

Ofcom Content Sanctions Committee

Consideration of sanction against:

TalkSPORT Limited (“the Licensee” or “TalkSPORT Ltd”) in respect of its service TalkSPORT (“TalkSPORT”), National Sound Broadcasting Licence AN003.

For:

Breaches of Ofcom’s Broadcasting Code (“the Code”) in respect of:

Rule 6.1: “The rules in Section Five, in particular the rules relating to matters of major political or industrial controversy and matters relating to current public policy, apply to the coverage of elections and referendums”; relating to the following conduct: broadcasting material in breach of Section Five of the Code’s due impartiality requirements.

On:

20 March 2008.

Decision:

To impose a financial penalty (payable to HM Paymaster General) of **£20,000**; and, in addition, to require TalkSPORT Ltd to **broadcast a statement of Ofcom’s findings on its service TalkSPORT** in a form and at a time to be determined by Ofcom on one specified occasion.

1. Summary

- 1.1. For the reasons set out in section 8, under powers delegated from the Ofcom Board to Ofcom's Content Sanctions Committee ("the Committee"), the Committee has decided to impose a statutory sanction on TalkSPORT Ltd. This is in light of the seriousness of the Licensee's failure to ensure compliance with the Code in its service TalkSPORT.
- 1.2. This adjudication under the Code relates to the broadcast of an edition of *The James Whale Show* transmitted on TalkSPORT on 20 March 2008 at 22:00.
- 1.3. TalkSPORT is a national radio station operated by TalkSPORT Ltd, whose output is speech based and primarily sports-related. *The James Whale Show* was a late night phone-in programme, debating a range of topical issues, which was transmitted on Sunday to Thursday nights.
- 1.4. During the edition of 20 March 2008, James Whale took two calls from listeners and along with his producer discussed the Prime Minister Gordon Brown, and his backing of Ken Livingstone's Labour candidacy for the 2008 London mayoral elections. James Whale criticised Ken Livingstone by saying that he "*has been nothing but a complete and utter tragedy for the capital city*". He also directly encouraged listeners in London to vote for Boris Johnson (the Conservative candidate) in the 2008 London mayoral elections. He said that people would have a better quality of life under Boris Johnson's leadership and that they would not be "*ripped off nearly as much, if at all*". He also said that if people did not vote for Boris Johnson then they had only themselves to blame if "*Livingstone gets in for another term*".
- 1.5. Ofcom received three complaints regarding this edition of *The James Whale Show*.
- 1.6. Following an investigation of the programme, Ofcom recorded a breach of Rule 6.1 of the Code¹. The subjects of James Whale's comments - the 2008 London mayoral elections and which candidate to vote for - were matters of major political controversy. James Whale made a number of comments directly criticising Ken Livingstone and explicitly encouraging listeners to vote for Boris Johnson. Alternative views about the London mayoral candidacy and Ken Livingstone's record as London mayor were not represented in the programme so as even to attempt to achieve due impartiality. In any event, it is not appropriate for presenters to use their position to urge voters to support political parties or candidates. The presenter's comments were not simply a "vote for..." comment, but amounted to a direct political message to his listeners. This effectively resulted in the programme becoming a platform in support of Boris Johnson and critical of Ken Livingstone. This occurred during the pending period of the London mayoral elections which

¹ Rule 6.1 states: "The Rules in Section Five, in particular the rules relating to matters of major political or industrial controversy and major matters relating to current public policy, apply to the coverage of elections and referendums". The effect of Rule 6.1 is to ensure broadcasters must show due impartiality in their coverage of elections and referendums. This is to help ensure that elections are conducted fairly, and that no unfair advantage is given to candidates through promotion in the broadcast media, irrespective of whether the candidate can be shown to have actually benefited in practice.

commenced on 18 March 2008. The breach of the Code therefore had the potential to cause considerable harm to the democratic process.

- 1.7. This contravention followed a previous and serious breach of the due impartiality rules by TalkSPORT in a programme presented by George Galloway MP. On that occasion, Ofcom warned the Licensee on 19 November 2007 that if further and similar breaches of the Code occurred it would consider the imposition of statutory sanctions. Ofcom therefore believed this case to be sufficiently serious to be referred to the Committee for consideration of a statutory sanction.
- 1.8. After considering all the evidence and all the representations made to it by TalkSPORT including oral representations, the Committee decided that the breach by the Licensee of the Code was sufficiently serious to attract a statutory sanction, including a financial penalty.
- 1.9. The Licensee said it had done everything in its power before, during and after the breach to prevent the breach of the Code from happening. TalkSPORT Ltd stated that the breach was “a one-off rant” by an experienced presenter in the face of clear instructions from TalkSPORT production staff and management regarding the Code. TalkSPORT Ltd said that following the George Galloway case, the Licensee had taken a number of steps to improve compliance. These included sending a written reminder to all staff, including James Whale, that highlighted the importance of complying with the due impartiality rules.
- 1.10. Diversity and debate are an intrinsic part of the democratic process. In deciding on a level of financial penalty in this case, Ofcom was concerned not to impose a penalty which in its view would have an inappropriate and restricting effect on live discussion and phone in programmes on TalkSPORT and similar channels, hosted by presenters with controversial and outspoken views. Such programmes have a real value and are to be encouraged rather than stifled. Ofcom does not underestimate the importance of TalkSPORT providing a platform for different opinions. Ofcom considers that it is important to ensure that the plurality of viewpoints and broadening of debate on important issues that a channel like TalkSPORT can provide are not discouraged.
- 1.11. The Committee however considered that the breach of Rule 6.1 of the Code was very serious because: it involved an experienced presenter who used his programme in a deliberate and conscious way to promote one particular candidate for the 2008 London mayoral elections; the programme was broadcast in the election period close to the polling day (on 1 May 2008) with a greater potential to influence the voting intentions of listeners; it was the second time within eight months that the station breached the Code’s due impartiality requirements; and TalkSPORT Ltd could, and should, have taken more action to ensure more robust compliance both before and on the date of the broadcast, namely 20 March 2008.
- 1.12. A breach of the Code such as the contravention in the present case had the potential to cause considerable harm to the democratic process. The due impartiality rules applicable at the time of elections were in place to ensure that elections were conducted fairly, and that no unfair advantage was given to candidates through promotion in the broadcast media.

- 1.13. Ofcom recognises the importance to rights of freedom of expression. This encompasses the broadcasters' right to transmit and the audience's right to receive creative material, information and ideas without interference, but subject to restrictions proscribed by law and necessary in a democratic society. This right is in enshrined in the European Convention on Human Rights. However, UK legislation requires broadcasters to preserve due impartiality on matters (and major matters) of political controversy. This obligation is considered to be particularly important at the time of elections
- 1.14. TalkSPORT – like any other licensee, whose services are broadcast live – must maintain proper editorial control at all times. It is the Licensee's duty to ensure compliance with the Code: control should never rest with a presenter, however experienced. There must be mechanisms in place to prevent serious breaches of the Code. This is particularly important in relation to matters relating to due impartiality.

Summary of the Committee's Findings

- 1.15. Having regard to the seriousness of the breaches and to Ofcom's Penalty Guidelines, the Committee decided it was appropriate and proportionate in the circumstances to impose a financial penalty (payable to HM Paymaster General) of **£20,000**; and, in addition, to require **TalkSPORT Ltd to broadcast a statement of Ofcom's findings on its service TalkSPORT** in a form and at a time to be determined on one specified occasion.

2. Background

- 2.1. TalkSPORT is a national radio station operated by TalkSPORT Ltd, whose output is speech based and primarily sports-related. The owner of TalkSPORT Ltd is the media company, UTV Media plc.
- 2.2. *The James Whale Show* was a late night phone-in programme, covering a range of topical issues. It was transmitted at 22:00 on Sunday to Thursday nights. In this programme, the presenter discussed a wide range of topical issues with listeners, who were given the opportunity to challenge his views and to put forward their own opinions.
- 2.3. During the edition of 20 March 2008, James Whale took two calls from listeners and along with his producer discussed the Prime Minister Gordon Brown, and his backing of Ken Livingstone's Labour candidacy for the 2008 London mayoral elections. James Whale criticised Ken Livingstone and encouraged listeners in London to vote for Boris Johnson. He said that people would have a better quality of life under Boris Johnson's leadership and that they would not be "*ripped off nearly as much, if at all*". He also said that if people did not vote for Boris Johnson then they had only themselves to blame if "*Livingstone gets in for another term*". (For a full transcript of the relevant remarks broadcast see paragraph 5.4).
- 2.4. Ofcom received three complaints from listeners, who objected to James Whale criticising Ken Livingstone and encouraging listeners to vote for Boris Johnson.
- 2.5. Prior to this case, Ofcom had recorded a breach of the Code's due impartiality requirements against the Licensee. On 19 November 2007, Ofcom had found that the comments of George Galloway MP in his programme broadcast on 10 August 2007 contravened Rules 5.5 and 5.6 (due impartiality) of the Code. The Licensee was warned by Ofcom at that time that this case was a serious breach of the Code and that any similar significant failures to ensure compliance with its due impartiality obligations would result in the consideration of further regulatory action. This breach was recorded and published in Ofcom's Broadcast Bulletin 97, dated 19 November 2007².

3. Legal Framework

The Communications Act 2003

- 3.1. Ofcom has a duty under section 319 of the Communications Act 2003 ("the Act"), by means of the Code, to set standards for the content of programmes in television and radio services as appears to it best calculated to secure the standards objectives. The standards objectives are set out in section 319(2) of the Act. In particular, section 319(2)(c) states that one of the standards objectives is: "that the impartiality requirements of section 320 are complied with". Section 320 of the Act sets out the special impartiality requirements which relate to, amongst other things, matters of political controversy.

² http://www.ofcom.org.uk/tv/obb/prog_cb/obb97/

- 3.2. In discharging its functions, one of Ofcom's principal duties is: "to further the interests of citizens in relation to communications matters" (section 3(1)(a)).
- 3.3. In performing its duties, Ofcom is also required to have regard to the: "principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles appearing to Ofcom to represent the best regulatory practice" (section 3(3)); and where relevant, a number of other considerations including: "the need to secure that the application in the case of television and radio services of standards [relating to harm and offence] is in the manner that best guarantees an appropriate level of freedom of expression" (section 3(4)(g) of the Act).

Observance of Code

- 3.4. Under section 325 of the Act, every programme service licensed by a Broadcasting Act licence includes conditions for securing that the standards set by Ofcom under section 319 are observed. If Ofcom is satisfied that the holder of a licence to provide a sound broadcasting service has contravened a condition of the licence, it may impose the following sanctions under sections 109, 110 and 111 of the Broadcasting Act 1990 (as amended)("the 1990 Act"):
 - issue a direction to broadcast a correction or a statement of Ofcom's finding;
 - impose a financial penalty; and/or
 - revoke or suspend the licence.

The Human Rights Act 1998

- 3.5. Under section 6 of the Human Rights Act 1998, there is a duty on Ofcom (as a public authority) to ensure that it does not act in a way which is incompatible with the European Convention of Human Rights ("the Convention").
- 3.6. Article 10 of the Convention provides for the right to freedom of expression. It encompasses the broadcaster's right to "impart information and ideas" and also the audience's "right to receive information and ideas without interference by public authority". Such rights may only be restricted if the restrictions are: "prescribed in law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary" (Article 10(2) of the Convention).
- 3.7. Ofcom must exercise its duty in light of these rights and not interfere with the exercise of these rights in broadcast services unless it is satisfied that the restrictions it seeks to apply are required by law and necessary to achieve a legitimate aim.

Ofcom Broadcasting Code

- 3.8. Standards set by Ofcom in accordance with section 319 of the Act are set out in the Code which came into force on 25 July 2005³.
- 3.9. Accompanying Guidance Notes⁴ to each section of the Code are published, and from time to time updated, on the Ofcom website. The Guidance Notes are non-binding but assist broadcasters to interpret and apply the Code.

Remedial action and penalties

- 3.10. Section 109(3) of the 1990 Act provides Ofcom with the power to direct a sound broadcasting services licensee to broadcast a correction or statement of findings (or both) in respect of a contravention of a licence condition.
- 3.11. Sections 110(1)(a) and 110(3) of the 1990 Act provide Ofcom with the power to impose a financial penalty on a sound broadcasting service licensee of up to £250,000 or five per cent of its qualifying revenue for its last accounting period, whichever is greater.
- 3.12. Section 110(1)(c) of 1990 Act provides Ofcom with the power to suspend a sound broadcasting service licence by up to six months.
- 3.13. Under section 111 of the 1990 Act, Ofcom may revoke a sound broadcasting service licence if, following due process, it is satisfied that revocation is necessary in the public interest.

Relevant provisions of the Ofcom Broadcasting Code

- 3.14. Rule 6.1: “the Rules in Section Five, in particular the rules relating to matters of major political or industrial controversy and major matters relating to current public policy, apply to the coverage of elections and referendums”.
- 3.15. Rule 5.11: “In addition to the rules above, due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy by the person providing a service (listed above) in each programme or in clearly linked and timely programmes”.

The meaning given in Section Five of: “matters of major political or industrial controversy and major matters relating to current public policy” is:

“These will vary according to events but are generally matters of political or industrial controversy or matters of current public policy which are of national, and often international, importance, or are of similar significance within a smaller broadcast area”.

Meaning of “due impartiality”:

“‘Due’ is an important qualification to the concept of impartiality. Impartiality itself means not favouring one side over another. ‘Due’ means adequate or appropriate to the subject and nature of the programme. So ‘due impartiality’ does not mean an equal division of time has to be given to every view, or

³ The Code can be found at <http://www1.bsc.org.uk/tv/ifi/codes/bcode/>

⁴ Guidance Notes can be found at <http://www1.bsc.org.uk/tv/ifi/guidance/bguidance/>

that every argument and every facet of every argument has to be represented. The approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience. Context, as defined in Section Two: Harm and Offence of the Code, is important”.

4. Ofcom’s investigation

- 4.1. Following the complaints, Ofcom carried out an investigation of the programme *The James Whale Show* broadcast on TalkSPORT from 22:00 onwards, on 20 March 2008.
- 4.2. The Licensee wrote to Ofcom with an unsolicited response to the complaint and informed Ofcom that it took its duty towards impartiality very seriously. Further, the Licensee said that it had considered suspending James Whale’s employment contract while the matter was investigated, but that after having spoken to the programme’s production team and James Whale, it believed that both those parties had been left in no doubt of the station’s commitment to impartiality. It was therefore not necessary to suspend James Whale’s contract, at that stage.
- 4.3. Ofcom wrote to the Licensee seeking representations on whether its output had complied with the impartiality requirements on the Code at the time of the election. In particular, Ofcom asked the Licensee to comment on the inclusion of the material in relation to the following Rules of the Code: Rule 5.11 (due impartiality over a matter of major political controversy) and 6.1 (application of due impartiality Rules during elections).
- 4.4. The broadcaster stated that it believed the election period for the mayoral elections (and therefore the rules in Section 6 of the Code concerning elections) commenced on 27/28 March 2008. However, the correct date was in fact 18 March 2008.
- 4.5. The Licensee accepted that James Whale had breached the Code regarding due impartiality and stated that it took the matter very seriously. The Licensee reiterated that it had spoken directly to James Whale and his production team to remind them of the standards expected. It believed it had left them in no doubt about the Licensee’s commitment to impartiality. It said that the content of the broadcast was not premeditated or a concerted and organised campaign by the presenter in support of Boris Johnson, but was a “one time rant by James Whale”, who, it said, has a reputation for being highly opinionated and controversial. However, having investigated the matter fully and, given the serious nature of the breach of the Code, the Licensee said that the right and proper action to take was to terminate James Whale’s employment contract with the station. The Licensee stated that this decision would serve to illustrate to both presenters and production staff how seriously TalkSPORT Ltd viewed a breach of this type. The Licensee had delayed informing James Whale of its decision until after the election so as not to compromise the election in any way. The Licensee also stated that it had implemented various structural changes in order to prevent a repeat of this type of breach. This included having a dedicated compliance officer in place whose duties included regulatory issues for the station.

5. Ofcom's decision that TalkSPORT Ltd was in breach of the Code

- 5.1 Ofcom found that the programme broadcast on 20 March 2008 was in breach of Rule 6.1 of the Code (application of due impartiality rules during elections).
- 5.2 Rule 6.1 of the Code states that the Rules relating to matters of major political or industrial controversy as set out in Section Five of the Code apply to the coverage of elections and referendums⁵. Rule 5.11 is applicable on the facts by virtue of Rule 6.1, which extends the application of Rule 5.11 in circumstances such as those in this case.
- 5.3 Ofcom noted that it considered that elections (which were defined as including Mayoral elections) in the UK were matters of major political controversy. It noted that what amounted to "matters of major political controversy" would vary but were generally matters of political or industrial controversy or matters of current public policy which were of national, and often international, importance; or were of similar significance within a smaller area. The London mayoral elections were political in nature and were very important to London and Greater London. They were, therefore, a "matter of major political controversy", in Ofcom's view.
- 5.4 During the programme, the following exchanges between James Whale and his co-presenter were broadcast:

James Whale: Now in the run up to the mayoral election in London, I don't think we're supposed to show any, any preference one way or the other. But in an interview earlier today, I heard Ken Livingstone being championed by the prime minister. Gordon Brown said if Londoners didn't vote for Ken Livingstone, if they voted for Boris Johnson, who I by the way, think would make a fantastic leader of this city. If Boris Johnson was the London mayor, people would have a far better quality of life and would not be ripped off nearly so much, if at all. And for anybody that doesn't vote for Boris, you'll get what you deserve because what you'll get is Ken Livingstone. Now, I'm pretty sure we're not supposed to champion one...

Producer: Yeah, you're not allowed to do that.

James Whale: But I don't give a stuff, I couldn't care less. If the prime minister feels that he can champion Ken Livingstone, and let's face it, Ken Livingstone has been nothing but a complete and utter tragedy for the capital city...I think Ken Livingstone running London again will be a complete tragedy. If you don't walk, you'll be a non-person.

Producer: It's good for some people what he's done.

James Whale: No, not good for anyone. Boris Johnson...

⁵ Rule 6.1 applies both before and during an election period. The election period relating to the mayor of London elections began on the last date for publication of notices of the election i.e. 18 March 2008. (See the Media Handbook, Mayor of London Assembly elections, 1 May 2008 (The Electoral Commission), page 6). The election period concerning these elections therefore began two days before the broadcast of *The James Whale Show* considered by the Committee in this case.

Producer: If you're a roller blader.

James Whale: "Boris Johnson for mayor of London" that has to be the mantra...

Producer: You're not allowed to say that.

James Whale: I couldn't give a stuff.

Producer: You can't do, sorry you can't. He's a nice bloke though, he did the show here when you were off. Really, really, really, nice genuinely nice guy.

James Whale: Vote him in.

Producer: You can't say anything about his politics. You're not allowed to.

James Whale: Make sure that he's the next mayor of London because quite frankly, Gordon Brown...

In a further exchange between James Whale and a caller, the following conversation took place:

James Whale: ...I mean, the one little thing that makes me, makes me feel that there is a light at the end of the tunnel, if Boris Johnson gets in as mayor of London, I think you will see the face of politics change dramatically.

Caller: Well on a final note, and on that subject James, I mean Brown's backing Livingstone, well that's the kiss of death for Ken then isn't it?

James Whale: Well, I hope so, but I was under the impression that the prime minister should be totally impartial to who became the mayor of our capital city. And since he's not going to be impartial, then nor am I. And I think, if people don't vote for Boris at the elections, then they've just got themselves to blame if Livingstone gets in for another term. Because if he gets in for another term, he will increase the congestion charge and he will make the congestion charge area wider and it will operate longer. And the people of London that drive cars, and they are the majority in my view, will suffer...I think Boris would make the place a more fun city to live in. You get, you know like, some of these major cities where the mayor has been a bit of a personality, rather than a tyrant, I think that that's what we can look forward to if we get Boris Johnson in as mayor of London. And let me tell you, I will continue to support Boris Johnson getting in as mayor, as long as the prime minister starts promoting Ken Livingstone...

5.5 Clearly the subjects of James Whales comments, the 2008 London mayoral elections and which candidate to vote for, were matters of major political controversy. James Whale made a number of comments directly criticising Ken Livingstone and explicitly encouraging listeners to vote for Boris Johnson. Alternative views about the London mayoral candidacy and Ken Livingstone's record as London mayor were not represented in the programme so as to even attempt to achieve due impartiality. In any event, it is not appropriate for presenters to use their position to encourage and urge voters to support political parties or candidates. The presenter's comments were not simply a "vote for..." comment, but amounted to a direct political

message to his listeners. This effectively resulted in the programme becoming a platform in support of Boris Johnson and criticising Ken Livingstone. This occurred during the pending period of the London mayoral elections which commenced on 18 March 2008. In summary, the broadcast failed to maintain the due impartiality required by Rule 5.11 of the Code, such rule being applicable in the circumstances by virtue of Rule 6.1 of the Code.

6. Referral to the Content Sanctions Committee

- 6.1. When recording the breach of Rule 6.1 of the Broadcasting Code, Ofcom took into account all the relevant circumstances. These included the fact that the breach had taken place only eight months after a prior breach by the Licensee had been recorded. This had been “the George Galloway case” (see paragraph 2.5 above).⁶ Ofcom therefore informed the Licensee that the case was sufficiently serious to warrant the consideration of the imposition of a statutory sanction.

TalkSPORT Ltd’s written representations on the decision to refer

- 6.2. In its submission to Ofcom, the Licensee did not contest that there had been a serious breach of the Code regarding due impartiality, nor that this was the second such serious breach of the Code regarding due impartiality in eight months. However, the Licensee said that it had done everything in its power before, during and after the breach to prevent the breach from happening and to ensure that nothing of the kind happened again. Arguing against the imposition of a sanction, the Licensee stated that the breach was “a one-off rant” by an experienced presenter in the face of clear instructions from TalkSPORT production staff and management regarding the Code.
- 6.3. TalkSPORT Ltd said that following the George Galloway case, the Licensee had taken a number of steps to improve its compliance processes, including compliance training and a written reminder to all staff, including James Whale, highlighting the importance of complying with Section Five of the Code. TalkSPORT Ltd also said that James Whale was an experienced broadcaster, fully aware of the requirements of the Code, who had broadcast during numerous local and national elections. It supplied evidence to this effect. During the programme in question, on four occasions, James Whale had ignored the on-air instructions of his producer not to encourage listeners to vote for Boris Johnson. Furthermore, the Licensee maintained that no radio station can legislate against the wilful actions of a “rogue” presenter. The only right course of action was to terminate James Whales’ contract, despite his value to the radio station, and the negative and damaging publicity that his dismissal attracted.

Decision to refer to the Committee

- 6.4. The Committee, having reviewed the decision to refer the breach, accepted that the case was sufficiently serious that it should be considered for sanction. Accordingly, TalkSPORT Ltd was invited to attend a hearing before the Committee.

⁶ Ofcom Broadcast Bulletin Number 97 – *George Galloway*, TalkSPORT, dated 19 November 2007.

7. Sanctions Hearing

Oral representations by TalkSPORT Ltd

- 7.1. The Licensee made oral representations to the Committee on 18 November 2008, before the Committee decided whether the breaches warranted the position of a statutory sanction and, if so, of what type(s) and at what level(s). TalkSPORT Ltd was represented by John McCann (Group Chief Executive, UTV Media plc), Scott Taunton (Chief Executive, TalkSPORT), Mairéad Regan (Group Human Resources Director, UTV Media plc), Moz Dee (Programme Director, TalkSPORT) and Bill Ridley (Compliance Officer, TalkSPORT).
- 7.2. In the oral submissions, the Licensee restated many of the points it had made in previous written submissions (see paragraphs 6.2 and 6.3). It said that UTV Group in both the UK and the Republic of Ireland had an excellent compliance record, and that despite robust compliance measures being in place at TalkSPORT, occasionally problems arose, due to the sheer volume of speech in its output. The Licensee pointed to the steps taken to bolster compliance at TalkSPORT in the wake of the previously recorded breach against TalkSPORT involving George Galloway. These had included the then Programme Director warning all programming staff in writing, including James Whale (“the Programme Director’s Warning”), that they would lose the “privilege to broadcast on TalkSPORT” if they breached the due impartiality Rules under the Code.
- 7.3. In relation to the present case, the Licensee said that, although a breach had taken place, a sanction would not be appropriate because the breach resulted from the actions of a “rogue presenter”. The Licensee had taken all reasonable steps to ensure compliance in advance of 20 March 2008; and a clear message had already been sent both internally and to the wider broadcasting community, that breaches of the Code would not be tolerated. Although there was a seven second profanity delay mechanism at the station (which allowed producers to, for example, stop the broadcast of brief examples of offensive language), TalkSPORT Ltd considered that use of this mechanism could not have prevented the breach in this case.
- 7.4. Further, in the Licensee’s opinion, if the producer had taken James Whale off air when the breach had happened, this could have inflamed the issue during a politically sensitive period, namely, the London mayoral election campaign. However, the Licensee had taken the decision to dismiss James Whale despite the negative publicity this generated. This signalled the Licensee’s determination to ensure compliance with the Code.
- 7.5. In response to questions from the Committee, TalkSPORT Ltd clarified that following the broadcast of 20 March 2008, James Whale had continued to broadcast on TalkSPORT until 17 April 2008, when he took a pre-arranged holiday. TalkSPORT Ltd had decided not to warn James Whale about his conduct explicitly in writing during the period immediately after the broadcast on 20 March 2008 and before he went on holiday on about 17 April 2008. However, it was made clear to James Whale that any further breach in the interim would not be tolerated. Producers were under instructions to take James Whale off air in such circumstances. Senior executives decided not to terminate James Whale’s contract of employment until after the mayoral

election had taken place because it was felt that to do so would have been hugely controversial in the run up to the election.

- 7.6. The Licensee said that, despite the fact that it had been mistaken as to the date of that the election period commenced (it had believed that it started on 27/28 March 2008 and not 18 March 2008), all production staff were aware of their responsibilities to ensure due impartiality. Referring to the Programme Director's Warning, TalkSPORT Ltd said that while this e-mail stressed to programming staff the personal consequences of non-compliance with the Code, there was no doubt that all personnel were also aware of the possible sanctions that could be taken against TalkSPORT for non-compliance.
- 7.7. The Committee asked the Licensee about the change in tone between its initial and informal response to Ofcom dated 1 April 2008 (after it had been informed by Ofcom of the complaints), and TalkSPORT Ltd's formal response to Ofcom of 2 May 2008. The Committee characterised the first letter as suggesting the breach was "serious...but not that serious", whereas the second letter confirmed that the Licensee treated the breach "very seriously indeed" and that it had terminated James Whale's contract with TalkSPORT. In reply to the Committee, TalkSPORT Ltd acknowledged the difference. It described the first as "a holding letter...whilst an internal investigation took place". The second letter as the result of that investigation which had left the Licensee in "absolutely no doubt as to [its] view, from a management perspective, of the breach", and its appropriate response.
- 7.8. The Licensee confirmed that TalkSPORT held daily production meetings at which programmes – including editions of *The James Whale Show* – that might raise compliance issues were discussed. It denied that an experienced presenter, with a powerful personality, such as James Whale, had *de facto* editorial control over his live broadcasts. It said the producer retained this control. The decision as to whether to take a presenter off-air would have been with the producer, who in this case, had ten years' experience, including during election periods.
- 7.9. In response to questioning from the Committee, TalkSPORT Ltd maintained the producer of *The James Whale Show* was in editorial control of the programme, even though it conceded that the producer's attempts, on air, to stop James Whale breaching the due impartiality rules could be perceived as not being clear "instructions" given by a person who was in such editorial control. However, the Licensee said it had been given assurances by the producer that he had in fact given clear and direct instructions to James Whale, by means of talkback through the presenter's headphones, to cease discussing the issue of Boris Johnson's candidacy. The producer had told the Licensee that he had deliberately kept his on-air intervention light-hearted (again, in the interests of not raising the profile of the breach). In the Licensee's opinion, in circumstances where James Whale and the producer would have been the only people at the station during the late-night broadcast, the producer had taken a difficult but ultimately correct, editorial decision to continue broadcasting and to raise the issue with management the following day. In any workplace, the only sanction against a person who does not comply with instructions was dismissal, which is what ultimately happened in this case.

- 7.10. TalkSPORT Ltd said that, given that this case involved the actions of an experienced presenter acting with predetermination, where appropriate compliance procedures were in place, the producer chose – on balance – the least worst option on the night. The use of the profanity delay mechanism by the producer would not have avoided the breaches. The other option of taking the station off air would, in its opinion, have been “nuclear” and less attractive option. Further, the Licensee conceded that this may happen again in the future, so long as the Licensee maintained its present policy of broadcasting live programmes, over which, because of the controversial nature of the programming, a Licensee has less control. However, the Licensee underlined that, since James Whale’s dismissal, all production staff were fully aware of their responsibilities to ensure compliance with the Code.

8. Decision by the Committee

- 8.1 In reaching its decision, the Committee considered carefully all the written and oral submissions made by TalkSPORT Ltd as well as the programme as broadcast. The Committee decided, for the reasons set out below, to impose a financial penalty of £20,000; and, in addition, to require TalkSPORT Ltd to broadcast a statement of Ofcom’s findings on its service TalkSPORT in a form and at a time to be determined by Ofcom on one specified occasion.
- 8.2 In deciding on the level of financial penalty the Committee had regard to Ofcom’s Penalty Guidelines⁷.

The seriousness of the breaches

- 8.3 Having listened to the material, and taken account of all the evidence and the representations of the Licensee, the Committee considered that the breach of Rule 6.1 of the Code was particularly serious. This was for the following reasons.
- 8.4 First, the case involves an experienced presenter who was aware that he should not have been making such comments, and who used his programme in a deliberate and conscious way to promote one particular candidate for the 2008 London mayoral elections. The Committee noted that James Whale even acknowledged while on air that he was breaching the rules, but that he carried on regardless. It also believed that James Whale’s conduct on 20 March could not be fairly described (as it was in correspondence from the Licensee) as a “one time rant” by the presenter. Starting at 22:30, James Whale made comments supporting Boris Johnson, broke off, and then made further sustained comments along similar lines during the programme. The Code rules on due impartiality were therefore breached repeatedly and in a sustained manner in one programme.
- 8.5 Second, the programme was broadcast in the election period close to the polling day (on 1 May 2008) with a greater potential to influence the voting intentions of listeners.

⁷ Ofcom’s Penalty Guidelines are available at <http://www.ofcom.org.uk/about/accoun/pg/>. Section 392 of the Communications Act 2003 requires Ofcom to prepare and publish a statement containing guidelines it proposes to follow in determining the amount of any penalties imposed by Ofcom, which Ofcom must have regard to in setting any penalty.

- 8.6 Third, it was the second time within eight months that the station breached the Code by failing to ensure that a presenter complied with Ofcom's due impartiality requirements. Ofcom considered that the Licensee had already been sufficiently warned in the George Galloway case (see paragraph 2.5 above), that any similar significant failure to ensure compliance with the due impartiality requirements would result in further regulatory action being considered.
- 8.7 The Committee noted TalkSPORT Ltd's representations that it had done all it could reasonably have done in terms of improving its compliance procedures in the wake of the George Galloway case, and the Licensee's contention that no radio station could guard against the actions of an out-of-control presenter, determined to break the rules. However, the Committee considered that TalkSPORT Ltd could, and should, have taken more action to ensure more robust compliance both before and on the date of the broadcast in question, namely 20 March 2008. For example:
- James Whale's producer did make some attempts, during the broadcast, to limit the presenter's remarks concerning the mayoral election candidates. However, as the Licensee now conceded, these interventions could not be described as "instructions" to James Whale. Despite what may have been said to James Whale through talkback (and how it was said), on air James Whale ignored the comments of his producer, giving listeners the clear sense that James Whale was in charge of what was broadcast and not the producer. The Committee stressed that whenever a broadcaster is making a live broadcast, the Licensee maintains full responsibility for – and so should retain control over – all output; and
 - whilst TalkSPORT Ltd had demonstrated that, in the wake of the George Galloway case, it had warned all programming staff of the consequences for individual presenters of not abiding by the Rules of the Code governing due impartiality, the Licensee had not formally warned them all in writing of the possibility that Ofcom might consider imposing serious sanctions on TalkSPORT Ltd, if a similar breach occurred in the future.

In summary, based on all the evidence, the Committee did not agree with the Licensee's contention that: "all necessary measures were in place to prevent a breach of The Broadcasting Code regarding due impartiality at the time of the James Whale broadcast". The Committee remained of the view that the breach was serious.

Precedent

- 8.8 As regards previous sanctions cases which could be considered as precedents, the Committee noted that there were no equivalents. However, the Committee did consider a case against the *Islam Channel*⁸ that had been referred to the Committee on 6 June 2007 for breaches of the Rules of the Code relating to due impartiality at a time when Section Six requirements applied during an election period. In that case, Islam Channel Limited was

⁸ Ofcom Content Sanctions Committee Adjudication dated 31 July 2007: http://www.ofcom.org.uk/tv/obb/ocsc_adjud/islamchannel.pdf

fined a total of £30,000 for the breaches of Rules 5.5, 5.12, 6.6, 6.8 and 6.9 of the Code. In the *Islam Channel* case, the Committee said that it considered the breaches of the Code to be serious and that the Licensee had shown a reckless disregard for the important rules of the Code with respect to ensuring that the special impartiality requirements in the Communications Act 2003 and other legislation, relating to broadcasting on elections and referendums, were applied at the time of elections and referendums.

8.9 TalkSPORT Ltd had argued that the *Islam Channel* case was not a useful precedent. This was because in *Islam Channel*, there had been sustained and serious breaches committed by political candidates over a number of programmes, some of which included pre-recorded clips, which were not comparable to a “one-time rant” by a controversial, late-night radio personality such as James Whale. The Committee acknowledged that the *Islam Channel* case, where presenters had themselves been candidates and presented programmes during an election period, and the present case were not directly comparable. However, the Committee considered that the *Islam Channel* case served as a precedent to some extent for the present case. This was because:

- both cases involved breaches of the Code which took place during the election period for the London mayoral and London Assembly elections, and so also had the potential to cause considerable harm to the democratic process by conferring an unfair electoral advantage on particular candidates;
- though the *Islam Channel* case concerned repeated breaches by political candidates over a period of time, the present case was analogous in terms of its potential for affecting the electoral process through the repeated and impassioned interventions on behalf of one political candidate, by a high-profile presenter;
- both cases involved a breach of the Code’s due impartiality requirements relating to the coverage of elections only a short period after a previous recorded breach of a similar nature; and
- both cases demonstrated a lack of editorial control by the Licensee over the output.

8.10 As regards the comparison with *Islam Channel*, the Committee decided that the present case merited the imposition of a sanction as had the earlier one. Both cases concerned serious breaches of the Code because the Licensees in question had allowed repeated and impassioned interventions on behalf of one political candidate thus breaching the due impartiality Rules during an election period. This was unacceptable in both cases. The Committee was disappointed that TalkSPORT Ltd, a well established and responsible Licensee, with a very good compliance record overall could have once again allowed a lapse in compliance to occur. It also took into account that TalkSPORT, a national radio station, has a qualifying revenue far exceeding that of the *Islam Channel*.

8.11 The Committee noted that parallels could be drawn between the representations made by the Licensee in this case and a further case⁹, in which a presenter of a programme had promoted the candidacy of a third party who was standing in an election. On 7 July 2008, Ofcom recorded a breach of its Code under Rule 6.1 against Invicta FM and 36 other radio stations owned by GCap (since the material was simulcast). In that case, Jason Donovan made a brief comment in support of Boris Johnson in the London mayoral elections during one of his programmes. The Committee noted that, although Ofcom viewed this as a serious breach of the Code, Jason Donovan was a relatively inexperienced radio broadcaster who had made only one comment in support of Boris Johnson. Further, whilst this was in breach of the Code, it was a message of general political support rather than active encouragement to listeners to vote for Boris Johnson, in the way James Whale had done. Further, in the case of Invicta FM, the Committee considered that the presenter had not used his position as a political platform. Finally it was also noted that Invicta FM and the other stations had not contravened the due impartiality Rules in the Code only a few months before and received a specific warning from Ofcom, as had occurred with TalkSPORT in the George Galloway case. In the Committee's view, for all these reasons, the TalkSPORT breach involving James Whale was considerably more serious than the Invicta FM breach.

8.12 The Committee was not persuaded, on the evidence, that the facts of the current case were so different from those in the *Islam Channel* case that it would be inappropriate to impose a fine on TalkSPORT Ltd. On the contrary, the Committee decided that the imposition of a financial penalty in the current case was appropriate and consistent with previous practice at Ofcom.

Incentive to Comply

8.13 In accordance with Ofcom's Penalty Guidelines, the threat of a financial penalty should act as a sufficient incentive for both the Licensee and other licensees to comply with the Code. The financial penalty should therefore be sufficiently significant to act as a deterrent against a repeat of these or similar breaches. In all the circumstances, the Committee believed that the imposition of a significant financial penalty would be both appropriate and proportionate to achieving this aim. It is crucial in the view of the Committee that TalkSPORT Ltd, and all other Licensees whose services broadcast live, have a clear incentive to ensure that they maintain proper editorial control, through their producers, over all their output. As a last resort, a Licensee must be prepared to take a live broadcast off air to ensure compliance with the Code.

Other specific criteria

8.14 The Committee then considered whether there were any specific criteria it should take into account in deciding on a suitable level of financial penalty. It noted that:

- a breach of the Code such as the breach in the present case had the potential to cause considerable harm to the democratic process. The due impartiality rules applicable at the time of elections were in place

⁹ Ofcom Broadcast Bulletin Number 113 – *Sunday Night with Jason Donovan*, Invicta FM et al., dated 7 July 2008.

to ensure that elections were conducted fairly, and that no unfair advantage was given to candidates through promotion in the broadcast media, irrespective of whether the candidate could be shown to have actually benefited in practice;

- as a well-established radio station, TalkSPORT should have been well aware of its compliance responsibilities;
- the relevant circumstances surrounding the contravention were within the control of the Licensee, bearing in mind that it resulted from the conduct of a highly experienced presenter and of his highly experienced producer; and
- TalkSPORT's audience would expect robust and provocative debate and challenging content in a late night talk show of this nature, but would not expect breaches of the due impartiality requirements of the Code of such a serious nature.

Factors increasing the level of penalty

8.15 The Committee then reviewed factors which aggravate or tend to increase the level of the financial penalty.

8.16 The Committee took account of the following facts as aggravating factors:

- James Whale repeatedly made comments supporting Boris Johnson on separate occasions within the same programme; this increased the risk of the presenter's comments affecting the voting intentions of listeners;
- following the George Galloway breach of the Code (recorded eight months previously), senior management of the Channel ought to have been more aware of the risk of another contravention of the rules involving due impartiality if a headstrong presenter with controversial views was not firmly controlled by production staff. Furthermore, management should have flagged up with staff more effectively the heightened sensitivity and care required as a result of the forthcoming mayoral elections;
- on the night of 20 March 2008, the internal compliance procedures of the Licensee failed to prevent the breach of the Code. Despite the presence of an experienced producer who was supposed to have editorial control of the programme, James Whale was allowed on repeated occasions to contravene flagrantly the rules on due impartiality; and
- the Licensee only appeared to realise fully the seriousness of what had occurred once group management became involved (see paragraph 7.7 above), and even then it appeared to the Committee that proper processes may not have been always followed – for example between 21 March 2008 and the date when James Whale went on holiday around three weeks later, James Whale was not warned in writing about the unacceptability of his conduct on 20 March.

Mitigating Factors

- 8.17 The Committee then considered whether there were any factors which, in its view, might limit or decrease the level of financial penalty.
- 8.18 The Committee noted all the submissions as to mitigation made by the Licensee. In particular the Committee took account of the following:
- TalkSPORT Ltd had taken the complaints seriously and admitted the breach promptly;
 - after investigating the matter, the Licensee took what it considered to be the right and proper action. Namely, it terminated James Whale's employment contract with TalkSPORT, despite his popularity and the adverse publicity his dismissal attracted and it took disciplinary action against the producer of the programme;
 - various improvements to compliance procedures were made by TalkSPORT Ltd following the George Galloway case, including extra training to make staff more aware of the Code, sending out an email to production staff warning them of the serious results for them personally if they breached the due impartiality rules and holding extra production meetings to discuss forthcoming content and, in particular, risk areas; and
 - TalkSPORT Ltd had co-operated with Ofcom's investigation.

Conclusion

- 8.19 A case where a Licensee's compliance procedures were such that an established and experienced presenter was able repeatedly to promote the candidacy of one particular candidate during an election period amounted to very serious breaches of the Code's rules on due impartiality. This seriousness was also compounded by the fact that the breaches of the Code took place during the "election period" of the London Mayoral elections to be held on 1 May 2008. Further, the breaches followed a previous breach under the due impartiality Rules of the Code, against the same Licensee, recorded only eight months previously.
- 8.20 In mitigation, the Committee noted that TalkSPORT Ltd had taken steps to improve compliance following the George Galloway case and had terminated James' Whale's employment contract as a result of the present case. However, the Committee considered that TalkSPORT Ltd's compliance procedures were not robust enough. Breaches of this nature had the potential to cause considerable harm to the democratic process by conferring an unfair electoral advantage on a particular candidate.
- 8.21 Ofcom recognises the importance to rights of freedom of expression. This encompasses the broadcasters' right to transmit, and the audience's right to receive creative material, information and ideas without interference, but subject to restrictions proscribed by law and necessary in a democratic society. This right is in enshrined in the European Convention on Human Rights. However, UK legislation requires broadcasters to preserve due

impartiality on matters (and major matters) of political controversy. This requirement is considered to be particularly important at the time of elections.

- 8.22 Nevertheless, in deciding on a level of financial penalty in this case, Ofcom was also concerned not to impose a penalty which in its view would have an inappropriate dampening effect on live discussion and phone in programmes on TalkSPORT and similar channels, hosted by presenters with controversial and outspoken views. Diversity and debate in such programmes is to be encouraged rather than stifled. Ofcom does not underestimate the importance of TalkSPORT providing a platform for different opinions. Ofcom considers that it is important to ensure that the plurality of viewpoints and broadening of debate on important issues that a channel like TalkSPORT can provide are not discouraged.
- 8.23 Having considered the relevant facts as outlined above and all the representations made by TalkSPORT Ltd, the Committee decided to impose a financial penalty on the Licensee of **£20,000** (payable to HM Paymaster General). The Committee considered this to be a proportionate and appropriate penalty in all the circumstances, especially given the seriousness of the breach and the substantial potential for harm to viewers. In addition, the Committee requires **TalkSPORT Ltd to broadcast a statement of Ofcom's findings on its service TalkSPORT** in a form to be determined by Ofcom on one specified occasion.

Content Sanctions Committee

Philip Graf
Stewart Purvis
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8 December 2008