

## **Selection Day Feedback Report**

**122 Salaried Judge of the Employment Tribunal**

**February 2019**

## **Purpose**

The purpose of this report is to provide general feedback on candidate performance in the 122 Salaried Judge of the Employment Tribunal selection days. The report describes how the panels undertook the selection days for this selection exercise and what characterised stronger and weaker examples.

## **Competency Framework**

At selection day, the situational questions and interview were 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.

## **Performance of candidates**

420 candidates applied for this exercise. Following the qualifying test and online scenario test, 125 candidates were invited to selection day.

59 candidates were recommended by the Judicial Appointments Commission to the Senior President of Tribunals for appointment. 66 candidates were assessed as 'not presently selectable'.

## **Additional selection criteria**

For this exercise, the Lord Chancellor required that candidates have current or previous substantial experience of employment law.

## **Selection day**

### **Situational questions**

The situational questions were drafted by 2 Regional Employment Judges.

In common with all the selection tools developed for this exercise, the situational questions were designed to assess relevant transferable skills and to minimise the extent to which candidates might be advantaged or disadvantaged by their professional background.

The JAC Advisory Group, which is composed senior judiciary and representatives of the legal professions and chaired by a lay JAC Commissioner, offered advice and guidance during their development.

In common with all assessment tools used by the JAC, both the situational questions and the panel guidance were subject to an extensive quality – and equality – assurance process including review by our Head of Diversity and Engagement and through the JAC Advisory Group. The effectiveness of the situational questions was also assessed by means of a dry run using a range of volunteers.

## **Structure of the situational questions**

There were 2 written scenarios with a series of questions on each scenario.

**Scenario 1** was about a situation where a judge acted improperly in several respects and, arguably, showed apparent bias in communicating with professional representatives during a hearing. It required the candidates to analyse, in a real-life situation, how the judge acted as the events developed. The scenario therefore set out a narrative of the events which included several stages and an outcome.

This provided, by way of follow up questions to the questions set out in the scenario, the opportunity for the candidates to show their deeper understanding of the issues and discuss how they would have behaved when presented with the situation.

In this scenario, the judge gave both acceptable and unacceptable reasons for refusing to stand down and the exercise required candidates to analyse these fully and accurately.

The exercise also required the candidates to consider the question of apparent bias, the test being well-known: whether a fair-minded and informed observer would conclude there was a real possibility that the judge was biased. Allegations of bias are common in hearings and the concepts are of practical importance. In the particular example, although the judge had acted wholly improperly, he had not shown apparent bias and the exercise required the candidate to analyse the concepts in a factual situation.

In **Scenario 2** candidates were asked to take the role of a salaried Employment Judge.

This scenario related to a hearing regarding a claim for unfair dismissal and disability discrimination. There were issues relating to the claimant's diagnosis of Asperger's Syndrome and his request for reasonable adjustments, the potentially prejudicial comments made by the two lay members of the panel and the timing of the hearing.

In this scenario the legal and factual issues to be decided had already been agreed by the parties. The candidate needed to engage directly with the injudicious comments made by the members, making sure that they are prepared to keep an open mind as they consider the evidence of the claimant and the respondent.

This scenario was designed to test whether the candidate, in the role of the Judge, appreciates that the tribunal has a duty to hold a fair and timely hearing and to anticipate and plan, in outline, practical and procedural matters, accordingly.

Before the hearing begins, the candidate would be expected to anticipate the likely needs of the parties with the members using the information they had been given in the preliminary hearing summary, by the parties and by the clerk. The candidates were also expected to have considered the information provided by the Equal Treatment Bench Book and to use the guidance where it appeared relevant.

The Employment Judge must maintain firm control over the proceedings, having regard to the time allocation and the agreed issues. Rule 45 provides statutory authority for the practice of

timetabling of hearings. If the Tribunal intends to set a timetable for the hearing, they should do so at the start of the hearing and not attempt to do so part of the way through the hearing.

### **Advance preparation**

Candidates were asked to familiarise themselves with chapter 4 of the Equal Treatment Bench Book in advance of selection day and were then given 60 minutes preparation time on selection day. During this time candidates were given the 2 scenarios and the main questions that would be asked for each scenario.

### **Assessment of candidates' responses to the situational questions**

The evidence for each competency is assessed as either outstanding, strong, sufficient or insufficient. The panels then make a final overall assessment of candidates as either outstanding, strong, selectable or not presently selectable.

Outstanding evidence included:

- Identifying the relevant test to apply on recusal and be familiar with the Court of Appeal's 'best practice' guidance in *Jones v DAS Legal Expenses Insurance* and able to name a number of the suggested steps
- Quoting the *Rackham v NHS Professionals Ltd* case and talk about whether there ought to have been a second preliminary hearing to discuss reasonable adjustments beforehand
- Recognising the difference between the work experience in chambers and at Excellent Ltd
- Correctly analysing the sequence of problematic emails passing between the judge and Ms Ali
- Dealing with the members' inappropriate comments firmly and reminding them that the claimant may need supporting in the high stress environment of a tribunal hearing
- Good use of the guidance in the Equal Treatment Bench Book to inform the adjustments the tribunal could make to help the claimant
- Acknowledging that the claimants' requests for adjustments went beyond the recommendations of the GP's letter
- Recognising the impact of the potential prejudgement, giving clear decisions about the request for the hearing to be heard in private, request for written questions, presence of the child and resisted pressure to adjourn
- Considering and referring to the impact on timings and management of the hearing
- Clear timetabling of the hearing
- Clear consideration of the overriding objective

Strong evidence included:

- Giving the correct legal test for recusal for apparent bias and showing some understanding of the best practice steps (*Jones v DAS Legal Expenses Insurance*) open to the tribunal
- Evidence of authority in pressing the non-legal members on whether they could hear the claim objectively in view of their opening comments
- Proposals to timetable the hearing
- A good understanding of the Equal Treatment Bench Book
- Evidence that actions were in keeping with the overriding objective: considering the needs of the claimant balanced with the respondent's views
- Analysis of the sequence of problematic emails passing between the judge and Ms Ali

Sufficient evidence included:

- An appreciation that a judge should not see a party privately during a hearing, whatever the reason for it
- Identifying that there are circumstances in which it may be appropriate to express a preliminary view in advance of final submissions, namely to promote settlement or shorten the hearing by clarifying the issues, or if the parties ask the judge to do so
- Identifying the correct legal test to apply when there is any question of recusal for apparent bias. (whether a fair minded and informed observer would conclude there was a real possibility that the judge was biased)
- Showing an understanding of the provisions within the Equal Treatment Bench Book and of possible reasonable adjustments
- Demonstrating an awareness of the information provided, for example the GP's medical report and recommendations
- A reference to timetabling
- Understanding the balance to be made in deciding upon the appropriate adjustments and keeping them under continual review
- Some analysis of the sequence of problematic emails passing between the judge and Ms Ali

Insufficient evidence included:

- No reference to the Equal Treatment Bench Book and/or possible reasonable adjustments
- No identification of the test of apparent bias (whether a fair minded and informed observer would conclude there was a real possibility that the judge was biased)
- Failing to convincingly analyse the concept of recusal correctly and/or brought inappropriate considerations into play such as threats to a fair hearing and costs considerations
- Not identifying that a judge could express a preliminary view if the parties wished the judge to do so, or to promote a settlement or clarify the issues
- Not demonstrating assimilation of the medical report, the claimant's additional requests and the guidance
- Did not reach clear conclusions on, for example, how to address the apparent pre-judgement of Mr Green and Ms Blue, whether to allow time for written questions and decision to adjourn for further information

### **General comments on situational questions:**

Outstanding candidates:

- Grasped all the facts and issues to be addressed
- Focused on key areas
- Directed parties and tribunal members to the critical issues
- Clear management of timings and the hearing from the outset
- Thorough understanding of tribunal processes and procedures
- Clear knowledge of the tests to be applied, their implication and the relevant case law

Strong candidates:

- Showed a thorough grasp of the facts in the materials and gave appropriate weight to the issues raised

- Clear and confident decisions, evaluating the issues and providing reasoned explanations having considered every aspect of the scenarios from the view of all the parties and differentiated between obligations to the claimant and counsel
- Considered the impact of time on the actions they decide to take, and balanced this with the interests of justice

Selectable candidates:

- Grasped the necessary facts in the brief and most of the issues to be addressed
- Reached correct conclusions but with limited explanation of reasoning
- Some hesitation and deliberation of the points before reaching a conclusion
- Demonstrated a reasonable understanding of tribunal processes and procedure
- Responses correct but lacked sufficient detail for the information to be considered strong

Not presently selectable candidates:

- Reached wrong or inappropriate decisions. For example, not reaching a clear conclusion concerning whether or not to recuse, or deciding to adjourn in Scenario 2 without adequate explanation of why this may be appropriate
- Did not consider timings or the impact of potential delays on court processes and parties
- Showed lack of knowledge of court processes and procedures
- Did not demonstrate a knowledge of the tests to be applied
- Insufficient grasp of the relevant facts, missing key information and issues
- Failure to manage own time in answering the situational questions.
- Limited evidence of planning the hearing
- Debating the points without reaching a clear conclusion

## **Competency-based interview**

Each candidate then had a competency-based interview. Here the panel was seeking further evidence and examples from the candidate of the required competencies and in the context of the role of a salaried judge of the Employment Tribunal. The panel drew upon evidence provided in the candidate's self-assessment, career history and Independent Assessments, to inform their questioning.

### **Exercising Judgement**

Outstanding evidence:

- Clear demonstration of excellent decision making with a high level of complexity
- Consistently excellent information demonstrating ability against the criteria
- Decision making at the forefront of the jurisdiction or in novel areas, hugely complex and in challenging circumstances

Strong evidence:

- Examples involved considerable complexity and legal challenge, in the context of the level of decision making required by a salaried Employment Judge
- More complex areas of the law
- Conflicting issues and information
- Reaching a fair decision where the outcome is unclear

Sufficient evidence:

- Examples that demonstrate decision making in a context relevant to the post. For example, of similar challenge and complexity
- Demonstrates objectivity and independence
- Evidence of reaching a fair decision
- Some demonstration of complexity and challenge

Insufficient evidence:

- Example gave no clear decision
- Situation was of limited challenge or legal complexity
- Lack of evidence of confident and well-reasoned decisions

### **Possessing and Building Knowledge**

Outstanding evidence:

- Substantial knowledge of own field including most complex and challenging areas
- Clear ability to develop and apply knowledge of complex employment law in wide ranging situations
- Evidence of the ability to develop knowledge in complex areas of own field or in an unfamiliar or novel area of law
- Advises other legal professionals

Strong evidence:

- Proactive about extending knowledge in own field and new and unfamiliar areas
- Developing knowledge of a complex area of employment law which was applied and/or effectively explained to others

Sufficient evidence:

- Sufficient knowledge of employment law to meet requirements of a salaried post
- Keeps up to date as required
- Ability to develop knowledge and understanding of employment law

Insufficient evidence:

- Evidence of considering employment-related issues, but no particular reference to the Equality Act or discrimination law principles
- Little or limited knowledge of employment law, particularly of the more complex areas which are regularly dealt with by salaried Employment Judges (the additional selection criteria specifically asked for substantial knowledge)
- Clear ability to develop and apply knowledge of complex employment law in wide ranging situations
- Evidence of the ability to develop knowledge in complex areas of own field or in an unfamiliar or novel area of law
- Advises other legal professionals

### **Assimilating and Clarifying Information**

Outstanding:

- Examples involving complex, conflicting information from multiple sources, showing thorough analysis establishing key criteria and focussing others on critical issues

Strong evidence:

- Examples involving how the candidate analysed a large volume (typically several lever arch files) of complex and conflicting information

Sufficient evidence:

- Examples showing a clear, logical approach to analysing reasonably complex information

Insufficient evidence:

- Examples did not involve volumes of information or any complexity
- Candidate did not adequately explain how the information was analysed, or how key issues were established
- Some examples were of volume but little complexity
- Responses unfocussed and lacked clarity of approach

### **Working and Communicating with Others**

Outstanding evidence:

- Clear demonstration of appropriate authority, impartiality and fairness in dealing with challenging situations
- Consistently excellent examples demonstrating all aspects of the competency
- Complex situations requiring insight and sensitivity
- Calm confident approach when dealing with challenge
- Taking appropriate steps to assume control
- Examples from high level challenging situations where there is demonstration of an ability to ensure fairness

Strong evidence:

- Gave examples of situations requiring broader understanding and involving more demanding situations requiring considerable sensitivity and accommodation
- In addition, examples from positions of responsibility where candidates were in a leadership capacity and demonstrating the ability to work constructively with others and command respect in a broader context
- Dealing with challenging situations, perhaps in a judicial or quasi-judicial setting

Sufficient evidence:

- Demonstration of confidence and authority - perhaps in small groups or standing one's ground
- Gave examples which demonstrated sufficient understanding of how to accommodate the needs of vulnerable people. Examples were of more routine situations (hearing loops, interpreters, for example)

Insufficient evidence:

- Limited evidence of persuasive communication
- Responses not always focused on relevant information and/or lack of clarity
- Poor communication – giving excessive background and generalised information, rather than details of actions and behaviours
- Failure to respond to prompts from panel members

- Examples did not demonstrate the ability to exercise authority or command respect at the level required. Low level situations

### **Managing Work Efficiently**

Outstanding evidence:

- Examples involved devising and implementing new systems or procedures which improved own work throughput and that of others
- Novel use of IT to improve efficiency or make more effective use of existing systems
- Examples of handling multiple roles

Strong evidence:

- Proactively planning and setting priorities
- Examples often related to an extended period of pressure (not just a single day) requiring sustained management and use of various resources
- Responsibility for and coordinating the work of others
- Evidence of resilience in a challenging situation

Sufficient evidence:

- Examples that demonstrated the ability to handle a considerable work load, proactive planning and responding swiftly to changing needs
- Evidence of resilience and flexibility to manage workload effectively
- Effective use of technology

Insufficient evidence:

- Little evidence of managing proactively
- Inability to demonstrate effective time management

### **General comments**

Candidates who were assessed as not presently selectable tended to generalise in responses and describe the type of situation they were required to handle rather than concentrating on what happened in a challenging case. This limited the evidence for the panel to assess the candidate's abilities against the competencies. They also chose examples that did not address the questions posed.

Selectable candidates focused on their actions and behaviours in specific cases involving complex issues and challenging demands.

A number of candidates demonstrated that they possessed some of the required competencies for judicial appointment, however they were not able to satisfy the requirements under Possessing and Building Knowledge or Exercising Judgement to the required level for a salaried post.

### **Welsh questions**

Candidates for posts in Wales were required to have an understanding, or the ability to acquire the understanding, of the administration of justice in Wales, including legislation applicable to Wales and Welsh devolution arrangements. This requirement was assessed at selection day through a series of questions. Candidates were assessed as either suitable or not suitable for posts in Wales, based on their answers to these questions.

In addition, the ability to communicate fluently in spoken and written Welsh was required for at least one post. This was assessed through a telephone assessment prior to selection day. Candidates who participated in the telephone assessment were assessed as either competent or not competent for this post.