



## Season 3

### Episode 5 – What to expect at an employment tribunal: Appearing as a witness, with Kim Wright and Joseph England

**Ellie:** Hi and welcome to the Work Couch Podcast, your fortnightly deep dive into all things employment. Brought to you by the award-winning employment team at law firm RPC, we discuss the whole spectrum of employment law with the emphasis firmly on people. Every other week we unpack those thorny HR issues that people teams and in-house counsel face today and we discuss the practical ways to tackle them. My name is Ellie Gelder, I'm a Senior Editor in the Employment, Engagement and Equality team here at RPC and I'll be your host as we explore the constantly evolving and consistently challenging world of employment law and all the curveballs that it brings to businesses today. We hope by the end of the podcast that you'll feel better placed to respond to these people challenges in a practical, commercial and inclusive way. Today we are diving into the world of employment tribunal hearings and we'll be discussing what to expect if you are appearing as a witness, some common but tricky scenarios and some important do's and don'ts.

**Ellie:** And joining me to share their insights are two experts in this field.

**Ellie:** Firstly, Kim Wright, Senior Associate in our Employment Team, who also sits part-time in the Employment Tribunal as a judge and in the Health, Education and Social Care Chamber, hearing cases regarding special education needs and disability. And we're also delighted to welcome Joseph England, a barrister from 3PB chambers who specialises in employment law and is also the author of NHS Whistleblowing and the Law. Welcome to you both. Thank you so much for joining us today.

**Kim:** Hi Ellie.

**Joe:** Great to be here. Thank you, Ellie.

**Ellie:** Now, Joe, the word witness can often conjure up images of appearing in court in front of a judge. We may often associate it with criminal or civil court proceedings. But with many employment disputes, while some will proceed in the civil court system, many claims are issued in the employment tribunal. So, Joe, before we discuss what to expect as a witness, can you just set out how the employment tribunal differs from the court setting?

**Joe:** Sure, I think it's a good question. I suspect most people's image of a court comes from TV but an employment tribunal and frankly a court is very different. Employment tribunals were originally designed to be informal and some listeners may have heard the term industrial tribunals which is the original term for them set up in the 70s and back then what is now a two-day case would be more like two hours. What I'm told as it was before my time is that you'd have things like union members attend in their blue overalls with their union badges proudly emblazoned on their clothing. Now there is certainly more formality but there's still a strong sense of that informality. There are for example no wigs and gowns, no standing other than when giving the oath, no court rise eg to stand up when the judge comes in, when an usher calls it out, there's no royal crest etc. So they are still more informal and more relaxed, I would say, compared to courts. The rules and approach to those mirrors that. So for example, the deadline to issue a discrimination claim currently is three months broadly. But the test to extend time is what is just and equitable which is a very broad term whereas the courts have a much stricter deadline albeit longer deadlines in the first place but similarly with the procedural steps there's more leeway and flexibility about those dates. I think the best comparison between an employment tribunal court is probably to the small claims track that some people will be familiar with.

So for example, costs are either legal costs for each side in employment tribunals, as in small claims, the default is that each side bears their own costs. So whether you win or lose, the default position is that each side pays their own. There are exceptions to that though. There are, again, like with small claims, a lot of what I call litigants in persons in the

tribunals, ie people who are acting without lawyers. I would say at least half of all cases have one side, typically the claimant, who is not represented by a lawyer.

And the final difference I would say is that as the name suggests, a tribunal can be a tribunal, ie three people rather than just one. There was a rule change last year such that now the judge chooses whether a case has three or just the judge alone and the parties can express a view on that at an earlier stage.

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**Ellie:** Okay, so thanks for setting the scene, Joe. And Kim, can you outline the circumstances in which someone might be called as a witness in an employment tribunal claim?

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**Kim:** Yeah, absolutely. As the claimant, you'll always give a witness statement. They'll give their evidence of what happened, what they're complaining about, and they might call other employees as witnesses if there's anyone that accompanied them to a meeting or witnessed any of the incidents being complained about. And on the respondent side, the employer's side, you'd hear from people like in an unfair dismissal claim, maybe the line manager, there might be the person who investigated a disciplinary issue or a grievance or that might be dealt with in the paperwork and they just need the person who made the decision to dismiss. That's the crucial person who needs to be giving evidence in this case because the Tribunal needs to know why they've made the decision that they have. You might also hear from an appeal manager who heard that. In discrimination cases, again, it will be those involved in investigating any complaint or who made a decision, so such as in a case of disability discrimination and a failure to make reasonable adjustments. If someone's got a disability, it will be crucial to call the person who, for example, made the decision not to make adjustments to an employee's workload or targets or absence triggers and to find out why that was the case. If it's an allegation of discriminatory comment being made then they'd want to call the person or people accused of making the comment to rebut it or to provide the wider context to the comment which might put it in a different light.

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**Ellie:** And on that point about evidence, let's talk about a person's witness statement. That would be the key piece of evidence that someone will be asked questions about during the tribunal hearing. And Joe, often the dispute might relate to things that were said or done quite a long time ago. So how does a person know where to start when going about preparing their witness statement?

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**Joe:** Well, obviously if a party has a representative they will guide them through the process and give them an outline of what to write reflecting the issues in the case. There's also instructions that come out from the tribunal in terms of what needs to be in it. And then in terms of a broad structure, chronological is probably always best. It's generally how the events are analysed and it makes it easy to follow. The tribunal want to know what happened and often what's particularly important is why things happen and that's very important for respondents, ie employers and the decision makers are in those. So if for example a witness was the person who decided to dismiss or dismissed a grievance or did not uphold an appeal, the tribunal wanted to know why that decision was taken. For claimants on the other side, what they really need to outline is obviously what happened but also what's wrong with what the respondent did. So for example, if they were sent a letter and they disagree with it, or the respondent did something they consider unfair, such as a short deadline or in a disciplinary matter didn't interview someone relevant, they need to explain why that's unfair, what difference would it have made? For both sides, the list of issues is a very important document. So that's something that will be sent out by the tribunal, maybe after a preliminary hearing, it sets out what it suggests, what are the questions and issues the tribunal will look at. For example, was this comment said? If the comment was said, was it because of discrimination? And that's an important doctrine to check through when you've written your statement to make sure you've covered all of those issues evidence about those points. Another tip would be to cross reference to the tribunal bundle. It's very useful to guide the Employment Tribunal to the relevant documents as used. There they are by referencing the page numbers. You don't need to copy out the contents and it's also a chance to, for example, explain if you disagree with a document, if there were minutes of a meeting taken by either side and you don't agree that you can explain that. If there's some anomaly, like if a manager wrote something perhaps insensitive or ill-advised in an email and they want to explain that they can do so if you didn't query a point sent by the other side and you want to explain the context and you now realize it's wrong again you can explain all that by reference to that document and the final important point is just to make sure it's got a statement of truth at the end.

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**Ellie:** And Kim, what would you say to someone who is tempted to use AI to draft their witness statement?

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**Kim:** I think for litigants in person, they might view AI as a helpful tool to provide a starting point and could be a great way to time save with producing a first draft. But, and this is a big but, it's really important the witness statement is in the witness's own words. So they need to be comfortable with the language used and it must be an accurate account of what happened. They're giving that statement of truth, confirming so. So there's a real risk of using AI for this purpose and it might not be suitable.

While we're talking about AI, there have also been reported problems with AI being used in litigation, with AI referring to cases that actually don't exist. So case law isn't going to be referred to in a witness statement. So that's more of a note of caution for using it to plead or respond to a case, but it's something that's a good idea to be aware of.

**Ellie:** And so assuming you or your legal representative has submitted your witness statement, let's talk about the day of the hearing itself then. So Joe, what are your top tips on feeling as comfortable as you can do on the day? Because I think the thought of appearing as a witness can be really daunting.

**Joe:** Sure, well I think that's understandable to have some trepidation about appearing as a witness. It is a formal environment despite what I said at the start about the attempt to make it informal. Listening to resources like this excellent podcast will obviously give you a clue as to what to expect. There are also videos online including from HMCTS, Her Majesty's Court's Tribunal Service, on YouTube for example where they show you what the tribunal room will look like and that will certainly help you to know what to expect on the day. You can also visit a tribunal, they are open to the public. Not all hearings are public hearings but you'll be able to attend and find out. Many hearings nowadays are by video so if you can I would say check in advance to make sure there's something suitable for you before you attend but again information can be found online.

Some legal representatives, particularly for larger companies, might arrange some witness training but that's not common. I would say it's more common where the case is particularly complex or there's lots of witnesses or a particularly long hearing. The main thing to prepare is to re-read your witness statement. You want to get as familiar with it as possible and read the tribunal bundle, particularly the documents that you refer to or you're involved with and ultimately as many documents as you can. I would say don't worry if you can, which I appreciate is easy for me to say, but ultimately you're there just to tell your story and that's what the tribunal want to hear. There shouldn't be any questions you can't answer because you were the one that was there and you should know more than any of the lawyers in the tribunal themselves.

If there are particular adjustments or accommodations you need, such as extra breaks, standing, interpreters, etc. All of that can be requested and it often is at what's called a preliminary hearing, so it's a hearing before the trial. And if you don't have one of those, you can always write in and ask for any adjustments.

**Ellie:** And Kim, just talk us through then what to expect when someone first arrives at the tribunal if it's in person.

**Kim:** Yeah sure, you usually meet well in advance of the time that the hearing is due to start. Most tribunals require parties to be there by 9.30 on the first day, so you need to leave plenty of time as it can take a while to get up in lifts or through security and find where you're meant to be. There's different waiting rooms for claimant witnesses and respondent witnesses. The press may be attending if it's a novel point or a particularly well-known respondent employer.

You need to be careful when discussing the case in open areas, in and around the tribunal, either in the cafe or in the lifts, or even on the train on the way up, as it's not uncommon for all parties to be in the same carriage and maybe even the judge.

**Ellie:** That's a really good point. And there are also a few tricky but common scenarios that can crop up. So Joe, first of all, what happens if a witness isn't well on the day or travel disruption means they're going to be late?

**Joe:** Well, like anything in life, these things do happen. The main thing, first thing to do is to tell the tribunal and go from there. But as I say, it does happen. The trains in our country are unfortunately not reliable. The M25 often is heavily congested in this part of the world. There are illnesses, etc. So it's not unheard of. I've had delayed hearings because the judge's train was late. A witness of mine once had to be rushed to hospital because they had an angina attack. I even had a tribunal member who had a car crash on the way to the hearing so we had to have a delayed start. Even barristers are late sometimes. So I would say if one of these situations happen to you, communicate, call and send urgent emails. It's obviously easier if you have a representative because hopefully they've already arrived or at least can pass on the message whilst you're trying to get in. But there are things that can happen to help the problem. Often on the first day there is a substantial amount, sometimes half a day, sometimes more of what's called reading time, which is simply where the tribunal read the documents and that can be useful to enable witnesses to arrive. Witness orders can be rearranged, so if you were due to be first, perhaps now you go second and another witness who is already there there can go. And if you have a later start one day, maybe you have an earlier start the next day, something like that. So there is flexibility and people shouldn't panic if one of these situations does occur.

**Ellie:** Okay, that's really helpful, thank you. And Kim, tribunal hearings obviously take quite a lot of time out of a person's day. So are witnesses entitled to be reimbursed for their time away from work?

**Kim:** So normally with respondent witnesses, they will be being paid as if they're at work. So there will be no loss of earnings. But if a witness has incurred expenses and lost earnings, they can make a claim to the tribunal within one month of the hearing and they can be reimbursed for travel. But that's travel exceeding five pounds and that's provided it's by public transport and a standard fare. So you can't go first or a claim for mileage, but the tribunal won't reimburse car parking fees and taxi fees and rarely reimburse, there'd have to be a real reason for a need for a taxi. Overnight accommodation can be reimbursed, but again, only to a limited amount, so don't go staying at the Ritz. And there's a loss of earnings that can be claimed per day, but it's limited to 45 pounds a day. So there's some mechanism there to avoid hardship, but it's not going to be full reimbursements if you're a senior person attending then you are going to suffer a loss if you're not attending on behalf of the respondent and being paid as normal for the day.

**Ellie:** Okay, so Joe, can a person be forced to give witness evidence at a hearing? We've just heard that it can cause some financial loss to some people.

**Joe:** Yes they can. The process is to apply for what's called a witness order which is very similar to a witness summons that some may have heard of in the court procedure. It is essentially an order from the tribunal that compels a person to attend and give evidence. If the person does not then if they don't have a reasonable excuse they can be fined up to £1,000. It's sometimes seen as actually quite a negative thing that you don't want because if you've got a witness that doesn't want to attend and you're forcing them to attend, I would suggest you need to think very carefully about whether they actually are going to be on your side and give favourable evidence to you or not. Sometimes though it is seen as something necessary and say the most common situation is where you've got a current employee who says they won't attend to be a witness unless they're forced to although they're willing to give evidence. But they want to be able to say to their employer that they have to go they don't want any potential repercussions if they do attend freely? The procedure if one is wanting is to simply apply to the tribunal in writing you have to show why the person's evidence is relevant and useful and explain that they will not come without the order and there's no procedure for the witness to resist that, ie they don't get a say in it, they'll just get given the order if they are ordered.

**Ellie:** And what happens where a witness lives abroad?

**Joe:** There's two considerations. One is how they're going to give their evidence. And secondly, the permission needed from that country. In terms of how, one of the big changes to procedure post the COVID pandemic has been the huge increase in video hearings. So they're now very common, including when all parties are in the UK and including particularly for preliminary hearings. Regions vary but generally if there's a trial of two to three days or more that would be in person but anything less than that is by video anyway.

So if a witness is abroad the parties need to apply in good time to have that witness give their evidence by video even if everyone else is attending in person and that system is quite commonly used where someone is abroad. The other issue though which is more complex is that the country in which the person is residing needs to give permission for that person to give evidence. The broad basis for that is that essentially that foreign country does not want us, ie the UK and our legal system, intruding and carrying out our justice system within their country so they have to give permission. Many countries do but some do not. There is a list online of those that do. One important resource to look at is the presidential guidance produced in January 2025. So a quick google of presidential guidance on witnesses abroad should produce that.

The onus essentially is on the parties to check and ensure the country does give permission. So you look at that website, it's on the FCDO, that's the Foreign and Commonwealth Development Office, they will say whether or not the permission has been given. If not, the party themselves has to make inquiries of the state in question. There may be a consular fee to do so.

And even if the country gives permission, the application nevertheless needs to be made to the tribunal to ask that oral evidence can be given from abroad. And that will be a decision for a judge potentially at a preliminary hearing or if not, an application will just be made in writing.

**Ellie:** So Kim, on that point of virtual hearings, are there any sort of key dos or don'ts?

**Kim:** Yeah, definitely. It's important to remember when in a video hearing that the same rules apply as in an in-person hearing so you can't go drinking your cup of tea and eating your Kit Kat unless you've got a medical condition for example that means you need to be eating during the hearing. If there is more than one person in the room you both need to be on the screen so the judge knows who's there but maybe not on separate laptops as that can cause terrible feedback. Also you should have your cameras on as if you're in a physical hearing room unless directed by the judge otherwise. You need to avoid having side conversations and put yourself on mute when you're not talking to avoid inadvertent reactions such as sighing at someone's witness evidence that you disagree with and this being broadcast to the room. You just need to remember that when you're giving evidence or witness evidence or commenting on someone else's that the judge is

listening to this and that's the first time they've met you and yeah it's important to remember that the evidence is being heard by the judge because it can be quite emotive and upsetting when a witness or especially a claimant hears what a witness is saying. So yeah just checking yourself on your reactions really remembering that it's still a professional environment and remembering that the judge is hearing everything that you're saying and thinking about the impression you want to give to the tribunal. Phones should be on silent. You definitely can't be looking at phones whilst giving evidence. You need all the documents with you and they need to be clean copies without notes on when you're giving evidence and then you need to have a second screen so don't dial in on a phone if you can avoid it that that will make it difficult for you to participate.

**Ellie:** And Jo, can you just talk us through the usual running order for a witness once it's their turn to give their evidence?

**Joe:** Sure, in terms of where you start. If you're in person, the default is that all witnesses are allowed in the room. It's not that you have to be in some other room and come through. Similarly, with a video hearing, you would just be watching the whole time but on mute. You then attend what's called the witness stand, which is really just a separate desk away from the other desks. That is the only time you will stand at the beginning of that and you promise to tell the truth.

You can either do that by swearing an oath, ie on a holy book, or you can give what's called an affirmation, which is just a solemn promise.

Once you've done that, you're not allowed to talk about the case to anyone else until you've finished giving your evidence and that can include lunch breaks and overnight, but everyone does their best to avoid witnesses being under oath overnight because we appreciate it's difficult to not at least want to talk about the case. If you have to address the employment judge, bear in mind that you're not the first witness to come before them. They will know you're nervous and they will try and help you with that. If you have to address them the term generally used is just judge. The first stage is what's called evidence in chief.

In the employment tribunals that's simply done by confirming your witness statement. I should say Scotland is different. In Scotland generally the default is to read out your witness statement or at least evidence to come out through questions. But in England and Wales you confirm your witness statements are true. If there are any amendments you can clarify that. And if there are any supplemental questions, for example things that have arisen in the other side's witness statement that you couldn't have anticipated when you wrote your witness statement, your representatives may ask you about those and they should always have discussed that with you in advance.

So once you've confirmed all of that's true and that's your bulk of your evidence, there's then the opportunity for what's called cross-examination. That's when the other side can ask you questions. You'll have all of the documents and witness statements in front of you and you can refer to any of those. And I would say you can and should ask to re-read documents when you need to and say beware the summary given by the other side in their questions.

Answer the questions as fully and honestly as you can do if you don't know an answer There's nothing wrong with saying that if it's your best guess and you're not sure again nothing wrong with saying that but just you need to explain that and just remember that as I said it's your chance to tell your side of the story. Some content you may find upsetting even traumatic. I would say that that unfortunately is not uncommon I think probably one in three of all the trials I ever have someone cries and I've seen witnesses cry, lawyers cry, judges cry. It's not necessarily because it's so sad, but I think for a lot of people your working lives are where you spend most of your time and it means a lot to people and emotions therefore run high. There is some expectation therefore of emotional content and ultimately everyone knows what the evidence is broadly going to be because we've read the witness statements and seen the documents in advance. If you do find it upsetting or if you've got something that you are anticipating may upset you, I say don't worry about that.

There will be a pause as needed. You can ask for a break if you need to. There's no benefit to the other side's lawyer in coming across as imposing or bullying you. It's not going to help their side to do it and I would strongly expect them not to do that. And ultimately the judge is there to make sure you have a fair hearing and you can ask for a break as you need.

**Ellie:** Yeah, thank you for raising that point that some witnesses will have to relive potentially upsetting events and we'll actually be exploring that aspect of legal proceedings in a future Workout episode later in the year. Finally, Kim, assuming you've appeared as a witness, you're free to leave. What happens after the hearing? So when can you as the witness find out the outcome of the hearing and will your evidence be available to the public?

**Kim:** So generally, it will just be those who are in the hearing that will be able to see the documents and witness statements and these cannot be taken away out of the hearing by those not involved in the case. Quite often a judgment is given orally at the tribunal, so it will be on the day, there and then. And unless written reasons for the judgment are requested, then it will just be the outcome of the case that is in the public domain. It's uploaded to a judgment register, which you can find by Googling employment tribunal judgments. However, if written reasons for a judgment are requested, then reference to witness evidence heard may well feature to some extent in that judge's written reasons and it will be attributed to the witness who gave that evidence. Written reasons are also uploaded to the register in the same way as judgments can be searched. Normally, if a decision is reserved, you'll receive a judgement within 28 days. Occasionally, if it's something very complex, it may take as long as three months for that to appear.

**Ellie:** Well, thank you both for providing such a comprehensive overview of what people can expect when they are required to appear as a witness at an employment tribunal hearing. You've both provided some really helpful, practical tips to help people feel prepared and confident. So thank you.

**Kim:** Thanks, Ellie.

**Joe:** Thank you for having us.

**Ellie:** If you would like to revisit anything we discussed today, you can access transcripts of every episode of The Work Couch podcast by going to our website: [www.rpclegal.com/theworkcouch](http://www.rpclegal.com/theworkcouch). Or, if you have questions for me or any of our speakers, or perhaps suggestions of topics you would like us to cover on a future episode of The Work Couch, please get in touch by emailing us at [theworkcouch@rpclegal.com](mailto:theworkcouch@rpclegal.com) – we would love to hear from you.

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