



Qualifying Test Feedback Report

122 Salaried Judge of the Employment Tribunal

17 July 2018

Purpose

The purpose of this report is to provide general feedback on candidate performance in the **122 Salaried Judge of the Employment Tribunal** qualifying test. The report describes how the Judicial Appointments Commission (JAC) developed the test and marking schedule, and how the test was structured.

Additionally, it provides information on the overall performance of candidates in the test, identifying areas where they performed well and where there were weaknesses.

The qualifying test for this exercise is designed to test a candidate's transferable skills and their potential to work effectively as a salaried Employment Judge rather than to assess their jurisdictional knowledge. All candidates undertook a Qualifying Test (QT).

Competency Framework

The test was designed to assess the following competencies:

- Exercising Judgement
- Possessing and Building Knowledge
- Assimilating and Clarifying Information
- Working and Communicating with Others
- Managing Work Efficiently

The competencies were developed so that candidates could demonstrate the skills and abilities which were transferable to the role from other contexts. The specific bullet points under each competency heading were designed to reflect skills and abilities that an effective employment tribunal judge is expected to have. This enabled us to assess candidates in a fair and consistent way.

Development of the test

The test and marking schedules: Parts 1 and 2 of the Qualifying test were devised by the President of the Employment Tribunals; Part 3 of the test was devised by two Regional Employment Judges.

In common with all the test material developed for this exercise, the test was designed to assess relevant transferable skills to minimise the extent to which candidates might be advantaged or disadvantaged by their professional background.

The JAC Advisory Group, which is composed of senior judiciary and representatives of the legal professions, offered advice and guidance during its development.

In common with all qualifying tests used by the JAC, both the test and marking schedule were subject to an extensive quality – and equality – assurance process including review by our Head of Diversity and Engagement and our Advisory Group. The effectiveness of the test was assessed by means of a dry run with a range of volunteers from relevant candidate groups.

Structure of the actual test

The test was hosted on the JAC website and was accessed by candidates using their online account. The 120-minute test presented candidates with three parts:

- Part 1 (multiple choice): Situational Judgement (30 minutes, 20 questions)
- Part 2 (multiple choice): Critical Analysis (35 minutes, 20 questions)
- Part 3 (narrative responses): Scenario Test (55 minutes, 3 questions)

Advanced reading

Part 1: no preparation was required

Part 2:

- The judgment of the UK Supreme Court in *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 given on 26 July 2017.

Part 3:

- Section 111 Employment Rights Act 1996
- Section 207B Employment Rights Act 1996
- Section 123 Equality Act 2010
- Section 140B Equality Act 2010
- An online calendar

In **Part 1** all of the situations were hypothetical and no prior knowledge of rules or procedures was required. Candidates were not being assessed on whether or not they knew the right answer based on knowledge or experience. They were assessed on their reading of a situation and their ability to judge the effectiveness of different responses. Each question had one best answer, which scored 5 points.

In **Part 2** it was explained that for each question candidates had to select the number of correct choices indicated in that question relating to the judgment of the UK Supreme Court in *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 given on 26 July 2017. There were 3 marks available for each correct choice in each question, and 33 correct choices in total giving a total of 99 marks available.

Part 3 was a scenario set in the context of a teacher being dismissed for gross misconduct. The decision was made by a disciplinary panel and subsequently endorsed by the headteacher. The teacher made a claim to the Employment Tribunal for unfair dismissal and unlawful racial discrimination. There is disagreement between the parties about the effective date of the teacher's dismissal and also about whether his claims to the Employment Tribunal were made within the prescribed time limits. Candidates were asked to provide narrative answers (400 words per answer) to three questions.

Marking of the test

Part 1 and Part 2 of the test was marked automatically. Part 3 was marked by two panels consisting of a JAC panel member and an experienced Regional Employment Judge. In any selection panel where more than one panel are used we use calibration, sampling, Senior Selection Exercise Manager oversight and moderation to ensure consistency between panels.

JAC staff provided a full briefing to the markers at the outset of the marking of papers. All test papers were anonymised but cross referenced by a unique reference to the candidate.

Marking schedule

In Part 1 (situational judgement) there was only one correct answer per question which scored 5 marks. A total of 100 marks were available for this test.

In Part 2 (critical analysis) for each question in Part 2 candidates had to select the number of correct choices indicated for that question, 3 marks were available for each correct choice and in total there were 33 correct choices. A total of 99 marks was available for this test.

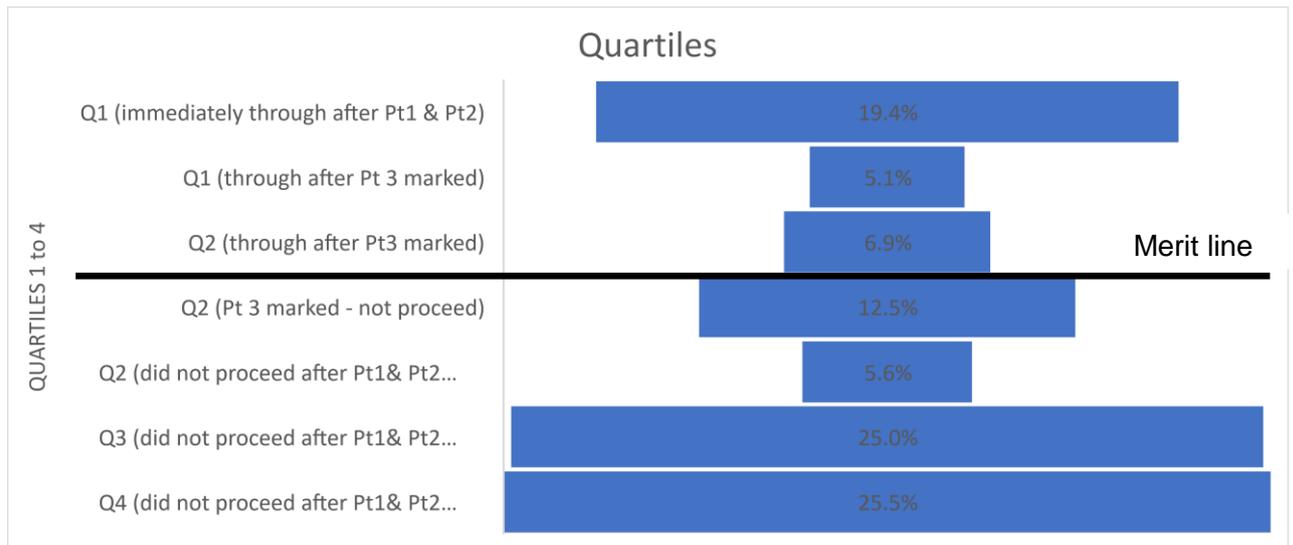
In Part 3 (scenario) papers were anonymously marked by a panel consisting of an independent JAC panel chair and a Regional Employment Judge. A marking schedule was provided to the panel. Any question on the interpretation of the marking schedule was resolved after full discussion between the panels and the judges who produced the test. Such decisions were agreed at a calibration meeting once all markers had marked a sample of the same test papers. Individual panel members marked each paper and all marks were then discussed within the panel to achieve consensus. There were three questions scoring (question 1) 30 marks in total, (question 2) 50 marks in total and (question 3) 80 marks in total.

Distribution of scores

418 candidates took the test.

The scoring process was as follows:

- all candidates were scored on their answers to Part 1 and Part 2 of the test; all candidates were then ranked in order from first to last based on the combined outcome of Part 1 and Part 2
- the highest scoring 80 candidates went straight through to selection day
- the next 101 highest scoring candidates had Part 3 of their test marked. Their scores from Part 3 were then used to provide a new ranked order to determine on merit which of them were best suited to proceed to the next stage. Of those, 50 candidates were shortlisted
- a total **130 candidates went through to selection day**



The highest and lowest marks awarded are shown in the table below

Part	Highest score	Lowest score
1. Situational Judgement	100/100 (1 candidate)	25/100 (3 candidates)
2. Critical Analysis	99/99 (3 candidates)	0/99 (1 candidate)
3. Scenario	160/160 (1 candidate)	10/160 (1 candidate)

The test was clearly quite challenging because:

- While no one question was found to be particularly difficult (i.e. more than 10% of candidates scoring zero), only one candidate scored the maximum possible marks on Part 1. On average 52% of candidates answered each question correctly.
- While Part 2 was found to be slightly easier because on three questions more than 90% of candidates got the highest marks possible (see the spread of scores below), but over the whole test only 3 candidates scored the maximum possible marks on Part 2
- Of those marked, only one candidate scored the maximum marks on Part 3.

Approach to marking Part 1 and Part 2

When we receive a vacancy request from HMCTS we calculate how many candidates we need to take to selection day to fill the vacancy request (usually a ratio

of 2 or 3 candidates for each vacancy). This allows us to estimate the number of candidates we need to progress after the qualifying test to selection day (usually around twice the number of vacancies). If 2 or more candidates have the same score we will take all those candidates through, this is what we call 'bunching'.

Usually on qualifying tests we do not use a simple score to rank candidates, instead we apply statistical analysis tools, such as averaged standard deviation across both online tests for each candidate, to scores before they are ranked into a merit order for decisions to be made about progression to the next stage of the exercise. This ensures tests with more points available than others don't disproportionately affect outcomes. For example, 30/40 (75%) in one test isn't better than 9/10 (90%) in another test just because the first test had 30 points scored compared to 9 points in the second. This also allows us to compare how far your score varies from the average candidate, best candidate over both parts of the online test for example.

We also do not have a fixed pass mark as such. Our line is determined by how candidates' scores bunch once that analysis is complete. For example, a score of 30 points out of a possible maximum of 40 points in both parts of the test might mean there are 2 people with higher scores above you, or 30 people above you or 600, it depends on how strong your competitors were and how much bunching there is at the highest merit points, so the "pass mark" is relative, not fixed. Such tests routinely involve over a thousand candidates so bunching around a score can be quite considerable.

We do have a lower line below which candidates are automatically sifted out of the competition, this is usually a score of 30% or less on any part of the test.

Approach taken by the panel to marking Part 3 (scenario test)

The scenario test was designed to assess candidates' skills in the judicial competences of exercising judgment, possessing and building knowledge and assimilating and clarifying information.

The scenario was based on one that is commonly encountered by the judiciary of the Employment Tribunal: whether a claim is out of time. The candidates were asked to familiarise themselves with the relevant legislation in advance. The crucial issues were: (a) identifying the effective date of termination of employment where there was a dispute about when the claimant learned of his dismissal; (b) applying the provisions governing the calculation of time limits where ACAS early conciliation has taken place; and (c) understanding and applying the different provisions governing time limits for unfair dismissal and discrimination complaints.

The test lasted 55 minutes. This was based on an assumption that candidates would spend 10 minutes familiarising themselves with the scenario and the remaining time answering the three questions.

The three questions attracted different marks. Question 1 attracted 30 marks; question 2 attracted 50 marks; and question 3 attracted 80 marks. Only one candidate achieved full marks on the last question, which was clearly quite challenging.

Question 1

The first question asked candidates to identify the effective date of termination of a claimant's employment.

Most candidates correctly identified that dismissal was not effective until the decision to dismiss was communicated to the employee (*Gisda Cyf v Barratt*). Most candidates correctly spotted that the effective dismissal letter was the one sent by the disciplinary panel on 19 September 2016 rather than the one sent by the headteacher on 23 September 2016.

Far fewer candidates dealt correctly with the "ordinary course of post" rule, which (on the facts of the scenario provided) would deem the dismissal letter to have arrived at the claimant's home address on the second day after first-class posting (leading to an effective date of termination of 21 September 2016). A common mistake made by candidates was to accept the respondent's submission, without further enquiry, that a letter sent by first-class post would have been received the next day. Weak candidates said that it would be a matter for further evidence; in offering no decision at all, they failed to demonstrate decisiveness.

Question 2

The second question asked candidates to identify the primary time limit for presenting a complaint of unfair dismissal and then to consider the impact of the ACAS early conciliation provisions and any extension of time that might be available. Candidates who had identified the wrong effective date of termination in answer to question 1 were not penalised twice; the marking panels worked with the dates candidates had provided.

Weaker candidates provided an inaccurate precis of the terms of Section 111(2)(a) Employment Rights Act (ERA). However, most candidates correctly identified the primary time limit under Section 111(2)(a) ERA as being three months less a day from the effective date of termination they had chosen at question 1. In a model answer, this would lead to a primary limitation deadline of 20 December 2016.

The ACAS early conciliation provisions led to confusion. About a third of the candidates whose scripts were marked by the panel correctly applied the EAT's judgment in *Luton Borough Council v Haque*. This required candidates to apply Sections 207B(3) and 207B(4) ERA sequentially: to add 44 days under the Section 207B(3) "clock-stopping" provision and then, on the facts provided, to ignore the provision under Section 207B(4) by which the revised limitation deadline would be a month after Day B. If applied correctly, this approach led to a revised limitation deadline of 2 February 2017 and the conclusion that the presentation of the complaint of unfair dismissal was late by four days.

Many candidates lost points by stopping the clock for a different period, or by wrongly choosing a revised limitation deadline of a month after Day B under Section 207B(4), or by hedging their bets and not making any clear choice as between Section 207B(3) or Section 207B(4).

About a third of candidates failed entirely to deal with the issue of an extension of time by reference to the “not reasonably practicable” test in Section 111(2)(b) ERA. Of those that did consider the issue, most correctly identified that ignorance of the law and reliance on the trade union representative were not sufficient excuses for presenting a claim late. Higher marks were given to candidates who properly explained their conclusion that it had been reasonably practicable for the claimant to have presented his unfair dismissal complaint in time, for example by referring to the fact that the trade union representative was very experienced, and that the claimant might have a remedy elsewhere in a claim for negligence. Weaker candidates extended the time limit on the basis that the claimant was “only” four days late.

Question 3

The third question asked candidates to identify the primary time limit for presenting a complaint of race discrimination and then to consider the impact of ACAS early conciliation and any extension of time that might be available. There was a lot to unpack in the question, which is why it attracted the same marks as the first two questions combined.

Again, weaker candidates provided an inaccurate precis of the terms of Section 123(1)(a) EqA. Most candidates offered a primary limitation date which was three months less a day ahead of the date that dismissal was communicated; see below as to the accuracy of this. As above, ACAS early conciliation caused confusion: mistaken approaches that had been seen in candidates’ answers to question 2 (when applying Section 207B ERA) were often mirrored in their answers to question 3 (when applying the equivalent provisions in Section 140B EqA).

The biggest variance between candidates arose from how they tackled the claimant’s later appeal against his dismissal (if at all). Weaker candidates focused solely on whether the respondent’s original decision to dismiss him on 19 September 2016 was an act of race discrimination. Such candidates nevertheless earned some marks by correctly concluding that, like the complaint of unfair dismissal, this claim would appear to have been presented late, even after the primary time limit had been extended by the period of 44 days spent in ACAS early conciliation.

Stronger candidates recognised that the claimant was also criticising the respondent’s approach to his subsequent appeal (where he said that the appeal panel refused to investigate his allegation that a white employee was treated more leniently). The appeal outcome was communicated to the claimant on 31 October 2016 and required its own “clock-stopping” analysis under Section 140B, leading to the correct conclusion that a complaint of race discrimination in respect of the appeal process was in time.

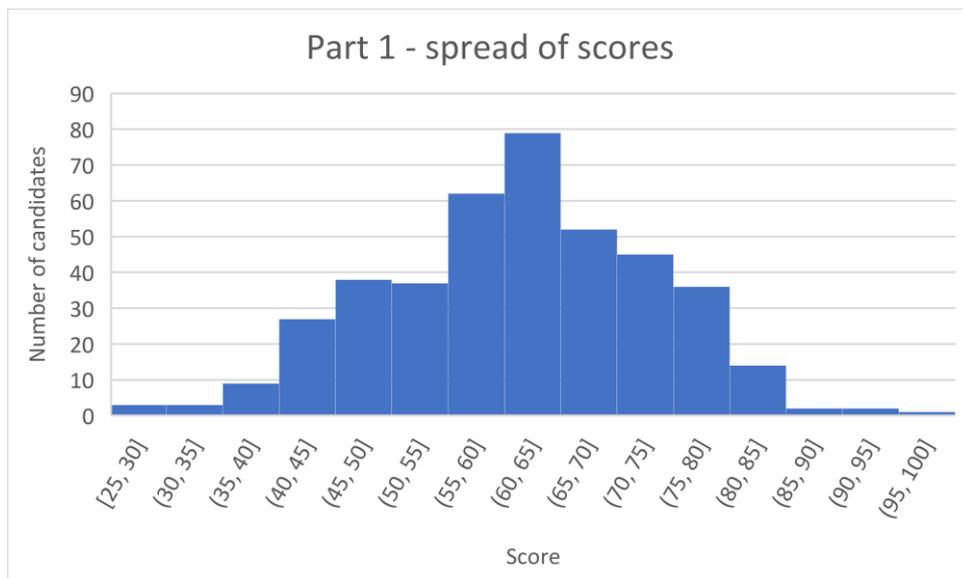
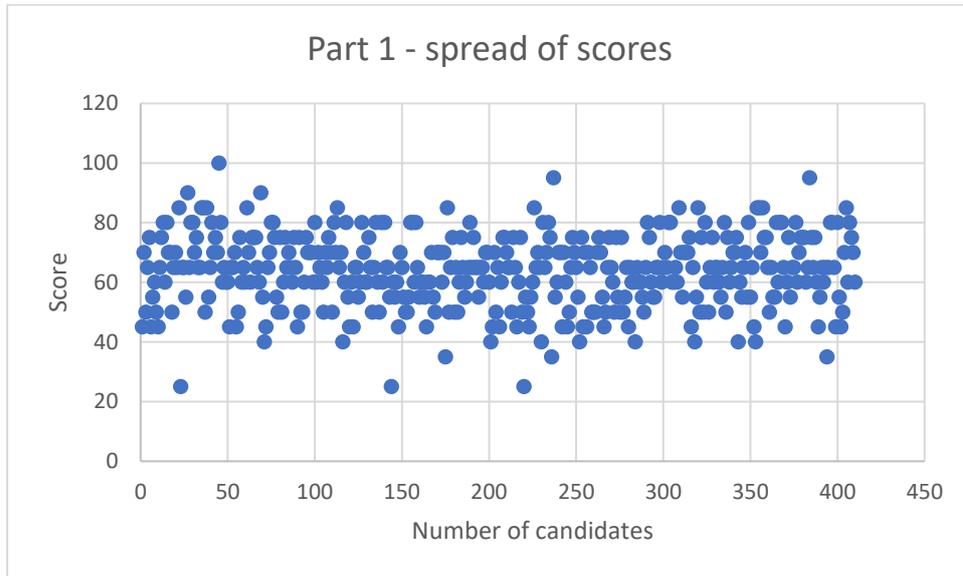
The strongest candidates recognised that, unlike in the case of a complaint of unfair dismissal, time ran from the date of the alleged act of discrimination and not from the date when the consequences of that act were communicated to the claimant (*Virdi v. Commissioner of Police for the Metropolis*). This earlier date was provided in relation to the decision to dismiss but not in relation to the appeal hearing.

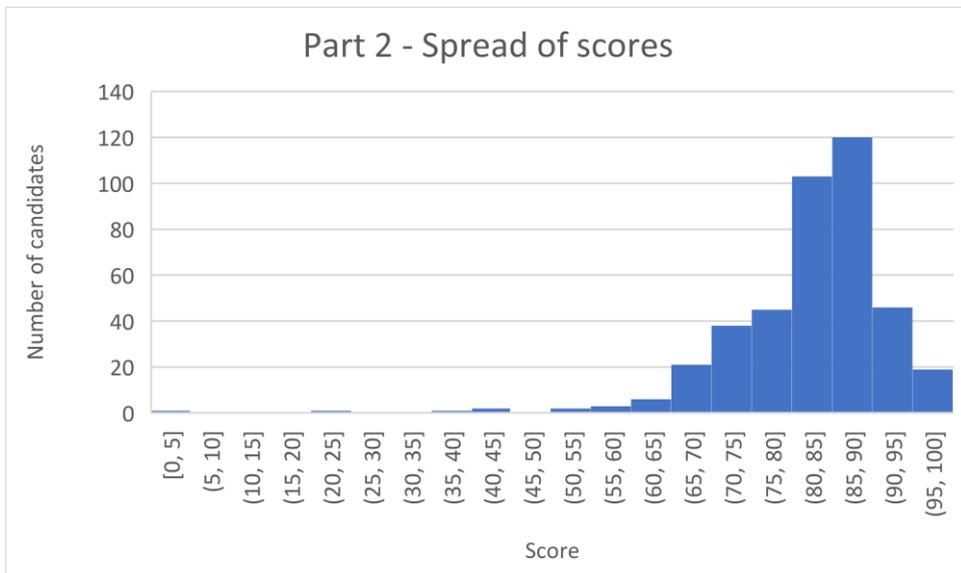
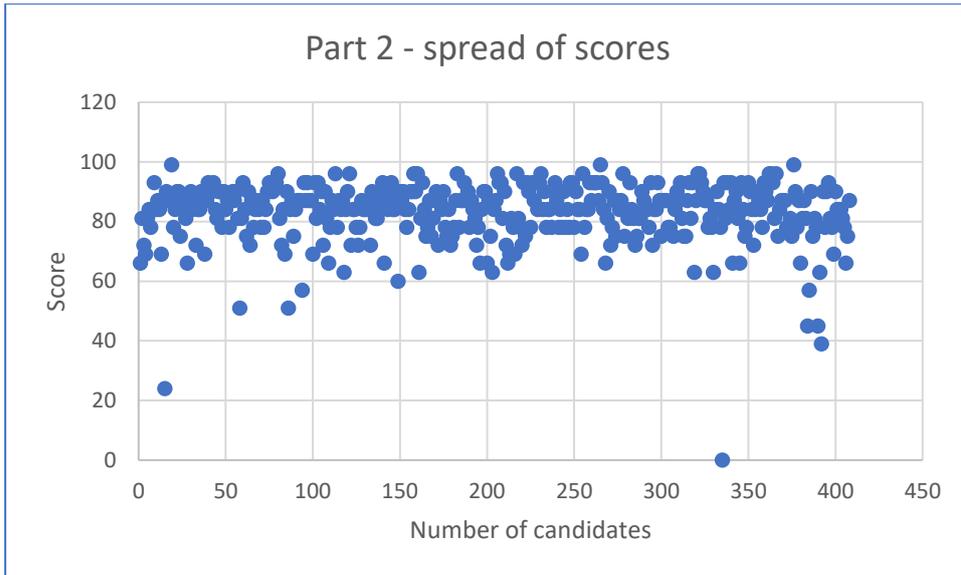
The strongest candidates also properly analysed whether the respondent's original decision to dismiss the claimant and the approach to his appeal could form part of a "continuing act" for limitation purposes. If correct, this would mean that the complaint in respect of the dismissal was in fact in time; by virtue of Section 123(3)(a) EqA, conduct extending over a period is to be treated as done at the end of the period.

Recognising that it was possible that the dismissal and the appeal might not be a continuing act, stronger candidates then analysed whether the complaint about the alleged discriminatory dismissal might benefit from an extension of time under the "just and equitable" provisions of Section 123(1)(b) EqA. This involved something more than simple reliance on the trade union advice as seen in answer to question 2; it required an analysis of the points discussed in *British Coal Corporation v Keeble*. These would include: the length of and reasons for the delay (not just trade union advice but an internal appeal process); the limited extent to which the cogency of the parties' evidence was likely to be affected by a short delay; there was no suggestion that the respondent had failed to co-operate with any requests for information; the claimant failed to act promptly after the outcome of this appeal; and the steps taken by the claimant in obtaining advice from an experienced trade union representative. So long as the candidate offered a reasoned analysis, those that extended time and those who did not extend time received the same marks.

Finally, in relation to all three questions, candidates were not penalised for providing legal analysis on points that were outside the scope of the questions they had been asked. However, they received no credit for such analysis. In some cases, it was clear to the marking panels that this had contributed to running out of time. Examples of such unnecessary diversions were: whether the claimant was employed by the school's governing body or the local authority; whether the claimant had gone through ACAS early conciliation with both entities; the 'vires' of the disciplinary panel to dismiss the claimant; whether the claims were of direct or indirect discrimination or victimisation; what the Provision, Criterion or Practice would have been in a complaint of indirect discrimination; whether an appropriate comparator had been chosen; and the merits of the underlying claims.

The charts below show the spread of scores:

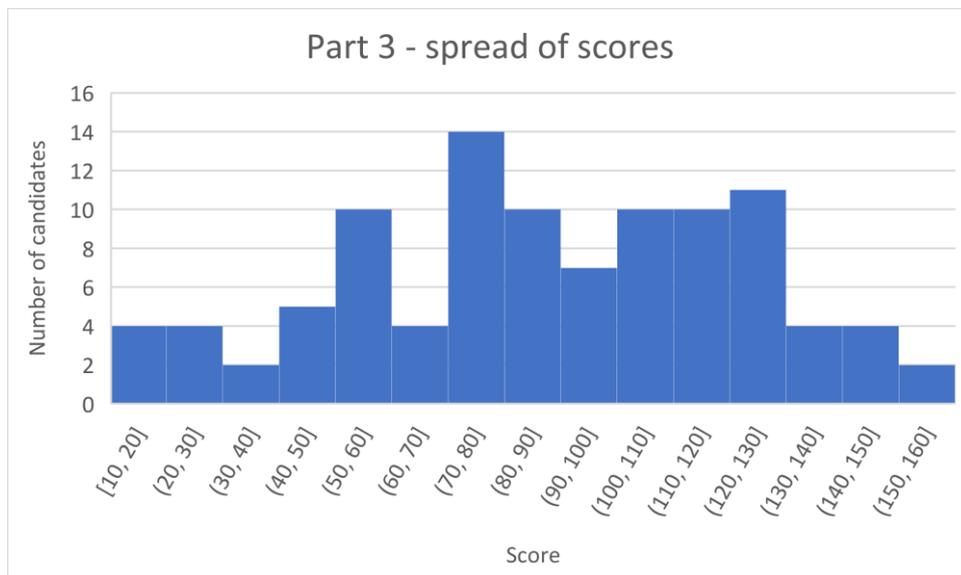
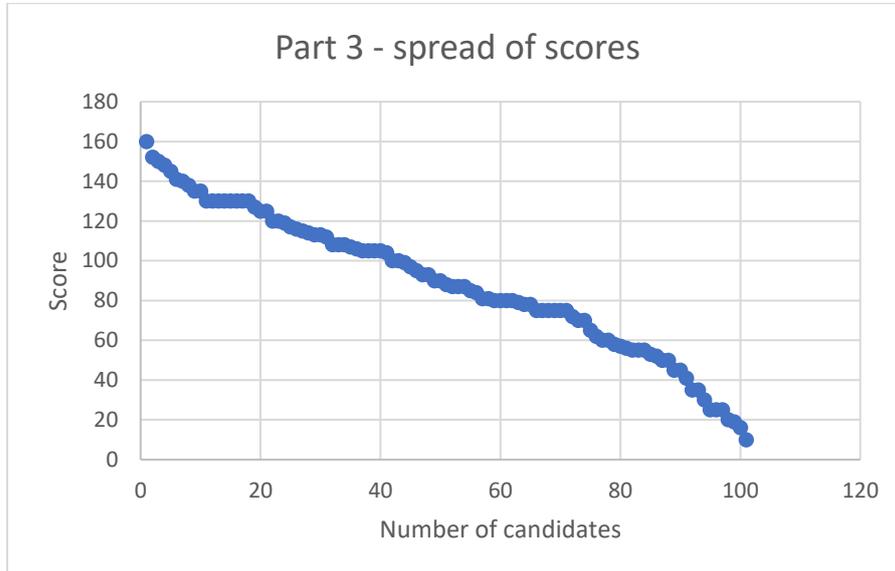




The lowest candidate score averaged over Part 1 and Part 2 combined for this test was 20%, the highest was 93% and the average was 73%.

In Part 1 (where each question had one correct answer, which scored 5 points) there were no questions where over 90% of candidates gave an incorrect answer (harder questions) and no questions where 90% or more of candidates gave the right answer (easier questions). The average candidates getting an answer right in any question in Part 1 was 21%.

In Part 2 (where there were 3 marks available for each correct choice) there were no questions where more than 10% of candidates gave an incorrect answer (hard questions) and 3 questions where 90% or more of candidates gave the correct answer available (easy questions). The average candidates getting an answer right in any question in Part 2 was 74%.



In Part 3 (where question 1 attracted 30 marks; question 2 attracted 50 marks; and question 3 attracted 80 marks) the average score for scenario 1 was 21/30 and the average score for scenario 2 was 31/50. The average score when both scenario scores were added together was 35/80 points.

Feedback from candidates

Most candidates who responded to the candidate survey said they spent two or more hours preparing for the test. 99% had a copy of the preparation material to hand whilst sitting the test. Just over 94% of candidates found the test instructions were satisfactory, good or excellent.

91% of candidates found the test challenging or very challenging. Most candidates found the time allocated to complete Part 1 and Part 2 of the test to be about right, whilst over 89% felt they had too little time to complete Part 3 of the test. In Part 3 of the test about 80% of all candidates ran out of time before completing their answers.

The drafting judges and those quality assuring the test and the material thought the test should be challenging on time to demonstrate a candidate's ability to assimilate and clarify the facts under pressure, and to ensure they can communicate the salient points in writing.

Qualifying test technical issue

On 17 July 2018 the qualifying test for 122 Salaried Judge of the Employment Tribunal went live on our website at 7am.

For fewer than five candidates who were completing parts 1 and 2 of the test upon submitting either parts, an 'access denied' message was displayed rather than 'test successfully submitted'. Candidates affected called the JAC helpdesk and upon checking it was found that their test had been received despite this message.

A small technical issue arose for some candidates who were completing part 3 of the test. As the timer reached zero, on selected browsers a pop up box was displayed asking candidates to leave the page or 'cancel'. Selecting 'cancel' resulted in the browser crashing. Those forty or so candidates who were affected contacted the JAC helpdesk and the difficulties they were experiencing were addressed to ensure they were not disadvantaged.

The issues which arose on this test were investigated by our digital team and have been resolved for future tests.