

Ms Kimberly Fortier through the Simkins Partnership v Sunday Mirror

Clauses noted: 3, 4

Ms Kimberly Fortier complained to the Press Complaints Commission, through the Simkins Partnership, that an article published in the Sunday Mirror on 29 August 2004 headlined "Blunkett lover: It's all over" included a photograph that had been taken in a manner that breached Clause 4 (ii) (Harassment) of the Code of Practice. She also complained that publication of the image intruded into her privacy in breach of Clause 3 (Privacy) of the Code and breached Clause 4 (iii) (Harassment) because the photograph constituted 'non-compliant material'.

The complaint was rejected.

The complainant was the subject of considerable press attention when it was alleged that she had been having an affair with the Home Secretary. The first story about the alleged relationship appeared on the 15th August 2004 – although it did not name the complainant. The following day the complainant was identified in another newspaper and her solicitors contacted the Commission alleging that she was being harassed. In line with its normal procedures, the Commission communicated these concerns to the relevant newspapers, at which point the situation eased and Ms Fortier did not pursue any formal complaints. Her solicitors also wrote directly to several editors – including that of the Daily Mirror – on the 16th August requiring "the activities comprising harassment, persistent pursuit, and the questioning, telephoning, pursuing or photographing of our client to cease".

On the 26th August the complainant was approached while out walking with her son in Los Angeles, and was photographed. Although her representatives warned several national newspaper editors that to publish any resulting picture would be to publish 'non-compliant material' in breach of Clause 4 (iii) (Harassment) of the Code, a picture of the complainant appeared in the Sunday Mirror on 29 August. Her solicitors submitted a formal complaint to the Commission, arguing that in light of their previous requests for harassment of their client to cease, the taking of the photograph was in breach of Clause 4 (ii) of the Code, and its publication in breach of Clause 4 (iii) which requires editors to take care not to use material that is obtained in breach of the Code. Moreover, they argued that the photographer's approach on the 26th August constituted harassment in its own right, given that the complainant had told him at the time that she did not want her photograph taken. Having stated that the complainant was on a public street when she was approached, her solicitors later said that she had in fact entered the grounds of a library when she was photographed, and had not therefore been pictured in the street. However, they argued that the location was not in fact relevant because the complaint related to harassment, which can occur anywhere.

In addition, they said that publication of the image intruded into their client's privacy in breach of Clause 3 of the Code. Ms Fortier was not, said her solicitors, a public figure, and both the newspaper and the freelance photographer were aware that she did not wish to be photographed.

The newspaper argued that the complainant was, in fact, a public figure – by virtue of her work in the media industry and her numerous appearances on radio and in newspapers and magazines. In addition, it had been alleged without challenge that she had – as a married woman with children – conducted an affair with the Home Secretary. The newspaper contended that she had therefore put herself at the centre of a story, publication of which was legitimately in the public interest.

While the complainant's solicitors had told several newspapers (including the Daily Mirror, which was also part of the MGN group) not to engage in intimidation, harassment and persistent pursuit and to cease questioning, telephoning, pursuing and photographing her, the newspaper maintained it had done none of those things. Its legal adviser suggested it would be "a ludicrous situation if any person who was in the news as a result of their own actions could successfully demand that they

should not be photographed in public". On this occasion, Ms Fortier had been photographed by a freelance journalist while walking along a road – a place where she could not have a reasonable expectation of privacy. Regarding that encounter, the journalist had approached her once, having taken her photograph. The paper accepted that she had not given her consent to be photographed, but this did not mean that the complainant had been harassed because there had been, as both sides agreed, only one approach.

The complainant's solicitors maintained that their client was not a public figure but simply someone whose job carried with it the inevitable consequence of being to some extent in the public eye. She had no official, governmental, regulatory, legal or administrative function of any kind and therefore had an entitlement to privacy. Publication of the specific picture accompanying the article was not in the public interest and was wholly unnecessary.

Adjudication

Noting that no complaint had been lodged about the more general coverage of the complainant's alleged affair with the Home Secretary, the Commission's central task in this case was to decide whether the taking and publication of the particular photograph under contention was in breach of the Code of Practice – and, if it was, whether there was a public interest justification for that breach.

Clause 4 (Harassment) requires journalists not to engage in "intimidation, harassment or persistent pursuit", and there was no evidence that those responsible for taking the picture in question had behaved in this way. Similarly, there did not appear to have been questioning or telephoning of the complainant in a way that would infringe the requirements of the Code. While the complainant had apparently been distressed by the approach, something that the Commission regretted, it did not appear that the photographer had 'persisted' in taking her photograph after having been asked to desist. The photographer had asked the complainant if she wished to pose for a picture and she had indicated that she did not. At some point – either before he spoke to her or afterwards – he took a photograph. Neither account of the incident led the Commission to conclude that there had been a breach of the Code.

However, the matter under Clause 4 did not end there, because the Commission had to consider the further argument that the request of the 16th August to journalists and photographers to desist from approaching the complainant was still relevant on the 26th August. The solicitors had contended that this was the case, and that any approach made after the 16th August would therefore breach the Code.

The Commission found this argument difficult to accept. It was certainly not disputed that the newspaper was aware of the complainant's earlier request, and was also aware of her request – made after the photograph was taken – that any resulting image not be published. However, the purpose of Clause 4 is to protect individuals, and provide relief, from physical intrusion by journalists and photographers, whether they are on their own or in a group. The Commission responds quickly and flexibly to any complaints under Clause 4 because it recognises the immediacy of any problem, and it is well placed to organise the disbanding of press packs by passing on messages to desist.

The Commission does not consider it appropriate – or within the meaning of Clause 4 – to assume that a request for journalists and photographers to desist from approaching a complainant lasts in perpetuity. It would be artificial not to recognise that circumstances change. The Commission judges each case on its merits, and on this occasion it noted that the approach had taken place ten days after the request to desist, during which time there had been demonstrable developments in the story. Indeed, the article which accompanied the photograph had reported the news that the complainant had contacted the Home Secretary in order to bring an end to their alleged relationship. In these circumstances, the Commission found no breach of the Code in the photographer's approach to the complainant, which took place in public and without any physical intimidation. It followed that there was also no breach of Clause 4 (iii) regarding the use of non-compliant material.

Ms Fortier also complained under Clause 3, arguing that publication of the photograph intruded into her private life. The complainant's solicitors had at no stage argued she was in a place where she had a reasonable expectation of privacy when she was photographed. The Commission does not generally consider that the publication of photographs of people in public places breach the Code. In this case – in circumstances where there had been no harassment – the Commission did not consider that there was any particular reason to divert from this general principle. Exceptions might be made if there are particular security concerns, for instance, or in rare circumstances when a photograph reveals something about an individual's health that is not in the public interest.

The Commission noted that the newspaper and the complainant's solicitors had disagreed about whether the complainant was a public figure. Whether or not this was the case, it had been alleged publicly that she was having a relationship with a senior politician. Her identity had been established in the public domain without complaint. There was a general public debate about the life of a senior politician with whom the complainant was allegedly involved. No complaints had been received from the politician or from the complainant about the content of the numerous articles about their alleged relationship. The Commission could not agree that in this context the publication of a photograph – which contributed to the public debate and which was taken in accordance with the Code at a time when the story was developing – was intrusive. For all these reasons, the complaint was rejected.

Adjudication issued 2004