GUIDANCE ON THE WITNESS STATEMENTS IN THE EMPLOYMENT TRIBUNALS

This note gives you guidance on witness statements for Tribunal hearings in the Uk and The Republic of Ireland (the ROI) .

Jurisdictions

Although there is some cross over in tribunal procedure between all the jurisdictions there are some important differences.

Northern Ireland for example still has the statutory questionnaire procedure , there is no mandatory early conciliation procedure and the Fair Employment Tribunal , rather than their Industrial Tribunal , hears discrimination cases on the grounds of religious belief or political opinion. The principal employment qualifying employment rights arise after 1 year (like the ROI whereas it is 2 years now in the rest of the UK and since April 6th 2012). And cases are held in front of one legally qualified person (whereas in the rest of the UK that is true only for some cases (e.g. Unfair Dismissal) and all discrimination cases have a panel of three) .

Similar minor, but important ,differences apply in the case of witness statements. Scotland does not generally use witness statements (although see on) and Northern Ireland require a witness to prepare their own statement without the assistance of a legal or other representative . In The Republic of Ireland they do use witness statements which are read out and in England and Wales sometimes they are read out and sometimes they are not (the ET Judge or panel reading them privately).

In Scotland even if you don't need statements it is helpful to write a statement (called 'precognitions') to focus the mind of the witnesses, ensure limited cross over and a connected narrative. It assists in preparing questions for the witness to enable them to give their 'evidence in chief' at the hearing. It also allows a cross reference to the documents that the witness needs to mention.

For those interested in more information as to the jurisdiction led differences in employment tribunal law you may want to use this link https://www.legal-island.com/globalassets/pdf-documents/emp-law-comp-table-2017.pdf

Advice on Witness Statements

Most of this section is relevant to England and Wales and some of it to the other jurisdictions taking my comments above into account. To me the argument for well-prepared written statements is compelling.

Case Management Directions (CMDs)

CMDs (one type of preliminary hearing) spell out directions for the rest of the case. Including the dates for a full hearing . If an " open" Preliminary Hearing then they may first deal with e.g.

a strike out application where a case has no reasonable prospect of success for one reason or another (this used to be called a Pre hearing Review in " old money") .

One can expect the Employment Tribunal to also give orders that witness statements are to be prepared and exchanged (often simultaneously so there is no unfair advantage to either side as a result) . A party that does not comply may have their case struck out. This will mean that the case cannot proceed (in the case of a claimant) or that the case will proceed undefended (in the case of a respondent).

It is more usual these days for witness statements to be read by the ET panel along with key documents at the start of the case. The witness then gives an oath or affirms as to the truth of the evidence and the statement is taken into evidence " as read" . Bear in mind the ET panel /Judge hearing the case has usually not seen anything to do with it before the day of the hearing.

So what is my " compelling" argument for written statements?

There are five good reasons that occur to me as to why the Employment Tribunal prefers (and usually insists , other than in Scotland) that parties prepare and exchange statements:

- It is helpful (to all) to write down all that can be said about the facts. A pre prepared statement allows for that and makes a witness more comfortable, when giving evidence. And less likely to stumble because of a poor memory as to past events.

- It enables the ET to understand the case in the round (reading all witness statements together). Especially with cross references being made between witness evidence and pages in the (normally agreed and always paginated) bundle(s) of documents .

- Early (usually at least 7 days before the full hearing and often a month before) exchange of statements between the parties enables them to know what case they have to meet. The parties can see clearly just what the issues are going to be. It narrows the issues in a constructive way.

- Even if witnesses read their evidence (but especially if they are taken as " read") it speeds up the proceedings and ensures that the witness is less stressed for questions from the Tribunal and cross examination from the other side .

- Anything which helps to ensure that the case is completed in the time allowed is a good thing given the frustrations and prejudice usually caused by a case going part heard and finalized months later. And however careful the timetabling this is more likely if witness evidence is open ended.

What form should a statement take?

It is easier for everyone if the statement is typewritten or word-processed. A clear and legible handwritten statement is an acceptable but less desired alternative.

The statement should be broken into logical paragraphs, which should be numbered. Remember that at the hearing all the evidence will come out and there is nothing to gain (and much to lose) by keeping it secret until then.

In addition the CMD will normally indicate that further examination in chief (in other words expanding on the evidence by oral questions on the day) is only allowed at the discretion of the Judge. So the written statements should be as comprehensive as possible.

When completed, it should be signed dated and a copy provided to the other party. Four unmarked copies need to be taken to the hearing (one for the witness table and three for the Tribunal).

How should a statement be set out?

The statement should set out in logical order the witness's story of his or her involvement in the matter. That is usually the order in which events happened (the chronological order). Sub headings are fine and often helpful.

The statement should cover all the issues in the case and set out fully what the witness has to tell the Tribunal. The Claimant and Respondent will wish to have one eye to relevance and the pleadings i.e. the claim and defence.

When the witness has prepared the first draft of his or her statement, it may be a good idea to ask a friend to ask questions on it. This may show gaps in the statement which need to be filled in order to make it clearer.

And if a lawyer has prepared it upon instruction the witness should ensure not only its accuracy but they agree with and understand every word and line and paragraph. Untrue or inaccurate or unclear statements (even in part) lead more naturally to a finding that the witness testimony is unreliable.

As mentioned above (but worth iteration) the statement should be as full as possible because, unless there are exceptional circumstances, the Tribunal might not allow the witness to add to it, unless the additional evidence is obviously relevant.

When you have received the other party's statements you may realise that your statement(s) has (have) left out something relevant. In that case, it is usually acceptable to make a supplementary statement and send it immediately to the other party. But if so be ready for questioning as to why this was necessary.

Minor mistakes/typos can be changed and with a margin initial if time does not allow written amendments . Last minute ones should be explained on the day and to the Tribunal and other side.

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