

**Salaried Employment Judge 2010
Qualifying Test
December 2010**

Feedback Report

Purpose

The purpose of this report is to provide general feedback on candidate performance in the qualifying test for the Salaried Employment Judge 2010 selection exercise. The report describes how the qualifying test and its marking scheme were developed, and how the test was structured. It explains how the test was marked and the approach taken by the markers and the moderator. The report provides information on the overall performance of the candidates in the test, identifying where they performed well and where they performed poorly. The final part of the report gives more detailed comments in relation to each of the 16 questions in the test.

Qualities and abilities

The qualifying test was designed to test the following Qualities and Abilities:

Intellectual Capacity:

- Ability quickly to absorb and analyse information.
- Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary.

Authority and Communication Skills:

- Ability to explain the procedure and any decisions reached clearly and succinctly (in writing).

Efficiency:

- Ability to work at speed and under pressure.

In accordance with the Lord Chancellor's guidance, the test was also designed to give an indication of candidates' understanding of, or potential to learn, employment law.

Development of the test

The qualifying test and marking scheme were developed by two Regional Employment Judges in association with the President of the Employment Tribunals (England & Wales). The Judicial Appointments Commission offered advice and guidance during its development. The qualifying test and marking scheme were

subjected to an extensive quality assurance process, including equality proofing. The effectiveness of the test and the marking scheme was assessed (and then amended) in separate dry runs with the assistance of a number of volunteer legal professionals and existing judicial office-holders.

Structure of the test

The qualifying test required candidates to provide answers to 16 questions which derived from three case scenarios. The case scenarios were broadly based upon a race discrimination case study and two shorter age discrimination case studies. They replicated the kind of material that a salaried judge would need to read and to digest when preparing to hear a case for the first time. They would create no inherent difficulties for a competent lawyer, whether with an employment law background or not.

Candidates were required to analyse the case scenarios, to identify the issues and to apply the relevant substantive law and procedural rules to give reasoned answers. Depending upon their previous knowledge of the jurisdiction, candidates were advised to prepare for the test. Candidates were provided with a list of the relevant reference materials in advance and clean copies of those materials were provided to them when sitting the test.

Marking scheme

The marking scheme provided a skeleton answer for each question, together with an allocation and distribution of the marks obtainable for each question. There were 16 questions. A total of 115 marks were available for the test, providing sufficient marks to be able to differentiate between good and excellent candidates while also ensuring that the marking process was not unwieldy. Each question was allocated a maximum number of marks and the available marks were clearly indicated on the qualifying test paper and in the marking scheme.

Marking of the test

The President of the Employment Tribunals (England & Wales) nominated two Regional Employment Judges to mark the test. The Judicial Appointments Commission conducted a full briefing of the markers and the moderator at the outset of the marking process. Each marker marked the complete scripts of the candidates allocated to him or her and then second marked the scripts allocated to the other marker. Thus all scripts were doubled marked. All scripts were marked anonymously.

Moderation

The President acted as the moderator. The markers were invited to identify for moderation any scripts that they considered warranted moderation. Such scripts were moderated, for example, where the marker considered that a strict application of the marking scheme had resulted in a candidate being under-rewarded, or where a candidate appeared to be at risk of being disadvantaged by illegible handwriting or an economical style of answer. Other scripts were also sampled by the moderator.

In excess of 25 per cent of scripts were moderated by the moderator. This ensured that the markers were assessed for consistency within the scripts they had double marked and for consistency between the markers. Included within the sample for moderation was a selection of low-scoring, mid-scoring and high-scoring scripts. The scripts of candidates close to the prospective cut-off point for invitation to the selection days were moderated. The marking and moderation process remained anonymous throughout.

Separate quality assurance checks were undertaken by the Commissioner and the Director assigned to the selection exercise. The Judicial Appointments Commission was satisfied that the marking had been fair, robust and consistent.

Distribution of the marks

There was no pre-set pass mark for the qualifying test. Therefore, the candidates who were invited to a selection day following the qualifying test were those scoring highest in the test. The highest mark awarded was 64 out of the possible 115 marks and the lowest 8.

General approach taken by the markers

The eligibility criteria did not require candidates to have experience in the jurisdiction. The questions were designed to enable candidates to demonstrate their general legal and procedural skills and the capacity to acquire relevant knowledge. The markers were briefed accordingly. It was thus important for candidates to be able to score as many marks as possible. It was not a pre-condition of that that they should be capable of completing all the questions. However, the test was designed to be capable of being completed by the competent candidate within the 90 minutes allowed. The case scenarios, the supporting materials and the questions set had been carefully chosen and refined to achieve that purpose.

The marking scheme had also been devised and revised to ensure that objective. The scheme and the allocation of marks within it had been designed to promote fair treatment of all candidates and to give them every opportunity to score as many marks as possible. The scheme also encouraged objectivity in marking and consistency between the markers. The markers were thus afforded little or no discretion in marking the scripts. However, a candidate who achieved a novel, but

acceptable answer, not anticipated by the marking scheme, was discussed between the markers and the moderator. Similarly, a stellar but concise candidate would be capable of achieving a good total of marks when compared with a poor candidate who filled the answer book with hit and miss points. Again, if the markers were in any doubt, such candidates were discussed and/or referred to the moderator.

Because there was not a 'pass mark' for the qualifying test, markers were not concerned about making a qualitative assessment of each candidate's script. The exercise was a quantitative one. Each marker ensured that the candidates were allocated a mark every time the marking scheme called for one to be awarded.

General observations

In the main, the answers provided by candidates provided appropriate evidence that they had grasped the essential issues arising from the case scenarios. The answer scripts evidenced a reasonable command of the reference materials and that candidates were able to draw from those materials. However, the general weakness betrayed by the answers was in applying accurately or appropriately the materials to the case scenarios or to the particular questions asked.

In contrast with previous selection exercises, fewer candidates wasted precious time reproducing large parts of the statutory provisions in their answers. More candidates sensibly offered an accurate summary or paraphrase of, or an appropriate cross-reference to, the statutory materials or the relevant case law. However, as in previous qualifying tests in this jurisdiction, an inefficient use of time was illustrated in the tendency of some candidates to repeat and reproduce otherwise relevant material across more than one answer, when a clear cross-reference to an earlier answer would have sufficed. Nevertheless, unless a candidate made an explicit cross-reference in one answer to a relevant discussion in another answer, marks could not be awarded where they might otherwise have been earned.

The markers were not expected to infer from accurate reasoning or a correct conclusion that candidates had understood the principles or provisions underpinning the answer. Marks could not be awarded by inference. It is important that candidates set out clearly and succinctly the relevant legal principle or statutory provision upon which their reasoning or conclusion relies.

A very small but noticeable group of candidates presented their answers in an illegible way. The markers took great pains to interpret these answers and to award marks where appropriate. However, such candidates did not do their cause any service by sometimes impenetrable handwriting.

Markers awarded marks where appropriate regardless of how the answers were presented within a question. There was no requirement that answers be presented in any particular way. For example, answers in bullet form were perfectly acceptable provided they were correct. Markers did not require points to be made in any

particular order within an answer. On this occasion, markers did not feel the need to comment adversely upon poor presentation skills.

The qualifying test was in part a test of a candidate's ability to work under pressure and at speed. The test reflected the time pressures that a salaried judge working in this jurisdiction is likely to face. Many candidates did not allow themselves enough time to complete all the questions or to provide answers of sufficient detail distributed across the test. A noticeable number of candidates provided good, but over elaborate answers to early questions, thus depriving themselves of sufficient time to give acceptable answers to later questions. Surprisingly, nearly all candidates appeared to answer the questions in the sequence in which they were presented – although there was no requirement to do so – rather than prioritising questions according to the number of marks they attracted.

Comments on each question

Question 1

Question 1 was answered very well by most candidates. Candidates who failed to obtain the maximum marks often did not identify all of the factors that the tribunal would take into account in exercising its discretion whether to allow the claim to be amended. Some candidates gave incorrect answers based upon confusion between an amendment which resulted from a mere re-labelling of existing pleaded facts and an amendment which gave rise to a completely fresh complaint.

Question 2

Many candidates did not spot the practical point that the claimant should take care not to withdraw the age discrimination complaint before the claim was amended to include the race discrimination complaint. As a result they missed the marks available for dealing with rule 25 and went off on a tangent in discussing the issues that might have arisen if the claimant was presenting a completely new claim out of time.

Question 3

Question 3 was generally poorly answered. Candidates tended to look for a more complex analysis than was required by the question. The question was about the timing of making the application to amend. Too many candidates interpreted this as a question about time limits for making a claim.

Question 4

Question 4 was generally well answered. The better candidates mentioned the possibility of a hypothetical comparator and the need to compare like with like.

Question 5

Question 5 was not answered consistently well. Many candidates appeared confused by the two definitions of indirect discrimination to be found in the Race Relations Act 1976, as amended – namely, section 1(1)(b) and section 1(1A). Only a small number of candidates appreciated the difference between the two tests and when one would apply but not the other. That confusion was often repeated in subsequent questions. Nevertheless, the majority of candidates offered either both tests or the correct test, and did so in a way that attracted most of the marks available for this question.

Question 6

Question 6 was generally answered competently, although not always fully. Only a small minority of candidates dealt with the reversal of the burden of proof in section 54A and its consequences on the facts.

Question 7

The majority of candidates answered this question very well, although only a small minority achieved maximum marks. Many answers failed to identify the cause of action in section 4(1)(c) before going on to consider the ingredients of indirect race discrimination.

Question 8

The better candidates spotted the significance of *Nagarajan* and of *James*. Most candidates were able to demonstrate that they understood the significance of the application of a nationality policy and how the outcome might be different in a direct discrimination complaint as opposed to an indirect discrimination complaint.

Question 9

Many candidates missed the opportunity to score easily obtainable marks by failing to set out fully the range of remedies available and the statutory provision (section 76) in which they are to be found. Many candidates also incorrectly concluded that, as Victor Hugo had suffered no immediate loss, he could not obtain any monetary compensation. Only a minority of candidates considered the possibility of proving a loss of opportunity.

Question 10

Most candidates scored well on this question. However, only a small minority scored maximum marks. The larger majority usually missed one or two points (for example, not dealing with whether aggravated or exemplary damages could arise). The candidates achieving more points here, spotted the possibility of a harassment complaint.

Question 11

This question offered a potential of 14 marks. This provided a clue as to the detail a good answer would require. Many candidates did not make the most of this opportunity. Some candidates dealt with direct discrimination but not with indirect discrimination (or *vice versa*); others failed to set out the ingredients of each form of discrimination in sufficient detail. While many candidates identified the possibility of a justification defence in a complaint of direct age discrimination; hardly any candidates considered whether this arose as a result of statutory interpretation or whether the decision in *Age Concern* was relevant. Many candidates failed to raise the question of whether a genuine occupational requirement might arise under regulation 8.

Question 12

The same points that have been made about question 11 can also be made for question 12.

Question 13

Most candidates were able to obtain 3 or 4 marks out of the 5 marks available for this question, but few obtained maximum marks. This was because many candidates offered the correct conclusions, but failed to offer a full set of reasoning to explain how those conclusions were reached.

Question 14

The same points that have been made about question 13 can also be made for question 14. In addition, many candidates failed to identify the relevant statutory provisions upon which they were otherwise accurately relying.

Question 15

This question offered a potential of 15 marks. This provided a clue as to the detail a good answer would require. Many candidates did not make the most of this opportunity. Many candidates seemed to have run out of steam or of time. Only a small number of candidates offered anything approaching a sound or convincing analysis of the facts or could apply the relevant legal provisions to them.

Question 16

A candidate who did not do well on question 15 almost invariably failed to pick up marks on question 16. This last question required the candidate to have understood the correct analysis of question 15, and to appreciate that the context in question 16 was now a different one, and then to identify how that altered the reasoning and conclusion. Very few candidates did well on this final question.