and covers events that have taken place over a long period of time;
 - Whether issues of credibility and reliability are to the fore and any difficulties, or advantages, arising in that context from evidence in chief being given in writing;
 - Whether there is a risk that evidence in chief being given in writing rather than orally will impact adversely on the ability of the tribunal to assess particular aspects of the case such as the extent of injury to feelings.

Format of witness statements to be used in Employment Tribunal proceedings in Scotland

7. Insofar as possible, taking into account the resources available to parties, witness statements for use in Employment Tribunal proceedings in Scotland should:
 - 1) Have each page numbered consecutively at the bottom of the page with the page containing the case number and name being page 1;
 - 2) Be divided into numbered paragraphs;
 - 3) Be double or 1.5 line spaced;

- 4) If on paper, be single sided on each page;
- 5) Be typed/word-processed and, if handwritten, must be legible;
- 6) Have a margin of at least 3 cm on the right hand side of each page so that document numbers can be added after the statement has been finalised, if need be;
- 7) Use bold headings to assist the tribunal, highlighting matters covered in particular sections (for example – **The disciplinary meeting in June 2022, The appeal hearing in September 2022**);
- 8) Normally refer to events in chronological order but may be structured otherwise (as long as the tribunal is given enough information to understand the approach that has been taken, and its underlying logic) where that accords with the manner in which the witness best recollects events;²
- 9) Ensure that the full form of any abbreviation used is given on first usage (for example ‘the Managing Director (MD) said on 5 May 2022 that he was not happy with the results delivered. Later that week the MD said that the results were entirely unacceptable and heads would have to roll.’);
- 10) Set out at the end of the statement a list of the documents referred to in the statement and provide basic information which describes them. (For example, ‘**Doc 15** is the respondent’s disciplinary policy which was in force at date of dismissal’; **Doc 22** is the dismissal letter sent to the claimant by the respondent on 15 June 2022).

Heading of witness statement

8. Each witness statement prepared for Employment Tribunal proceedings in Scotland should be headed with the case number and name at the top of the first page. On the right hand side of the first page it should specify the name of the witness, their occupation and connection to the party who has submitted the statement as part of their case (e.g. fellow employee of claimant, trade union representative of claimant, line manager of the claimant, Chief Executive of respondent etc), and the home or business address of the witness (unless the tribunal consents to the omission of address details because of information supplied by the party calling them which tends to show there is a good reason why address details should not be provided).

² The research referred to at footnote 1 provides a useful insight into the importance of taking into account how memory and recollection work in the context of gathering accurate evidence.

Evidence given by witness which requires to be translated into English

9. The tribunal should be informed, at the time parties are being consulted about whether one or more witness statements should be used, about any witness whose evidence, if given by witness statement, would require to be translated into English. This will enable appropriate directions to be given, bearing in mind the need to ensure that witness statements contain the evidence of the witness in their own words, uninfluenced by input from any other person.

The content and preparation of witness statements

10. Directions about the preparation, content and style of witness statements are given in the Practice Direction³ which should be followed by parties who are embarking on the process of producing a witness statement.
11. Representatives can assist witnesses by providing information about the structure, layout and scope of a witness statement and may take primary responsibility for drafting it. Where that happens, in addition to what is said in the Practice Direction, those involved in the preparation of witness statements should strive to ensure that:
 1. They do not ask leading questions when eliciting evidence and do everything possible to ensure that they do not put words into the mouth of the witness by any other means;
 2. If there is a need to ask questions to elicit relevant evidence they ask open questions designed to allow the witness to give detailed evidence in their own words. For example, an open question might be 'Tell me what happened when you walked into your office on 15 July 2022'. This allows the witness to give a detailed account in their own words of what happened without seeding their mind with ideas, thoughts or descriptions which are not their own. If the question instead was 'Is it correct that on 15 July 2022 your boss confronted you in your office?' this is a leading (and closed) question which calls only for the answer 'yes' or 'no' and which puts words into the witness's mouth since it describes what happened as a 'confrontation' even though the witness may not have viewed what happened in that way or used that word to describe what actually happened.
 3. They do everything possible to allow the witness to give their evidence without it being influenced by any other person or material (other than reference to relevant documents in accordance with the Practice Direction);
 4. If evidence is being given about what a witness thought or suspected at the time of the events to which reference is being made, it is made clear that this is the nature of what is being stated rather than giving the

³ See in particular paragraphs 19-23

impression it is a fact. For example, a witness statement may contain the words 'Jean became very annoyed'. However, there is a considerable difference between the situation where the witness was told by Jean at the time that she was very annoyed and the witness simply forming a view, based on their perception of Jean's demeanour, that she was very annoyed. A witness statement should be drafted in a way which explains the basis of what is being said in such circumstances. In this particular case it could say "Jean told me at the time she was very annoyed". If the assertion is based on speculation it could say "Jean became red in the face and started shouting. I formed the view from this that she was very annoyed.";

5. The witness statement for any final hearing, as defined in rule 57, contains any evidence which can relevantly be given about the issue of remedy, unless directed otherwise by a tribunal, bearing in mind that in Scotland the issue of remedy is routinely dealt with as part of a single final hearing rather than liability and remedy being considered at separate hearings;
 6. If reference is being made to particular parts of documents then the relevant pages (and paragraphs within those pages, where appropriate) that the witness is relying upon as part of their evidence are identified although it is not necessary, and indeed will often be counter-productive, to incorporate lengthy quotations from documents into the witness statement. For the avoidance of doubt, the ability of the tribunal to deal with a case in accordance with the overriding objective will be hampered where reference is made in general terms to significant numbers of pages of documents in connection with a particular assertion in the statement, for example (p.835-2,077);
12. A professional representative can consider a draft witness statement to ensure that the witness has covered the relevant matters about which it is thought that the witness can give evidence. Where there are matters which it is thought the witness might be able to address, a representative can properly ask the witness whether they can give evidence on those subjects. They can also seek to clarify ambiguous statements when the statement is in draft but must be careful not to interfere with the evidence in any way. Witnesses can be shown documents which they might have seen at the time of the events in question during statement preparation and asked for comments on them. Where the witness comments on documents they had not seen at the relevant time, the fact that the witness had not seen them then should be made clear in the statement and they should explain how and when they became aware of the documents in accordance with paragraph 17(2) of the Practice Direction.

Supplementing statements by oral evidence in chief and taking witness statements as read

13. Rule 43 states that any witness statement ordered by the Employment Tribunal is to stand as the witness's evidence in chief *unless the tribunal orders otherwise*.
14. There are a range of reasons why a tribunal might order that all or part of a witness statement is read out and why they may conclude that it is in accordance with the overriding objective for additional evidence in chief to be allowed orally at the hearing. What is appropriate will depend on the circumstances of the individual case and that is why it is important that tribunals considering this issue are flexible in their approach. Although it was formulated prior to the current Rules of Procedure coming into force in 2013, the guidance provided by the Employment Appeal Tribunal in the case of *Mehta v Child Support Agency* [2011] I.R.L.R. 305, [2011] ICR D7 about when it may be appropriate to allow all or part of a statement to be read out, and the circumstances in which additional evidence in chief, whether elicited through questioning or otherwise, may be allowed, is still pertinent and useful.
15. As the EAT makes clear in *Mehta*:
 - (1) It may be that allowing a party giving evidence in the case, particularly an unrepresented claimant, to read all or part of a witness statement aloud enables the party to feel they have had their say;
 - (2) It may be that when a statement is confused, inadequate or very technical, taking the witness through the statement, or parts of it, may allow it to be elucidated and/or, so far as proper, amplified;
 - (3) It may be that a fair hearing is facilitated by a witness being allowed to settle into giving evidence by being asked some friendly or at least neutral questions about their evidence in chief before being subject to cross examination (which may be more hostile and which the witness will almost certainly fear will be hostile).
16. Similarly, it may be entirely appropriate for a representative/party to elicit oral evidence in chief from one or more of their witnesses about matters which only emerged when the evidence of witnesses for the other party became clear, on exchange of witness statements, or when witness statements for the party they represent were finalised. Parties/representatives should ask the tribunal for permission to lead such evidence as early as possible.
17. As the EAT emphasises in *Mehta* deciding what course to take in any particular case must be a matter for the tribunal in the exercise of its case management powers, whether at a hearing or otherwise. Parties and representatives should assist the tribunal to exercise these powers in accordance with the overriding objective.

Admissibility and relevance of evidence

18. Paragraph 27 of the Practice Direction deals with the procedure to be followed when a party wishes to submit that a fundamental legal issue affecting the admissibility of evidence in a statement has arisen. It may well be the case, despite what is said in the Practice Direction and in this Guidance, that evidence may be given in a witness statement which the other party in the case considers to be irrelevant to the issues which the tribunal has to determine. While such concerns can be raised at the hearing, in the same way as objections on grounds of relevancy can be made when oral evidence is being given, it is important to bear in mind that Employment Judges and non-legal members hear irrelevant oral evidence regularly: they are trained to recognise such information and to leave it out of account when determining the issues in the case. The fact irrelevant evidence is contained in a written statement does not mean it will be treated any differently by the tribunal than irrelevant oral evidence. Any member of the public inspecting a witness statement, under the provisions of rule 44, should bear in mind that issues about admissibility and relevancy of evidence can arise at any point in the proceedings; the fact that a witness statement contains statements pertaining to particular matters does not mean that the tribunal has found or will find the information concerned to be legally admissible and relevant to the issues to be determined by the tribunal.

Whether the tribunal will read statements in advance, at the start of the hearing or as the hearing progresses

19. It is not practically possible to make listing arrangements which will always allow the tribunal to read statements in advance of a hearing. Where a reading day has been allocated to the tribunal, for the purpose of reading the statements in advance, reasonable efforts will be made to inform parties of the position but that may not occur until the first day of the hearing in question. When a reading day has not been allocated the tribunal will normally read the statement of a witness immediately before that witness is called. If the tribunal is going to adopt any other approach parties will be advised at the earliest opportunity although that may not be until the start of the hearing at which the statements are to be used.

Susan Walker

President of Employment Tribunals (Scotland)

3 August 2022