EMPLOYMENT TEAM

PUMP COURT CHAMBERS

Newsletter

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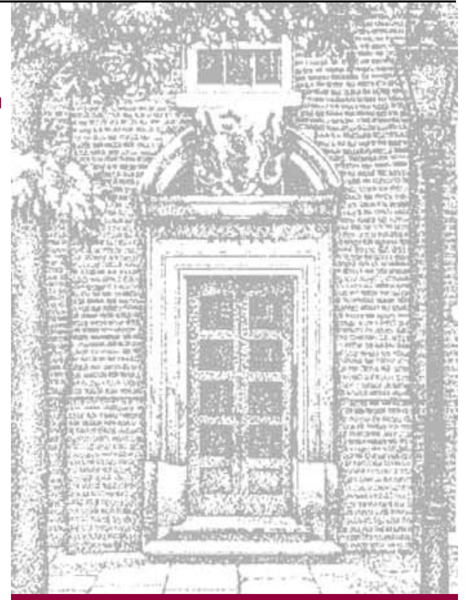
CHAMBERS NEWS

Welcome to the 1st Edition of Pump Court Chambers' Employment CPD Update. Every two months members of the Pump Court employment team will be bringing you the latest developments in UK and European employment law. You can claim a ½ hour of free CPD for reading the newsletter and completing the questions at **www.pumpcourtcpd.com**.

In this first newsletter we thought we would take the opportunity of conducting a broader review of some of the more interesting developments so far this year. Mark Hill QC, the UK's leading authority on ecclesiastical law and an expert on all matters pertaining to religion or belief considers developments under the *Employment Equality (Religion or Belief) Regulations 2003*. Alison Russell looks at *the default retirement age* and Spencer Keen summarises some recent changes to the *Equality Bill*. Finally our regular *recent cases* section, prepared this month by Ellie Bruce and Jennifer Lee, summarises recent decisions that we hope will be of interest.

Helen Trotter and Spencer Keen (Co-Editors)



In this Issue

Pages 1– 3:
Philosophical Belief: The Search For Cogency Under The Employment Regulations.
Professor Mark Hill QC and Spencer Keen

Page 4:
Equality Bill
Spencer Keen

Page 5-6:
Is The Default Retirement Age Facing Its Own Retirement?
Alison Russell

Page 6-8:
Recent Cases
Eleanor Bruce and Jennifer Lee

Page 9:
Employment Programme 2009/2010

PHILOSOPHICAL BELIEF: THE SEARCH FOR COGENCY UNDER THE EMPLOYMENT REGULATIONS

A feature common to most equality legislation is that, in order to make a claim, a person must show that he or another person has a *protected characteristic* and has been discriminated against. The protected characteristic is defined by the relevant legislation under which the claim is brought, whether it be race, sex, disability etc. Thus a person making a claim under the *Employment Equality (Religion or Belief Regulations) 2003* must show that the religion or belief upon which the claim is based is protected by the Regulations.

A belief is defined by the Regulations as a "religious or philosophical belief". One does not need to be a philosopher to identify immediately the immense difficulties facing a tribunal that has to determine whether a belief so qualifies. What, after all, is a philosophical belief?

Philosophical Belief: The Search For Cogency Under The Employment Regulations Continued

The only guidance to date from the EAT on this point is provided in the case of *McClintock v Department for Constitutional Affairs* [2008] IRLR 29. In that case Mr Justice Elias held that a belief would qualify as a philosophical belief under the Regulations where it had "sufficient cogency, seriousness, cohesion and importance to be worthy of respect in a democratic society".

This test was derived from the case of *Campbell and Cosans v UK* (1982) 4 EHRR 293, a judgment of the European Court of Human Rights under Article 2 of the Convention. According to the ECtHR although a philosophical belief might be anything from a fully fledged system of thought to views on trivial matters neither of these extremes was appropriate when determining whether Convention rights were engaged under Article 2. Instead the ECtHR set down the test subsequently adopted by Elias J in McClintock, which is now the mechanism by which tribunals can draw the dividing line between a philosophical belief that qualifies for protection under the Regulations and one that does not. It may not always be an easy test to apply.

A decision of the Central London Employment Tribunal earlier this year provides an example of a tribunal applying the test to a philosophical belief unrelated to a religion. In *Nicholson v Grainger* (22203367/2008, 18 March 2009) the claimant had "a strongly held philosophical belief about climate change and the environment." He believed that "we must urgently cut carbon emissions to avoid catastrophic climate change." The claimant's belief affected how he lived his life, his choice of home, his chosen methods of travel and the food and drink that he consumed.

Although the tribunal in *Nicholson v Grainger* did engage in some high sounding rhetoric about the meaning of philosophy it is very hard to identify why the tribunal considered that the claimant's belief in climate change satisfied the *Campbell v Cosans* test. The claimant's evidence was simply that he believed that a cut in carbon emissions was required to save the planet. In the reasons recorded by the tribunal there was no examination whatsoever of the substance of the belief.

The Regulations require the tribunal to make a considered (and possibly politicised) judgment about what is cogent, serious, cohesive, and worthy of respect in a democratic society. Although this is a difficult test to apply, it does not relieve tribunals of the requirement to give proper reasons for their decision; they must still set out in detail both the substance of the belief contended for and the reasons why the tribunal considers that it does or does not qualify for protection.

If tribunals do not deliver properly reasoned decisions there is the potential for any belief to qualify for protection simply because it is easier to say that it does than to say that it does not

PHILOSOPHICAL BELIEF: THE SEARCH FOR COGENCY UNDER THE EMPLOYMENT REGULATIONS CONTINUED

Since an evaluation of the nature of the belief is crucial to determining whether there is a claim under the Regulations, tribunals cannot hide behind the traditional deference previously afforded to religion: see M Hill 'Religious Approaches to Religious Disputes' in O'Dair & Lewis, *Law and Religion* (Oxford University Press, 2001) 409-420.

In Nicholson, for example, the tribunal stated that it was difficult to argue that the beliefs around the impact of climate change lacked cogency, seriousness, cohesion or importance. Since the judgment gives no indication of why the claimant felt that carbon emissions should be reduced the obvious question is why was it difficult to argue that the belief was coherent etc? This is especially so given that the onus of proof rested on the claimant. Would the claimant's belief in climate change still have qualified if it stemmed from the teachings of the legendary small green Jedi, Yoda D'Kana the Whill, whom Luke Skywalker visited on the swamp planet of Dagobah?

When Baroness Scotland was commenting on the amendments made to the meaning of "philosophical belief" by the Equality Act 2006 she specifically stated that the Regulations would not encompass either political beliefs or beliefs in the Jedi Knights. Unless tribunals undertake a more rigorous examination of the substance of the belief itself it will not be long before a belief in the quasi-divine teachings of Yoda will be covered in any event.

Further guidance on how to apply the *Campbell v Cosans* test is urgently required from the higher courts. In the meantime it is tremendously difficult for employment lawyers to advise with any certainty whether or not a particular belief will qualify for protection under the Regulations. One thing however is clear; the legal development of the interpretation of "philosophical belief" will be prove a fascinating source of controversy and litigation for many years to come.

MARK HILL QC was called to the Bar in 1987 and appointed Queen's Counsel in March 2009. His specialisms include ecclesiastical law, religious liberty and judicial review and he is regularly retained in equality and discrimination cases. His publications include *Ecclesiastical Law*, Third Edition (Oxford University Press, 2007) and *Religious Liberty and Human Rights* (University of Wales Press, 2002). He is Honorary Professor of Law at Cardiff University, Chancellor of the Dioceses of Chichester and Europe, and sits as a Recorder on the Midland Circuit.

PROFESSOR MARK HILL QC & SPENCER KEEN

EQUALITY BILL

A new draft of the Equality Bill was published on 08 July 2009. It contains two particularly interesting changes. Firstly a new clause 14 inserts, for the first time in English law, the concept of combined discrimination. Secondly the Bill has been amended to remove the requirement for a comparator in cases of discrimination on the grounds of pregnancy.

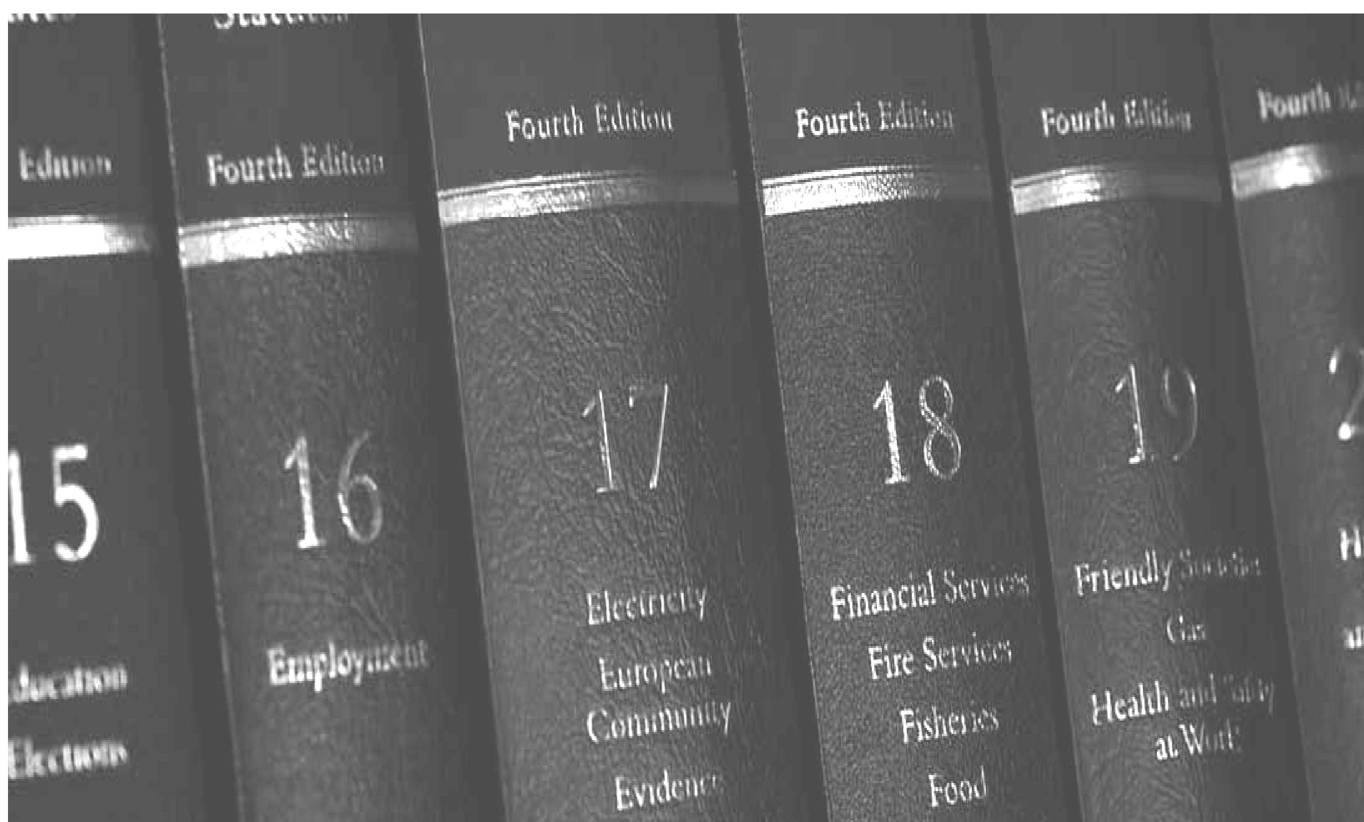
Clause 14 now outlaws less favourable treatment that is based on two relevant characteristics and is intended to deal with the situation where a person is discriminated against because she is say, both black and a woman. Combined discrimination ensures that respondents are not able to defend discrimination claims by arguing that the treatment was not afforded to the claimant on the grounds of either her race or sex but rather on the grounds of a combination of her race and sex.

The second change arises from the disquiet about the way in which the original protection in the Equality Bill required a comparator in cases of pregnancy discrimination. The old clause 16 (7), for instance, only prohibited treatment that was less favourable *than was necessary* and in Clause 17 the phrase *less favourable treatment* (rather than unfavourable treatment) was used throughout.

If the Equality Bill had not been amended to remove the requirement for a comparator it may well have been found to be contrary to requirements of the Equal Treatment Directive 76/207/EEC, particularly bearing in mind ECJ authorities such as Webb v EMO Cargo (UK) Ltd [1992] 4 All ER 929. Clause 16(7) has now been removed and all the references to "less favourable treatment" in Clause 17 have been changed to "unfavourable treatment".

Spencer Keen has published a guide that compares the current legislation with the provisions of the Equality Bill which can be found on **www.disability-discrimination.com.**

SPENCER KEEN



IS THE DEFAULT RETIREMENT AGE FACING ITS OWN RETIREMENT

The *Employment Equality (Age) Regulations 2006* provide valuable protection against discrimination in employment on grounds of age. However, in a highly contentious exception to the general principle of non-discrimination, employers may lawfully dismiss on grounds of retirement employees who have attained the age of 65 or such other normal retirement age as the employer may have.

The impact of the default retirement age provisions is considerable. Recent statistics show that 1.3 million employees are older than state pension age, in other words about 1 in 10 older people are working past state pension age.

Increasing numbers of claims are being made under the Regulations. In the period from its introduction to the end of March 2008, there were 2,900 complaints of age discrimination made to the Employment Tribunals Service. However, in the ten months to the end of January 2009 a further 3,100 claims had been registered. Many of these claims include challenges to the default retirement age.

The default provisions of the Regulations are being challenged by Heyday, a branch of Age Concern. This has led to considerable uncertainty as to whether employers may safely rely upon the default retirement age exception. Following the Court of Appeal judgment in *Johns–v- Solent SD Ltd* [2008] IRLR 820, a Tribunal Practice Direction has been issued staying claims based solely upon retirement age pending the outcome of the *Heyday* challenge.

The *Heyday* Challenge

The *Heyday* challenge is brought by way of judicial review, essentially arguing that the provisions are void as they offend against the requirements of the Equal Treatment Directive. On 24th July 2007, the High Court referred agreed questions to the ECJ for determination and these were answered on 5th March 2009. The ECJ held that:

(i) the default retirement age provisions do fall within the scope of the *Equal Treatment Directive* but do not establish a mandatory scheme of automatic retirement;

(ii) domestic legislation need not include a specific list of justified differences, but the general context of the measure is important for courts reviewing whether the aims are legitimate and the means to achieve them are appropriate and necessary;

(iv) legitimate aims are social policy objectives, such as those related to employment policy, the labour market or vocational training. These are public interests, distinguishable from reasons particular to the employer's situation (although domestic legislation could include a certain degree of flexibility for employers);

(v) it is for the national court to determine questions of justification, based upon all relevant evidence. Mere generalisations will not suffice.

The case came back before the High Court on 16th July 2009 for hearing of the detailed arguments about justification. Judgment is expected by the end of September and will determine whether or not the default retirement age is objectively justified (and therefore enforceable) or not (and therefore void). Further legal uncertainty will however continue in the event that the High Court judgment is appealed.

Is The Default Retirement Age Facing Its Own Retirement Continued

Government Review of the Default Retirement Provisions

Whilst *Heyday* will eventually result in a judicial determination of the lawfulness of the default retirement age provisions to date, the ongoing desirability of such provisions is also being considered at a policy level. In May 2009 the Department for Work and Pensions Committee recommended in a report on the Equality Bill that the default retirement provisions should be scrapped.
On 15th July 2009 the Government announced that the review of the default retirement age, planned for 2011, will be brought forward a year. The Pensions Minister, Angela Eagle, stated that the Government wants to give older people flexible retirement options and to the review will provide the opportunity to respond to the changed economic landscape.

It appears, therefore, that whatever the outcome of the *Heyday* challenge, the default retirement age provisions are themselves facing retirement as being no longer in step with modern social and economic circumstances

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ALISON RUSSELL

Recent Cases

Amnesty International v Ahmed, UKEAT/0447/08, 13/08/2009

Ms Ahmed, who was of Sudanese origin, worked for Amnesty and applied for a promotion to the role of Sudan researcher. Amnesty believed that her ethnic origin would compromise its perceived impartiality, and would expose the claimant (and her colleagues) to an increased safety risk when visiting Sudan. Ms Ahmed was not therefore appointed.

Ms Ahmed resigned and made a claim for, amongst other things, direct race discrimination contrary to sections 1(1)(a) and 4(2)(b) of the *Race Relations Act 1976.* The Employment Tribunal upheld her claim.

Amnesty appealed and argued that the Tribunal had erred in treating the only question as being whether, "but for" Ms Ahmed's ethnic origins, she would have been appointed to the post. Amnesty argued for a two-stage enquiry, namely [1] whether there would have been less favourable treatment but for Ms Ahmed's race, and [2] if so, what, considering the mental processes of the alleged discriminator, was the reason for that difference in treatment?

The Employment Appeal Tribunal concluded that the only question was whether the ground of the treatment complained of was Ms Ahmed's ethnic origins. The fact that Amnesty had a concern about conflict of interest was irrelevant. Consideration was given to the perceived tension between *James v Eastleigh Borough Council* [1990] 2 AC 751, where Lord Goff had stated that "in the majority of cases, I doubt if it is necessary to focus upon the intention or motive of the defendant", and *Nagarajan v London Regional Transport [2000] 1 AC 501*, where Lord Nicholls had stated that " it is necessary to inquire why the complainant received less favourable treatment." The EAT had no difficulty in reconciling the two cases. In some cases, like *James*, the reason for the treatment is inherent in the act itself and no further inquiry is needed. In

Recent Cases Continued

other cases, like *Nagarajan*, the act is not in itself discriminatory, but is made discriminatory by the motive. The ultimate question is, what was the ground of the treatment complained of.

The EAT acknowledged that its decision "may have implications…for other employers whose employees are required to work abroad in situations of acute political or ethnic tension". The tribunal also raised the question, upon which no view was expressed, of whether employers in such cases might be able to rely on the defence of "genuine occupational requirement" under s. 4A of the RRA 1976. The author also notes that where the health and safety of an employee is threatened the employer may have a defence under s.41 of the RRA 1976. Neither of these defences were raised in this case.

Lothian & Borders Police v Cumming, UKEATS/0077/08/BI, 29/07/2009

Ms Cummings, who had served as a Special Constable, failed in her application to become a regular Constable due to a problem with her left eye. She had carried out the duties of a Special Constable without any difficulty. Arguing that she was equally able to carry out the duties of a Regular Constable, she claimed disability discrimination.

The tribunal at first instance found that she was a disabled person under Schedule 1 of the *Disability Discrimination Act 1995*. Lothian & Borders Police appealed on the basis that, although Ms Cummings suffered a relevant impairment which had an adverse effect on her ability to carry out normal day-to-day activities, [1] the refusal to allow her to proceed to the next stage of her career was not a relevant adverse effect, and [2] the relevant adverse effects were not substantial. The EAT upheld the appeal. It held that Ms Cummings did have an impairment that affected
her speech hearing or eyesight. The EAT then considered whether that impairment had an effect on her ability to carry out normal day-to-day activities. There was no dispute that it affected her in some respects. However, the Tribunal had erred in accepting that her impairment had a *further* effect on normal day-to-day activities because it was the cause of the refusal to allow her to become a Regular Constable. That conclusion was based on a misunderstanding of cases such as *Patterson v Commissioner of Police for Metropolis* [2007] IRLR 763; they were not authority for the proposition that being afforded general access to professional life is a day-to-day activity. Applying to enter a profession does not imply any particular physical activity. Further, refusal of the application is not a physical effect. The status of disability for the purposes of the Act cannot be dependent on the decision of the employer as to how to react to the employee's impairment.

SCA Packaging Limited v Boyle, House of Lords, [2009] UKHL 37, 1 July 2009

SCA Packaging v Boyle is authority for the proposition that the word "likely" in the *Disability Discrimination Act 1995 ("DDA 1995")* means "could well happen" rather than "more likely than not".

In this case the House of Lords had to decide whether the relevant illness qualified as a disability for the purposes of the DDA 1995 and to consider the meaning of the word "likely" in 2 contexts:

> the likelihood of a substantial adverse effect if the corrective measures were not taken; and
>
> the likelihood of a recurrence of that effect at some point in the future.

RECENT CASES CONTINUED

The House of Lords rejected previous authorities that stated the word "likely", used in the context of the DDA 1995, meant a 51% chance *Latchman v Reed Business Information Ltd [2002] I.C.R. 1453 EAT, Swift v Chief Constable of Wiltshire [2004] I.C.R. 909 EAT and Cream Holdings Ltd v Banerjee [2004] UKHL 44, [2005] 1 A.C 253.*

Where, following medical advice, someone was following a course of treatment, unless there were indications showing otherwise, an employer could assume that without the treatment the impairment was "likely" to recur. If the impairment had a substantial effect on the patient's day to day life before it was treated, the employer could also assume that its effect would be substantial if it did recur.

It was held that the correct approach, and what should be applied in future, was to consider what "could well happen" and therefore a lower standard applies.

Sandhu & Ors v Gate Gourmet London Ltd, EAT UKEAT/0264/08/RN

The appellant employees appealed against the Employment Tribunal's rejection of their unfair dismissal claims against the respondent employer. A number of employees took part in unofficial industrial action and G dismissed more than 600 employees who had not attended work during the action. Eventually a number were reinstated. 22 of those not reinstated claimed before the tribunal that they had either attended the action as trade union officials, not as participants, or been absent from work for other reasons.

The tribunal found that six had been unfairly dismissed, but the remainder either had taken part in the action at the time of their dismissal, in which case they were prevented by the *Trade Union and Labour Relations (Consolidation) Act 1992 s.237* from claiming unfair dismissal, or had engaged in gross misconduct, in which case they were fairly dismissed within the meaning of the *Employment Rights Act 1996 s.98.* Six of the unsuccessful claimants submitted that:

(1) the mere physical presence of a union official did not amount to his participation in the action; and
(2) participation in unofficial industrial action which was not precluded by s.237 of the 1992 Act, since it was not at the time of dismissal, did not amount to gross misconduct.

The EAT (Underhill P) dismissed the appeal and the case is good authority for the proposition that:

(1) Where a trade union official has been present to merely assist in resolving the dispute, he would not be participating in the unofficial industrial action. From the time the employees arrived on the scene, their positions were indistinguishable from that of the other staff;
(2) (2) Whilst the withdrawal by an employee of his labour, even if it was in breach of contract, would not necessarily and in every circumstance justify dismissal, In the current case it was fair for it to remain within the range of reasonable responses because large numbers of employees had deliberately absented themselves from work in a manner which was plainly liable to do serious damage to the employer's business.

Simmons v Hoover [1977] ICR 61 is still good law notwithstanding developments in Human Rights and UK/EU law regarding the right to strike.

Employment Team Programme

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Pump Court Employment Programme for October 2009 to October 2010

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Spencer Keen	1998
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Heather Platt	2002
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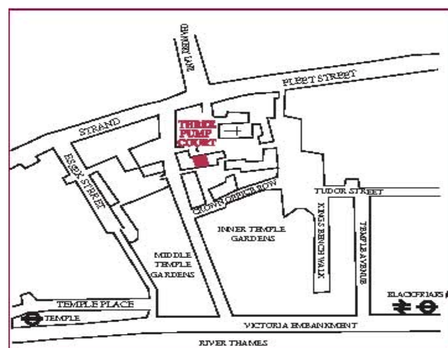

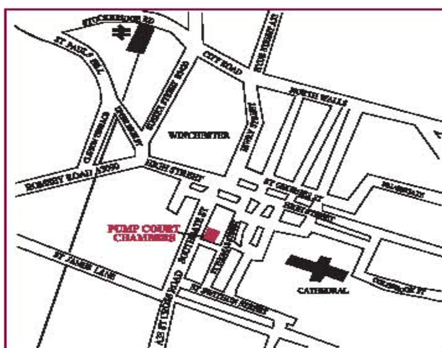

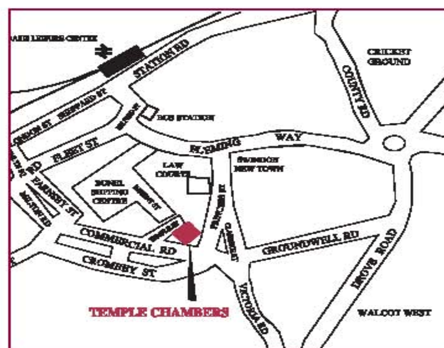

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