

**Fee-paid Employment Judge 2010  
Qualifying Test  
May 2010**

**Feedback Report**

**Purpose**

The purpose of this report is to provide general feedback on candidate performance in the qualifying test for the Fee-paid 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 15 questions in the test.

**Qualities and abilities**

The qualifying test was designed to test primarily **Intellectual Capacity**:

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

It also tested elements of:

- **Authority and Communication Skills:**
  - Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved.
- **Efficiency:**
  - Ability to work at speed and under pressure.

**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 two 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 15 questions which built upon a case study. The case study was broadly based upon a redundancy and misconduct dismissal scenario. It replicated the kind of material that a judge would need to read and to digest when preparing to hear a case for the first time. The case study was similar in content to the 'pleadings' that would be found in a simple ET1 claim form and ET3 response form (or

the simple pleadings and particulars in any other civil proceedings). It would create no inherent difficulties for a competent lawyer, whether with an employment law background or not.

Candidates were required to analyse the case scenario, 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 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 15 questions. 100 marks were available for the test. That provided sufficient available marks to be able 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 seven Regional Employment Judges to mark the test. The Judicial Appointments Commission conducted a full briefing of the markers at the outset of the marking process. Each marker marked the complete scripts of the candidates allocated to him or her. All scripts were marked anonymously. One of the nominated markers acted as the moderator, who provided guidance to the markers at appropriate points in the marking process.

### **Moderation**

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.

In addition, approximately 20 per cent of scripts were second marked by the moderator. Such scripts were sampled and identified by the Judicial Appointments Commission. This ensured that all markers were assessed for consistency within the scripts they had marked and for consistency between markers. Included within the sample for moderation was a selection of low scoring, mid scoring and high scoring scripts. Further moderation took place after the initial marking. The scripts of candidates close to the prospective cut-off point for invitation to the selection days were second-marked by a different marker. The moderation and second-marking process remained anonymous.

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. The Judicial Appointments Commission aimed to interview approximately two candidates per vacancy. Therefore, the candidates who were invited to a selection day following the qualifying test were those scoring highest in the test.

The highest mark achieved by any candidate was 66, and the lowest was 10. Within this range the distribution of the marks was as follows:

10-19 marks	2% of candidates
20-29 marks	12% of candidates
30-39 marks	29% of candidates
40-49 marks	36% of candidates
50-59 marks	18% of candidates
60-66 marks	3% of candidates

### **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.

The test was designed to be capable of being completed by the competent candidate within the 90 minutes allowed. The case scenario, the supporting materials and the questions set had been carefully chosen and refined to achieve that purpose.

The marking scheme for this test set out the allocation of marks and was designed to promote fair treatment of all candidates. The scheme also encouraged objectivity in marking and consistency between markers. 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 referred to the moderator for consideration and award of marks. 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 referred to the moderator. This ensured consistency in marking was maintained throughout.

### **Comments on each question**

#### **Question 1**

The first three questions drew directly from the case scenario and section 139 of the Employment Rights Act 1996. The answers were readily to be found in the reference materials. These questions were designed to give candidates early confidence.

Question 1 was answered very well by most candidates. Candidates who failed to obtain the maximum marks often did not identify the need for there to be a dismissal as a precondition of redundancy. Frequently, they also offered an incomplete or misleading summary or paraphrase of the definition of redundancy.

## Question 2

Question 2 required the candidate to identify the possible inference to be drawn from the reduction in the number of computers and then to apply the relevant part of the definition of redundancy. Many candidates met one but not the other of these two requirements.

## Question 3

Question 3 was generally poorly answered. Candidates tended to look for a more complex analysis than was required by the question, instead of simply applying the statutory definition of redundancy to the factual variation suggested.

## Question 4

The next three questions were intended to be a little more demanding, but still capable of attracting high marks by the good or competent candidate.

Question 4 prompted many very competent and technically correct answers. The ingredients of the expected answer were easily obtainable from the statutory materials. Where candidates failed to obtain maximum or near maximum marks this was invariably because they failed to break down all the separate elements necessary for a redundancy payment calculation. For example, many candidates failed to identify the 'relevant date' or David's age (although both were easily ascertainable from the case scenario). A surprising number of candidates did not highlight the fact that the redundancy calculation is based upon gross pay. A small but noticeable group appeared to treat the statutory maximum week's pay as being applicable in every case (that is, regardless of a lower week's pay actually being paid).

## Question 5

Question 5 was not answered consistently well. The answer required an understanding of basic common law principles linked to the interpretation of the relevant statutory provision. A good many candidates failed to see that the question was about how the payment in lieu of notice might affect the calculation of the relevant date and the knock-on effect that might have for the qualification for and calculation of a statutory redundancy payment. A significant minority of candidates approached the question incorrectly as if the payment in lieu of notice fell to be set off against a basic award for unfair dismissal.

## Question 6

Question 6 was a self-contained question drawing upon the recoupment regulations. It was usually answered competently, although not always fully. Many candidates reached the correct conclusion, but failed to maximise the marks awarded because they did not set out their reasoning and its sources fully. A minority of candidates incorrectly treated redundancy payments as if they were basic awards and therefore recoupable.

## Question 7

Question 7 was intended to be a demanding question based upon section 98 of the Employment Rights Act 1996 and the decision in *Polkey*. The second highest number of marks in the test was available for it. The majority of candidates answered this question very well, although only a small minority achieved maximum marks. Many answers overlooked the need for collective consultation (although some candidates digressed into a discussion of

protective awards); the importance of identifying the appropriate pool for selection; and the significance of applying the selection criteria properly.

#### Question 8

This was a question based upon section 112 of the 1996 Act. As expected, nearly all candidates correctly identified the three remedies for unfair dismissal, but then surprisingly spurned the extra mark available for correctly identifying the relevant statutory provision.

#### Question 9

Like question 7, this was a relatively demanding question. It potentially attracted the highest number of available marks. The question required candidates to draw upon the reference materials supplied in order to explain the principles by which the basic award and the compensatory award for unfair dismissal are calculated. This question was generally answered very well by most candidates, although only a very few candidates scored maximum marks. Common causes of missed marks were a failure to draw a distinction between present and future loss of earnings; the need to take account of earnings from new employment (although most candidates separately and correctly identified the duty of mitigation); and the possibility of an increase or reduction for a failure to follow the Acas Code.

#### Question 10

Question 10 tested the candidates' knowledge of common law principles of contractual breach and compensatory damages. Many candidates correctly identified the inference adverse to the employer's case that might be drawn from the payment in lieu of notice (and a small number of candidates went on to explain why such an inference might be avoided). However, only a minority of candidates underpinned this with an explanation of the common law consequences of an act of gross misconduct, the employer's entitlement to dismiss without notice or the status of a payment in lieu of notice.

#### Question 11

This question on the test of a fair dismissal in section 98(4) of the 1996 Act attracted many good and complete answers. A candidate who did not score maximum marks for this question did so because he or she omitted or elided essential stages in the reasoning required (the need to treat similar cases alike; the unfairness of inconsistent treatment; and the importance of examining the individual merits of a case).

#### Question 12

Nearly all candidates scored some marks for this question, although only a very few picked up maximum marks. Some marks were obtainable simply for reciting the statutory formula for minimum notice, but often this opportunity was ignored. It was disappointing to note that a number of candidates considered that the statutory minimum notice requirements (contained in section 86 of the 1996 Act) could not be improved upon by a more generous contractual entitlement to notice. Many candidates also failed to follow an otherwise good answer to its logical conclusion, namely, that David would be entitled to sue for the balance of his contractual notice over his statutory notice.

### Question 13

Questions 13 to 15 were designed to examine the candidates' ability to work with procedural rules and regulations. These three questions were poorly answered on the whole. In part this might have been due to pressure of time, although the qualifying test was intended to test candidates' efficiency (their ability to work at speed and under pressure). It also seemed to reflect a lack of confidence or experience when handling procedural materials rather than substantive law.

In question 13, only a minority of candidates correctly identified the relevance of regulation 19 and rule 57. A large number of candidates failed to identify the fact that the respondent company resided and carried on business both in England & Wales and in Scotland, so that the claim was validly presented in either Birmingham or Glasgow. Many candidates also explored whether the claim had been presented in time (a question that would only be relevant once the question of geographical jurisdiction had been resolved).

### Question 14

A very good answer could be obtained by focusing upon rule 4 and rule 8. Many candidates ignored or glossed over rule 4 and/or gave an incomplete account of rule 8.

### Question 15

A very good answer could be obtained by focusing upon rule 4 and rule 6 (with a cross-reference to rules 8, 33 and 34). Many candidates ignored or glossed over rule 4 and/or gave an incomplete account of rule 6. As a result, many answers failed to identify what would be required if an extension of time were to be granted and/or they confused the respective roles of the Secretary and of the Employment Judge in rejecting a late response. The decision to reject a response was not well understood.

### **General observations**

In the main, candidates grasped the essential issues arising from the case scenario. The scripts evidenced a good command of the reference materials, both statutory and case law, and that candidates were able to draw from those materials. However, the general weakness betrayed by the answers was in applying the materials to the case scenario or to the particular questions asked.

Far too many candidates wasted precious time reproducing large parts of the statutory provisions in their answers, when an accurate summary or paraphrase, or an appropriate cross reference, would have sufficed. A similar inefficient use of time was illustrated in the tendency of some candidates to repeat and reproduce otherwise relevant material across more than one answer. For example, a candidate who had explained how a redundancy payment is calculated in question 4 might have more efficiently cross referred to that calculation in question 9 when explaining that a basic award is calculated like a redundancy payment. By way of further example, rule 8 could have been relevant to both questions 14 and 15. However, unless a candidate made an explicit cross reference in one answer to the discussion of rule 8 in the other answer, marks could not be awarded where they might otherwise have been earned.

Markers were not expected to infer from a correct reasoning or conclusion that candidates understood the principles or provisions underpinning the answer. For example, question 4 expected candidates expressly to state that they would need to know the relevant date and

David's age, length of service and gross weekly pay at that date. Many candidates applied the correct formula to the calculation of David's redundancy payment, but omitted to set out the preliminary information required. Marks could not be awarded by inference.

A small but noticeable group of candidates presented their answers in an illegible way. 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 were instructed to award marks where appropriate however 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. Nevertheless, markers did comment adversely upon the poor presentation skills of some candidates. There was no question of subtracting marks in such cases. However, it was very difficult to find marks to award within an answer that was badly presented and whose sense was difficult or impossible to interpret.

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 judge working in this jurisdiction is likely to face. Some candidates did not allow themselves enough time to complete all the questions or to provide answers of sufficient detail distributed across the test. A 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. 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.