Witness Statements for the Employment Tribunal in England and Wales: What Are The Issues?

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Report Contents

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Executive Summary

There is limited guidance and empirical research with regard to the best ways to prepare witness statements in the civil justice system. This project explored the pre-existing literature (including law, procedure, guidance and empirical research) on the preparation of witness statements for the purposes of Employment Tribunals (ETs) in England and Wales.

We conducted 40 semi-structured interviews with ET judges, panel members, employment law practitioners (solicitors, barristers, advisers) and litigants in person. Here, we explored the perceived quality of witness statements and their preparation. Findings revealed six themes: (i) *professional processes*, (ii) *challenges for litigants in person preparing statements,* (iii) *resources*, (iv) *case management*, (v*) presentation preferences*, and (vi) *future improvements*.

There was variability in our interviewees' perceptions of the professional processes used to prepare witness statements. Whilst such processes may not always be obvious because witness statement preparation is a private process, it was widely understood that solicitors play a significant role in drafting witness statements. This study relies on self-reporting of the processes, plus third-party impressions of the outputs, i.e. witness statements produced for ETs. (We are not aware of any study involving the independent observation and analysis of witness statement preparation in the civil justice system; such a study could bring fresh and valuable insights.)

Interviewees thought the quality of witness statements varied both amongst those prepared by legal practitioners and by litigants in person. There were differing levels of support available to litigants in person, but most participants recognised the benefits of case management hearings. Consistent with our literature review, our interviews revealed almost no evidence of legal practitioner training on how best to prepare a witness statement.

We recommend updating the Presidential[1] Guidance (2018) to reflect the findings of this study and psychological research which informs current best practice on interviewing witnesses. Such revision should include:

- Clarification about determining the case 'issues', what is meant by 'issues', how and when they should be identified and agreed (including in cases when there is no preliminary case management hearing) and how they should be addressed by a witness statement;
- Relevant principles from psychological research with regard to the production of witness statements.

[1] Issued by the President of Employment Tribunals (England and Wales).

We note some parallels between our findings and those of another recent project conducted for the Business and Property Courts which has heralded new procedural rules on witness statements in those courts.[2] However our recommendations go further; there should be more detailed guidance for practitioners based on established witness interviewing practices; such guidance should underpin mandatory training for all practitioners who prepare witness statements.

We looked at the resources which support the making of witness statements. We recommend:

- The value of current and proposed sources of support (organisations and publications) identified in this project should be reviewed in greater depth. For example, this might be achieved by surveying practitioners and lay people about their frequency of use of current sources and the perceived effectiveness of current and proposed sources;
- Sources (or potential sources) of support and guidance for those preparing witness statements should be presented in an 'official' list maintained by, and available on, the gov.uk website alongside other information about ETs.

We found barely any evidence of professional training which specifically focussed upon how best to prepare a witness statement, including the questioning methods used and the approaches used to establish rapport with witnesses. We recommend:

- An in-depth review of witness statement training. This review may take the form of qualitative research which explores programme content and materials (where available);
- A wider review of legal practitioners' training needs in relation to witness statements;
- Pre- and post- qualification training and CPD courses are informed by relevant research from the field of psychology. Such training should be mandatory for practitioner representatives who interview witnesses, draft witness statements or oversee the practice of taking and making witness statements.

Producing witness statements which contain relevant, complete and accurate evidence, and which comply with the legal rules and directions, is a complex task. This is borne out by our findings. We believe there are unmet guidance and training needs, and there is a pressing need for detailed guidance and mandatory training about witness statement preparation. If implemented, these recommendations are likely to lead to better quality witness statements, enhance access to justice and improve the efficiency of court and tribunal decision-making.

[2] Due to come into force on 6 April 2021.

Introduction

In 2018 when we first proposed this study to our funder, The Nuffield Foundation, we were motivated by the fact that the preparation of witness statements for civil litigation in England and Wales was an almost entirely over-looked area of research. Witness statements have a direct bearing on the outcome of cases, litigation costs and the efficiency of hearings and yet, very little is known about how litigants in person and lawyers prepare witness statements for civil cases.

When planning to address this gap in research, we designed a study focussing on one area of civil litigation, the Employment Tribunal (ET). We chose the ET because litigants in person and legal practitioners prepare witness statements for ETs and the ways in which those statements are used is similar to the ways in which they are used in other non-criminal courts and tribunals. Where possible, we intended our findings to have applicability across the civil and family justice systems.

ETs in England and Wales are responsible for hearing claims from persons who believe that an employer or potential employer has treated them unlawfully. Issues may concern unfair dismissal, discrimination and matters concerning pay (HM Courts and Tribunals Service, 2020). While the majority of working relationships operate in a way that is fair and just (by law), disputes often arise. The Advisory, Conciliation and Arbitration Service (ACAS) Code of Practice on Disciplinary and Grievance Procedures (2015) provides practical guidance and outlines principles to employees and employers about the management of disciplinary and grievance issues in the workplace (although it does not apply to redundancy or non-renewal of fixed-term contracts).

Many disputes are resolved internally, but this is not always possible. In these situations, employees may consider making a claim to an ET and having their dispute heard independently. However, before an employee may submit a claim to an ET, they must first contact ACAS, where the opportunity to resolve the issue(s) will be offered by way of an 'Early Conciliation Service' (ACAS, 2020). In cases where this service does not resolve matters, an Early Conciliation Certificate will be issued, which then allows an employee to make a claim to an ET.

After a claim has been issued in the ET, the tribunal will decide when the case will be heard and determine (or 'direct') what the parties must do to prepare for that hearing. The ET's directions will usually include instructions to the parties about preparing witness statements. Witness statements are likely to come from the person making the claim ('the claimant') and their supporting witnesses as well as from witnesses for the employers ('the respondent'). It is not unusual for a party, particularly a claimant, to represent themself, which renders potential for inequality of arms if a claimant is unrepresented and a respondent has substantial resources in terms of in-house expertise (e.g., human resources) and/or external legal advice.

Our project, which lasted twenty months (July 2019 to February 2021), had three phases and tied to each phase were distinct research questions about the law, procedure, guidance, preparation and perceived quality of witness statements.

In phase 1, we reviewed law, procedure, guidance and pre-existing published research on the preparation of witness statements in order to address the following research questions:

- Q1. What are the legal requirements for statement preparation in ET cases?
- Q2. What law and guidance exist to support the preparation of witness statements in the ET?
- Q3. What does empirical research recommend for effective witness statement taking and making?
- Q4. Is the law and guidance in accordance with the existing empirical research from related areas (e.g. the psychology of memory and questioning for evidential purposes)?

In phase 2, we conducted 40[3] semi-structured interviews with ET judges, panel members, employment lawyers (solicitors, barristers, advisers) and litigants in person to explore the perceived quality of witness statements and their preparation. We used thematic analysis (Braun & Clarke, 2006) to explore the data; themes and codes emerged as we analysed the experiences and perceptions of interview participants. The results of our analysis address the following research questions:

- Q5. How do lawyers and litigants in person prepare witness statements?
- Q6. To what extent are those who prepare witness statements aware of the law, guidance and research studies?
- Q7. Do those who prepare witness statements find the existing legal rules and guidance useful, and if so/if not, how/why?
- Q8. What directions/case management decisions do ET judges and panels make to support the preparation of the best quality witness statements?
- Q9. How do panel members and other stakeholders perceive the quality of witness statements?
- Q10. What practical methods and technological devices are relied on by those who prepare statements?

[3] Several interviewees told us that witness evidence is handled very differently in employment tribunal cases in Scotland. Therefore, in addition to these 40 interviews with we conducted an interview with an experienced Scottish employment lawyer in order to better understand these differences. The ET in Scotland is a separate jurisdiction with a separate President and very different procedures for taking witness evidence.

In phase 3, we addressed the final question (Q11): What practice change/s could be introduced to the preparation of witness statements that would enhance their quality?

Having identified practices which enhance, and detract, from the production of the best quality witness statements, and by presenting shared examples of good practice, we looked ahead and made specific recommendations about reviewing and enhancing guidance, creating practitioner training and improving on-line resources, particularly for litigants in person.

Project results and discussion

Phase 1: Review of the law, procedure, guidance and pre-existing published research

Research Question 1. What are the legal requirements for statement preparation in ET cases?

Much of the evidence submitted to civil courts, including ETs, takes the form of contemporaneous documents[4] which provide information about the issues in dispute. While of high importance, such documents do not always prove the areas of dispute, they may contain omissions, and they may lack clarity without the accompaniment of narratives provided by parties concerned with the dispute (Pender & Heatley, 2018). These narratives are provided in the form of witness statements. Witness statements include evidence from relevant parties who propose to attend hearings, as well as those who do not propose to attend, although little weight is placed on the statement of a witness who is not present at a hearing (HM Courts and Tribunals Service, 2020). Indeed, witness statements can influence the ways in which disputed issues are interpreted, thus they can have a bearing on litigation costs, efficiency of the courts and tribunals, and overall decision-making outcomes (Pender & Heatley, 2018). The ability to produce witness statements in compliance with the legal rules and directions, is fundamental to any party seeking access to justice in the civil courts and tribunals.

[4] 'Contemporaneous documents' refers to materials that were created at or close to the time of alleged events. In an employment dispute examples of relevant contemporaneous documents might include the employment contract, timesheets, emails between the claimant and colleagues, copies of employee complaints, company policies, records of sick leave, written warnings, notes of disciplinary meetings, etc.

The Employment Tribunal Rules of Procedure 2013 (updated in 2015 and 2020)[5] govern the purpose of a witness statement and who will be able to inspect a witness statement used in a hearing.

- Witnesses give their oral evidence on oath or affirmation, and their witness statement(s) stands as their evidence in chief unless the tribunal orders otherwise. Witnesses shall be required to give their oral evidence on oath or affirmation. The tribunal may exclude from the hearing any person who is to appear as a witness in the proceedings until such time as that person gives evidence if it considers it in the interests of justice to do so. (Rule 43).
- Usually, any witness statement which stands as evidence in chief shall be available for inspection during the course of the hearing by members of the public attending the hearing (Rule 44, and see also Rules 50 and 94 regarding exceptions to this rule).
- The Presidential Practice Direction (2020)[6] notes that 'rule 44 provides for inspection of a witness statement in the prescribed circumstances; it does not allow for copies to be taken' (para4). It includes provisions relating to members of the press or public seeking to observe a remote or partly remote hearing, inspect witness statements (para 10.2) or to make an application explaining why they wish to inspect documents (para 11.2).

In England and Wales, witness statements are prepared and exchanged in advance of an ET hearing and the ET is supplied with copies before the hearing. Statements are either prepared by witnesses themselves or with assistance provided by legal representation or others who may or may not be legally qualified. At the hearing, it is usual for the statement to serve as the witness's own account of events (their 'evidence in chief') once they have 'adopted' their written statement. i.e. confirmed to the tribunal that their statement is true. A rule was introduced in 2012[7] that a witness statement would stand as the witness's evidence in chief unless the tribunal directed otherwise (now found in Rule 43). Since then witness statements have usually been 'taken as read'; the practice of requiring a witness to read out loud their witness statement is no longer the norm.

[5] HMCTS (2013, 2015, 2020) The Employment Tribunal Rules of Procedure 2013 (as amended), available at https://www.gov.uk/government/publications/employment-tribunal-procedure-rules

[6] Employment Tribunals (England and Wales), Presidential Practice Direction on remote hearings and open justice (2020), available at https://www.judiciary.uk/wp-content/uploads/2013/08/14-Sept-2020-SPT-ET-EW-PD-Remote-Hearings-and-Open-Justice.pdf

[7] The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2012

Requiring a witness to read out their statement is arguably unnecessarily formal and time-consuming; 'avoiding unnecessary formality' and 'saving expense' is part of the tribunal's 'overriding objective' (Rule 2 (c) and (e)). That said, any ET has general powers to manage the proceedings in a way it considers fair,[8] therefore it is conceivable that a witness could be required to read out their statement or give evidence in chief (i.e. give their account by answering non-leading questions about their recollection of events) if the tribunal thought it necessary. This topic is covered in some detail in the judgment in *Mehta v CSA* (2010) UKEAT/0127/10/CEA, para 16.[9]

Typically, when a witness is called to give evidence they make a solemn promise to tell the truth (swearing an oath or affirming, as required by Rule 43), state their name, confirm that they have made a written witness statement/s, adopt that statement/s and undergo cross-examination by the opposing party.[10] Prior to the Covid-19 global pandemic, the impact of which began to be felt in England and Wales in March 2020, witnesses would normally give evidence in person in the tribunal room. However, if the quality of a witness's evidence was likely to be diminished by reason of their vulnerability the ET could make adjustments, for example directing that the witness takes part remotely by video link (Presidential Guidance (2020a), paras 13 & 22).

Challenges and restrictions on in-person contact as a result of the prevalence of Covid-19 have led to much wider use of wholly or partly remote (sometimes called hybrid) hearings.[11] Presidential Guidance of September 2020 states that, 'where it is consistent with fairness and justice to do so, there is a temporary need for the Employment Tribunals to conduct remote hearings in greater numbers, and to do so in respect of cases that, in ordinary circumstances, would have been conducted on a face-to-face basis' (Presidential Guidance, 2020b, para 4). That guidance should be read alongside the Presidential Practice Direction (2020) on remote hearings. Although not formally endorsed by the President of Employment Tribunals (England

[8] Rule 41 includes: 'The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective.'

[9] http://www.employmentappeals.gov.uk/Public/Upload/10_0127fhwwSBCEA.doc

[10] Cross-examination is when the opposing party challenges the witness's account, or parts of the witness's account. A cross-examiner often uses leading questions to suggest an alternative version of events to the witness. If the evidence contained in a witness's statement is not disputed, the opposing party should indicate prior to the hearing that they do not intend to cross-examine that witness thereby co-operating with the other party and saving time and expense in accordance with the 'Overriding Objective' (Rule 2).

[11] Under rule 46 where it is just and equitable to do so.

and Wales), The Employment Lawyers Association has published 'A practical guide for remote hearings in the Employment Tribunals' (ELA, 2020).[12]

Research Question 2. What law and guidance exist to support the preparation of witness statements in the ET?

Information about witness statements and how witnesses give evidence can be found in guidance from the President of the Employment Tribunals (England and Wales) about 'General Case Management'[13] (Presidential Guidance, 2018) and about 'vulnerable parties and witnesses'[14] (Presidential Guidance, 2020a). ETs in England and Wales 'must have regard to such Presidential Guidance' but they are not bound by it.

The Presidential Guidance (2018) includes:

- '…the Tribunal will need to know how many witnesses are to be called, so that the required length of the hearing can be properly allocated and, if necessary, timetabled. The identity of the witnesses and the relevance of their evidence to the issues will also often be important.' (Note 3: Witnesses and Witness Statements, para. 2)
- 'It is easier for everyone if the statement is typewritten or word-processed (although a clear and legible handwritten statement is acceptable) with each page numbered.' (Note 3: Witnesses and Witness Statements, para. 15)
- 'The witness statement should be in a logical order (ideally, chronological) and contain numbered paragraphs. It should cover all the issues in the case. It should set out fully what the witness has to tell the Tribunal about their involvement in the matter, usually in date order.' (Note 3: Witnesses and Witness Statements, para. 16)
- 'The statement should be as full as possible because the Tribunal might not allow the witness to add to it, unless there are exceptional circumstances and the additional evidence is obviously relevant.' (Note 3: Witnesses and Witness Statements, para. 17)

[12] Available at https://www.elaweb.org.uk/resources/responses-to-consultations/practical-guide-remote-hearings-employment-tribunal

[13] Judiciary UK (2018) Employment Tribunals (England and Wales) Presidential Guidance – General Case Management, available at https://www.judiciary.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20180122.pdf

[14] Judiciary UK (2020) Employment Tribunals (England & Wales) Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal proceedings, available at https://www.judiciary.uk/wp-content/uploads/2013/08/ET-Presidential-Guidance-on-Vulnerable-Parties-and-Witnesses-22-April-2020.pdf

- It is 'good practice' for a witness statement to be signed, but the Rules 'do not require a witness statement to contain a "statement of truth" (such as "This statement is true to the best of my knowledge and belief" or "I believe the facts in this statement to be true")' (Witnesses and Witness Statements, para. 18)
- If a witness realise they have left out something relevant, they should 'make a supplementary statement and send it immediately to the other party.' (Note 3: Witnesses and Witness Statements, para. 20)
- Often, at the start of the hearing, the Tribunal will read the witness statements (and pages in the bundle of documents to which the statements refer). (Note 5: Timetabling, para. 10.2)
- 'Each witness is then questioned on their own statement. This is called "cross–examination". The Tribunal may also ask questions of the witnesses. A specific time may be allocated for questions in respect of each witness and for the witness to clarify any points that have arisen from those questions (this is called "re- examination").' (Note 5: Timetabling, para. 10.3)

In England and Wales, Citizen's Advice informs its service users that witness statements are "*an important document and you should take care when you write it. The most important evidence in your case is the evidence that you yourself give… The tribunal will not allow you to add anything or change your evidence once the witness statements have been exchanged, unless there is a very good reason, so it's important to get your statement right*."

Legal representatives who assist in the preparation of witness statements, should, in line with Presidential Guidance (2018), strive to ensure that any statement drafted is comprehensive, and provides a full account of the facts, because the purpose of these statements is to help the tribunal identify the issues in the case, while also ensuring that the case is completed on time and within the time allotted to it when directions were made timetabling the hearing. Witness statements should provide information relating to specific legal issues and facts. They should add to the evidence provided within contemporaneous documents, rather than simply regurgitate the contents of the documents or to provide a running commentary on the documents (Harrison, 2019; Pender & Heatley, 2018).

Paragraph 11 states that "*It helps to write down what you have to say in evidence. You often remember much more and feel more comfortable when giving evidence having done so*." It is not clear from the Guidance where this memorial benefit emanates from, how it has been identified and whether or not it is based upon empirical evidence. The Presidential Guidance (2018) doesn't explicitly state that the act of writing one's evidence enhances the content in the form of completeness of the statement evidence provided, nor does it state that the act of writing enhances completeness of evidence when giving oral evidence but completeness is implied ("*You often remember much more…"*). While benefits of statement writing are

suggested, it is not apparent whether the benefit is produced during the physical and or cognitive act of statement writing, or whether the memorial benefit is realised during the tribunal when the witness is cross-examined.

If it is not the witness who is drafting the statement, it raises the questions as to whether or not the same benefits (improved memory and level of comfort when giving evidence) apply. Yet regardless of who is tasked with writing, practitioner commentary suggests that witness statements should be written in the witnesses' own words (Rushton & Heatley, 2019). This latter suggestion is also noted in information provided to claimants by Citizen's Advice.

The Presidential Guidance (2018) makes reference to the order in which issues should be covered in the statement. Paragraph 16 (of Note 3: Witnesses and Witness statements) states that "*The witness statement should be in a logical order (ideally, chronological) and contain numbered paragraphs. It should cover all the issues in the case. It should set out fully what the witness has to tell the Tribunal about their involvement in the matter, usually in date order*." Here, it is clear that two specific factors are addressed: (i) the structure of the statement and (ii) the completeness of the evidence set out in the statement. With regard to the first, the structure of the statement, Citizen's Advice also recommend "*Your witness statement should say what happened, in the order that it happened*." There is clear consensus that the witness's evidence should be presented in chronological order.

It is not apparent from the available guidance why chronological order is advocated as an approach to witness statement production. The Presidential Guidance does give some indication in its use of the phrase 'logical order' – that is, presenting the statement in chronological order may be related to comprehension and understanding of the evidence, perhaps by those tasked with making sense of it, testing it, and case related decision making. However, this is not explicitly stated, and only inferred. It may be the case that this particular guidance is taking into account the witness's perspective and possible challenges associated with the task of statement production. For instance, presenting the statement in chronological order may be related to paragraph 11 ("*It helps to write down what you have to say in evidence. You often remember much more…*") There is no stated rationale or clear justification for this suggestion. There also appears to be no accounting for the ways in which human memory functions in relation to attempts to recall information in chronological order.

The second factor, completeness of the statement, identified within Paragraph 16 of Note 3 (witnesses and witness statements: "*It should set out fully what the witness has to tell the Tribunal about their involvement in the matter*.") is emphasised with further and more explicitly in Paragraph 17: "*The statement should be as full as possible because the Tribunal might not allow the witness to add to it, unless there are exceptional circumstances and the additional evidence is obviously relevant*." Additionally, in Paragraph 20: "*If you realise that your statement has left out something*

relevant when you receive the other party's statements, you should make a supplementary statement and send it immediately to the other party. You do not need to comment on or respond to every point in the other side's statements or repeat what you said originally." While the Guidance goes some way to inform witnesses that a comprehensive account of matters is required, there is no detailed and specific guidance as to how completeness is determined by those whom are responsible for reading and making decisions about the content of the statement. Further, there is no specific guidance about how completeness is best achieved. Both of these guidance omissions relate not only to witness's who prepare statements themselves (indeed, whom the Guidance appears to be directed by the use of second person language, "you", as opposed to third person, s/he/they), but also to those whom are tasked with assisting in the production of witness statements for ETs (e.g., support services such as Citizens Advice, or legal representative(s) of the witness).

Guidance forms are provided by HM Courts and Tribunal Services (which is intended directly for parties in involved in ETs) include the following: (i) Making a claim to an ET, (ii) Your claim – what next, (iii) Responding to a claim to an ET, (iv) Responding to a claim to an ET (details of a hearing to be sent), (v) The hearing (ET): guidance for claimants, and (vi) The hearing (ET): guidance for claimants and respondents. None of these forms provides information that comprehensively guides witnesses on the best way(s) in which to prepare a witness statement.

Alternative sources of guidance for litigants in person and practitioners

An individual who makes a claim without legal representation, known as a 'litigant in person' is responsible for preparing their own witness statement. There are many organisations at a national and local level which could potentially assist a claimant (see Appendix 1 – Support and Publications on Witness Statements). Here, we review key sources of guidance accessible to litigants in person as well as to practitioners tasked with drafting statements.

Citizens Advice

Citizens Advice provides litigants in person with free guidance in the preparation of statements. Claimants are advised to clearly put into writing what happened in the order that it happened, but unlike guidance provided in the aforementioned articles, there is no reference to the use of contemporaneous documents as a basis for basic chronological structure. Clarity is highlighted as important, while simultaneously noting that litigants should use the same language that they normally use, avoiding language or words that they do not understand.

Litigants who do not have a representative and 'have trouble writing', can seek assistance from an advisor at Citizen's Advice. The manner by which statements are prepared with such assistance (if available) is not outlined, nor is the process used to 'check through' statements (a service also offered by Citizen's Advice). However, more detailed guidance from advisors at Citizens Advice is available free, online via Medium.com. Here, specific information is presented in the article entitled 'Witness statements in the ET in England and Wales'. Key definitions of legal terminology, including what a witness is and who may be appropriate to act as a witness in an ET is clearly presented. There is also information about who needs to provide a witness statement – at least both the claimant and the respondent, as well as anybody else who is to give evidence in the case. One of the key consequences of providing a statement is noted, that is, anybody who provides a statement is required to attend the hearing, thus the importance of ensuring that a potential witness is prepared to do so, is highlighted. As is the importance of ensuring that the statement is complete because '…*you will not be allowed to expand on it greatly on the day, so it's important to include everything you need to say*.'

The guidance focuses only on discrimination claims, but it goes on to provide the most comprehensive, and publicly available, information about how to prepare a witness statement for an ET in England and Wales.[15] Beginning with advice about the formatting, for instance, the advice is that statements should be typed, use numbered paragraphs, use line spacing. They should also include key information such as the case reference number, the witness's name and address, a closing statement of truth, and the witness's signature with the date. Presented next is an outline of what sections should be included and, importantly, what kind of detail each section should contain. The sections outlined include: 'about the claimant', 'about your work', 'what happened', further details relevant', 'injury to feelings', 'financial loss and/or recommendations sought'.

- Section 1: *About the claimant*, suggests that witness should begin by covering key details, such as dates of employment and job title. Although it is not clear if this refers only to the dates of employment and job title relating to the employer in the dispute, or if witnesses should cover present and past employment details. Protected characteristics pertinent to the dispute should next be outlined. Very brief examples of how such should be written are provided, perhaps with the function of illustrating writing style, but it is made

[15] Other free to access resources are available on the internet. Some companies and law firms offering employment law advice publish their own (usually very brief) guidance on preparing witness statements for the ET. The Labour Research Department, an independent trade union based research organisation, publishes an example witness statement available at https://www.lrdpublications.org.uk/downloads/WitnessStatement.pdf though it appears the 'companion booklet' is no longer available. More extensive guidance is offered by a number of organisations for a fee.

clear that in cases concerning disability, comprehensive detail is needed – although the actual level of detail required by a tribunal is not apparent.

- Section 2: *About your work* provides readers with topics that witnesses should include in their statements. Here witnesses are advised to write about the nature and size of their employer's business, their duties, including how these duties relate to the structure of the business. Employment history should also be covered with information provided about any disciplinary record, but as per section 1, it is not clear to what extent the writer such discuss such issues. Again, a brief example is provided as to how one should write this information. Matters in relation the Equality Act are noted, but the guidance lacks clarity.

- Section 3: *What happened* starts with guiding the reader to write a narrative in chronological order. While there is no justification provided for this, it does conform with guidance previously discussed in this review. Contrary to the aforementioned guidance, Medium suggests that for witnesses who are making multiple claims, these could be presented separately (see section 4). Here, however, no acknowledgement that by doing so, events may not be presented in chronological order. As per the previous sections, an example is provided about how to write about 'what happen'. This example includes key details such as dates and names of relevant persons, although there is no reference to any documents that may be supplied to the tribunal as part of the bundle.

- Section 4: *any further details relevant to the specific discrimination not covered in section 3* appears to provide a dedicated space for witnesses to deviate from the chronological order of events. Here, it is explicitly recommended that claims which do not fit 'neatly' into a chronological account, should be covered separately. This section goes on to give information about how to present claims with regard to discrimination. Direct and indirect discrimination, as well as failures to make reasonable adjustments are covered. Each of these sections contains questions which prompt claimants about what details to cover. For example, '*How the treatment you received was less favourable than other people. Which people? Is there an actual comparator? Or anyone in similar circumstances? What happened to them? How do you know what happened to them?*' Apart from additional prompts relating only to discrimination, no further guidance is provided.

- Section 5: *injury to feelings*, very briefly advises claimants to write about the personal and/or emotion effect experienced, with a prompt to include information about any medical treatment needed. An example is provided, but as with section 4, section 5 concentrates only on discrimination claims, so may not provide sufficient guidance to witnesses who are pursuing claims relating to other issues.

- Section 6: *financial loss and/or recommendations sought*, focusses claimants of the financial impact of the discrimination. It prompts claimants to include information about loss of earnings and the loss of other employment benefits, before discussing efforts made to source new employment.

Before providing a 'full' example of what a witness statement looks like, some general guidance is outlined in the form of *tips for writing a witness statement*. Contrary to the examples provided, of which the contents are very brief, the first tip presented to readers is: 'give enough detail'. Addressing agreed and disputed facts is outlined. A definition of what agreed facts are is provided, and suggests that these should be dealt with briefly, but there is no definition of what constitutes a disputed fact, even though it is recommended that these matters should be covered in much more detail. Examples of what not to do, are given, but there are no examples of what claimants *should* do, apart from the open suggestion that specific instances of discrimination should be provided. The tips go on to suggest that conduct, where open to criticism, should be discussed – again, it is not entirely clear how to do this appropriately, and in what level of detail.

It is also recommended that inconsistencies with other peoples' accounts should be explained because for some matters, the tribunal may need to make a decision about who they believe. As per the other guidelines, there is no clear guidance on how to achieve this. The final recommendation is that reference should be made to the documents in the bundle (including citing relevant page numbers). This is the first instance where the guidance mentions the role that documents play in the production of a witness statement. In practitioner commentary, there is specific focus on describing how such documents should be used to prepare witness statements i.e., that they should form the basis for the witness statement (Pendler & Heatley, 2018), but that they should not be included in the witness statement by way of commentary or regurgitation (Harrison, 2019; Pendler & Heatley, 2018).

Streetlaw

A number of ET regions in England and Wales are collaborating with local universities to operate Streetlaw projects, by which students give presentations to actual and prospective litigants on ET procedure. This includes the format and content of a witness statement.[16]

Employment Tribunal Litigant In Person Support Scheme ('ELIPS')

[16] Further Information is available at https://www.bpp.com/insights/bpp-streetlaw

Several Employment Tribunal regions now host legal advice clinics where the advice given can extend to the appropriate content of a witness statement. ELIPS went online in August 2020 to provide a virtual clinic available to litigants involved in a live claim in four Employment Tribunals (London Central, Bristol, Cardiff and Midlands West). 'ELIPS volunteers provide support in the form of one-off advice on the day of the clinic' but currently (due to the impact of the Covid-19 pandemic) they 'are not able to offer representation at hearings.'[17]

Published books

In addition to freely accessible guidance available on the internet, there are a number of published and purchasable books which focus on ETs. Here, we review these publications with specific focus on the production of witness statements.

Published in 2014 and authored by Naomi Cunningham and Michael Reed, the fourth edition of *Employment Tribunal Claims* provides comprehensive guidance on navigating the process of ETs including several pages on witness statements. Here, focus is placed upon the function and use of witness statements, with commentary on the format and contents. There is clear importance placed on presenting written evidence in a logical and chronological order, with a formal writing style which is also in keeping with the vocabulary of the witness (i.e., using the witness' own words). Significant emphasis is given to the presentation only of relevant material, aligned with the identified 'issues' and the documents to be presented in the bundle. Moreover, readers are provided with clear and tangible examples of witness statements (including what to avoid).

Additional text which focus on ETs include (i) *The Employment Tribunals Handbook: Practice, Procedure and Strategies for Success* (Waite, Payne, Meredith, Moss & Goss, 2017) and (ii) *Employment Claims without a Lawyer* (Curwen, 2018). The guidance provided in these text, as well as that presented by Cunningham and Reed (2014), conforms with the previously outlined Presidential Guidance, as well as the alternative sources concerning the writing of witness statements (which have been presented thus far in this review). In particular, there is consistency in terms of the suggested formatting, structure, language, and contents (e.g. reference to the 'issues' and supporting evidence). Like the guidance reviewed thus far, there is no reference to the process of eliciting information and drafting a statement such as what techniques practitioners should use in order to aid witness recall of events, ensuring that complete and accurate accounts are achieved. Nor does the literature guide witnesses themselves about the most appropriate ways to recall and document their experiences

[17] Further Information is available at https://www.elaweb.org.uk/content/employment-tribunal-litigant-person-support-scheme-elips

Law[18]

From time to time judges express their concerns about witness statements and how they are prepared. For example:

- 'The process of civil litigation itself subjects the memories of witnesses to powerful biases…Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute.' Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm).

- 'There were undoubtedly flaws in the way some of the statements were drafted. Witnesses were interviewed and notes taken but the statements were not drafted for many months or even years. This is not a method likely to achieve the best evidence**…**The lack of focus in the defendant's case led to a huge workload which was wholly disproportionate to the real issues. That is why statements were served well out of time, with no explanation and why careless errors were made**.'** Thirwall LJ in *Marsh v Ministry of Justice* [2017] EWHC 1040 (QB).

- 'The true voices of the witnesses, and the extent of their real recollection, which became apparent when they were cross-examined over a number of days each, are notably lacking from the witness statements.' Fancourt J in *Estera Trust (Jersey) Ltd & Anor v Singh & Ors* [2018] EWHC 1715 (Ch)

We note that the case of *Gestmin* has been used by the President of Employment Tribunals (England and Wales) in judicial training, insofar as it pertains to the value of memory and recollection in finding facts.[19]

In 2019 the Witness Evidence Working Group published its report, *Factual Witness Evidence in Trials Before the Business and Property Courts* (WEWG, 2019). The WEWG's project 'stemmed from the impression shared by a substantial majority of judges of the Commercial Court that factual witness statements were often ineffective in performing their core function of achieving best evidence at proportionate cost in Commercial Court trials' (WEWG, 2019, para 1). The WEWG project included gathering views via a large survey (932 participants, 92% of whom

[18] We note the website Civil Litigation Brief;[18] entering 'witness statements' in the search function provides case summaries where a judge have opined on the quality of the witness statements in a particular case.

[19] Email from the President of Employment Tribunals (England and Wales) to the PI, Professor Cooper, 29th January 2021.

were barristers or solicitors). The WEWG identified a number of ways in which the use of witness statements in the Business and Property courts could be improved.

Following on from the publication of the report *Factual Witness Evidence in Trials Before the Business and Property Courts* (WEWG, 2019), a draft practice direction (PD 57AC and Appendix) was submitted to the Civil Procedure Rule Committee. From 6th April 2021 there will be a new Practice Direction (57AC) plus Appendix about the preparation of witness statements for the Business and Property Courts.[20] The WEWG's findings and proposals, the resultant Practice Direction and the parallels with this study, are covered in more detail below in the 'Phase 3' discussion and our Conclusion.

The WEWG's findings and proposals, including the parallels with this study, are covered in more detail below in the 'Phase 3' discussion and our Conclusion.

Summary

When a claimant has legal representation (in the form of a solicitor or barrister), assistance drafting the statement is usually provided by the representative. As is the case for litigants in person,[21] there is a shortage of guidance publicly available to such representatives. In particular, there is no guidance from the Office of the President of Employment Tribunals (England and Wales) which provides good practice techniques for gathering information for witness statements and the best ways to ensure that the process preserves the evidence of the witness (i.e., questioning techniques that promote and support complete and accurate memory recall). By reviewing the existing empirical research concerning witness statement production, we now go on to address the second research question.

Research Question 3. What does empirical research recommend for effective witness statement taking and making?

The Presidential Guidance for General Case Management in Employment Tribunals (2018) states that *'It helps to write down what you have to say in evidence. You often remember much more and feel more comfortable when giving evidence having done so*.' (p. 11). Practitioner commentary also supports the notion that witness statements should be used to aid recollection (Pender & Heatley, 2018; Rushton & Heatley, 2019). Witness statements should be as accurate and as complete as possible because,

[20] Further information is available at https://www.justice.gov.uk/courts/procedure-rules/civil/127-cpr-update.pdf

[21] Though according to some interviewees, some tribunals will specifically draw the parties' attention to the Presidential Guidance for General Case Management in Employment Tribunals (2018).

unless there are exceptional circumstances, tribunals don't usually allow witnesses to add to or change their statements (Presidential Guidance, 2018).

While there is a consensus that legal professionals strive to obtain statements which are considered to be both complete and accurate (Brackmann, Otgaar, Roos af Hjelmsäter, & Sauerland, 2017), empirical research has yet to investigate and scrutinise the methods adopted by practitioners to gather information for witness statements in civil cases, including ETs. Nonetheless, achieving good quality witness statements has, for a number of decades, been a particular focus within the area of criminal law. Here, a plethora of theoretically based best practice, informed by scientific evidence, has guided the gathering of witness evidence and the production of witness statements.

Internal factors that affect witness statements

Much of the witness research is in the field of psychology and has focused upon internal and external factors that influence witness accounts. Internal factors include a witness's memory for an event, their ability to recall and narrate these memories, and the impact of individual characteristics such as age as well as developmental level – also referred collectively as 'estimator variables' (Wells, 1978). There is a consensus that memory, in particular, witness memory, can be fallible, thus causing significant consequences in the legal system as a whole (Wixted, Mickes & Fisher, 2018). Multiple internal factors influence witnesses' recollection of past events. At the point that an event is experienced, information about the event needs to be attended to because only this information will be 'encoded'. Encoding refers to the processing of information in order for it to be stored in memory and possibly available to be retrieved at a later time. There is a very clear link between attentional systems and memory encoding (Sperduti, Armougum, Makowski, Blondé, & Piolino, 2017), where a vast amount of information in our environment is never attended to, thus never enters our memory. Individual differences in attentive capacity are also apparent, and reflect the occurrence of differing versions of events from different witnesses who were all present at the same event.

Other internal factors also influence the information available for recall. Memory fade or 'decay' can induce forgetting of past events and, in most cases, is caused by the passage of time (Cowan & AuBuchon, 2008). The process of recollection itself can also induce forgetting (Ciranni & Shimamura, 1999; MacLeod, 2002). Separately, interference can occur – a process whereby memories are present, but inaccessible via one or multiple traces (Hardt, Nader & Nadel, 2013). Overall, it is very well established that witnesses' recall of past events is not literal and not an entirely objective account of their experiences because memory is reconstructive in nature and influenced by one's own prior knowledge (Hemmer & Steyvers, 2009). When recollection does occur, events are constructed using whatever retrievable information was encoded at the time of the event, as well as an individual's prior knowledge which

can serve the function of subconsciously filling in 'gaps' (errors of commission; Tuckey & Brewer, 2003). These theoretical principles are well established but are not always widely known by legal professionals. For instance, previous research has found that student populations are just as aware of memory phenomena as legal professionals are (Benton, Ross, Bradshaw, Thomas & Bradshaw, 2006). Interestingly, reference to any of these principles is overwhelmingly omitted from all of the guidance currently available about the production of witness statements in ETs.

External factors that affect witness statements

Witness accounts are long known to be heavily influenced by external factors (including system variables, in the case of the justice system; Wells, 1978). A plethora of empirical research has focussed upon the external factors that influence the accuracy and completeness of eyewitness memory and reports of such memories. Most remarkable, was the discovery by Elizabeth Loftus in the 1970s that memory is malleable – highly vulnerable to 'misinformation effects' (Loftus & Palmer, 1974; Loftus, Miller & Burns, 1978). Misinformation effects are defined as impairments in recall of events that occur after a witness is exposed to misleading or false information (Loftus, 2005). The phenomenon of misinformation effects has been investigated for over 40 years, and has been found to be more prevalent after the passage of time, where memory fade has occurred, and the event memory is weakened – thereby reducing a witness's ability to identify misinformation and resist its effects (Loftus, 2005). The source of misinformation, primarily, has received a great deal of attention from the scientific community

Misleading information can emanate from many sources. Discussions with a co-witness results in greater misinformation effects, especially if the witness is previously acquainted with the co-witness as opposed to having no prior acquaintance (Hope, Ost, Gabbert, Healey, & Lenton, 2008). Misinformation effects from co-witnesses are also greater when misleading co-witnesses are particularly confident in their memory of events (Goodwin, Hannah, Nicholl & Ferri, 2017). Claimants in ETs are actively encouraged to seek witness statements from other witnesses who are prepared to attend a hearing (Citizens Advice, 2020). It is not clear how prior discussions in employment cases that occur between claimants and co-witnesses, or indeed respondents and co-witnesses, affect the quality of evidence presented in witness statements. It is likely that, in line with the findings from psychological research, the effects of co-witness misinformation are the same, but the guidance available to witnesses and practitioners in ETs does not acknowledge and attempt to mitigate or minimise such effects. Similarly, witnesses may also discuss matters with non-witnesses, which may not only influence recall, but if discussions are misleading, could potentially distort or influence statement evidence. Again, this factor is not acknowledged nor accounted for in guidance relating to ETs. The above described effects are not only found to occur as a result of witnesses directly discussing matters

with one another, but they can also emanate from information provided indirectly by a third party (Paterson & Kemp, 2006). As previously outlined, contemporaneous documents typically form the basis for witness statements in ETs, highlighted within practitioner commentary (Pendler & Heatley, 2018), but these documents can contain inaccuracies, there is little in the way of guidance about how to minimise possible misinformation effects.

Gathering witness evidence

The reconstructive and malleable nature of memory means that incorrect information from a variety of sources can affect a witness's accounts of past events. Within the legal arena, there is great emphasis on the accuracy of witness statements. However, accuracy of recall often comes at the expense of the quantity (completeness) of witness testimony (known as the quantity-accuracy trade-off; see Koriat & Goldsmith, 1994, 1996). Although accurate witness statements are highly sought, so are statements that are regarded as full and complete. It is long established that witness statements can lack all of the information required by legal professionals, and often do not contain all of what was encoded by the witness at the time of the event(s) in question. Information encoded and stored by witnesses, but left out of event recall, is regarded as errors of omission. These are most prominent in statements produced by young witnesses, and previous research suggests that these omissions occur because witnesses are uncertain about what information should be reported and what they believe to be important (Larsson & Lamb, 2009). While the age of the witness is of significance here, it could be argued that in criminal proceedings, practitioners are well versed with how to communicate the type of information and level of detail needed from witnesses, but it is not clear if this is the case in ETs.

While the field of research specific to ET witness statement production is almost non-existent, other areas of law have informed the practice of gathering accurate and full accounts of events. In the area of criminal law, the most common method to gather information is by way of an investigative interview. Practitioners who, at the initial stage, prepare witness evidence (whether in written format or by way of a video-recorded interview) are tasked with the following objectives: (i) gather information about who did what, when and where, (ii) gather information which informs an investigation and (iii) obtain a truthful account (Milne & Bull, 1999). However, there is agreement that witness statements are not always able to meet the quality and quantity demands of legal professionals (Fisher & Geiselman, 2010), and this issue has been subject to vigorous and extensive research in order to inform practitioners about how to encourage optimal memory retrieval in order to achieve both quality and quantity. The field of investigative interviewing offers the most scientifically informed guidance on how to gather accurate and complete witness statements. Here, the primary focus is on the techniques used by practitioners, in particular, the information presented to witnesses at the time of recall.

Numerous recommendations and comprehensive guidance documents have been produced both nationally and internationally with the purpose of providing methods for professionals to be appropriately trained to gather the most accurate, detailed, complete and reliable accounts from witnesses. Available guidance (and training) is based upon scientifically tested approaches and methods, often comprising of interviewing frameworks and models. Examples of such include the PEACE framework (Baldwin, 1993; Bull & Milne, 2004; Clarke & Milne, 2001; Moston, Stephenson & Williamson, 1992), Cognitive Interview (Fisher & Geiselman, 1992), Sketch-Reinstatement of Context (see Dando, 2013; Dando et al., 2009; Dando et al., 2020); Self-Administered Interview (Dando et al., 2020; Gabbert et al., 2009), and for use with vulnerable witnesses, Achieving Best Evidence (Home Office, 2011) and the National Institute of Child Health and Human Development Investigative Interviewing (NICHD) protocol (Lamb, Hershkowitz, Orbach & Esplin, 2008). The majority of these approaches begin with a focus on rapport building and the setting of interview ground rules, before concentrating on methods to safely obtain event-related information (Brackmann et al., 2017).

Those tasked with conducting evidence gathering interviews are subject to formal training and assessment. In England and Wales (as well as in other countries) training is underpinned by psychological literature and scientifically tested approaches from which the available guidance is based upon. The PEACE framework, a mnemonic acronym referring to the phased approach of interview (planning and preparation, engage and explain, account, closure, evaluation), is regarded as the world leading approach. Consequently, the PEACE framework (which also advocates the use of the Cognitive Interview), has been incorporated into interviewer training manuals since the 1990s. Effective training of the PEACE framework has been shown to improve the quality of evidence gathered (although there are valid concerns about the efficacy of interviewer training; see Oxburgh & Dando, 2011; Smith, Powell & Lum, 2009). From the available literature, it is not apparent what training legal practitioners receive about preparing witness statements for the purpose of ET. If formal training does exist, it ought to be based on sound theoretical principles.

Questioning styles

In the absence of empirical research about questioning styles adopted during witness statement preparation in the area of employment law, we concentrated on the literature published in the context of criminal law. There has been much academic consideration about the techniques recommended for obtaining complete and accurate witness statements in criminal proceedings, and the impact of misinformation effects and suggestive influence. The type of questions posed to witnesses when gathering information has taken centre stage, and is regarded as one of the most crucial elements of witness interviews. The most prominent assertion throughout the

guidance aimed at criminal justice practitioners, is that interviewers can facilitate the production of the 'best' witness evidence with the use of 'appropriate' questioning styles (Oxburgh, Myklebust & Grant, 2010).

The research focussing upon questioning styles is vast, but there is an acceptance that interviewers should begin gathering evidence with the use of 'free recall' prompts and open questions (e.g., "tell me what you have come to talk to me about today"). These prompts and questions are proven to encourage witnesses to provide the most accurate narrative of their experience(s). The majority of studies which concentrate on question types used during interviews have also found that open questions yield longer and more detailed responses than closed questions, regardless of witness age or cognitive capacity, event type and the delay between the event and interview (Oxburgh, Myklebust, Grant, & Milne, 2016). The desired outcome from using open questions is that witnesses will provide a fully detailed and comprehensive account of events. In practice, this is not often the case. Interviewers are therefore also advised about the best ways to elicit further detail with the use of more targeted follow-up prompts and questions. The body of research which supports the notion of gathering information with the use of open questions, extends to the appropriate use of follow-up questions.

Such follow-up questions or prompts should preferably be open (e.g., "tell me more about X"). In practice, this is challenging for interviewers and not often not achieved. Studies exploring criminal law practitioners use of questions has often revealed that closed and probing questions are most widely asked (Snook & Keating, 2011), and in earlier research findings, interviews were dominated with closed questions (Clarke & Milne, 2001). Practitioners commonly revert to inappropriate questioning styles and these can have an error-inducing effect, and unfortunately, the information contained within questions and the way that they are structured, is a prominent source of misinformation. Error-inducing approaches include presenting misinformation within a question (known broadly as 'leading' questions), asking sequence of closed questions or very specific questions, encouraging witnesses to speculate or guess without proving the option to omit a response, and repeated questioning about the same event (Clarke & Milne, 2001). Nonetheless, the quality of information presented in a witness statement is determined not only by the ability and motivation of the questioner to ask the most appropriate and relevant questions, but by the interviewer's cognitive capacity for holding/maintaining relevant information and documenting it accordingly (Launay & Py, 2015).

Research Question 4. Is the law and guidance in accordance with the existing empirical research from related areas (e.g. the psychology of memory and questioning for evidential purposes)?

There is limited guidance available for those tasked with producing a witness statement for the purpose of an ET. The guidance which is currently available considers: (i) structure and formatting of statements, (ii) content, including addressing of the identified issues and reference to the claim bundle, and (iii) the use of language, including the witness's own words.

Our literature review[22] has found no published empirical research which specifically focuses on the process of producing witness statements in civil law proceedings. To date, empirical studies concerning witness evidence have focused upon the audio/video *interviewing* of witnesses in criminal law proceedings, with a marginal number of studies paying sole attention to witness *statement* production. A vast body of research within the area of psychology has already established the cognitive abilities and limitations of witnesses in criminal proceedings, and how human memory is fallible to a host of extraneous variables, including misinformation effects. Further, studies have reported on the effects of particular question types on witnesses' responses, and what effects training can have on the ability of legal professionals to accurately gather complete accounts. However, as outlined, focus is placed on witnesses in criminal investigations and criminal court proceedings, not on witnesses in civil cases.

In relation to the available guidance (including ET rules and Presidential Guidance), there is no explicit reference to the current literature and empirical research concerning the most appropriate way(s) to obtain a complete and accurate account from a witness.

[22] Search of appropriate databases.

Phase 2: Establishing the experiences of practitioners and litigants in person

In Phase 2, we addressed the following research questions:

- *Q5. How do lawyers and litigants in person prepare witness statements?*
- *Q6. To what extent are those who prepare witness statements aware of the law, guidance and research studies?*
- *Q7. Do those who prepare witness statements find the existing legal rules and guidance useful, and if so/if not, how/why?*
- *Q8. What directions/case management decisions do ET judges and panels make to support the preparation of the best quality witness statements?*
- *Q9. How do judges, panel members and other stakeholders perceive the quality of witness statements?*
- *Q10. What practical methods and technological devices are relied on by those who prepare statements?*

Adopting a qualitative approach, this project sought to investigate methods of preparation of witness statements and the perceived quality of witness statements for ETs. We used semi-structured interviews and applied thematic analysis (Braun & Clarke, 2006) to explore the experiences and views of those who working in ET settings and those who themselves have produced a witness as a litigant in person (LiP). An interview schedule was developed which emanated from the existing guidance on the production and use of witness statements, relevant to the field of ET, and in line with our project research questions for Phase 2.

The interview schedule was reviewed by a senior ET judge, and proposed questions were appropriately amended and refined as a result of feedback. Adopting a qualitative approach was important because it allowed for detailed consideration of personal experiences in an appropriate way (Forrester, 2010). Further, our approach afforded a degree of flexibility to explore topics and issues that arose throughout the interviews (Runswick Cole, 2011). This was regarded as particularly important due to the lack of previous research studies in this area, and the importance of developing new knowledge (Mason, 2018). Ethical approval was obtained from the School of Law Research Ethics Committee of Birkbeck, University of London, in 2019.

Research participants

A key consideration of recruitment was to engage a range of ET experience in our participant group. We sought to recruit participants who considered themselves to be ET (i) practitioners (i.e., solicitors/barristers/legal advisors), (ii) panel members, (iii) ET judges or (iv) litigants in person ('LiPs').

A variety of methods were used to invite potential participants to contact us if they were interested in taking part:

- The Office of the President of the Employment Tribunals (England and Wales) emailed all judges and non-legal members of the panel on our behalf with our invitation to contact us for more information about being interviewed;
- The Principle Investigator (PI) published an article in the journal of the Employment Lawyers' Association (Cooper, 2019);
- We published information on the website of The Institute of Crime and Justice Policy Research, Birkbeck College (the link[23] was subsequently tweeted by the College and the University of Chester);
- The PI directly emailed barristers and solicitors who had published articles on employment law (based on an internet search for employment lawyers);
- The PI emailed solicitors and barristers who she knew to be practising in ETs;
- The ET President's Office agreed to ask regional tribunal offices to contact LiPs identified by the PI from the most recent publicly available tribunal decisions published on a government website[24].

Persons who expressed an interest in the research were encouraged to contact the PI via email. A total of 40 participants were recruited. Our sample consisted of:

- 8 ET judges,
- 12 ET non-legal panel members,
- 18 ET practitioners (barristers, solicitors and a paralegal), and
- 2 Litigants in Person.

One panel member participant identified themself as having dual experience of ETs as both a panel member and a former LiP in their own ET claim.

Several of our England and Wales interviewees commented that Scottish employment cases handled witness evidence very differently, in particular there are no witness statements. We therefore interviewed one experienced Scottish employment lawyer (taking our grand total of interviews to 41) in order to increase our understanding of how employment tribunals in Scotland receive witness evidence. In Scotland, since no statements are exchanged in advance, the witnesses are taken through their narrative account in examination-in-chief.

The background experience of the 38 ET judges, panel members and practitioners was diverse. The judges recruited in this study had been sitting for a range of 6 to 15 years (*M* = 11.4 years). All had previously, or still, worked in practice as a solicitor or

[23] https://www.icpr.org.uk/taking-and-making-statement-exploratory-study-analysing-through-lens-research-production-witness-0

[24] https://www.gov.uk/employment-tribunal-decisions

barrister. The 18 practitioner participants worked in various professions, with their experience ranging from six months to 27 years (*M* = 12.9 years). Eight practitioner participants were barristers, six were solicitors, two worked in employment law support services, and one worked as a paralegal. Panel member participants had been sitting for between six months and 42 years (*M* = 17.4 years).

Two LiPs contacted us having seen information about the study on the web (this included details of a £25 Amazon voucher as a reward for their time). Both LiPs were interviewed. Insurmountable difficulties arose recruiting additional LiPs when from spring 2020, due to Covid-19 'lockdown', courts and tribunals were no longer operating as normal:

- The regional offices no longer had the resources to contact LiPs on our behalf[25], and;
- Access to the public to law centres and tribunals/court centres became extremely limited thus we lost the opportunity to use these spaces to display posters and distribute leaflets to recruit LiPs to our study.

Effectiveness of recruitment methods

Our methods of recruiting judges, panel members and practitioners were effective. Our planned method of recruiting LiPs was not tested; this was due to ongoing unprecedented circumstances created by the pandemic. In October 2020, when Covid-19 restrictions were still in place nationally, following discussion with our funders and members of our advisory group, we decided to complete this study with the data we had already collected. It is unfortunate that we could not recruit and interview more LiPs; we do not know if the recruitment method proposed would have been effective. Generally there is a dearth of research exploring lay participants' experiences of the justice system (Jacobson & Cooper, 2020), though we note there is a significant body of research focused on LIPs in the family courts and in Northern Ireland.[26]

Procedure

[25] This method of recruitment had just begun when national lockdown was initiated. One LiP contacted us but, having received further information, decided not to be interviewed.

[26] See for example, Trinder, E.J. & Hunter, R. (2015). Access to justice? Litigants in person before and after LASPO. *Family Law* and McKeever, G., Royal-Dawson, L., Kirk, E. & McCord, J. (2019). Litigants in person in Northern Ireland: Barriers to legal participation - Final report. Ulster University, Northern Ireland Human Rights Commission and Nuffield Foundation.

Participants who expressed an interest in the research were provided with detailed information about the project via email. Those who wished to take part were asked to complete and return a consent form before a convenient time and date was scheduled for the interview.

All interviews were audio recorded and conducted by the PI via telephone. The semi-structured nature of the interviews meant that participants were all asked ten questions, with further questions developing from individuals' responses. Before the interview was concluded, participants were also encouraged to share with the researcher any additional information they felt was relevant. The duration of interviews was between 18 minutes and 74 minutes (with an average of 41.9 minutes).

Data analysis

All participant interviews were transcribed verbatim. Due to the nature of the participants' background profile and their involvement in ET cases, issues of confidentiality and anonymity were crucial. During the transcription review process, care was taken to ensure that any details which might reveal personal identities or party/case participant identities were redacted (e.g. ET locations, organisations). This process was especially important when participants were providing case examples to illustrate their experiences and perspectives.

The data were analysed using Braun and Clarke's (2006) six-stage model of thematic analysis. This process involved reading all transcripts several times to develop familiarity. The transcripts were then coded for individual units of meaning, before a review of these codes revealed shared meanings (themes). We present these themes in line with Phase 2 research questions.

Phase :2 Results

Our thematic analysis revealed six themes. These were: (i) *professional processes*, (ii) *challenges for litigants in person preparing statements,* (iii) *resources*, (iv) enabling through *case management*, (v*) presentation preferences*, and (vi) *future improvements*. These themes are presented in line with the project research questions 5 – 10.

Research Question 5. How do lawyers and litigants in person prepare witness statements?

Here, we present participants' views and experiences in relation to the methods used to prepare witness statements. These findings relate to Theme 1: *Professional processes* and Theme 2: *Challenges for litigants in person preparing statements*. We begin with reference to Theme 1 before turning to Theme 2.

Theme 1: Professional processes

There was variability in participants' perceptions of the professional processes used to prepare witness statements.

> *With some solicitors I have no idea how they go about doing it, their methodology is quite mysterious to me.* PRAC 13

Whilst their methods may not always be obvious, it was widely understood that solicitors play a significant role in drafting statements.

> *You will find that the solicitors have basically written the witness statements largely upon client instructions based upon documents. I know from how the profession works that whilst the client might do a provisional statement, the solicitors will do draft statements, and based upon their instructions, but very much based upon the documentation.* JUD 3

> *They're often a little stiff, I think. You can tell when they've been worked on by the solicitors.* PRAC 4

One barrister described how they saw the solicitor's role and its limits.

> *The solicitor or the person drafting it may be imposing structure on it, may be asking the right questions, may be getting the information out and putting it in a useful order, may be excluding irrelevant material and may be trying to put it together in a way that tells a pervasive story, but, fundamentally, all the material has to come from the witness...* PRAC 5

One judge was clear about what they thought should happen.

> *…one of the things that happens is that the witness statements end up being drafted by committee… what should happen is that the solicitor interviews the witness, covers the areas with the witness that he or she thinks needs to be included in the witness statement, prepares a draft, sends it back to the witness. The witness corrects it and that's the statement.* JUD 5

Another barrister highlighted what happened in a case when the material did not appear to have come from the witness.

> *Because his witness statement just didn't sound like him, it was quite easy for my opponent then to make submissions that really the witness statement wasn't to be relied on at all. I think it was a mistake to draft the witness statement as if the claimant remembered things as clearly as the witness statement suggested.* PRAC 10

Telephone, email and face to face consultations were variously described as methods of creating a first draft; the method chosen may depend on the complexity of the case.

> *… complex ones, I prefer not to do them remotely. Basic cases, yes, I'm happy to do that but I just feel that sometimes having a client opposite [me in the same room] – maybe I'm a bit old school to some degree – you to sit down and go through [the evidence] sometimes is quite different to doing it on the phone. I'm not saying it can't be done. It can be done. It just depends. It depends on the client as well.* PRAC 11

> *I do prefer them to come in rather than do it over the phone...So I've got a little handheld recorder, so I'll record on that and then take a proof of evidence as I go... it's a lot easier to cross-refer and cross-check what I've done. I find that if I've interviewed a client they'll tend to want to come in every time we re-review the document…* PRAC 12

> *When I was a solicitor and drafted statements for witnesses, you sit down with the witness, you go through the story, you put it down in the language that you think the tribunal will want. And then you give the witness the draft, and I would always say, "I know I've drafted this for you, but it's your words, not mine. You're the one who takes the oath, and the worst thing that can happen in the tribunal is if you're asked about this and you say, 'The lawyer wrote that for me.' So, you take responsibility for it."* JUD 4

One practitioner made reference to practice which may inadvertently affect the content of the statement:

> *Yes, it's in our template thing we send out. "Don't talk to each other until we've all got draft witness statements together." And then you might say, "I know you think that happened, but it didn't, it wasn't." And then they say, "Actually, yes, you're right there." In which case one might change it.* PRAC 4

Several respondents questioned the merits of some drafting practices or highlighted the dangers of witnesses discussing their evidence together before or during the drafting process:

> *And with some cases there's sort of a factory production line. People who take on bulk litigation for major clients, where there's almost a proforma witness statement. You read it and you look at it and you say, "Well, how much thought's gone into this?" It's always obvious when the typeface is different for different parts of the same paragraph. The blanks have been filled in. So that's sometimes irritating.* JUD 3

> *Sometimes, if I'm really honest with you, the witness statement has been duplicated, because it's come as directed by the solicitor… They just change who they're talking about for the third party. So there's a quality about them there. I'm not saying it's a good quality; I'm just saying there is a standard quality when they've been fill-in-the-gaps type documents.* PAN 13

> *I dislike having witnesses discussing their evidence together, because it's just not how it's supposed to happen.* PRAC 14

Several interviewees made reference to the importance of having the documents in the case to hand when preparing the witness statement. According to one practitioner, referencing the bundle (of documents) and focusing on the issues is what makes a good quality witness statement.

> *I think what makes a good witness statement a) is the bundle but then I think b) is focusing on the issues.* PRAC 11

We note the Presidential Guidance on hearing bindles. It is usual for the ET to require the parties to co-operate to prepare a set of documents (known as 'the bundle') for the final hearing.

- 'Even if no formal order is made, the Tribunal prefers that documentary evidence is presented in one easily accessible set of documents (often known as "the hearing bundle") with everyone involved in the hearing having an identical copy.' (Guidance Note 2: Disclosure of documents and Preparing Hearings Bundles, para. 1)

The Presidential Guidance (2018) explains:

- 'Sometimes the parties meet and inspect each other's documents. More commonly, they agree to exchange photocopies of their documents in the case, which should be "clean" copies (that is, unmarked by later notes or comments, unless those notes or comments are themselves evidence).' (Guidance Note 2: Disclosure of documents and Preparing Hearings Bundles, para. 12)

The contents of the bundle should be agreed. In practice the parties do this by agreeing the index to the bundle.

- 'The parties then co-operate to agree the documents to go in the hearing bundle. The hearing bundle should contain only the documents that are to be mentioned in witness statements or to be the subject of cross-examination at the hearing, and which are relevant to the issues in the proceedings. If there is a dispute about what documents to include, the disputed documents should be put in a separate section or folder, and this should be referred to the Tribunal at the start of the hearing.' (Guidance Note 2: Disclosure of documents and Preparing Hearings Bundles, para. 13)

- 'One party then prepares the hearing bundles. This is often the respondent because it is more likely to have the necessary resources. Whoever is responsible for preparing the hearing bundles prepares the documents in a proper order (usually chronological), numbers each page (this is called "pagination") and makes sufficient sets of photocopies, which are stapled together, tagged or put into a ring binder.' (Guidance Note 2: Disclosure of documents and Preparing Hearings Bundles, para. 14)

Having a copy of the bundle to hand is essential when preparing a witness statement because the statement is a means of drawing key documents to the attention of the tribunal.

> *I always make sure that people have got a copy of the bundle, that's the first thing. Because you're meant to cross-refer, of course, to the bundle in your witness statement.* JUD 6

> *...I always make it clear to anyone I'm representing that the employment tribunal will not take a bundle of documents to the hearing and read them from start to finish. At best they will read the statements that are expressly referred to in the statement. Even then, they may not read all of those unless the advocate highlights these are really the key documents. I always say it's going to be really important to make sure every single document of relevance is cross-referred to.* PRAC 13

Theme 2: Challenges for litigants in person preparing statements

Some litigants in person might not realise that they need to produce a statement of their own:

> *[Some LiPs think] "Oh, a witness is somebody other than me." So, they don't come along with a witness statement themselves, and then they look blankly at me when you say, "Where's your witness statement?" Yes, I mean that happens quite a lot.* JUD 2

Many differences in the quality and content of statements were noted:

> *[The quality of witness statements is] just such a mixed bag really, I think it partly depends on how emotional the claimant is as well because some people are very, very aggrieved when they're in a tribunal, I think in a way they can't see the wood for the trees. For example you might get a witness statement that has the first three pages about their professional qualifications so we can see their dignity has been affronted...* PAN 2

> *As I say, that is where you can see the difference. Any litigant in person who has had to write their own statement, you can spot it within the first sort of three paragraphs, it hasn't got the same- (a) the layout is often different. All legal representatives who are familiar with the employment tribunal process, they have a set template, for a start, so the witness statements always look the same. You can tell a litigant in person who has done his own, or her own, witness statement because it doesn't always- It can be a different type font, it's not the same sort of way up. So you can see straightaway. But obviously it's*

the narrative. They can often go down paths of huge detail that probably isn't relevant. And obviously the biggest area is a lot of litigants don't always have the ability to correlate their witness statement, or emphasise within their witness statement, what the key points are of their actual case. And I think that's very difficult. PAN 11

But really quite often, particularly because employment law is quite complicated, in the beginning litigant in person witnesses often go off on tangents or address matters that the tribunal doesn't have jurisdiction to consider, or that don't go directly to the issues. PRAC 15

His statement was, in one sense, very, very good and very detailed. But often, because of emotion, he'd put several paragraphs in of things that he believed had happened, that actually didn't relate to the specific issue that had been identified by his ET1, and also in the preliminary hearing that he'd had, to sort of try and narrow down the issues. PAN 11

The other thing that you see all the time is litigants in person thinking that their statement just needs to consist of some notes, which they can then supplement. You know, they think they're going to go into the tribunal and they'll be able to talk at length and say everything that they want to say. I mean, there are quite a lot of people out there, as I'm sure you appreciate, who are not comfortable with the written word, and, again, I mean, you know, putting to one side the proposals to do everything electronically, which fills me with some trepidation, I've got to say, because the number of people that that would exclude is very considerable, but there are still people out there who… yes, I mean, they're not illiterate, although there are completely illiterate people out there. Completely illiterate people are few and far between, but people who really aren't comfortable looking at a 500-word, 1,000-word document, it's enormous.
JUD 2

There were differing levels of support available to litigants in person:

If they were very lucky they might be in a region where there was an employment specialist who would help them prepare their case. If they were really, really lucky, although much less so now, they might find they are in a region where the Citizens Advice person went along to represent them, although I think the funding for that has pretty much gone now…You'd have to be lucky to get, at your local Citizens Advice, someone who knew what they were doing. JUD 5

Anyone with a bit of common sense and the facilities, that can get online, can do a bit of research, and quite easily find out the way that it works. Some of the ACAS documentation is quite useful. You wouldn't believe how often…we [as

panel members] get phoned up by people that have employment-related issues saying, "Oh, what do I need to do? Can you give us some advice?" And of course, you've got Citizens' Advice. The first thing we always say to people is, "Check your house insurance to see if you've got legal cover." Quite often, people have. PAN 5

Research Question 6: 'To what extent are those who prepare witness statements aware of the law, guidance and research studies?' and Research Question 7. 'Do those who prepare witness statements find the existing legal rules and guidance useful, and if so/if not, how/why?'

Here, we present participants' views and experiences in relation to the law and guidance available. We focus on Theme 3: *Resources*.

Theme 3: Resources

When asked about what guidance was available, most judges made reference to the Presidential Guidance on witness statements, but most practitioners did not.

I'm sure there are all sorts of stuff on there, unofficial stuff, of very variable quality, but the Presidential Guidance is about it in terms of official. JUD 2

There really isn't much by way of accessible guidance for someone trying to put a statement together, unless they're going to maybe a Citizens Advice Bureau. PRAC 13

Where respondents expressed a view about the 'official' i.e. Presidential Guidance, some suggested that it could be improved/more user-friendly. However, no consensus emerged on what improved guidance would look like (more detailed guidance, templates and examples of statements were suggestions).

It's got a lot of practice directions, and when you go to the website it all looks a little bit scary. I wonder whether a template there, even if it doesn't say much, if it just had numbered paragraphs and an indication that it should be chronological and deal with the facts, not the arguments, and be as brief as possible without missing out important facts... Some kind of good, very user-friendly guidance on the website rather than the rather more formal practice directions. JUD 5

My initial gut reaction is against, I admit. I find it quite hard to imagine how you would ask the right sorts of questions in an electronic template to get out the information that you need? I tend to think that guidance is a better way of doing this than trying to impose a structure. I suppose I find it quite hard to see how

you would do that in a way that it didn't impose a structure, a one-size-fits-all structure, and yet I think different witness statements, different factual scenarios do need very often quite different. PRAC 5

[The Presidential Guidance] is helpful, but it doesn't- It tells you what you're supposed to do, but it doesn't give people a template or a structure. PRAC 12

There'd be absolutely no harm in having online examples of witness statements that have assisted in other cases. JUD 4

Research Question 8. What directions/case management decisions do ET judges and panels make to support the preparation of the best quality witness statements?

Here, we present participants' views and experiences in relation to directions and case management decisions. We therefore focus on Theme 4: *Enabling through case management*.

Theme 4: Enabling through case management

Many but not all cases will have a preliminary case management hearing during which the judge will engage the parties to identify the issues in the case. Almost all judges, panel members and practitioners highlighted the importance of 'the issues' being addressed in the witness statements.

There are two prominent references to 'the issues' in the 'Overriding Objective' within Rule 2 (emphasis added).

> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
> (a) ensuring that the parties are on an equal footing;
> (b) dealing with cases in ways which are proportionate to the complexity and importance of **the issues**;
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (d) avoiding delay, so far as compatible with proper consideration of **the issues**; and
> (e) saving expense.

If there is a case management hearing, the issues will usually be identified and agreed.

> *In a very large group of types of case, there will be a preliminary hearing for case management and a case management order will be sent out…What is crucial is the list of issues in a case. We spend a lot of our time, preliminary hearings, refining lists of issues, getting parties to join us in identifying the issues...in shorter cases or one-day unfair dismissals, we wouldn't have a preliminary hearing.* JUD 4

> *Matching the issues is very important, because in most cases, certainly discrimination cases we have a case management hearing and we set out what the issues are… The issues, and particularly the legal issues would, or should have been, hammered out at a case management hearing before we actually get to trial.* JUD 8

One practitioner's view is that what happens at case management is of vital importance:

> *I tell my pupils that the case management preliminary hearing is the most important hearing of all, because that's where the issues are set. In fact, clients would be well advised to use the most experienced counsel, if not trial counsel, for that hearing, rather than sending off a pupil or a very junior barrister, because that's where the issues are defined, and you can win or lose a case two years down the line on that discussion, and so it's very important to get the issues absolutely right.* PRAC 3

Preliminary hearings can be a useful opportunity to 'point' LiPs towards sources of support.

> *The universities run legal clinics and so on that they can help with. The quality of those is really pretty good, and they can help put these things together. So we point people in those directions. Really that's the best we can do, I think.* JUD 1

Tribunals can also provide lists of helpful organisations (see Appendix 1: Support and Publications on Witness Statements).

Since the tribunal will be considering 'the issues', the consequences of not addressing the issues in a witness statement may be damaging to a case, though according to one panel member, it is unlikely to be completely 'disastrous'.

> *I've never seen a statement being so disastrous that we couldn't go ahead with a case. They're generally sufficiently well anchored in the issues, even if the witness doesn't know that's what they're doing, that you can try and build a narrative from there.* PAN 10

Several judges and panel members described how case management at the start of a hearing can address defects in a witness statement from a litigant in person.

> *… we start the case off by discussing the issues with the parties. We go down the list which has already been prepared, and we identify if there are defects in the witness statement which the litigant, once he's had them pointed out to them, might want to expand upon. Then it might be an argument about the extent to which the litigant's entitled to expand. But, because it's still in principle an informal tribunal, I don't think we'd take such a formalistic approach as one would in the courts, where no doubt there'd be a suggestion that one had to adjourn it so that there'd be a further supplemental witness statement served by the witness dealing with these matters which hadn't been properly covered. I mean one would try to avoid that...* JUD 7

One panel member saw it as part of the tribunal's job to sort through a witness statement that includes irrelevant information.

> *You know, the claimant's witness statement can run to hundreds and hundreds of paragraphs…"What are the really important things?" Now, that's our job, as a tribunal. I get that, but it doesn't make life any easier if there's this whole mass of information and history there, some of which is perhaps not relevant to the case. Sorting through that, sometimes, can take quite a lot of time.* PAN 4

Research Question 9. How do panel members and other stakeholders perceive the quality of witness statements?

Here, we present participants views and experiences in relation to the quality of witness statement. We focus on Theme 5: *Presentation preferences*.

Theme 5: Presentation preferences

Overall, participants felt that the quality of witness statements varied both amongst those prepared by legal practitioners and by litigants in person.

> *But even those prepared by professional advisors vary a great deal. I was thinking about my experiences in the last three months, and in fact I've seen some good ones in the last three months. Litigants in person have kept to the*

point, structured their witness statements chronologically, referred to the relevant documents in them, not gone into sort of unnecessary argument...
PAN 5

If I know a certain solicitor is representing somebody, I can confidently expect that I'll get a good statement. There are others who I say, "Oh no." I know what I'm going to get, and it's going to be all over the place. JUD 8

The biggest message about the quality of witness statements, in fact the biggest message overall from our interviews, was that a good quality witness statement must address 'the issues'. The majority of judges and panel members and practitioners expressed this view.

What makes for a good witness statement is one that is...addressing squarely the issues, the list of issues in the case. PRAC 16

The issues were described by one practitioners as a 'map and compass' when it came to drafting a statement.

I think a bit of advice on drafting witness statements…use the list of issues as your map and compass. If something you're saying doesn't seem to relate to any of the issues, then why are you saying it? If there's something in the list of issues that you haven't said anything about, what do you say about it?
PRAC 5

Some interviewees pointed out that addressing the issues was important because it pre-empts what the judge has to address.

Focussing on the issues in dispute, or the issue that you have to prove, rather than kind of ephemeral detail….and I suppose pre-empting what might be in the mind of the judge. And I suppose that goes back to the issues in dispute…
PRAC 7

In delivering his judgement, he will follow the list of issues. They set out the heads of claim, the separate strands, the legal test. If you apply your witness statement to that kind of format with a chronology to start off with and then that kind of format, it's then helpful because you're focusing on the issues.
PRAC 11

One judge commented that statements might also need to contain information that goes beyond the issues in order to make sense to the reader.

It should address the issues. It should, so far as is sensible, avoid things that are irrelevant. By 'so far as is sensible', I mean, you know, there are times when

you need to put in stuff which is, strictly speaking, irrelevant in order for the rest of it to make sense. JUD 2

Exactly what the list of issues looks like might challenge some legal practitioners and litigants in person. In plain English, according to one interviewee, it is the questions that the tribunal has answer.

It surprises me sometimes that professional advisors don't understand what a list of issues looks like… But because there are so many litigants in person in tribunals, it is just sensible to have that encapsulated in one place so that everybody understands what they are arguing about...I describe a list of issues to litigants in person, as questions that the court needs to answer, and they derive from the legal principles we have to apply and the factual disputes that you want to raise….[for example] "Was there an unfair dismissal?" In other words, "Was there a reasonable investigation? JUD 5

Research Question 10. What practical methods and technological devices are relied on by those who prepare statements?

Our study revealed no strong preference for the use of technology/particular types of technology to support the making of witness statements. Those interviewees who mentioned technology spoke only of word-processing and audio recording devices.

We focus again on Theme 5: *Presentation preferences*.

Theme 5: Presentation preferences

Whilst our study revealed no particular praise for technological devices, judges, panel members and practitioners attached significant importance to methods of presentation. There was overall agreement on the following:

The statement should tell the witness's story in their own words.

…like all judges, I like my own stock phrases, is, "Imagine that you are telling this story to a reasonably bright 12-year-old who knows nothing about it."...It should be fact. JUD 4

…if the solicitor is preparing it, [the witness statement] can provide a useful walk through what the relevant documents are. But, it can sometimes lose a bit of colour, and lose a bit of personality in terms of speaking with the witness's own words. PRAC 15

[I will ask] "Have you read this statement recently?" I am expecting a yes. "Is it true to the best of your knowledge and belief?" I am expecting a yes. I always say, "A good solicitor will have left in a minor error so that you can say, "In paragraph 12, where it says 17 people it was actually 20. PRAC 16

...where there are large organisations and they're represented, I think, sometimes, the witness statements are a little coached, in as much as you find that there is a similar- I'm sure I said this earlier. There's a similar style, and you know that they've been sat in a room with a solicitor, and they've gone through it, and the solicitor has written it, so it's not actually the witness' words. It is the solicitor's spin on the witness'- what they said... PAN 7

The formatting of a word-processed statement should be reader-friendly.

I want double-spacing, single-sided," and they come double-sided and double-spaced, because judges make the big mistake of assuming things about people. PAN 3

I know this sounds quite a small thing, but the font is really important to me, in terms of being able to read it properly. Sometimes, we do get statements where the font is really small or it's close together, and it's difficult to read and absorb the information. What I do, and I know my colleagues do this, I highlight what I've read and I tick it off that I've looked at the right place in the bundle. So if I've got the space to do it on it, that's really helpful. PAN 13

I know this sounds a bit flippant, but one of my colleagues, now retired, said to a litigant in person – this was many years' ago – "I want you to set out your witness statement in no more than three pages." She did, in a font size that I didn't know existed. It was minute. You needed a magnifying glass to read it. I don't tend to fix word limits. JUD 8

The structure should be 'logical'; this might be chronological, according to the issues, or a combination of the two.

...something that is logically ordered and which ideally does it so that it's framed as a narrative so that it makes sense for someone to follow as they're reading. So the structure, I think usually it is helpful if that's imposed by somebody helping to draft the statement, but then the fine-grain content at sentence and paragraph level should be absolutely, as far as possible, in the witness's own words, using their phrases. PRAC 10

I think one that works through the relevant evidence, so potentially even structured by the list of issues or by a chronology. PRAC 10

But the issue is always going to be just condensing it because some witnesses have a habit of just waffling, or putting things not in a chronological order. They jump from one incident today to the one six months ago, then come back three months ago, then go back two years ago. You don't have a correct sequence of events that can be confused in tribunals. PRAC 6

So what I'm next hoping for is that they will tell me the story, and hopefully in a chronological order, and hopefully I can make some sense of that with reference to the list of issues. JUD 2

Often [in sexual harassment cases] I'll go, there are 30 allegations here, but about 10 of them are really about a promotion or five of them are really about what happened at that party. Then I'll say, "It's going to have more impact if you adopt a thematic approach rather than a strict chronological approach." That's an example of the type of structures I might use or at least suggest my instructing solicitors use. PRAC 13

There is a certain order, say for an unfair dismissal you'd have the dismissing officer, you might have the investigating office, dismissing officer and the appeal officer, that would be fairly typical, but understanding each person's role...Tightly packed, it's very useful to have one that you can read quickly, so if something is densely written, sort of very small font or squished up paragraphs or great long paragraphs, that's not very useful because it's hard to see the salient points. PAN 2

Judges and panel members were consistently clear that the length of the statement is important. Some respondents thought directions imposing a word limit on witness statements was a good thing, others thought it was not. There was agreement that a witness statement should address the issues but it should not be overly long.

I mean, of course, nobody likes the 100-page witness statement, and you do get 100-page witness statements which goes on and on and on, where you're struggling really to cross-reference what they're saying to any of the issues in the case. I mean, that's quite a common failing, but another pet hate, which I'm sure I share with most judges, is a witness statement that is two pages long and doesn't actually deal with anything. You know, just makes bald assertions. JUD 2

Well, I've never seen [word limits directed] at our tribunal…we've seen some fairly terrible witness statements, 54 pages long, if someone is litigating, I don't see how you could limit what they could put in their statement. I mean, judges, even when people are giving evidence, and particularly where you've got a litigant in person cross-examining witnesses, they're fairly reluctant to push them along too quickly. PAN 5

I think, rather than put a limit on the amount of words you can use, what we need to do is focus on what the issues are. How do you interpret that to an individual without any legal experience? That's the issue. It isn't about the words. It's about the content. It's about have you said all you want to be saying about the issues that we've got to look at? PAN 8

...our problem with professional advisors is that their witness statements tend to be far too long. JUD 5

[Dr Johnson] began a piece of correspondence to a friend of his by saying, 'I'm terribly sorry to write you such a long letter. I simply don't have time to write a short one'. Because it takes time to condense and consolidate it. But that's the way to do it. JUD 1

Theme 6: Future improvements

A final theme which emerged from our data concerned how the process of witness statement production could be improved.

Consistent with our literature review, our interviews revealed almost no evidence of practitioner training on how best to prepare a witness statement. When judges, panel members and practitioners were asked if they had had any training about witness statements, with the exception of one interviewee, answers were vague.

Does the Law Society not do that as part of solicitor training? I don't know. But no, I'm not. I'm not aware of any, but that's probably because I came through a route where I wouldn't be aware of any. JUD 5

In describing their training for the role of panel member, one person said they had access to a 'Dropbox' containing resources:

There's a lot of general guidance, there are huge volumes of it, advice from experienced judges, and case law and all sorts of things…There's too much volume to read it all, really. I'm just trying to get through a bit each day, but there's nothing particular about witness statements. PAN 5

Only one of our interviewees referred to specific training on taking witness statements.

We've had bespoke training within our firm. There are a few people who do training; there's Gordon Exall that's done training, I think...we do our own training in-house as well because of the peculiarities of some of our cases, as I said, having to use interpreters and vulnerable clients we've had. PRAC 7

Some said they had received training about preparing witness statements when studying for their law qualifications, but could not remember it specifically. Others said they had received no training. Several practitioners said they had learned on-the-job or picked up the skill as they have gone along.

> *Apart from during my LPC, so no is the answer to that [question asking if I have had training]. I've hopefully picked up good practice as it's gone along.* PRAC 2

> *I haven't actually been on a course designed to prepare witness statements itself. My knowledge comes from my legal practice course and what I learnt there. A lot of it is through experience, reading, speaking to colleagues, even statements from the other side sometimes when they come. They're always helpful. You can look at something and say, "I like the way they've done this," or, "I like the way that this has been done," sometimes. I think it's just multiple things, multiple learning, block exercises with different things.* PRAC 11

> *I remember what I would describe as a very woolly section of training on this during the Bar Vocational Course. If I'm really honest, I don't think I learned anything of any real value about witness statements until I started pupillage. Then I learned from my supervisors or my pupil masters as they then were.* PRAC 13

> *Preparing witness statements definitely wasn't covered at bar school, and it wasn't really covered in pupillage either because it's not a central part of what barristers do, although we do end up doing it.* PRAC 10

Some practitioners emphasised the advantages of learning about statement writing in the context of practice and the importance of ongoing learning:

> *I think we have a long period of training, but I think it needs to carry on well beyond the date that you finish your training contract because you need to be under somebody to watch and learn, and to have an attitude that you're going to submit to that continued learning. It's not just CPD, it's not just checking boxes. It's about awareness, isn't it, that you're dealing with people, you're dealing with, potentially, situations that greatly affect people's lives, that it has a very traumatic effect.* PRAC 8

> *If I have [had training on preparing witness statements], I have absolutely no recollection of it. …I have learnt this in practice. If someone had taught me formally about it right at the very beginning of my career and before I'd really done it, I'm not sure it would have stuck. If someone tried to teach me about it a few years in, that might have been more use. It might have accelerated my learning process quite a bit.* PRAC 5

One judge's perception was that solicitors go to CPD courses about preparing witness statements however a lot of practitioners still do them badly.

> *I mean, the thing is, doing a witness statement is a skill which you train to do as a lawyer, particularly solicitors trained in taking witness statements, and it's not easy. If it was easy, if it was something that anyone could simply do well just by reading some guidance, well, solicitors wouldn't have to be trained in doing it and they wouldn't go to seminars about it and lectures and CPD about it. It's something which a lot of legal professionals do badly.* JUD 2

Phase 3: Recommended changes to practice, guidance and resources

Research Question 11. What practice change/s could be introduced to the preparation of witness statements that would enhance their quality?

Having identified practices which enhance, and detract, from the production of the best quality witness statements and shared examples of good practice, we looked ahead and make specific recommendations about the production of witness statements for the purposes of ETs. We believe these recommendations are likely to result in better quality witness statements, enhance access to justice and improve the efficiency of decision-making.

Based on our findings in phases 1 and 2, we recommend:

1. Improved guidance and sign-posting of resources to support practitioners and litigants in person and;
2. Mandatory CPD training for legal practitioners who prepare or oversee the preparation of witness statements.

Recommendations

1. Improved guidance and resources to support practitioners and litigants in person

The gathering of witness statements in criminal law cases has been the focus of substantial attention resulting in a plethora of published research, and consequently, scientifically informed guidance. Indeed, we identified no comparable, scientifically informed guidance for those tasked with preparing witness statements in ET cases. As revealed in Phase 1 of this project, there is limited guidance available for those tasked with producing a witness statement for the purpose of an ET. The guidance which is currently available, and which was discussed by participants in Phase 2 of this project, focusses upon: (i) the structure and formatting of statements, (ii) the content, including addressing of the identified issues and reference to the claim bundle, and (iii) the use of language, including the witness's own words.

A vast body of research within the area of psychology has already established the cognitive abilities and limitations of witnesses in criminal proceedings, and how human memory is fallible to a host of extraneous variables, including misinformation effects. Further, studies have reported on the effects of particular question types on witnesses' responses.

We therefore suggest:

a) Updating and amending the Presidential Guidance (2018)

We suggest updating the Presidential Guidance (2018) to reflect the findings of this study and psychological research which informs current best practice on interviewing witnesses. Such revision should include:

1. Clarification about determining the case 'issues', what is meant by 'issues', how and when they should be identified and agreed (including in cases when there is no preliminary case management hearing) and how they should be addressed by a witness statement;
2. Relevant principles from psychological research with regard to the production of witness statements.

The 'issues' that the witness statement should address appear to be the *factual issues* that speak to the *legal issues*; we suggest that if the legal and factual issues become conflated this might contribute to statements becoming 'over-lawyered' and the witness's own words getting lost in the process.

We note parallels between our findings and those of another recent project conducted for the Business and Property Courts. In that study, one of the proposals that 'gathered the support of a majority' was that 'specific issues should be identified at the [case management conference] and factual witness statements limited to those issues' (WEWG, 2019, 10). The WEWG also concluded that for the Business and Property Courts there is very little guidance regarding the process of drafting witness statements (WEWG, 2019, 11). The WEWG universally agreed that 'an authoritative statement of best practice in relation to the preparation of witness statements would be of assistance to practitioners' as well as trainers and teachers. Though the group did not attempt to draft such guidance or review studies on human memory and witness statements, it noted that guidance should be 'conscious of the risk of corrupting memory through the process [of preparing a witness statement]' (WEWG, 2019, 12).

Practice Direction 57AC, 'Trial Witness Statements in the Business Property Courts', requires a statement of compliance from the witness and the statement must be endorsed with a certificate of compliance by the relevant legal representative. The wordings of these declarations is set out in the Practice Direction.[27]

[27] Further Information is available at https://www.justice.gov.uk/courts/procedure-rules/civil/127-cpr-update.pdf

For the witness this is:

> ‘I understand that the purpose of this witness statement is to set out matters of fact of which I have personal knowledge.
> I understand that it is not my function to argue the case, either generally or on particular points, or to take the court through the documents in the case.
>
> This witness statement sets out only my personal knowledge and recollection, in my own words.
>
> On points that I understand to be important in the case, I have stated honestly (a) how well I recall matters and (b) whether my memory has been refreshed by considering documents, if so how and when.
>
> I have not been asked or encouraged by anyone to include in this statement anything that is not my own account, to the best of my ability and recollection, of events I witnessed or matters of which I have personal knowledge.’ Para 4, Practice Direction 57A)

Appendix to Practice Direction 57AC, ‘Statement of Best Practice in relation to Trial Witness Statements’, describes the approach of the court to human memory (para 1.3) and what the contents of witness statements should be limited to. The guidance for practitioners on the preparation of witness statements is brief and includes for example:

> ‘Any trial witness statement should be prepared in such a way as to avoid so far as possible any practice that might alter or influence the recollection of the witness other than by refreshment of memory...’ (para 3.2)
>
> ‘Particular caution should be exercised before or when showing a witness any document they did not create or see while the facts evidenced by or referred to in the document were fresh in their mind.” (para 3.4(3)
>
> ‘The preparation of a trial witness statement should involve as few drafts as practicable. Any process of repeatedly revisiting a draft statement may corrupt rather than improve recollection.’ (para 3.8).

Such guidance is innovative and a welcome development. However, we would recommend more detailed guidance for practitioners based on established witness interviewing practices; such guidance should underpin mandatory training for practitioners who interview witness and draft statements.

b) Resources listed in one user-friendly place

A number of interviewees acknowledged that there is guidance available to support the production of witness statements. However, both litigants in person in our study suggested that the available guidance did not meet their needs with regard to the required content of statements, particularly in terms of speaking to the issues. Practitioners made greater use of their own and colleagues' experience of drafting statements, rather than referring to published sources of support.

While none of the identified published sources were explicitly informed by psychological research, our review recognised that many sources attempt to enable the creation of *good quality* statements. At present, some material is freely available on the internet, but some is only available behind a paywall or in books (for which there is a fee). The costs associated with accessing resources may indirectly affect access to justice for many litigants in person.

It may also be the case that the way materials are presented (currently mostly written) could be more engaging, more effective and more accessible to members of the public. We note that the President of Employment Tribunals (England and Wales) is keen to develop the Employment Tribunal website and is considering a YouTube channel that provides accessible guidance in video rather than written form.[28]

We suggest that:

1. The value of current and proposed sources of support (organisations and publications) identified in this project are reviewed in greater depth. For example, this might be achieved by surveying practitioners and lay people about their frequency of use of current sources and the perceived effectiveness of current and proposed sources;
2. Sources (or potential sources) of support and guidance for those preparing witness statements are presented in an 'official' list maintained by, and available on, the gov.uk website alongside other information about ETs.

We have listed in Appendix 1 some organisations and publications which are sources (or potential sources) of support and guidance for those preparing witness statements. This list is not exhaustive nor should it be taken as an endorsement of the support or guidance that organisations purport to provide.

[28] Email from the President of Employment Tribunals (England and Wales) to the PI, Professor Cooper, 29th January 2021.

2. CPD Training for Practitioners

As identified in Phase 1 of this project, there is a vast body of research within the field of psychology has which has already established the cognitive abilities and limitations of witnesses in criminal proceedings, and how human memory is fallible to a host of extraneous variables, including misinformation effects. Research has reported on the effects of particular question types on witnesses' responses, and what effects training can have on the ability of legal professionals to accurately gather complete accounts.

Participants in Phase 2 revealed scarce evidence of professional training which specifically focussed upon how best to prepare a witness statement, including the questioning methods used and the approaches used to establish rapport with witnesses. Only one of our interviewees referred in detail to specific training on taking witness statements. Although some others said they had received training about preparing witness when studying for their law qualifications, they could not remember details of such training. Several practitioners said they had learned while in practice. Some practitioners emphasised the advantages of learning about statement writing in the context of practice and the importance of ongoing learning, however, Phases 1 and 2 identified little information about such continuing professional development (CPD) programmes or any evidence that they are widely attended.

We suggest that:

a) An in-depth review of witness statement training is conducted. This review may take the form of qualitative research which explores programme content and materials (where available);
b) A wider review of legal practitioners' training needs is conducted. This review may take the form of a survey which captures the perceptions, experiences and training needs of legal practitioners in respect of preparing witness statements;
c) Pre- and post- qualification training and CPD courses are informed by relevant research from the field of psychology. Such training should be mandatory for practitioner representatives who interview witnesses, draft witness statements or oversee the practice of taking and making witness statements.

Impact of Covid-19 and further research

The impact of the coronavirus, Covid-19, drastically reduced our opportunities to recruit and interview litigants in person. Only three interviewees in this study had experience themselves of being litigants in person in the Employment Tribunal, however this does not detract from the evidence-base for the recommendations made in this report. In addition, we strongly support and encourage further research which engages lay users of the Employment Tribunal.

Covid-19 and national requirements for social distancing have necessitated a reduction in in-person meetings with legal practitioners and a corresponding increase in the use of video technology for meetings. Our study focussed on practices before the impact of Covid-19. How practitioners have utilised/further utilised technology to take witness statements and what impact this might have on the process or quality of the witness statement is not covered by this study. We strongly support further research in this area including analysis of the interaction between practitioners and witnesses when they prepare statements. For example, independently recording and analysing[29] statement preparation processes could bring fresh and valuable insights.

Scope of this study and wider reform

The recent Business and Property Courts report (WEWG, 2019, 17) includes a call for an 'authoritative statement of best practice regarding the preparation of witness statements…based on the principles identified in this report' and a call for 'harmonisation' of the guides of the Commercial Court, Chancery Division and TCC' (WEWG, 2019, 18). We go further and call for harmonised guidance to be created that would represent good practice for the preparation of witness statements for all civil courts and tribunals in England and Wales. Such guidance should be taught to lawyers pre and post-qualification and be grounded in sound psychological principles for good interviewing to promote complete and accurate witness memory recall.

Whilst new guidance, training and open access to reliable, supporting resources (which might include statement templates and training videos) is a first step, we also encourage software developers to consider intelligent systems that support witnesses and practitioners in the preparation of witness statement evidence. Whilst outside the scope of this research, we acknowledge the possibility of future technology having a significant role to play in recording the process of preparing witness statements, recording witness evidence, guiding witness interview questions and producing witness evidence for courts and tribunals.

This study shows that preparing a good quality witness statement for the Employment Tribunal (England and Wales) is a complex task, the quality of witness statements

[29] This would need to be in compliance with strict confidentiality and ethical requirements.

varies and the implications for the justice system and those who use it are immense. We believe our recommendations, if implemented, will increase access to justice and better quality decision making; witness statements are more likely to contain evidence that is complete and accurate if guidance, support and training on the preparation of witness statements improves. Whilst this study is rooted in the Employment Tribunal process, we believe our recommendations are relevant to all civil courts and tribunals in England and Wales.

Conclusion

Based on our study about the preparation of witness statements for Employment Tribunals, we recommend improved rules and guidance, better signposting of existing resources and mandatory training for practitioners.

Judges and practitioners in our study repeatedly referred to the importance of witness statements 'addressing the issues'. We recommend rules of procedure and Presidential Guidance (2018) that require those taking part in case management to identifying and agree the factual issues that a witness statement should address. This should be a pre-requisite for every case when witness statements are ordered. This was not our only or main concern.

At present, Presidential Guidance (2018) is focussed on *what* a statement should look like ('typewritten or word-processed', 'page numbered', 'numbered paragraphs', 'in a logical order (ideally, chronological)') and *what* to include ('cover all the issues in the case' and 'as full as possible') but does not give guidance on *how to* achieve this. Current guidance and practitioners in our study place emphasis the presentation and coherence of the end product, the witness statement, *for the reader*.

Our study reveals that guidance should also place emphasis on how *the witness* is asked to recall events; psychological research tells us that both the circumstances in which a statement is taken, and the interviewer's approach affect the completeness and accuracy of witness evidence. These lessons from psychology are barely touched upon in literature or guidance for those preparing witness statements for the Employment Tribunal or for civil courts and tribunals more generally.

There is no straightforward route to finding informative guidance on how to prepare witness statements. Searching for on-line resources is a task in itself, 'separating the wheat from the chaff' is another. The relevance, reliability and relative importance of currently available material is not obvious to a non-expert and this places many litigants in person at a distinct disadvantage. Many lawyers new to the task of preparing a witness statement could face a similar difficulty. We recommend a thorough review of all available resources giving guidance on witness statements in order to provide appropriate signposting.

We found no evidence in our study of widely available or widely undertaken practitioner training on the preparation of witness statements. Employment lawyers in our study appear to have been mainly ‘learning on the job’. We note a significant gap in teaching and learning with regard to the preparation of witness statements, a gap which appears to exist for practitioners in civil courts and tribunals, not just the Employment Tribunal. This gap ought to be closed as soon as possible. Witness statements are evidentially important, and their quality is likely to be enhanced if practitioners are taught how to interview witnesses in accordance with the principles established by decades of psychological research.

Although our study focusses primarily on Employment Tribunals, much more could be done to improve training and guidance on witness statement preparation in the civil justice system as a whole.

References

Advisory, Conciliation and Arbitration Service, (2015). Code of Practice on Disciplinary and Grievance Procedures. Retrieved from: https://www.acas.org.uk/acas-code-of-practice-for-disciplinary-and-grievance-procedures/html

Advisory, Conciliation and Arbitration Service, 2020), Early Conciliation Service. Retrieved from: https://www.acas.org.uk/early-conciliation

Baldwin, J. (1993) 'Police Interview Techniques: Establishing Truth or Proof?' The British Journal of Criminology 33(3), 325–52.

Benton, T. R., Ross, D. F., Bradshaw, E., Thomas, W. N., & Bradshaw, G. S. (2006). Eyewitness memory is still not common sense: Comparing jurors, judges and law enforcement to eyewitness experts. *Applied Cognitive Psychology*, *20*(1), 115-129.

Brackmann, N., Otgaar, H., Roos af Hjelmsäter, E., & Sauerland, M. (2017). Testing a new approach to improve recall in different ages: Providing witnesses with a model statement. *Translational Issues in Psychological Science*, *3*(2), 131.

Braun, V., and V. Clarke. (2006). Using thematic analysis in psychology. *Qualitative Research in Psychology, 3*(2), 77–101.

Bull, R. and Milne, B. (2004) 'Attempts to Improve the Police Interviewing of Suspects' in Lassiter, G.D. (ed.) Interrogations, Confessions, and Entrapment. New York: Kluwer Academic.

Clarke, C., & Milne, R. (2001). National evaluation of the PEACE investigative interviewing course. Police Research Award Scheme. London: Home Office

Cooper, P. (2019). , 'Creating witness statements for employment tribunals', *ela Briefing,* Vol 26, No 8, 16.

Ciranni, M. A., & Shimamura, A. P. (1999). Retrieval-induced forgetting in episodic memory. *Journal of Experimental Psychology: Learning, Memory, and Cognition*, *25*(6), 1403.
Cochran, K. J., Greenspan, R. L., Bogart, D. F., & Loftus, E. F. (2016). Memory blindness: Altered memory reports lead to distortion in eyewitness memory. *Memory & Cognition*, *44*(5), 717-726.

Cowan, N., & AuBuchon, A. M. (2008). Short-term memory loss over time without retroactive stimulus interference. *Psychonomic Bulletin & Review*, *15*(1), 230-235.

Cunningham, N. & Reed, M. (2014). *Employment tribunal claims: tactics and precedents* (4th ed.). London: LAG Education.

Curwen, D. (2018). *Employment claims without a lawyer: a handbook for litigants in person* (2nd ed.). Bath: Bath Publishing.

Dando, C. J. (2013). Drawing to remember: External support of older adults' eyewitness performance. *PloS one*, *8*(7), e69937.

Dando, C. J., Gabbert, F., & Hope, L. (2020). Supporting older eyewitnesses' episodic memory: the self-administered interview and sketch reinstatement of context. *Memory*, 1-12.

Dando, C., Wilcock, R., & Milne, R. (2009). The cognitive interview: The efficacy of a modified mental reinstatement of context procedure for frontline police investigators. *Applied Cognitive Psychology: The Official Journal of the Society for Applied Research in Memory and Cognition*, *23*(1), 138-147.

ELA (2020). A practical guide for remote hearings in the Employment Tribunal. Employment Lawyers Association (UK).

Fisher, R. P., & Geiselman, R. E. (1992). *Memory enhancing techniques for investigative interviewing: The cognitive interview.* Springfield, US: C.C. Thomas.

Fisher, R. P., & Geiselman, R. E. (2010). The cognitive interview method of conducting police interviews: eliciting extensive information and promoting therapeutic jurisprudence. *International Journal of Law and Psychiatry, 33,* 321-328.

Forrester, M. (2010). *Doing qualitative research in psychology*. London: Sage.

Gabbert, F., Hope, L., & Fisher, R. P. (2009). Protecting eyewitness evidence: Examining the efficacy of a self-administered interview tool. *Law and human behavior*, *33*(4), 298-307.

Goodwin, K. A., Hannah, P. J., Nicholl, M. C., & Ferri, J. M. (2017). The confident co-witness: The effects of misinformation on memory after collaborative discussion. *Applied Cognitive Psychology*, *31*(2), 225-235.

Hardt, O., Nader, K., & Nadel, L. (2013). Decay happens: the role of active forgetting in memory. *Trends in cognitive sciences*, *17*(3), 111-120.

Harrison, R. (2019). Statements of the bleedin' obvious. https://www.newlawjournal.co.uk/content/statements-of-the-bleedin-obvious

Hemmer, P., & Steyvers, M. (2009). A Bayesian account of reconstructive memory. *Topics in Cognitive Science*, *1*(1), 189-202.

Hope, L., Ost, J., Gabbert, F., Healey, S., & Lenton, E. (2008). "With a little help from my friends…": The role of co-witness relationship in susceptibility to misinformation. *Acta Psychologica*, *127*(2), 476-484.

HM Courts and Tribunals Service, 2020. The hearing: guidance for claimants and respondents: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869712/t425-eng.pdf

Jacobson, J. & Cooper, P. (2020). Eds. Participation in courts and tribunals: concepts, realities and aspirations. Bristol: Bristol University Press. ISBN 9781529211290.

Koriat, A., & Goldsmith, M. (1994). Memory in naturalistic and laboratory contexts: Distinguishing the accuracy-oriented and quantity-oriented approaches to memory assessment. Journal of Experimental Psychology: General, 123, 297–316.

Koriat, A., & Goldsmith, M. (1996). Monitoring and control processes in the strategic regulation of memory performance. Psychological Review, 103, 490–517.

Lamb, M. E., Hershkowitz, I., Orbach, Y., & Esplin, P. W. (2008). *Tell me what happened: Structured investigative interviews of child victims and witnesses.* Chichester, England: Wiley-Blackwell.

Larsson, A. S., & Lamb, M. E. (2009). Making the most of information gathering interviews with children. *Infant and Child Development, 18*, 1-16.
Launay, C., & Py, J. (2015). Methods and aims of investigative interviewing of adult witnesses: an analysis of professional practices. *Practiques Psycholoiques, 21,* 55-70.

Loftus, E. F. (2005). Planting misinformation in the human mind: A 30-year investigation of the malleability of memory. *Learning & memory*, *12*(4), 361-366.

Loftus, E. F., Miller, D. G., & Burns, H. J. (1978). Semantic integration of verbal information into visual memory. *Journal of Experimental Psychology: Human Learning and Memory, 4,* 19-31.

Loftus, E. F., & Palmer, J. E. (1974). Reconstruction of automobile destruction: an example of the interaction between language and memory. *Journal of Verbal Learning and Verbal Behaviour, 13,* 585-589.

MacLeod, M. (2002). Retrieval-induced forgetting in eyewitness memory: Forgetting as a consequence of remembering. *Applied Cognitive Psychology: The Official Journal of the Society for Applied Research in Memory and Cognition*, *16*(2), 135-149.

Mason, J. 2018. *Qualitative researching*. 3rd ed. London: Sage.

Medium.com: Witness statements in the employment tribunal in England and Wales**.** https://medium.com/adviser/witness-statements-in-the-employment-tribunal-in-england-and-wales-a09a1aec7fa3

Milne, R. and Bull, R. (2006) Interviewing victims of crime, including children and people with intellectual difficulties. In M. R. Kebbell and G. M. Davies (eds) *Practical Psychology for Forensic Investigations* (7–23). Chichester: Wiley.

Moston, S., Stephenson, G.M. and Williamson, T. (1992) 'The Effects of Case Characteristics on Suspect Behaviour During Police Questioning' The British Journal of Criminology 32: 23–40.

Office for National Statistics, (2020). Employment in the UK: March 2020: Estimates of employment, unemployment and economic inactivity for the UK. Retrieved from: https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/employmentintheuk/march2020

Oxburgh, G., & Dando, C. J. (2011). Psychology and interviewing: What direction now in our quest for reliable information?. *British Journal of Forensic Practice*, *13*, 135-147.

Oxburgh, G. E., Myklebust, T., & Grant, T. (2010). The question of question types in police interviews: a review of the literature from a psychological and linguistic perspective. *International Journal of Speech, Language & the Law*, *17*(1).

Oxburgh, G., Myklebust, T., Grant, T., & Milne, R. (2016). Communication in investigative and legal settings: introduction and contexts. *Communication in investigative and legal contexts. Wiley, Chichester*, 1-13.

Paterson, H. M., & Kemp, R. I. (2006). Comparing methods of encountering post-event information: The power of co-witness suggestion. *Applied Cognitive Psychology: The Official Journal of the Society for Applied Research in Memory and Cognition*, *20*(8), 1083-1099.

Presidential Guidance for General Case Management in Employment Tribunals (2018): https://www.judiciary.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20180122.pdf

Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal proceedings (2020a): https://www.judiciary.uk/wp-content/uploads/2013/08/ET-Presidential-Guidance-on-Vulnerable-Parties-and-Witnesses-22-April-2020.pdf

Presidential Guidance on remote and in-person hearings (2020b): https://www.judiciary.uk/wp-content/uploads/2013/08/14-Sept-2020-SPT-ET-EW-PG-Remote-and-In-Person-Hearings-1.pdf

Presidential Practice Direction on remote hearings and open justice (2020): https://www.judiciary.uk/wp-content/uploads/2013/08/14-Sept-2020-SPT-ET-EW-PD-Remote-Hearings-and-Open-Justice.pdf

Runswick Cole, K. (2011). Interviewing. In *Qualitative methods in psychology: A research guide*, ed. P. Bannister, G. Bunn, and E. Burman, pp.88–100. New York: McGraw-Hill Education.

Shapira, A. A., & Pansky, A. (2019). Cognitive and metacognitive determinants of eyewitness memory accuracy over time. *Metacognition and Learning*, *14*(3), 437-461.

Smith, R. M., Powell, M. B., & Lum, J. (2009). The relationship between job status, interviewing experience, gender, and police officers' adherence to open-ended questions. *Legal and Criminological Psychology*, 14, 51-63.

Snook, B., & Keating, K. (2011). A field study of adult witness interviewing practices in a Canadian police organization. *Legal and Criminological Psychology*, *16*(1), 160-172.

Sperduti, M., Armougum, A., Makowski, D., Blondé, P., & Piolino, P. (2017). Interaction between attentional systems and episodic memory encoding: the impact of conflict on binding of information. *Experimental brain research*, *235*(12), 3553-3560.

Tuckey, M. R., & Brewer, N. (2003). How schemes affect eyewitness memory over repeated retrieval attempts. *Applied Cognitive Psychology, 17,* 785-800.

Volz, K., Leonhart, R., Stark, R., Vaitl, D., & Ambach, W. (2017). Psychophysiological correlates of the misinformation effect. *International Journal of Psychophysiology*, *117*, 1-9.

Wells, G. L. (1978). Applied eyewitness-testimony research: System variables and estimator variables. *Journal of Personality and Social Psychology*, *36*(12), 1546.

Witness Evidence Working Group (2019). *Factual Witness Evidence in Trials before the Business and Property Courts*: https://www.judiciary.uk/wp-content/uploads/2019/12/Witness-statement-working-group-Final-Report-.pdf

Wixted, J. T., Mickes, L., & Fisher, R. P. (2018). Rethinking the reliability of eyewitness memory. *Perspectives on Psychological Science*, *13*(3), 324-335.

Waite, J. P., Payne, A., Meredith, Moss, A., & Goss, J. (2017). *The employment tribunal handbook: practice, procedure and strategies for success* (5th ed.). London: Bloomsbury Professional.

Appendix 1: Support and Publications on Witness Statements

Organisations and publications can provide support and guidance for those preparing witness statements This list is not exhaustive nor should it be taken as an endorsement of the Organisations support or published material listed in sections B and C below. We have no control over the quality or content of these or any other resources and take no responsibility for the accuracy of the information listed below or quality of any advice of guidance obtained.

A: Organisations

Generally (all types of case)[30]

Advice on tribunal procedures and what happens at an Employment tribunal hearing can be found at www.advicenow.org.uk See https://www.advicenow.org.uk/tags/employment-tribunals

Law Centres: www.lawcentres.org.uk
The precise locations and addresses of those nearest to any litigant are available on the website and by ringing the Law Centres Network on 020 7842 0720.

Law Works Clinics www.lawworks.org.uk/clinics
A nationwide network of free legal advice sessions supported by the Law society. You can find when and where your local sessions are to be held.

Citizens' Advice Bureaux: www.citizensadvice.org.uk

The precise locations and addresses of those nearest to you are available on the website. The CAB website also has a link to a self-help website: www.adviceguide.org.uk which has advice.

Public Concern at Work www.pcaw.org.uk

Any trade union or trade association of which you are a member.

ACAS: Helpline 0300 123 1100 or online support www.acas.org.uk

University of Law advice line Tel 01483 216 528 and http://www.law.ac.uk/about/legal-advice-for-the-public

[30] This section is part of the information sheet for users of the East Anglia Region of the Employment Tribunal which identifies relevant national organisations. The sheet also lists regional resources but we have not included those here. It is noted on the information sheet, and we reiterate here, the Employment Tribunal is not responsible for the content or quality of any advice or assistance which may be obtained.

The Bar Pro Bono Unit www.barprobono.org.uk

University of East Anglia law clinic http://www.uea.ac.uk/law/clinic/students/free-legal-advice-scheme

Free Representation Unit www.thefru.org.uk - requires a referral from a referral agency (see the website for an explanation)

If you have household, car or other insurance cover, it may be that you are paying for legal expenses insurance which could be used to fund employment tribunal proceedings.

Some solicitors, barristers or other representatives offer a 'no win – no fee' service:

Cambridge free Legal Advice Group http://lawworks.org.uk/cambridge-cab-legal-advice-group-clinic

Norfolk Community Free Legal advice (Cromer) http://lawworks.org.uk/norfolk-community-law-service

Norfolk Community Law Service (Norwich) http://www.ncls.co.uk

Law Advice Centre Ipswich and Suffolk Council for Racial Equality http://www.iscre.org.uk/

Northamptonshire CAB Pro Bono Clinic http://www.northampton.ac.uk/about-us/services-and-facilities/pro-bono-advice-clinic

BPP Law school (Telephone Advice line) http://www.bpp.com/bpp-university/l/eltal

For discrimination cases only:

Equality and Human Rights Commission: www.equalityhumanrights.com
Tel 0808 800 0082.

Equality Advisory and Support Service Freepost FPN4431
www.equalityadvisoryservice.com

You may also find a local Racial Equality Council through the British Federation of Racial Equality Councils http://www.bforec.co.uk/

C: Books

Cunningham, N. & Reed, M. (2014). *Employment tribunal claims: tactics and precedents* (4th ed.). London: LAG Education.

Curwen, D. (2018). *Employment claims without a lawyer: a handbook for litigants in person* (2nd ed.). Bath: Bath Publishing.

Waite, J. P., Payne, A., Meredith, Moss, A., & Goss, J. (2017). *The employment tribunal handbook: practice, procedure and strategies for success* (5th ed.). London: Bloomsbury Professional.

Appendix 2 – An example of directions relating to the preparation and use of witness statements in an Employment Tribunal

This example of 'standard' wording for a 'witness statement order' were provided an Employment Tribunal Judge interviewed for this study.

1. The claimant and the respondent must prepare witness statements for use at the hearing. Everybody who is going to be a witness at the hearing, including the claimant, needs a witness statement.

2. A witness statement is a document containing everything relevant the witness can tell the Tribunal. Witnesses will not be allowed to add to their statements unless the Tribunal agrees.

3. Witness statements should be typed if possible. They must have paragraph numbers and page numbers. They must set out events, usually in the order they happened. They must also include any evidence about financial losses and any other remedy the claimant is asking for. If the witness statement refers to a document in the file it should give the page number.

4. At the hearing, the Tribunal will read the witness statements. Witnesses may be asked questions about their statements by the other side and the Tribunal.

5. The claimant and the respondent must send each other copies of all their witness statements by [date].

6. The claimant and the respondent must both bring copies of all the witness statements to the hearing for their own use.

7. The [respondent/claimant] must bring [two/four] more copies of the witness statements to the hearing for the Tribunal to use by 9.30 am on the first morning.

Or

The [respondent/claimant] must provide [two/four] more copies of the witness statements to the Tribunal on the working day immediately before the first day of the hearing, by 12 noon.

8. There is more information about witness statements here, in [Presidential Guidance on General Case Management] Guidance Note 3, from page 10:
https://www.judiciary.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20180122.pdf