

All England Reporter/2016/April/Axon v Ministry of Defence - [2016] All ER (D) 72 (Apr)

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## Axon v Ministry of Defence

[2016] EWHC 787 (QB)

**Queen's Bench Division**

**Nicol J**

**11 April 2016**

*Equity – Breach of confidence – Confidential information – Complaints being made that claimant former Commanding Officer of Royal Navy ship bullying junior officers – Equal opportunities investigation upholding complaints – Sun newspaper publishing stories – Claimant being removed from command and later resigning commission and retiring – Third party newspaper publisher disclosing it having source within defendant Ministry of Defence – Claimant bringing proceedings against defendant for misuse of private information and/or breach of confidence – Whether claimant having reasonable expectation of confidence and/or privacy in relevant information at relevant time – Whether source owing claimant duty of confidence – European Convention on Human Rights, art 8.*

### **Abstract**

*Equity – Breach of confidence. The Queen's Bench Division, in dismissing a claim for misuse of private information and/or breach of confidence, held that the claimant had not had a reasonable expectation of privacy in any of the information in issue and a source within the defendant Ministry of Defence (the MOD) had not owed him (as opposed to the MOD) a duty of confidence.*

### **Digest**

The judgment is available at: [2016] EWHC 787 (QB)

In 2004, the claimant was the Commanding Officer of a Royal Navy ship. Complaints were made that he had bullied junior officers on the ship. An equal opportunities investigation (the EOI) upheld the complaints. On 10 December, the claimant was instructed to return to London and hand over temporary responsibility to his Executive Officer. In a letter of 13 December, he accepted that his position as Commanding Officer had become untenable as a result of the EOI report and he did not oppose his removal. On 14 December, the Sun newspaper published a story under the headline 'Mutiny on Gulf Warship: "Bully" Captain is kicked off'. On 15 December, the claimant was formally removed from his command. On 15 December, the Sun published a second article and, on 17 December, a third article. In 2007, the claimant resigned his commission and retired from the Royal Navy. In 2013, the third party, the publisher of the Sun (NGN),

disclosed that it had had a source (JB) within the defendant Ministry of Defence (the MOD), who had been providing information for eight years and who had, over that time, received money. On 21 December 2004, she had been paid £5,000 for what was identified in a schedule of payments as two stories: 'Mutiny on Gulf Warship & Blackwatch soldier'. JB pleaded guilty to conspiracy to commit misconduct in public office and was sentenced to 12 months' imprisonment. The claimant issued a claim for misuse of private information and/or breach of confidence, contending that he had a reasonable expectation of privacy and/or confidentiality in connection with: (i) the fact that members of his crew had complained about his conduct; (ii) the fact that an EOI had been carried out into his conduct; (iii) the fact that he had been ordered to leave the ship whilst it was in Gibraltar and to return to the United Kingdom; and (iv) the outcome of the EOI, the fact that he was re-appointed, and the fact and nature of any possible further administrative sanction against him. He contended that the court should infer that JB had disclosed all of that information to the Sun and that she had intended that it should be published. It was his case that that was actionable interference with his reasonable expectation of privacy, confidentiality and/or his rights under art 8 of the European Convention on Human Rights for which the MOD was vicariously liable. The MOD denied liability to the claimant, but contended that, if it was liable to him, NGN was liable for the same damage and should indemnify it for any damages it was required to pay the claimant.

The issues included: (i) whether the claimant had a reasonable expectation of privacy in the relevant information at the relevant time; and (ii) whether JB had owed the claimant a duty of confidence. Consideration was given to art 10 of the Convention.

The claim would be dismissed.

(1) The claimant had not had a reasonable expectation of privacy in the information on which he relied. The case concerned the claimant's role in a very public position. That did not mean that there was nothing about his performance in that role which would attract a reasonable expectation of privacy, but it set an important context. The claimant had accepted that there could be no reasonable expectation of privacy in his removal from his command. The present court understood to him have accepted that 'removal' meant more than simply a change of command or appointment. Normal changes in command were trailed a long time in advance. That had not been what had happened in the present case. The inevitable inference was that the change of command had been imposed. The claimant's removal in that sense had been a public fact. Whilst the claimant had not committed any criminal or disciplinary offence, his behaviour had been characterised as 'gross misconduct' and, in addition, the seriousness of its consequences had been very grave. Misconduct was not just relevant to the balancing of interests under arts 8 and 10 of the Convention, but was also material as to whether the claimant had a reasonable expectation of privacy in information about that conduct. The court was not impressed with the analogy which the claimant had sought to draw with a private employee's reasonable expectation of privacy in the reasons for his employer's disciplinary action. It was significant that the claimant had been discharging a very public function, had been in charge of a warship and had, by his offensive conduct, imperilled the fighting effectiveness of his ship. With those features, there was not a ready comparison with private employment. The unusual character of the case was relevant in two respects: (i) it further illustrated how seriously the Navy had regarded the claimant's misconduct; and (ii) it lent force to the argument that the unusual event had been bound to become a public fact. Further, there was an important distinction to be drawn between the stage when the EOI was being conducted, on the one hand, and, on the other, the stage when the report had been completed and its conclusions accepted. Furthermore, in his cross-examination, the claimant had accepted that he could not have expected that his abhorrent and shameful conduct as a bully should be kept secret. It was not necessary to show a subjective expectation of privacy: the test was wholly objective. Therefore, the claimant's answer was not conclusive against his case, but it did reflect the objective reality of the position (see [64] of the judgment).

(2) The conclusion that the claimant had not had a reasonable expectation of privacy in the information in question meant that his claim for misuse of private information failed. His claim for breach of confidence (so

far as that had a separate existence) failed because JB had not owed him a duty of confidence. There was no doubt that she had owed a duty to preserve the confidentiality of information which she received in the course of her work and which she had not been authorised to disclose to outsiders. However, that had been a duty which she had owed to either the Crown or the MOD. It had not been a duty which she had owed to the claimant. The claim under art 8 of the Convention added nothing. All of that meant that the claimant's claim as a whole was unsuccessful and had to be dismissed (see [68], [71]-[74] of the judgment).

*Fraser v Evans* [1969] 1 All ER 8 considered.

Hugh Tomlinson QC and Sara Mansoori (instructed by Carter Ruck) for the claimant.

Christina Michalos and Tom Cleaver (instructed by the Government Legal Department) for the MOD.

Antony White QC and Catrin Evans QC (instructed by Wiggin LLP) for NGN.

Emma Price Barrister.