

ADMISSION TO THE JERSEY BAR FOR PART TIME WORKERS

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In 2015, the Royal Court handed down a judgment which determined that an applicant for admission to the Jersey Bar was ineligible for admission because she had not completed the requisite time in office by reason of the number of hours she worked each week. This has prompted review and change to the legislation through the Advocates and Solicitors (Amendment No 6) (Jersey) Law 201-. This article explores the effect of the judgment, the changes to the legislation and queries whether further review is necessary.

1 In the October 2015 issue of this *Review* (“Miscellany: Admission to the Jersey Bar”) a Royal Court judgment published earlier that year was noted, *Att Gen v Dunlop, Law Society of Jersey*.¹ In *Dunlop*, the Royal Court determined that “employed” in the context of applying for admission as an advocate under art 3 of the Advocates and Solicitors (Jersey) Law 1997 (“the 1997 Law”) meant employed for a period, or periods totalling, two years in a full time capacity.

2 Following the decision in *Dunlop*, the Law Officers’ Department was asked by the Legislation Advisory Panel to work with the Law Society and the profession to develop an amendment to the 1997 Law to enable more persons working part time to be able to qualify as advocates or solicitors.

3 On 27 May 2016, the Chief Minister lodged *au Greffe* the Advocates and Solicitors (Amendment No 6) (Jersey) Law 201- (“the Amendment No 6 Law”) and this was adopted by the States Assembly on 12 July 2016. It awaits Privy Council sanction. The Amendment No 6 Law is explored in further detail below.

What is required for admission as an advocate or solicitor?

4 In order to be admitted by the Royal Court as one of its officers, a person must first satisfy certain academic and professional requirements. The application is made to the Attorney General and if he is satisfied that the applicant meets the qualifying criteria, he or the Solicitor General will move that conclusion to the Superior Number of

¹ [2015] JRC 007; 2015 (1) JLR N [10].

the Royal Court, and the Court is then asked if it agrees. Although in theory the court could refuse someone on their so called “swearing-in day”, the processing of applications takes place in advance of the court sitting. This allows the Law Officers’ Department to alert candidates to any issues with their applications, or otherwise inform them that all is in order so that they can proceed in the knowledge that they will almost certainly be admitted and can therefore make all the usual arrangements for purchasing legal dress, writing a witty speech and haggling over how many of their family members can obtain a seat in the Royal box.

5 For a person seeking admission to the Jersey Bar, the first condition is that he or she must have passed the examinations for qualification in England and Wales as a solicitor² or as a barrister.³ Alternatively, if a candidate has passed similar examinations in Scotland, Australia, New Zealand or Northern Ireland, this will also suffice.⁴

6 The second academic requirement is that a candidate must have passed the “final examination” element of the “qualifying examination” *i.e.* the local exams on the law of Jersey.

7 The employment requirement is that a person must have been employed in one or more relevant offices⁵ for a period or periods totalling two years within the three years immediately preceding the application.

8 A candidate must also satisfy the Royal Court that he or she is a fit and proper person and to this end, applicants are asked to declare to the Attorney General any matters which may bring their character into question such as criminal convictions or findings of professional misconduct against them, or ongoing investigations into such matters.

9 Substantially similar conditions apply for persons seeking admission as a solicitor (*écrivain*). The main difference is that for solicitors it is not necessary to have completed the professional examinations in England and Wales or another specified jurisdiction. A law degree from a British University or such other university as the Board of Examiners approves, or a law conversion course or General Diploma in Law will suffice. The employment requirement is also slightly different in that a person must have been employed in one or more relevant offices for a

² *I.e.* the Legal Practice Course, or its predecessor the Law Society Finals.

³ *I.e.* the Bar Professional Training Course, or its predecessor the Bar Vocational Course.

⁴ Advocates (Specified Examinations and Assessments) Rules 2013.

⁵ A relevant office is an office of an advocate or solicitor in Jersey, the Law Officers’ Department or the Judicial Greffe.

period, or periods totalling, three years in the immediately preceding four years.

10 There is also provision in the 1997 Law which enables a person who is admitted as a solicitor to apply for admission to the Bar if he or she has passed the English and Welsh or other specified professional examinations or if he or she has practiced as a solicitor for three years.

11 Finally, a person who has worked for five years in a relevant office including the whole of the two years immediately preceding the application may, having passed the qualifying examination, apply for admission as a solicitor notwithstanding the fact that he or she does not have a law degree from an approved university.⁶

The requirement for a minimum period of employment

12 The provision which came under scrutiny in the *Dunlop* case was art 3(2)(b) of the 1997 Law which requires a requisite period of employment for a person applying for admission as an advocate.

13 It is not necessary to repeat here the full legislative history which is helpfully set out in paragraphs 17-29 of the *Dunlop* judgment.

14 The 1997 Law was the first statute, regulating admission as an advocate, which introduced the requirement for a candidate to have completed a period of employment experience in a local office.⁷ At that stage though, there was no window of three years to complete the two years' employment within and therefore a person had to be employed for the entirety of the two years immediately preceding the application. In *Dunlop*, the Court analysed the *Projet* for the 1997 Law and its transitional provisions and observed that the requirement to be employed in a local legal office had been introduced to compensate for the removal of the requirement to pass the necessary examinations at the University in Caen or the local Caen alternative examinations.⁸

15 The Advocates and Solicitors (Amendment No 4) (Jersey) Law 2008 amended, *inter alia*, the employment requirements so that a person seeking admission to the Bar could complete the requisite two

⁶ The effect of the Advocates and Solicitors (Qualifying Examination) Rules 1997 is that for a person to sit the qualifying examination, he or she must already have a degree other than a law degree, and must, before undertaking the final examination (*i.e.* the Jersey exams) sit a preliminary examination consisting of the same subjects as an English law degree.

⁷ The Court in analysing the *Projet* for the 1997 Law (P.108/1996) noted that solicitors were already required to spend three years in a local office prior to the 1997 Law (para 25 of [2015] JRC 007).

⁸ [2015] JRC 007, at para 28.

years' employment within the three years immediately prior to the application, and a person seeking registration as a solicitor could complete the requisite three years' employment within the four years immediately prior to the application. The Ministerial Report for this amendment⁹ stated that—

“This amendment would marginally widen the ability of a successful examinee to be admitted, and would also make it easier for non-legal businesses to recruit those in the last stages of qualification as Jersey lawyers.”¹⁰

Conclusion in *Dunlop*

16 On the interpretation of art 3(2)(b) of the 1997 Law, the Court took into account the amendment in 2008 and concluded that—

“the purposive construction is that there must have been employment for two years out of the last three in a relevant office and it does not matter if that is achieved by two years' full time employment with up to a year off or something less than full time employment over a three year period where the aggregate time employed reaches the same total as a two years' full time employee.”¹¹

17 Although it was not explicitly stated in the judgment, the above interpretation would most likely apply by analogy to the employment periods in art 4(2)(c) and 4(3)(b) of the 1997 Law regarding applicants for registration as a solicitor.

18 The Court considered but ultimately dismissed arguments advanced by the Law Society of Jersey under art 2, Protocol 1 to the ECHR (right to education) when read on its own and when read together with art 14 ECHR (discrimination).

19 The ultimate conclusion therefore was that the candidate was not qualified and the Court urged the Attorney General to bring the matter to the attention of the Chief Minister in the hope that the 1997 Law could be reviewed.

Effect of the *Dunlop* decision

20 The effect of the Court's decision in *Dunlop* is therefore that—

⁹ P.189/2007: <http://www.statesassembly.gov.je/AssemblyPropositions/2007/27385-5818-7122007.pdf>

¹⁰ *Ibid.*, at 5.

¹¹ [2015] JRC 007, at para 34.

- (a) under art 3(2)(b) of the 1997 Law, a person employed on a part-time basis who works just under three and a half days per week¹² for three years shall be eligible to apply for admission to the Bar, as he or she shall accumulate the requisite equivalent of two years within those three years. Any person working fewer days per week will be excluded from applying for admission;
- (b) under art 4(2)(c) of the 1997 Law, a person employed on a part-time basis who works just short of four days a week¹³ for four years shall be eligible to apply for registration as a solicitor as he or she shall accumulate the requisite equivalent of three years within those four years. Any person working fewer days a week will be excluded from applying for registration; and
- (c) under art 4(3)(b) of the 1997 Law, no part-time employee has the ability to accumulate the requisite experience to be able to apply for registration as a solicitor under this provision as he or she must have been employed on a full time basis for the whole of the two years immediately preceding the application.

21 Clearly, this is an unsatisfactory position to be in as it excludes a large proportion of persons who work on a part-time basis where their working week is smaller than the periods stated above. Furthermore, the discrepancy which means a higher proportion of part-time employees are excluded from the solicitor profession than the advocate profession appears unjust and has no justification.

22 The potential discriminatory effect on part-time workers, the majority of whom are likely to be female, is likely to be disproportionate. Therefore, the Legislation Advisory Panel and the Law Society agreed that the 1997 Law should be adjusted to extend the possibility of qualification to more persons working part-time in a local office. However, on the other hand there was also a desire to place a reasonable and proportionate limit on the time in which the requisite period of employment could be completed otherwise the purpose of the requirement (*i.e.* to gain reasonable and meaningful experience in a local office) would be defeated if, for example, a person could work one day a week for ten years.

¹² An average working year is 45 weeks (discounting annual leave and bank holidays) and so a person working a full 5 day week would accumulate 450 days over a 2-year period. This amount can also be achieved by working 3.3 days per week over a 3-year period.

¹³ A person working a full 5 day week would accumulate 675 days over 3 years, and this amount can also be reached by working 3.75 days a week over a 4-year period.

Consultation

23 The Law Society and the Law Officers' Department took into account the position in England and Wales which permits those undertaking a solicitor's training contract to complete this two year programme on a pro-rata basis, with four years the maximum period in which a person must complete the contract. This approach balances the need to allow more part-time workers to access the profession without compromising the need for the experience gained to be meaningful.

24 The authors of this article drafted a consultation paper which was then distributed to members of the Law Society of Jersey inviting comments from members of the profession.

Adjusting the window

25 The main thrust of the proposals in the consultation was to adjust the window in which a person could complete his or her requisite period of employment. The following amendments were proposed—

- (a) that art 3(2)(b) should be amended to provide that in the four years immediately preceding the application for admission to the Jersey Bar, the person must have been employed for a period(s) amounting to the equivalent of two years' full-time in a relevant office(s). This will therefore enable a person working two and a half days per week over a four year period to be eligible for admission to the Bar;
- (b) that art 4(2)(c) should be amended to provide that in the six years preceding the application for admission as a solicitor, the person must have been employed for a period(s) amounting to the equivalent of three years' full time in a relevant office(s). This will therefore enable a person working two and a half days per week over a six year period to be eligible for admission as a solicitor; and
- (c) that art 4(3)(b) should be amended to provide that the equivalent of two years' full time employment in a relevant office(s) must be completed within the four years immediately preceding the application, and period(s) totaling the equivalent of five years' full time employment in a relevant office(s) must be completed within the ten years immediately prior to the application.

26 There were a limited number of responses to the consultation but these were supportive of the proposed changes to the 1997 Law and the opportunity for more part-time workers to be able to qualify.

Practising as a solicitor

27 The consultation also addressed the provision in art 3(3)(b)(ii) of the Law which enables a person to essentially convert to an advocate after 3 years of “practising as a solicitor.” This provision can be distinguished from the provision which was the subject of interpretation in the *Dunlop* case *i.e.* it does not specify that a person should have been practising in a relevant office, it does not contain any window in which the three years must be completed or make provision for separate periods of practice, and it uses the term “practiced” instead of “employed.”

28 The consultation paper raised the issue that it would seem inconsistent with the provisions relating to employment experience if a person could “practice” for a minimal number of hours per week and be in a position to convert to being an advocate at the same time as a person who had been practising as a solicitor on a full-time basis. It was therefore suggested that the provision be amended to provide that a person should practice for a period of, or periods totaling, three years within a six year window. Furthermore, it was also suggested that it would be sensible to introduce a requirement for the period of practice to be undertaken in a relevant office as it would otherwise be incongruous to not include such a requirement. The provision for example would be undermined if a person was admitted as a solicitor and worked in a non-legal role for three years but was nonetheless still able to claim that he or she had been “practising as a solicitor” during that time. Difficulties could also arise with persons working as in-house counsel in banks, trust companies and other financial institutions because it may be difficult for a person to substantiate that he or she had “practiced as a solicitor” in such a role. The responses to the consultation were in favour of harmonising this provision with the employment provisions.

The nature of employment in a relevant office

29 The 1997 Law at present is not explicit as to what capacity a person must be employed in a relevant office. The Court made it clear in *Dunlop* that it would be absurd for a person to be deemed sufficiently qualified if their employment in a relevant office was as a filing clerk or secretary. An amendment to the 1997 Law in 2011¹⁴ allowed persons working in an advocate’s or solicitor’s office outside Jersey to use a proportion of their time towards the total calculation of employment period if the person was certified as having been “engaged predominantly in matters of Jersey law.” The Royal Court highlighted

¹⁴ Advocates and Solicitors (Amendment No 5) (Jersey) Law 2011.

that if it was possible to have degrees of absurdity, it would be even more absurd that a person could be sufficiently qualified if employed in a non-legal role in Jersey whereas a counterpart in the same firm working in an office outside Jersey would have to obtain a certificate showing that he or she was engaged predominantly in matters of Jersey law.¹⁵

30 Whilst the Court's finding means that an amendment was not entirely necessary, it was felt that removing any uncertainty as to the nature of a person's role could be beneficial but that this could be difficult to achieve. The responses to the consultation agreed that there could be benefit in making it explicit that the nature of the employment for the purposes of arts 3 and 4 should be employment in a legal capacity.

31 The above proposals were thereafter taken to the Legislation Advisory Panel which recommended in October 2015 that the Chief Minister approve drafting instructions giving effect to these proposals and some other provisions as detailed further below. The Chief Minister signed a Ministerial Decision in November 2015¹⁶ on the recommendation of the Panel and the work on a draft amendment began.

The Amendment No 6 Law

32 The Amendment No 6 Law¹⁷ was lodged by the Chief Minister on 27 May 2016 and adopted by the States of Jersey on 12 July 2016. The effect of the changes brought by the Amendment No 6 Law are now explored in further detail.

Adjusting the window and clarifying "employment"

33 As per the proposals set out in paragraph 25 above, the respective window period in which a person must complete the employment shall now be twice the amount of the requisite period of employment. For example, a person seeking admission as an advocate has four years in which to complete the requisite two years.

34 The Amendment No 6 Law will also amend the 1997 Law to provide that a reference to "employment" is to be read as a reference to full time employment. It is of course difficult to determine what is full-

¹⁵ [2015] JRC 007, paras 29–30.

¹⁶ http://www.gov.je/Government/PlanningPerformance/Pages/MinisterialDecisions.aspx?docid=a55f78a695fceb69855db3f5612bfb1_MDs2013

¹⁷ P.57/2016: <http://www.statesassembly.gov.je/AssemblyPropositions/2016/P.57-2016.pdf>

time because the amount of hours a person is required to work under a full-time contract will vary between different offices. Therefore, to avoid mischief and uncertainty, full-time employment is defined as being at least 32 hours.¹⁸ It is understood that most offices would require a person to work more hours than this under a full-time contract, but this is the minimum level for full-time trainee solicitors as set out by the Solicitors Regulation Authority in England and Wales.¹⁹ The effect of this is that a person contracted to work 16 hours a week over four years will be capable of applying for admission as an advocate, regardless of how he or she spreads those hours out over a five day week.

35 It is also now clarified in the 1997 Law that a person must be predominantly engaged in legal matters, thus removing any doubt that a non-legal role would suffice.²⁰

Solicitors converting to become advocates

36 The provision for solicitors being in a position to apply for admission to the Bar having practiced as a solicitor for three years has been adjusted so that such person must have been employed as, or practiced as, a solicitor in a relevant office for three years.²¹ This has been done to remove any uncertainty over what “practising as a solicitor” might mean in practice *i.e.* the period of employment or practice must be completed in a relevant office. Allowing for persons who have practiced as a solicitor in a relevant office will enable self-employed solicitors to be able to benefit from the provision.

37 Furthermore, to harmonise this provision with the other employment provisions, a window period of six years has been provided so that a solicitor working part-time can also achieve cross-qualification.²²

Discounting absences

38 The Royal Court said in *Dunlop* that under its interpretation of the 1997 Law, it considered that where a person in a full-time job is absent from the office by reason of maternity leave, study leave or any kind of leave, that person would still be treated as having been in full-time

¹⁸ Article 4A(6)(a) of the 1997 Law as amended by the Amendment No 6 Law.

¹⁹ The Glossary (<http://www.sra.org.uk/solicitors/handbook/glossary>) defines full time in relation to a period of “recognised training” to mean working 32 hours a week or more and part-time is defined as working fewer than 32 hours a week.

²⁰ Article 4A(6)(b) of the 1997 Law as amended by the Amendment No 6 Law.

²¹ Article 3(b)(ii) of the 1997 Law as amended by the Amendment No 6 Law.

²² *Ibid.*

employment, for the purposes of the 1997 Law, during the period of absence.²³ Concerns were expressed by the Law Society during the consultation process that there could be potential unfairness if a person was, for example, absent from work for a significant period of time during the required period of employment but he or she still technically met the requirement. Such a person would arguably not have as much meaningful employment experience as an analogous person who has worked for the entirety of the required period.

39 The decision was therefore taken to introduce a caveat to the provisions on the required period of employment, so that where a person is absent from the office for a continuous period exceeding six calendar weeks, any absence in excess of those six weeks is discounted.²⁴ It was felt that six weeks was a reasonable cut-off and was only likely to catch extended period of sick leave, maternity leave or sabbaticals whereas annual leave would rarely exceed this. It was decided that time spent absent from the office on study leave studying for the final element of the qualifying examination would continue to count²⁵ as this was considered an adequate substitution for time spent in the office.

Discretion to extend the window

40 It was noted by the Court in *Dunlop* that it had no discretion to exercise, and in one of the responses to the consultation it was suggested that some form of discretionary power should be considered. Therefore, new art 4A(9) of the 1997 Law (as amended by the Amendment No 6 Law) provides that the Attorney General may, when considering whether to submit a person's application, extend "the window period" if the person has completed the required period of employment but not within the window period. The Attorney General must be satisfied that there are exceptional circumstances that would cause undue hardship to the person if the window period were not extended.

41 Therefore, if a person has had a break in employment which would otherwise prejudice their ability to apply for admission, he or she could benefit from the Attorney exercising this discretion. A typical example might be someone who has worked two and a half days per week for almost four years but who has had a break in employment before completion of the four years. A strict application of the 1997 Law as amended would require that person to start from the beginning again, whereas the discretion would allow the Attorney General to extend the

²³ [2015] JRC 007, para 45.

²⁴ Article 4A(2) of the 1997 Law as amended by the Amendment No 6 Law.

²⁵ Article 4A(3) of the 1997 Law as amended by the Amendment No 6 Law.

window whilst still requiring the person to complete the required period of employment. This discretion will also mitigate against any perceived harshness caused by the provisions excluding prolonged absences from the calculation of a person's time spent in office.

42 Of course, it is ultimately for the Court to decide whether to grant the Attorney General's conclusions²⁶ and therefore when confronted with a decision on whether to exercise his discretion to extend the window period, the Attorney might in practice first consult with the Bailiff because otherwise as the Court highlighted in *Dunlop* it "would be unthinkable to have any uncertainty over a person's entitlement to be admitted to the Bar raised at [the admission] ceremony."²⁷

Further review?

43 The decision in *Dunlop* highlighted the difficulties with the rigid provisions of the 1997 Law, and it is hoped that the Amendment No 6 Law will not only enable more part-time workers to be able to qualify but that it will also provide a clear framework for persons embarking on a process to qualify as advocates or solicitors.

44 As a result, it will be obvious to persons seeking qualification what is required of them before they start out the process, and the uncertainty which required a referral to the Court in *Dunlop* can hopefully be avoided in future.

45 As the legal profession continues to develop and its numbers continue to swell, more changes to the qualification process may be called for. What this will entail shall remain to be seen. The Court in *Dunlop* suggested that one of the legitimate purposes for the employment requirement might be that a person gains a practical knowledge of Jersey customary law. As the Court acknowledged though, persons working in certain areas of specialty, particularly financial services, may have very little or no exposure to customary law. However, it is likely that persons working in a Jersey office for a minimum period of two years will at least have exposure to Jersey law generally, and not just customary law, *i.e.* this might include legislation and court procedures.

46 The employment requirement in the 1997 Law is relatively straightforward in that a person is simply required to have been employed in a relevant office for the requisite period (and the effect of the Amendment No 6 Law will be the introduction of an explicit requirement that the person has been predominantly engaged in legal

²⁶ Article 8(6) of the 1997 Law.

²⁷ [2015] JRC 007, para 2.

matters). It does not of course go any further and, for example, mandate that a person spends any particular amount of time working in a certain area of practice. This can be contrasted with the training contract for solicitors in England and Wales, where a trainee is required to receive practical experience in at least three distinct areas of English and Welsh law and practice.²⁸ Should Jersey consider a similar approach? An equivalent scheme to the training contract scheme would have resource implications for the Law Society in regulating such a scheme, and this would also restrict the number of persons able to qualify because candidates would have to obtain a specific trainee role as opposed to any legal role within a relevant office. Furthermore, not every legal office would necessarily be in a position to offer meaningful experience in several distinct areas of law and practice.

47 Looking across to the Bailiwick of Guernsey, for a person to qualify as an advocate (which is the only local legal profession in that jurisdiction), he or she must have been ordinarily resident in the Bailiwick of Guernsey for at least two years since attaining the age of 16 years and he or she must be a qualified solicitor of England and Wales, Scotland or Northern Ireland or a member of the Bar in England and Wales or Northern Ireland, or a member of the Faculty of Advocates in Scotland. A candidate must then undertake a pupillage in Guernsey under the supervision of a Pupil Master who must be an advocate of at least five years standing, and the duration of the pupillage depends *i.e.* if a person has completed at least six months' pupillage in England and Wales, Scotland or Northern Ireland, he or she must complete a pupillage in Guernsey for a period of not less than six months. If a person cannot satisfy the Royal Court that he or she has completed a six months' pupillage in one of those jurisdictions then that person must complete Guernsey pupillage of not less than 12 months. The prospective Guernsey advocate is also required to complete the Guernsey Bar exams and hold an academic qualification in French and Norman Law (although this is currently under review).

48 The route to qualification is therefore different in Guernsey and it is also worth noting that in advance of a person sitting the Guernsey Bar exams, the Pupil Master is required to certify to the Bailiff that the pupil has discharged him or herself with due diligence and achieved a standard which should enable him or her to have a reasonable expectation of passing the exams. Jersey could consider including something similar in the future but as a person already has to satisfy the

²⁸ Regulation 12.1(b) of the SRA Training Regulations 2014—Qualification and Provider Regulations. The SRA does not specify the amount of time that should be spent in each area, but in its guidelines suggests that “to gain the appropriate experience, you need to spend the equivalent of at least three months in any subject area.”

Royal Court that he or she is a fit and proper person, it is arguable that there would be no added value to requiring a certification process like Guernsey.

49 One thing is for certain and that is that the discussion is likely to continue. The opportunity has been taken to enable the States to amend the 1997 Law by way of Regulations in the future, thus removing the need for Royal Assent. How soon this power will be used will depend on the ever changing nature of the profession and those seeking to join it.

Conclusion

50 The Amendment No 6 Law has sought to address an undesirable effect of the 1997 Law which is that otherwise well qualified persons are not able to be admitted to the profession because their work schedules are arranged in a manner which means they work fewer hours a week than the standard.

51 The Royal Court in *Dunlop* and the Law Society's consultation raised some wider issues around the aims of the employment requirements and the exposure a person might have to customary law. The October 2015 issue of this Review even went as far as to suggest that the employment requirement should simply be abolished. What is clear is that the discussions will continue as to the value of the employment requirement. Some in the profession will argue that the structured tuition on the Jersey Law Course provides enough exposure to Jersey law and in particular customary law, whereas others will argue that the benefit of being employed for a minimum period in a local office exposes persons to the Jersey office environment and the practical application of those laws which one learns the theoretical aspects of at the Institute of Law.

52 For the time being, the Amendment No 6 Law will help in making the 1997 Law and the qualification regime clearer and fairer for persons embarking on the arduous route to qualifying to the local legal profession.

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This article expresses the personal views of the authors, and not necessarily the views of the Law Officers' Department