

Witness evidence: getting it right

Les Howard explains what makes a good witness at a Tribunal hearing – and what makes a bad one.

An awful lot of Tribunal cases are lost because the witness(es) for the Appellant taxpayer does not actually say what happened. This applies equally to a litigant in person, who is his/her own witness, or to a witness giving evidence in response to questions put by a representative.

In the majority of Tribunal cases it is the responsibility of the taxpayer to present his case so as to defeat the HMRC decision. And, in most cases, this relies on presentation of witness evidence. This means that there is a responsibility on the witness to clearly communicate certain information.

First, a good example in my own experience.

I was presenting a case in 2019, which concerned whether an annex to a Church building should be properly zero-rate. I called two witness, the church minister and the project manager. I was clear with them both – “this case turns on how well you present the facts”. The church minister explained the vision for the project and why the annex was required. The project manager explained the detail; where the doors where, how you would access toilets, etc. As it happens, both spoke clearly and accurately. They left the legal arguments to me. And we won!

Next, a not-so-good example. These are comments in the FTT decision of RPS Health in Business Ltd [2020] UKFTT 150. This was a case about the VAT liability of supplies of occupational health services. (It actually raises a number of issues about how not to conduct a Tribunal appeal!)

26. Mr Latter was extremely careful to give evidence he thought would assist RPS, in particular by seeking to avoid confirming that the services provided protected employee’s health...
27. At times this tendency led Mr Latter to make assertions which were not borne out by the documentary evidence...
28. We found Mr Latter to be a partisan witness who was not entirely reliable. Although the case was ultimately lost on its facts, such poor evidence from a witness will never support any legal argument.

Some observations about witness evidence.

If you are intending to produce witnesses, it is important to properly prepare them for the hearing. This is not asking them to memorise answers to specific questions. But being a witness can be quite daunting, so each witness must be well prepared.

Ideally, you will have sent a formal Witness Statement to the Tribunal ahead of the hearing. But this is not always necessary. (If the Tribunal has issued Directions in relation to Witness Statements, make sure you comply.)

Make sure they know the key facts they must explain. Make sure they give actual dates (or as near as possible). If necessary, provide some notes, as long as does not add to the

evidence bundle.

Explain that they will be cross-examined by HMRC. This is not normally aggressive. But a witness will be unsettled by what sounds like an accusation of wrong-doing or of dishonesty.

Remind them not to enter into legal argument. Although the Tribunal will tend to be quite relaxed with a litigant in person, in most cases the presentation of evidence is distinct from the presentation of legal argument. A witness contributes to the first, not to the second.

A witness is a witness of fact. If your witness is unsure about something or does not know something, then simply be honest. It is much better to admit "I don't know" than to guess or waffle.

Witnesses of truth make mistakes. None of us recalls precisely what happened on a specific day, nor why we did one thing in preference to another. Although HMRC presenting officers tend to attack such apparent inconsistency, the Tribunal will take a more reasonable view. Minor inconsistency is actually evidence of a genuine witness. and that will carry a lot of weight with the Tribunal.

In closing, a brief word about HMRC witnesses. My observation is that officers' witness statements tend to follow a rigid template. This can seem pretty unassailable. In fact such statements are open to challenge, and an officer may well struggle under good cross-examination. Without being overly aggressive, do look for weaknesses and inconsistencies that will help to undermine their argument. Do remember that you will need to win your own argument as well as defeat the HMRC argument.

And good luck!

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