

Ofcom Broadcast Bulletin

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Introduction

The Broadcast Bulletin reports on the outcome of investigations into alleged breaches of those Ofcom codes which broadcasting licensees are required to comply. These include:

- a) Ofcom's Broadcasting Code ("the Code") which took effect on 16 December 2009 and covers all programmes broadcast on or after 16 December 2009. The Broadcasting Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>.

Note: Programmes broadcast prior to 16 December 2009 are covered by the 2005 Code which came into effect on 25 July 2005 (with the exception of Rule 10.17 which came into effect on 1 July 2005). The 2005 Code can be found at http://www.ofcom.org.uk/tv/ifi/codes/bcode_2005/.

- b) the Code on the Scheduling of Television Advertising ("COSTA") which came into effect on 1 September 2008 and contains rules on how much advertising and teleshopping may be scheduled in programmes, how many breaks are allowed and when they may be taken. COSTA can be found at http://www.ofcom.org.uk/tv/ifi/codes/code_adv/tacode.pdf.
- c) other codes and requirements that may also apply to broadcasters, depending on their circumstances. These include the Code on Television Access Services (which sets out how much subtitling, signing and audio description relevant licensees must provide), the Code on Electronic Programme Guides, the Code on Listed Events, and the Cross Promotion Code. Links to all these codes can be found at <http://www.ofcom.org.uk/tv/ifi/codes/>

From time to time adjudications relating to advertising content may appear in the Bulletin in relation to areas of advertising regulation which remain with Ofcom (including the application of statutory sanctions by Ofcom).

It is Ofcom's policy to describe fully the content in television and radio programmes that is subject to broadcast investigations. Some of the language and descriptions used in Ofcom's Broadcast Bulletin may therefore cause offence.

Standards cases

In Breach

Special Live With Jassi Khangura

The Sikh Channel, 2 May 2010, 18:45

Introduction

The Sikh Channel is in the religious section of the Sky Electronic Programme Guide (“EPG”). The channel is aimed at the Sikh community in the UK. *Special Live with Jassi Khangura* was a programme in Punjabi, which featured as an interviewee Jassi Khangura, who is a serving politician in the Punjab area of India. Ofcom received a complaint that this programme - which took place during the recent 2010 UK General Election campaign - included a contribution from a Conservative party general election candidate and did not have any contributions from other political parties.

Ofcom commissioned an independent translation of the content of this broadcast. We noted it was a studio discussion programme. It featured eight participants, including Gurcharan Singh and Jas Parmer, both Conservative party Parliamentary candidates¹ in the General Election that took place four days after this programme was broadcast. It appeared to Ofcom that the discussion which took place concerned matters relating to the constituencies of the election candidates. At times of election specific rules apply to the broadcast of ‘constituency reports and discussions’.

Ofcom therefore asked The Sikh Channel for its comments under Rule 6.9, which states:

“If a candidate takes part in an item about his/her particular constituency, or electoral area, then candidates of each of the major parties must be offered the opportunity to take part. (However, if they refuse or are unable to participate, the item may nevertheless go ahead.)”

Response

The Sikh Channel said that this programme was a special programme about the career of the Punjabi politician Jassi Khangura. The broadcaster said that Gurcharan Singh and Jas Parmer were former colleagues of Jassi Khangura and “the fact they appeared in the programme was coincidental to the election period as they brought him [Jassi Khangura] as a guest to the Sikh Channel”. In addition, The Sikh Channel said Gurcharan Singh and Jas Parmer were not appearing in the programme for the purposes of self-promotion but were merely assisting the main guest of the programme i.e. Jassi Khangura.

Decision

Section Six of the Code applies specific rules at the time of elections. If broadcasters choose to cover election campaigns, they must ensure that they comply with Rules set out in Section Six of the Code, and in particular the constituency reporting Rules

¹ Gurcharan Singh was the Conservative party candidate in the constituency of Ealing Southall and Jas Parmer was the Conservative party candidate for the constituency of Warley.

laid out in Rules 6.8 to 6.13 of the Code. These are specific Rules that apply when a broadcaster is broadcasting a “constituency report” during an election campaign (i.e. when the report or the candidate focuses on his/her constituency). Ofcom guidance² to Section Six states that “Rule 6.9 requires that if a candidate takes part in an item about his/her constituency then the broadcaster must ensure that each of the major parties (in the case of the UK as a whole - the Labour, Conservative and Liberal Democrat parties) is offered an opportunity to take part, as well as those with evidence of significant previous or current electoral support (Rule 6.10)”.

In this case, we noted the broadcaster invited two Conservative party parliamentary candidates to take part in a discussion in the programme. We note the broadcaster’s representations that the focus of this programme was the career of an overseas politician. However, we noted that during the programme both Gurcharan Singh and Jas Parmer made various comments relating to the constituencies in which they were standing as Parliamentary candidates.

For example, at different times Gurcharan Singh said³:

“I was selected on 5 December 2008. On paper this is a Labour seat so I had to begin work and I did begin in earnest. I began on simple rounds. I sent letters to about 15,000 people and made a survey between 700 and 800. There were two important questions: How did you vote last time? How do you think you will vote this time?”

“...an important issue came up and that is that concerning the hospital in Southall, which treats 100,000 accident and emergency cases and where there is a maternity unit where 4,000 women give birth yearly, a paper was published that this service be closed. This hurt everybody. Our present MP did not raise a voice in protest against this. I had 1,860 people sign and sent it to the Secretary of State. He said that it shouldn’t have been closed”.

“They were the Labour Party and they thought that the seat was theirs, where was the need to get into all these things? There is no need to work. They are Asian, the vote is community-linked. No petition. No dialogue. Yes they did do one thing. They instructed their manager, their chief executive not to shut down for that would lead to a lot of noise. But see the gazette, the local paper they launched their campaign ‘Save our Services’. I launched our campaign ‘Save our Services”.

“So this is a part of our campaign and now only four days remain and in these four days you will have to decide who you will cast your vote for, if you do vote. Later do not regret that if you had cast your vote we might have won”.

“...We have to be prepared with our votes or else we will regret it...So vote early and vote Conservative and vote according to your conscience. Before signing, before crossing, look at the credibility of the candidate”.

In addition, at different times Jas Parmer said:

“You asked about the campaign. When, in 2008, the post office was being closed under the aegis of the Labour Party, I had campaigned at various places in

² See http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/section6_2009.pdf

³ All the following quotations are from the independent translation commissioned by Ofcom.

Smethick. Our sitting MP, John Spellar, moved and put to the vote two motions on 18 March and in both, the vote was for closure of the post office. I campaigned. I was selected in 2009, a year after the selection of brother Gurcharan. My campaign is a short campaign. Our association here was in a way as good as non-existent. So in a way I had to build an association here...When the Labour guys saw us they turned the other way though they had a former MP".

"...Our spirits have soared from the love and support we have got in Smethick and we are doing door-to-door campaigning. We have also sent 3 to 4 leaflets. My campaign hinges on two things: the first is about honest politics. Our politics will be honest politics. The Conservative Party has said that if your MP does not stand the test of honesty and integrity, then the people have the right to deselect him and throw him out. This is something that has not happened in our parliament. The second is that as a Sikh I will not only serve the entire community but no one will need to tell us about our special needs and requirements".

We considered that this programme, by including contributions from two Conservative party Parliamentary candidates, giving their views about the constituencies in which they were seeking election, was clearly a "constituency report or discussion" as defined in the Code. The Code states that if a parliamentary candidate is given an opportunity to discuss matters relating to his constituency then other candidates from the major parties should also be offered an opportunity to take part. This ensures due impartiality is strictly maintained at the time of elections with respect to specific constituencies.

We noted that the broadcaster, although it had invited two Conservative party Parliamentary candidates to participate in the programme, had not invited the Labour party candidates and Liberal Democrat party candidates for the constituencies of Ealing Southall and Warley to take part in the programme. Therefore, a constituency discussion concerning the constituencies of Ealing Southall and Warley was broadcast but not all the candidates from the major parties in these two constituencies were offered an opportunity to take part. We therefore concluded that the programme was in breach of Rule 6.9 of the Code.

Ofcom notes the view implicit in the comments from The Sikh Channel that this programme was not intended to be a constituency report. However, we remind all broadcasters of the care that needs to be taken when candidates appear in programmes during an election period. In particular, broadcasters must ensure that where a programme deals with matters relating to a specific constituency of a candidate appearing in the programme, then the broadcaster must ensure that each of the major parties is offered an opportunity to take part, as well as those parties with evidence of significant previous or current electoral support. In this regard, we refer broadcasters to the published Guidance to Section Six of the Code. This states: "A useful test for broadcasters is to ask whether a report could be seen as promotional for a candidate within his/her constituency. If it is, then it requires input from, at least, the other main parties and potentially others depending on the constituency".

Breach of Rule 6.9

In Breach

The Circle

Wedding TV, 23 to 30 April 2010, 00:00 – 01:00 and 10:00 – 11:00 daily

Introduction

Ofcom received a complaint that a ‘psychic’ participation TV programme, *The Circle*, was being repeated within the schedules of the channel Wedding TV. The programme could not, the complainant argued, therefore satisfy the Broadcasting Code’s rules on the use of premium rate telephone service (“PRS”).

We examined *The Circle* over the course of a week. Identical editions of the ‘programme’ were broadcast twice each day for an hour starting at midnight and at 10:00. At least one of these transmissions therefore must have been recorded, and it was apparent from the content of the ‘programmes’ that all the transmissions may have been recorded.

The Circle was hosted by the same presenter each time and consisted of interviews with ‘psychics’ who also gave readings to viewers who had apparently called in and been put to air.

Other elements of the content included magazine offers for new “members”; special offer cheaper phone calls; frequent claims that there are 250 Circle ‘psychics’; promotion of the availability of phone ‘psychics’ 24 hours a day, seven days a week; and the display of a rota of ‘psychics’ with details of how to select each of them after calling. In addition every ‘programme’ also included two pre-recorded segments featuring the presenter which solely promoted the company and its ‘psychics’.

Participation TV: background

‘Participation TV’ (PTV) is a type of programming in which viewers are encouraged to interact with a programme, typically by making a phone call or sending a text message. The telephone numbers and text shortcodes are promoted heavily within the programming and are invariably PRS. PTV programming usually features chat, sex chat, psychic or quiz content.

The Code makes clear that premium rate telephone numbers are considered to be products or services and cannot therefore appear in programmes without editorial justification. This means that they must meet one or both of the tests set out in Rule 10.9¹ of the Broadcasting Code:

“Premium rate numbers will normally be regarded as products or services, and must therefore not appear in programmes, except where:

- they form part of the editorial content of the programme; or
- they fall within the meaning of programme-related material.”

¹ This rule has been amended and renumbered following the Ofcom statement *Participation TV: Regulatory Statement* published on 3 June 2010. The changes will come into force on 1 September 2010.

PTV operators have argued that PTV programming is capable of meeting the Code's requirements as callers will influence what is seen and heard on screen, so fulfilling the Code's requirement that the PRS services form part of editorial. But for this to be possible the programming clearly must be live. Since pre-recorded or repeated PTV 'programming' can never satisfy the requirements of Rule 10.9, such programming must be advertising.

Separately, the Broadcast Committee of Advertising Practice (BCAP²) Television Advertising Standards Code ("the TV Advertising Code") currently contains an outright prohibition on the advertising of 'psychic' services. Rule 10.3 of the TV Advertising Code states:

"With very limited exceptions, advertisements for products or services concerned with (a) the occult or (b) psychic practices are not acceptable."

The "very limited exceptions" do not include personal 'psychic' consultations or readings. These are prohibited at present and have been for many years³.

All material broadcast on Ofcom licensed services must fall as either programming or advertising. Where the composition of an item or its terms of inclusion in a schedule (for example purchase of the item's 'airtime') exclude the possibility of the material being classed as programming, it must be considered as advertising.

Investigation

Wedding TV informed Ofcom that the airtime for *The Circle* had been sold to a third party. This, in combination with the fact that the content was pre-recorded meant that this material was advertising and therefore had to comply with the TV Advertising Code.

Ofcom therefore sought Wedding TV's response to the acceptability of the material under the following TV Advertising Code rules:

- Rule 2.1.1: "There must be a clear distinction between programmes and advertisements".
- Rule 3.1(i) [unacceptable categories]:
"the occult etc. (See 10.3 – The occult, psychic practices and exorcism – for details and some exceptions)".
- Rule 5.1.1: "No advertisement may directly or by implication mislead about any material fact or characteristic of a product or service".
- Rule 5.1.2: "No advertisement may mislead by omission about any material fact or characteristic of a product or service or advertiser".

² The duty to regulate broadcast advertising is carried out by the Advertising Standards Authority ("ASA") and its industry arm, the Broadcast Committee of Advertising Practice ("BCAP"). The ASA makes adjudications against the television and radio codes; BCAP supervises and reviews the codes.

³ This prohibition, and one related to PRS-based sex chat services, are due to be relaxed on 1 September 2010, but remain in force until that date. Ofcom's *Participation TV: Regulatory Statement*, is available at:
<http://stakeholders.ofcom.org.uk/consultations/participationtv3/statement/>

Rule 10.3: “With very limited exceptions, advertisements for products or services concerned with (a) the occult or (b) psychic practices are not acceptable”.

The misleadingness provisions were raised with Wedding TV as we considered the presentation of the pre-recorded or repeated ‘programmes’ to be potentially capable of misleading viewers into thinking that they could call the number on screen for the opportunity to be given a live ‘psychic’ reading on air.

Response

Wedding TV explained its understanding that Ofcom currently classified PTV as editorial content and commented that PTV material will from September 2010 be re-classified as teleshopping. For these reasons Wedding TV had believed *The Circle* to be programming. Wedding TV supplied a number of quotes from Ofcom Consultations and Regulatory Statements on PTV to demonstrate why it had formed the understanding that *The Circle* could be treated as programming.

As to the potential for viewers to be misled into thinking that pre-recorded material was live, Wedding TV said that when the channel began to carry *The Circle* “...our compliance department was undergoing a period of change, and never having previously broadcast pre-recorded psychic content, did not fully appreciate the significance of transmitting pre-recorded content including PRS numbers and interactive elements and were too reliant upon information provided by our client.”

Decision

Given that Wedding TV had sold the space in its schedule for *The Circle*, Ofcom concluded that the material must be regarded as advertising and be governed by the TV Advertising Code. This would have been so even if the air-time had not been rented out to another as the material was pre-recorded and contained heavy promotion of a product in the form of premium rate telephony, and therefore was inherently incapable of satisfying the requirements of Rule 10.9 of the Broadcasting Code.

In this context, it was clear that the content advertised psychic services which is prohibited under the TV Advertising Code. This was therefore a breach.

Ofcom also judged that the presentation of the material was misleading because it gave the appearance to viewers of being live, although it was pre-recorded. This resulted in the potential for viewers to believe that they could pay a premium rate to contact the ‘show’ while it was on air, when in fact they could not.

Further, we took the view that in the context of a genre that has until now persisted on screen only on the basis that it is able to qualify as interactive programming – given that it is prohibited as advertising – it was not clear to viewers, or Ofcom, that *The Circle* was in fact placed as advertising and therefore that the advertising was not clearly distinct from programming, as required by Rule 2.1.1.

Breach of Broadcast Committee of Advertising Practice Television Advertising Standards Code Rules 2.1.1, 3.1(i), 5.1.1, 5.1.2, and 10.3

In Breach

The Raj Show

Raaj FM, 27 April 2010, 11:00

Introduction

Raaj FM provides a community radio service for the Panjabi community in Sandwell, West Midlands.

The Raj Show is a music-based programme, which is presented in Punjabi. On this occasion, it was sponsored by Cape Hill Solicitors.

A listener complained that the presenter of the programme “repeatedly plugged the sponsor’s details...”

Ofcom noted that the presenter appeared to promote the programme’s sponsor within four lengthy sponsor credits. Each credit lasted between approximately one and three minutes. The credits not only stated that the programme was sponsored by Cape Hill Solicitors, but also included advertising messages, which:

- informed listeners that the sponsor was “*experienced in immigration and asylum cases, as well as asylum appeals*”;
- detailed the sponsor’s free services (e.g. “*...on Tuesdays they provide free sponsorship¹ from 10:00am to 4:30pm...*” and “*...Wednesdays, free immigration advice surgery from 1:00 to 4:00pm...*”);
- solicited listeners to contact the sponsor (e.g. “*...if you have any residential or commercial problem, you should give them a chance...*” and “*...if you have any issue or problem, definitely get in touch with them...*”); and
- provided the sponsor’s contact telephone number and two postal addresses.

We therefore asked Raaj FM for its comments on the matter, with regard to Rule 9.9 of the Code, which states:

“Credits must be short branding statements. However, credits may contain legitimate advertising messages.”

The Code also states that one of the key principles of the sponsorship rules is to maintain “a distinction between advertising and sponsorship.”

Response

Raaj FM confirmed that the presenter-read messages were sponsor credits. The broadcaster believed that these credits were distinct from advertisements, as the presenter had announced the sponsorship arrangement and presented the credits in full. It added that, by contrast, all Raaj FM’s advertisements were introduced as such by the presenter, pre-produced and included music or jingles. In addition, they were scheduled for broadcast at specific times and the presenter welcomed listeners back to the programme after the advertisement or commercial break had ended.

¹ In this context, ‘sponsorship’ refers to advice concerning the sponsoring of friends and/or family members to visit the UK or of a spouse to settle in the UK.

Nevertheless, the broadcaster acknowledged that, in this instance, the presenter had “a style that [involved] an element of repetition and explanation of points which other presenters would not labour”, adding that this style was also “represented within the sponsorship credits with unnecessary repetition of key words and phrases and explanations that were not required.” It considered that “other presenters faced with the same task would have a different style and would present the sponsorship credit succinctly and in a much shorter time.”

Raaj FM also recognised that all its presenters were volunteers. It had therefore reviewed its policy concerning the broadcast of sponsor credits. While presenters had previously been provided with information to include in credits, which could then be presented in an individual style, the broadcaster now pre-scripted and scheduled sponsor credits to be presented at specific times. In addition, each credit would now “contain just one advertising sales message.”

The broadcaster said that it had also “reinforced” its training of presenters, “to highlight the difference between advertisements and sponsorship and the primary purpose of sponsorship credits being to inform listeners of the sponsorship arrangement.”

In conclusion, however, Raaj FM reiterated that, in this instance, it considered the presenter had “ensured ... separation by ... providing ... details in a way that [was] distinct to advertisements.”

Decision

The primary purpose of a sponsor credit on radio is to inform the audience of the sponsorship arrangement. Nevertheless, a sponsor credit on radio should be brief.

Rule 9.9 states: “Credits must be short branding statements. However, credits may contain legitimate advertising messages”. Ofcom’s published guidance to Rule 9.9 reminds broadcasters that:

- “the primary purpose of a sponsor credit is to inform the listener of the sponsorship arrangement”;
- “a full sponsor credit comprises the sponsor's name and identifies clearly the sponsored output” and “may also contain limited legitimate advertising...”;
and
- “sponsor credits on radio should not sound like advertisements.”

Sponsor credits on radio tend to last less than ten seconds, including the announcement of the sponsorship arrangement that is in place and any short additional advertising message.

The presenter stated clearly that the programme was sponsored by Cape Hill Solicitors in each of the four sponsor credits. Nevertheless, the sponsor and its services were promoted for up to three minutes in each credit. Ofcom therefore considered that the emphasis of these credits was on advertising the sponsor and its services, rather than primarily informing listeners of the sponsorship arrangement.

We noted Raaj FM’s policy concerning the broadcast of clearly signalled and pre-recorded advertisements at scheduled times. This may generally have contributed to ensuring a distinction between advertisements and presenter-read sponsor credits.

However, in this instance, the presenter provided extended promotional messages about the programme sponsor and its products and services, within sponsor credits. Ofcom considered that these credits sounded more like full presenter-read advertisements for Cape Hill Solicitors (the sponsor) than brief branding statements.

The sponsor credits were in breach of Rule 9.9 of the Code.

Ofcom welcomed Raaj FM's actions concerning its future broadcast of sponsor credits.

Breach of Rule 9.9

In Breach

Bang Babes

Tease Me TV 2, 22 May 2010, 03:35 to 04:00

Introduction

Bang Babes is a programme on the adult sex chat television service Tease Me TV 2. Tease Me TV 2 is broadcast under a licence held by Playboy TV UK/Benelux Limited ("Playboy" or "the Licensee"). Playboy therefore has compliance responsibility for all programmes broadcast on that service, including *Bang Babes*. The service is available freely without mandatory restricted access on Sky channel number 902. This channel is situated in the 'adult' section of the Sky electronic programme guide ("EPG"). The channel broadcasts programmes after the 21:00 watershed based on interactive 'adult' sex chat services. Viewers are invited to contact onscreen female presenters via premium rate telephony services ("PRS"). The female presenters dress and behave in a sexually provocative way while encouraging viewers to contact the PRS numbers.

Ofcom received a complaint from a viewer who said that the broadcast "included prolonged and repeated close up graphic and intrusive images of vaginal and anal detail". The complainant also said the broadcast showed "masturbation throughout".

Ofcom noted that between 03:30 and 04:00, the broadcast included a female presenter wearing a yellow bikini top (which was pulled to the side to reveal her breasts) and a matching thong. During the broadcast she adopted various sexual positions for relatively prolonged periods of time, including bending over on all fours with her buttocks to camera and lying on her back with her legs spread wide open to camera. While in these positions the presenter's anal and labial area was shown in close up and extensive detail. Throughout the broadcast the presenter repeatedly: rubbed her genital area with her fingers; rubbed her thong against her genitals; pulled her buttocks apart to reveal her anus; sucked her fingers to mimic performing oral sex on a man; and rubbed saliva over her breasts.

Ofcom requested formal comments from Playboy in relation to the following Code rules:

- Rule 1.18 ('Adult sex material' - material that contains images and/or language of a strong sexual nature which is broadcast for the primary purpose of sexual arousal or stimulation - must not be broadcast at any time other than between 2200 and 0530 on premium subscription services and pay per view/night services which operate with mandatory restricted access. In addition, measures must be in place to ensure that the subscriber is an adult);
- Rule 2.1 (the broadcaster must apply generally accepted standards); and
- Rule 2.3 (offensive material must be justified by context).

Response

Playboy said that "having viewed the content, it appears that some of the content was in breach of the Code, for which we apologise".

It said that "we have recently started taking content from an experienced provider [of adult sex chat material]...much of this content is delivered live, and we have had to

install new systems, both technical and procedural, to cope with this product". It explained that there have been "some teething troubles, which have led to one or two slipups". The Licensee said that as a result it will be more vigilant in the future.

Decision

Ofcom has a duty to ensure that generally accepted standards are applied to the content of radio and television services so as to provide adequate protection from the inclusion of harmful or offensive material. In relation to generally accepted standards, including those in relation to sexual material, Ofcom recognises that what is and is not generally accepted is subject to change over time. When deciding whether or not particular broadcast content is likely to fall within generally accepted standards it is necessary to assess the character of the content itself and the context in which it is provided.

In relation to the broadcast of material of a sexual nature this normally involves assessing the strength or explicitness of the content and balancing it against the particular editorial or contextual justification for broadcasting the content. Ofcom seeks to ensure that material of a sexual nature, when broadcast, is editorially justified, appropriately scheduled and where necessary access is restricted to adults.

Broadcasters are allowed to broadcast after the watershed (and without other access restrictions) material which is of a strong sexual nature as long as it is justified by the context. However, this material must not be considered to be 'adult sex material' (i.e. it is not strong sexual images which are broadcast for the primary purpose of sexual arousal or stimulation), or BBFC R-18 rated films or their equivalent.

Rule 1.18 of the Code requires 'adult sex material' to be broadcast only between 22:00 and 05:30, and then only if mandatory restricted access is in place. In judging whether material is 'adult sex material', and therefore is subject to this rule, broadcasters should be guided by the definitions used by the BBFC when referring to "sex-works at '18'". This guidance has been supplemented by various decisions of Ofcom through a series of published findings, and published decisions of the Content Sanctions Committee. By these means Ofcom has made clear what constitutes 'adult sex material'¹.

¹ For example:

- Sanctions decision against Square 1 Management Limited concerning its channel Smile TV, dated 10 July 2008, http://www.ofcom.org.uk/tv/obb/ocsc_adjud/SmileTV.pdf;
- Breach Finding on SportxxxBabes, Ofcom Broadcast Bulletin 115, dated 11 August 2008; http://www.ofcom.org.uk/tv/obb/prog_cb/obb115/;
- Breach Finding on SportxxxBabes, Ofcom Broadcast Bulletin 119, dated 13 October 2008; http://www.ofcom.org.uk/tv/obb/prog_cb/obb119/;
- Sanctions decision against Satellite Entertainment Limited concerning its channel SportxxxBabes, dated 26 August 2008, http://www.ofcom.org.uk/tv/obb/ocsc_adjud/sportxxxbabes.pdf; and
- Sanctions decision against Satellite Entertainment Limited concerning its channel SportxxxBabes, dated 26 August 2008, http://www.ofcom.org.uk/tv/obb/ocsc_adjud/sportxxxbabes.pdf;
- Sanction decision against Playboy TV UK/Benelux Limited concerning its channel Playboy One, dated 2 April 2009, http://www.ofcom.org.uk/tv/obb/ocsc_adjud/playboytv.pdf;
- Breach Finding on Bang Babes licensed by Bang Channels Limited, Broadcast Bulletin 151, <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb151/>; and
- Breach Finding on Bang Babes, Broadcast Bulletin 152, <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb152/>

In considering the contents of this programme Ofcom asked itself two questions:

- was the content of the programme 'adult sex material'; and
- did the broadcaster ensure that the content was provided with sufficient contextual justification so as to ensure that it fell within generally accepted standards.

When setting and applying standards in its Code to provide adequate protection to members of the public from harm and offence, Ofcom must have regard to the need for standards to be applied in a manner that best guarantees an appropriate level of freedom of expression in accordance with Article 10 of the European Convention of Human Rights, as incorporated in the Human Rights Act 1998. This is the right of a broadcaster to impart information and ideas and the right of the audience to receive them. Accordingly, Ofcom must exercise its duties 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 are necessary to achieve a legitimate aim. Ofcom notes however that a broadcaster's right to freedom of expression, although applicable to sexual content and pornography, is more restricted in this context compared to, for example, political speech, and this right can be legitimately restricted if it is for the protection of the public, including the protection of those under 18.

Ofcom considered this broadcast in respect of Rules 1.18, 2.1 and 2.3 of the Code.

In relation to Rule 1.18, Ofcom examined the content of the broadcast and considered that it contained material of a very strong sexual nature, including graphic and intrusive images of genital and anal detail. For example, during the broadcast the presenter was shown apparently performing masturbation on herself by repeatedly touching her genital area and rubbing her thong against her genitals. In Ofcom's opinion, in this particular case, a viewer could reasonably have perceived the sexual acts as real. The presenter was also shown at various times bending over with her buttocks close up to camera and pulling her buttocks apart to reveal her anus and extensive labial detail. Further, Ofcom took account of the fact that the sequences were, in some cases, relatively prolonged and repeated throughout the 25 minute broadcast. In Ofcom's view, the primary purpose of broadcasting this material was clearly sexual arousal. Given the above, the material was, in Ofcom's view, of a very strong sexual nature. Having assessed these programme's content and purpose, Ofcom considered that the material broadcast constituted 'adult-sex' material. Its broadcast, without mandatory restricted access, was therefore in breach of Rule 1.18 of the Code.

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- Breach Finding on Bang Babes, Broadcast Bulletin 153, <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb153/>
 - Breach Finding on Bang Babes, Broadcast Bulletin 157, <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb157/>
 - Breach Finding on Bang Babes, Broadcast Bulletin 163, <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb163/issue163.pdf>

Ofcom then went on to consider whether the broadcast was also in breach of Rules 2.1 and 2.3 of the Code. In light of Ofcom's view that the programme contained material that constituted 'adult sex material' and was therefore unsuitable for broadcast without mandatory restricted access, the broadcast was clearly capable of causing considerable offence. Ofcom therefore examined the extent to which there were any particular editorial or contextual factors that might have limited the potential for offence. Ofcom noted that the programme was broadcast at 03:35, therefore a long time after the watershed, and that viewers tend to expect stronger sexual material to be shown later at night. Ofcom also took account of the fact that the Tease Me TV 2 channel is positioned in the 'adult' section of the Sky EPG and that viewers tend to expect the broadcast of stronger sexual material on channels in this section of the EPG than would be expected to be included on other channels.

However, in this case, given the relatively prolonged and repeated scenes of a very strong sexual nature and the inclusion of graphic images of genital and anal detail (provided for the purpose of sexual arousal), the time of broadcast and location of the channel was not sufficient to justify the broadcast of the material. The material shown was so strongly sexual that it would have exceeded the likely expectation of the vast majority of the audience. Ofcom concluded that the content was clearly not justified by the context and was in breach of generally accepted standards.

Ofcom notes that the Licensee acknowledged that "some of the content was in breach of the Code" and its apology for its broadcast. As part of correspondence prior to Ofcom agreeing to license Playboy to provide the service Tease Me TV 2, we were informed by Playboy that the Licensee would be "acquiring content for it [i.e. this service] from an established producer [Bang Media]" but "the service will be an original service not a simulcast of an existing one". In addition, Playboy assured Ofcom that it: "will continue to have editorial control and editorial responsibility for the channel"; "will have a second tier of compliance checking"; and "will also have a significant amount of editorial input during pre-production, and throughout the production process as necessary". Ofcom will expect, in future, Playboy to have in place adequate compliance arrangements.

Breach of Rules 1.18, 2.1 and 2.3

In Breach

Early Bird

Tease Me TV (Freeview) 3 June 2010, 05:45 to 06:30 and 08:00 to 09:00

Introduction

Earlybird is a televised daytime interactive chat programme broadcast without mandatory restricted access on Tease Me TV. Viewers are invited to contact onscreen female presenters via premium rate telephony services (PRS). The presenters generally dress and behave in a flirtatious manner.

The programme is broadcast on the service Tease Me TV between 05:30 and 09:00. Tease Me TV is located on the Freeview platform on channel number 98. The licence for the service Tease Me TV is held by Bang Media (London) Ltd (“Bang Media”).

Ofcom received two complaints about the above broadcast. The complainants were concerned that the material was too sexual to be broadcast in the daytime and that the presenter’s skimpy outfit and movements were inappropriate for a young audience who might be watching television on this free to air service on the Freeview platform.

The female presenter was wearing a very skimpy string/lace bra that barely covered her nipples, a thong with a string back and stockings and suspenders. During the broadcast the presenter adopted various sexual positions for periods of time including: on her side with her legs open; on her back with her legs open; and, on all fours with her hips raised. While in these positions she repeatedly stroked and touched her body, buttocks and breasts, wiggled and thrust her hips in a sexually provocative way. At one time she also stood up and danced briefly to the camera. On occasions the camera focused in on various parts of her body.

Ofcom therefore requested comments from Bang Media under Rule 1.3 (children must be protected from unsuitable material by appropriate scheduling).

Response

Bang Media said that “Ofcom have previously judged content of this nature broadcast at this time on the Freeview platform to be acceptable”. It said that it did not see “how this broadcast differed from broadcasts previously deemed to be acceptable by Ofcom”.

Decision

Rule 1.3 makes clear that children should be protected by appropriate scheduling from material which is unsuitable for them. Appropriate scheduling is judged according to factors such as: the nature of the content; the likely number of children in the audience, taking into account such factors as school time; the start and finish time of the programme; the nature of the channel; and, the likely expectations of the audience for a particular channel or station at a particular time and a particular day. It should be noted that the watershed starts at 21:00 and material unsuitable for children should not, in general, be shown before 21:00 or after 05:30.

Ofcom has made clear in numerous previous published findings what sort of material is unsuitable to be included in daytime interactive chat programmes without mandatory restricted access¹. In the context of daytime interactive chat programmes where the presenters generally dress and behave in a flirtatious matter for extended periods in order to solicit PRS calls, Ofcom underlined that the presenters should not, for example, appear to mimic or simulate sexual acts or behave in an overtly sexual manner and clothing should be appropriate for the time of broadcast. These decisions were also summarised in a guidance letter sent by Ofcom to daytime and adult sex chat broadcasters in August 2009. Some of these findings involved Bang Media.

This broadcast was transmitted during the early morning and featured a female presenter wearing very skimpy lingerie of a sexual nature. The presenter was shown acting in a sexualised way – for example by adopting various sexual positions for periods of time, such as: kneeling on all fours; lying on her front with her legs wide open and bottom raised in the air; and lying on her side and back with her legs wide open (albeit away from camera). While in these positions the presenter repeatedly wiggled or gyrated her buttocks and pelvis as though mimicking sexual activity or excitement. She also licked her lips in a sexualised rather than flirtatious way. In addition, the presenter, on various occasions, stroked particular parts of her body, including her breasts, stomach, thighs and buttocks.

We concluded that the content included in the broadcast as described above and shown on the Tease Me TV service licensed by Bang Media, had no editorial justification since its sole purpose was to elicit PRS calls. In Ofcom's view the revealing and sexual clothing, repeated actions and sexual positions of the presenter were intended to be sexually provocative in nature and the broadcast of such images was not suitable to promote daytime chat. In light of this behaviour, together with its lack of editorial justification, in Ofcom's view the material was clearly unsuitable for pre-watershed transmission. This material was broadcast at a time when children may have been watching television, some unaccompanied by an adult. While Ofcom noted that all of the material was broadcast on a channel that is not located directly next to children's channels on the Freeview platform, there was the potential for children, should they be flicking through the Freeview electronic programme guide, to come across the channel unawares.. Taking into account the factors above, Ofcom concluded that the content of this broadcast was clearly unsuitable for children and not appropriately scheduled so as to protect them from it. Therefore the content breached Rule 1.3 of the Code.

¹ Tease Me: Earlybird, Tease Me TV (Freeview), 15 February 2010, 05:30 and Tease Me: Earlybird, Tease Me TV (Freeview), 25 January 2010, 07:15 – both Findings in Bulletin 158 at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb158/>;
The Pad, Tease Me, 26 February, 11:45, The Pad, Tease Me 3, 27 February 2010, 11:45, Tease Me: Earlybird, Tease Me TV (Freeview) 26 January 2010, 07:15 - all in Bulletin 157 at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb157/>;
The Pad Tease Me, 6 November 2009, 12:00 to 13:00 and 14:00 to 15:00, Bulletin 152 at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb152/>;
Elite Days, Finding in Bulletin 151 at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb151/>;
Top Shelf TV, Finding in Bulletin 149 at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb149/>;

Ofcom noted Bang Media's assertion that this material was no different to that deemed acceptable by Ofcom in other broadcasts. We noted that the broadcaster did not however refer to any particular broadcasts. Ofcom notes that any material deemed by Ofcom to be acceptable in other broadcasts would not have contained the type of content included in this broadcast, in particular, the skimpy and sexualised outfit and the sexualised positions, movements and gestures of the presenter. Any material broadcast directly after 05:30 should be appropriate and in particular, content broadcast from 06:30 when children might be getting up for school and watching television. In Ofcom's view the very skimpy clothing of the presenter combined with her repeated and sexualised actions and behaviour were intended to be sexually provocative in nature and the broadcast of such images was not suitable to promote daytime chat.

As a result of the serious and repeated nature of the breaches recorded previously against Bang Channels Limited and Bang Media (London) Ltd in Bulletins 157, 158 and 163, Bang Media has already been put on notice that these contraventions of the Code are being considered for statutory sanction. Consideration of this statutory sanction is in addition to the sanction already imposed on Bang Media and published on 29 July 2010² for serious and repeated breaches of the Code in Bulletins 151, 152 and 153.

Breach of Rule 1.3

² See <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/bangchannels.pdf>

In Breach

18 Keen

Tease Me, 10 June 2010, 21:30 to 22:30

Introduction

18 Keen is an adult sex chat television service, owned and operated by Bang Channels Limited ("Bang Channels" or "the Licensee"). The service is available freely without mandatory restricted access on the channel *Tease Me* (Sky channel number 912). This channel is situated in the 'adult' section of the Sky electronic programme guide ("EPG"). The channel broadcasts programmes after the 21:00 watershed based on interactive 'adult' sex chat services. Viewers are invited to contact onscreen female presenters via premium rate telephony services ("PRS"). The female presenters dress and behave in a sexually provocative way while encouraging viewers to contact the PRS numbers.

Ofcom received a complaint that the content was too sexually explicit to be broadcast at around 21:30. The complainant referred to the underwear the two presenters were wearing and that they were performing sex acts on each other.

Ofcom noted that the broadcast featured two female presenters on an unmade single bed in a bedroom setting. They were both initially wearing bras and knickers and one presenter's knickers were made of see through material. The presenters removed their bras during their act. At various times, the presenters adopted sexual positions including: on all fours with their bottoms close to camera; lying on their backs with legs open to camera; one presenter between the legs of the other; on their knees with one presenter behind the other one; and one presenter sat over the other presenter's breasts. While in these positions they rubbed each other's bare breasts and nipples, thrust and moved their hips in a sexualised manner as if miming intercourse, and spanked and stroked each other's buttocks. They also licked their fingers and rubbed the inside of their upper thighs in a sexualised way.

Ofcom requested formal comments from Bang Channels in relation to the following Code Rules:

- Rule 2.1 (the broadcaster must apply generally accepted standards); and
- Rule 2.3 (offensive material must be justified by context).

Response

In response the Licensee said that it was "satisfied that the material broadcast was compliant with the Code" and was consistent with other material that was broadcast on the same evening in the 'adult' section of the EPG. It also pointed out that the Code does not prohibit the exposing of breasts at any time, particularly after the watershed.

Decision

Ofcom has a duty to ensure that generally accepted standards are applied to the content of radio and television services so as to provide adequate protection from the inclusion of harmful or offensive material. In relation to generally accepted standards, including those in relation to sexual material, Ofcom recognises that what is and is

not generally accepted is subject to change over time. When deciding whether or not particular broadcast content is likely to fall within generally accepted standards it is necessary to assess the character of the content itself and the context in which it is provided.

In relation to the broadcast of material of a sexual nature this normally involves assessing the strength or explicitness of the content and balancing it against the particular editorial or contextual justification for broadcasting the content. Ofcom seeks to ensure that material of a sexual nature, when broadcast, is editorially justified, appropriately scheduled and where necessary access is restricted to adults.

When setting and applying standards in its Code to provide adequate protection to members of the public from harm and offence, Ofcom must have regard to the need for standards to be applied in a manner that best guarantees an appropriate level of freedom of expression in accordance with Article 10 of the European Convention of Human Rights, as incorporated in the Human Rights Act 1998. This is the right of a broadcaster to impart information and ideas and the right of the audience to receive them. Accordingly, Ofcom must exercise its duties 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 are necessary to achieve a legitimate aim. Ofcom notes however that a broadcaster's right to freedom of expression, although applicable to sexual content and pornography, is more restricted in this context compared to, for example, political speech, and this right can be legitimately restricted if it is for the protection of the public, including the protection of those under 18.

In considering the images in this programme, Ofcom assessed the strength of the content and then asked itself whether the broadcaster ensured that the content was provided with sufficient contextual justification so as to ensure that it applied generally accepted standards.

In terms of this broadcast, Ofcom considered the sexual images shown to be strong and capable of causing offence. On a number of occasions the female presenters adopted sexually provocative positions both individually and together and the nature of their joint performance was very sexual. For example, they rubbed and stroked each other's exposed breasts, spanked each other, one presenter mimed licking the other between the legs and they rubbed the inside of their upper thighs in a sexualised manner.

Ofcom therefore examined the extent to which there were any particular editorial or contextual factors that might have limited the potential for offence. Ofcom noted that this programme was broadcast in the first hour after the watershed, and that viewers tend to expect stronger sexual material to be shown after this time. Ofcom also took account of the fact that the Tease Me channel is in the 'adult' section of the Sky EPG and that viewers tend to expect the broadcast of stronger sexual material on channels in this section of the EPG than would be expected to be included on other channels.

Ofcom noted that content broadcast on this channel changes at 21:00 from daytime chat (whose content must be appropriately limited) to an adult sex chat service. On this channel – as with all channels broadcasting without mandatory restricted access – the stronger material should appear later in the schedule. One of the factors Ofcom must take into account when assessing context is the likely expectation of the audience. Here Ofcom believes that viewers of a channel freely available without mandatory restricted access would not expect to see material of such strength

broadcast between 21:30 and 22:00.. Ofcom considered that the time of broadcast and the location of the channel were not sufficient to justify the broadcast of sexually provocative behaviour between two female presenters at this time in the schedule.. The material shown was so strongly sexual that we do not consider the broadcaster applied generally acceptable standards.

Ofcom notes the broadcaster's statement that the Code does not prohibit programmes that contain images of naked breasts regardless of the time of broadcast. The Code does allow for images of nudity to be broadcast both before and after the watershed. But if the images of nudity have the potential to cause offence – as here – they must be justified by the context. In this case, Ofcom considered that the material shown (including the presenters stroking and rubbing each other's naked breasts) was provided for the purposes of sexual arousal in order to elicit PRS calls. For the reasons set out above, this material was too strong to be shown so soon after the watershed and was clearly not justified by the context.

This broadcast was therefore in breach of Rules 2.1 and 2.3 of the Code.

On 29 July 2010¹ Bang Channels Limited and Bang Media (London) Ltd were fined £157,250 for serious and repeated breaches of the Code. These breaches had been published in Bulletins 151, 152 and 153. As a result of the continued serious and repeated nature of breaches recorded against Bang Channels Limited and Bang Media (London) Ltd in Bulletins 157, 158 and 163, the Licensee has already been put on notice that these further contraventions of the Code are being considered for another statutory sanction.

Breach of Rules 2.1 and 2.3

¹ See <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/bangchannels.pdf>

In Breach

Live XXX Babes

Live XXX Babes, 31 March 2010, 22:00 to 23:00

Live XXX Babes

Live XXX Babes, 1 April 2010, 22:00 to 22:24

Sport XXX Babes

Sport XXX Babes, 3 April 2010, 22:00 to 02:00

Northern Birds

Northern Birds, 11 April 2010, 22:30 to 23:00

Sport XXX Babes

Sport XXX Babes, 16 May 2010, 21:00 to 21:30

Sport XXX Babes

Sport XXX Babes, 19 May 2010, 00:00 to 01:00

Introduction

Live XXX Babes, Sports XXX Babes and Northern Birds are adult sex chat television services. Each service has a separate licence but all three licences are owned and complied by Satellite Entertainment Limited ("SEL" or "the Licensee"). The services are available freely without mandatory restricted access on Sky channel numbers 950 (*Live XXX Babes*), 945 (*Sports XXX Babes*) and 954 (*Northern Birds*). These channels are situated in the 'adult' section of the Sky electronic programme guide ("EPG"). The channels broadcast programmes after the 21:00 watershed based on interactive 'adult' sex chat services. Viewers are invited to contact onscreen female presenters via premium rate telephony services ("PRS"). The female presenters dress and behave in a sexually provocative way while encouraging viewers to contact the PRS numbers.

As a result of its concerns about compliance in this sector, Ofcom conducts monitoring exercises of daytime and adult sex chat channels.

Live XXX Babes, (Sky Channel 950) 31 March 2010, 22:00 to 23:00

During this programme, a female presenter was wearing a leather dress that exposed her breasts, a skimpy thong and fishnet stockings. She adopted various sexual positions. These included on all fours with her buttocks to camera and on her back with her legs wide open. While in these positions the presenter carried out a number of sexual acts including miming and simulating masturbation, by rubbing and touching her crotch and anus over her skimpy thong which at times revealed her labial contours. She also licked her fingers and touched around the edges of her labia and pulled on her thong to bunch it into her crotch and reveal her genital contours. At times the camera zoomed in between the presenter's wide open legs in intrusive detail.

Live XXX Babes, (Sky Channel 950), 1 April 2010, 22:00 to 22:24

During this programme, a female presenter wearing a pink thong and a bra pulled down to reveal her breasts. For the majority of the broadcast the presenter adopted the sexual position of lying on her back with her legs wide open to camera for a prolonged period of time. While in this position she simulated masturbation by severely bunching her thong against her genitals whilst gyrating up and down. The broadcast included close up shots of the presenter's genital area, with outer labial detail shown, which were massaged and oiled. In addition the presenter positioned

herself on all fours and massaged her buttocks thrusting them at the camera for prolonged periods of time and revealing anal detail.

Sport XXX Babes, (Sky Channel 945) 3 April 2010, 22:00 to 02:00

Between 22:00 and 23:26 and 00:02 to 00:47 this broadcast included a female presenter wearing her hair in pigtails and dressed in a "school uniform". For the majority of the broadcast she pulled her shirt and bra down to reveal her breasts. At various times, she lifted her mini skirt and adopted sexual positions including on all fours with her buttocks close to camera and lying on her back with her legs wide open to camera. While in these positions she was shown simulating masturbation by repeatedly rubbing her genital and anal area and pulling her thong tightly against her genitals whilst thrusting her hips forward in a sexual manner. The broadcast included repeated close up shots of the presenter's genital and anal area, with outer labial and anal detail visible.

Following this broadcast, from 23:26 to 00:02, Ofcom noted a blonde presenter wearing a gold thong. For the majority of the broadcast she lay with her legs wide open, gyrated her hips up and down and bunched her thong severely against her genitals simulating masturbation. At one point she squirted oil on her genital area and continued to simulate masturbation rubbing the oil into her upper thighs and outer labia. While on all fours she thrust her buttocks to camera and was seen to simulate masturbation by repeatedly and vigorously pulling on her thong. Throughout the segment, labial and anal detail were visible.

Northern Birds (Sky Channel 954), 11 April 2010, 22:30 to 23:00

During routine monitoring of this channel, Ofcom noted that this broadcast featured a female presenter wearing a black lacy basque. At various times during the broadcast the presenter adopted sexual positions, including lying on her back with her legs wide open to camera and bending over with her buttocks to camera for relatively prolonged periods of time. Whilst in these positions, the presenter repeatedly carried out a number of sexual acts in intrusive detail. These included: vigorously stroking her buttocks and pulling her buttocks apart direct to camera to reveal outer anal detail and labial detail; bunching her thong into her genitals and tugging at it to reveal her outer labia; simulating masturbation by rubbing her outer labia; and touching in and around her crotch area.

Sport XXX Babes, 16 May 2010, 21:00 to 21:30 & Sport XXX Babes, 19 May 2010, 00:00 – 01:00

With reference to these two cases, Ofcom received a complaint about their offensive nature. The complainant expressed concern about the anal and genital detail visible, particularly when shown prior to 22:00.

Sport XXX Babes, (Sky Channel 945), 16 May 2010, 21:00 to 21:30

The presenter was wearing a checked mini skirt which was pulled up around her waist for the majority of the broadcast to reveal a white thong. In the first half of the segment, from 21:00 to 21:30, she positioned herself on all fours with her buttocks upwards. While in this position, she rolled down the top of her thong to half way down her buttocks and thrust her buttocks in a sexual manner so as to mime sexual intercourse. In addition she licked her finger suggestively and inserted her finger into her mouth to suggest a sex act.

After 21:30 Ofcom noted the presenter repeated the same position on all fours but her buttocks were positioned direct to camera and the images were close up and intrusive revealing her outer labia. Whilst in this position she stroked her outer labia and between her buttocks to simulate masturbation, pulled her thong down and into

her buttocks to show anal detail and massaged her fingers around the top of her buttocks to suggest a sex act. The presenter also lowered her bra to show her breasts and sat with her legs wide open to camera. In this position she placed spit on her genital area, pulled her thong tightly against her genitals to reveal labial detail and simulated masturbation. She also pulled down her thong low enough to reveal her pubic area and repeatedly placed her hands between her legs.

Sport XXX Babes, (Sky Channel 945), 19 May 2010, 00:00 – 01:00

Ofcom noted that the broadcast featured a female presenter wearing a black basque with the top pulled down to reveal her breasts. During the broadcast she adopted various sexual positions for prolonged periods of time, including bending over on all fours with her buttocks to camera and lying on her back with her legs spread wide open to camera. While doing so, the presenter repeatedly pulled her underwear tightly against her genital area, opened her legs to expose labial detail in close up; and positioned her buttocks to camera revealing anal detail.

Ofcom requested formal comments under Code Rules 2.1 (the broadcaster must apply generally accepted standards) and 2.3 (offensive material must be justified by context) from SEL in relation to the following broadcasts:

- *Live XXX Babes*, (Sky Channel 950), 31 March 2010, 22:00 – 23:00;
- *Live XXX Babes*, (Sky Channel 950), 1 April 2010, 22:00 to 22:24;
- *Sport XXX Babes*, (Sky Channel 945) 3 April 2010, 22:00 to 02:00;
- *Northern Birds* (Sky Channel 954), 11 April 2010, 22:30 to 23:00;
- *Sport XXX Babes*, (Sky Channel 945) 16 May 2010, 21:00 to 21:30; and
- *Sport XXX Babes*, (Sky Channel 945), 19 May 2010, 00:00 – 01:00.

In addition, Ofcom requested formal comments from SEL under Rule 1.6 (the transition to more adult material must not be unduly abrupt at the watershed...the strongest material should appear later in the schedule) as regards *Sport XXX Babes*, (Sky Channel 945) 16 May 2010, 21:00 to 21:30.

Response

Ofcom contacted the Licensee on several occasions to confirm receipt of the requests for formal comments. SEL however did not provide comments to Ofcom. In the absence of any response from the Licensee, Ofcom proceeded to reach a decision on this material against the Code.

Decision

Ofcom has a duty to ensure that generally accepted standards are applied to the content of radio and television services so as to provide adequate protection from the inclusion of harmful or offensive material. In relation to generally accepted standards, including those in relation to sexual material, Ofcom recognises that what is and is not generally accepted is subject to change over time. When deciding whether or not particular broadcast content is likely to fall within generally accepted standards it is necessary to assess the character of the content itself and the context in which it is provided.

Broadcasters are allowed to broadcast after the watershed (and without other access restrictions) material which is of a strong sexual nature as long as it is justified by the context. This requires Ofcom to assess the strength or explicitness of the content and balance it against the particular editorial or contextual justification for broadcasting

the content. Ofcom seeks to ensure that material of a sexual nature, when broadcast, is editorially justified, appropriately scheduled and where necessary access is restricted to adults.

When setting and applying standards in its Code to provide adequate protection to members of the public from harm and offence, Ofcom must have regard to the need for standards to be applied in a manner that best guarantees an appropriate level of freedom of expression in accordance with Article 10 of the European Convention of Human Rights, as incorporated in the Human Rights Act 1998. This is the right of a broadcaster to impart information and ideas and the right of the audience to receive them. Accordingly, Ofcom must exercise its duties 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 are necessary to achieve a legitimate aim. Ofcom notes however that a broadcaster's right to freedom of expression, although applicable to sexual content and pornography, is more restricted in this context compared to, for example, political speech, and this right can be legitimately restricted if it is for the protection of the public, including the protection of those under 18.

Live XXX Babes, 31 March 2010, 22:00 – 23:00

Live XXX Babes, 1 April 2010, 22:00 to 22:24

Sport XXX Babes, 3 April 2010, 22:00 to 02:00

Northern Birds, 11 April 2010, 22:30 to 23:00

Sport XXX Babes, 16 May 2010, 21:00 to 21:30

Sport XXX Babes, 19 May 2010, 00:00 to 01:00

Ofcom considered all of the above broadcasts together because four resulted from the same monitoring exercise and all concerned similar issues and similar material broadcast post-watershed. Ofcom examined them in respect of Rules 2.1 and 2.3 of the Code.

In terms of the content of all these broadcasts, Ofcom considered the sexual images shown to be strong and capable of causing offence. During all six broadcasts detailed above, the presenters positioned themselves in front of the camera with legs wide apart and on all fours with buttocks in full view for prolonged periods of time. Given the fact that all presenters pulled their underwear tightly against their genital area so as to "bunch" the material, and the images were sometimes filmed close up, there were numerous occasions when outer labial and anal detail was shown in intrusive detail. In addition, during all broadcasts the presenters in each individual programme appeared to mime masturbation at various points in the broadcasts, by touching around their genital and anal areas and sometimes simulate masturbation by rubbing their underwear vigorously against their genitals and touching or stroking the crotch in a sexual manner.

Ofcom therefore examined the extent to which there were any particular editorial or contextual factors that might have limited the potential for offence. Ofcom noted that five of the six programmes were broadcast after 22:00, therefore after the watershed, and that viewers tend to expect stronger sexual material to be shown later at night. Ofcom also took account of the fact that the channels were positioned in the 'adult' section of the Sky EPG and that viewers tend to expect the broadcast of stronger sexual material on channels in this section of the EPG than would be expected to be included on other channels.

However, in all cases there were prolonged and repeated scenes of a sexual nature, such as miming and simulating masturbation, the adoption of sexual positions and

images of the presenters' outer labial and anal areas, which taken together resulted in material with highly sexualised content. Ofcom considered that the time of broadcast and location of the channel were therefore not sufficient to justify the broadcast of such material. Given the strength of the sexual nature of the content, available on a channel without mandatory restricted access, we considered that the broadcaster did not apply generally acceptable standards and the material was not contextually justified. These broadcasts therefore breached Rules 2.1 and 2.3 of the Code.

Ofcom is concerned in particular, that the broadcast on Sport XXX Babes on 16 May was transmitted from 21:00. This strong sexual content, of an equally similar nature to that shown after 22:00 on the other channels detailed, included the presenter revealing her breasts and genital and anal detail, simulating masturbation and inserting her fingers into her mouth to mime oral sex. Rule 1.6 makes clear that the strongest material should appear later in the schedule and that the transition to more adult material should not be unduly abrupt at the watershed of 21:00. The degree of offence likely to be caused by viewing this material was therefore considered greater than after 22:00 given the insufficient context. Ofcom concluded that this content was clearly not justified by the context and, in addition to breaching generally accepted standards also contravened Rule 1.6.

It is Ofcom's view that these breaches are serious. In particular, Ofcom is concerned by the apparent repeated nature of these breaches. Ofcom is therefore putting the Licensee on notice that further repeated contraventions of the Code of a similar nature will be considered for the imposition of a statutory sanction.

Live XXX Babes, 31 March 2010, 22:00 to 23:00: Breach of Rules 2.1 and 2.3

Live XXX Babes, 1 April 2010, 22:00 to 22:24: Breach of Rules 2.1 and 2.3

Sport XXX Babes, 3 April 2010, 22:00 to 02:00: Breach of Rules 2.1 and 2.3

Northern Birds, 11 April 2010, 22:30 to 23:00: Breach of Rules 2.1 and 2.3

Sport XXX Babes, 16 May 2010, 21:00 to 21:30: Breach of Rules 1.6, 2.1 and 2.3

Sport XXX Babes, 19 May 2010, 00:00 to 01:00: Breach of Rules 2.1 and 2.3

In Breach

The Naked Office

Virgin 1, 5 June 2010, 20:00

Introduction

Virgin 1 is a general entertainment service broadcasting on cable and satellite platforms. The licence for this service is held by Living TV Group Ltd (“Living TV” or the “Licensee”). The programme, *The Naked Office*, is a series of programmes in which a business behaviour expert coaches struggling commercial enterprises in an effort to improve their team cohesion and boost their overall commercial performance, the final challenge for the staff being going into work naked. In this particular episode the staff were also asked to have their favourite body part cast in plaster. One of the members of staff chose to have his buttocks cast, and in discussion with a colleague regarding the process involved in making the cast said “if you fucking rip it off, it kills you”.

When viewing the programme as a result of complaints, Ofcom noted this instance of the word “*fucking*” had not been bleeped in line with other examples of offensive language within the programme. As the programme was broadcast at 20:00, Ofcom requested the broadcaster’s comments under Rule 1.14 (the most offensive language must not be broadcast before the watershed).

Response

Living TV apologised for any offence that may have been caused. It said this was an isolated incident and the result of human error and not a failure of process. The Licensee said that it had robust procedures in place to ensure programmes complied with the Code and that normally they worked successfully. In this case, the content of the programme was fully viewed and complied by a first compliance executive. Usually a second executive then makes further checks to ensure all potentially offensive language has been bleeped or removed. Unfortunately, in this case due to human error the second check did not take place and Living TV said that in this instance the first executive had not instructed a second colleague to check his work, and the use of the most offensive language was missed. The relevant member of staff had now been disciplined. Living TV assured Ofcom that this particular programme in the series had now been complied to ensure adherence with the Code and that any repeats of the programme would be fully compliant.

Decision

Rule 1.14 states that the most offensive language should not be broadcast before the watershed. Ofcom research¹ indicates that the word “fuck” and its derivatives are an example of the most offensive language.

Ofcom notes the Licensee’s apology and welcomes the prompt action the broadcaster has taken to ensure the programme will comply with the Code in any future broadcast and its assurances about the robustness of its usual compliance

¹ Ofcom research publication: Audience attitudes towards offensive language on television and radio at: <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf> June 2010, p.92

processes. However, in this case, this broadcast of the most offensive language was in breach of Rule 1.14 of the Code.

Breach of Rule 1.14

In Breach

Provision of recordings

MATV, 5 June 2010, 21:30 and 6 June 2010, 22:00

Introduction

MATV is a news and family entertainment television channel aimed at the Asian community in the UK. Ofcom was contacted by a viewer who complained that MATV presenters had made promotional references to a number of products and services in a programme broadcast on 6 June 2010. Ofcom requested a recording of this programme on 8 June 2010.

Ofcom did not receive a recording. Therefore on 23 June 2010, we repeated our request for the recording. Ofcom was informed that it would be sent within 48 hours.

On 22 June 2010, Ofcom received another complaint of a similar nature about a programme broadcast on MATV on 5 June 2010 and subsequently requested a recording of this programme on 25 June 2010.

Both recordings were provided to Ofcom by the broadcaster on 2 July 2010. However, neither of the recordings had included any sound and therefore Ofcom was unable to consider the complaint.

Under Condition 11 of MATV's TLCS licence to broadcast, MATV is required to keep recordings of its output in sound and vision for 60 days after transmission. If requested by Ofcom, Condition 11 also requires licensees to provide such recordings to Ofcom "forthwith".

Ofcom asked the broadcaster for its representations on whether it had complied with Licence Condition 11 on two occasions: firstly, on 30 June 2010, with regard to its failure at that time to provide Ofcom with the first recording; and the broadcaster's comments were again requested on 6 July 2010, when MATV confirmed that it was unable to supply either recording with sound.

Response

When Ofcom notified MATV of the problem with the audio, the broadcaster said that unfortunately, its playout facility, operated by a third party, "had some issue that day as they were moving the play out from one place to another".

In further correspondence, MATV apologised for the incident and said that "as a corrective step", it has "now started recording at a 2nd location as well".

Decision

Despite requesting the first recording on 8 June 2010, Ofcom received no communication from MATV until it contacted the broadcaster on 23 June 2010 to enquire why the recording had not yet been provided. MATV then sought confirmation of the name of the specific channel and then told Ofcom that it would be in receipt of the recording within 48 hours.

However, it took a further seven days and additional contact from Ofcom before both the recordings were received on 2 July 2010. As noted above, the recordings were inadequate since neither recording included any sound.

Ofcom was therefore concerned about MATV's failure to supply forthwith a recording of the programme broadcast on 6 June 2010 despite reminders from Ofcom, and MATV's failure to supply recordings with sound.

Further, Ofcom noted that MATV's response indicated the lack of audio in the recordings was owing to "some issue that day" but as the affected programmes were broadcast on different days, it was apparent to Ofcom that the problem was not confined to just one day.

Ofcom is concerned that it has found MATV in breach of Condition 11 of its licence previously (in Broadcast Bulletin 145¹). Ofcom is therefore now putting MATV on notice that, in the event of any further breaches of this Licence Condition, Ofcom will proceed to considering further regulatory action.

Breach of Licence Condition 11 (Retention and production of recordings)

¹ <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb145/>

Advertising Scheduling Cases

In Breach

Advertising scheduling

The Africa Channel, 20 April 2010, various times

Introduction

Rule 17 of the Code on the Scheduling of Television Advertising (“COSTA”)¹ applies restrictions to the number of advertising breaks during a programme. This rule implements the requirements of the Audiovisual Media Services (AVMS) Directive.

As part of Ofcom’s routine monitoring of broadcasters’ compliance with COSTA, we observed that, during two of three separate broadcasts of the programme *Akwaaba! Ghana welcomes the Obamas* on 20 April 2010, the broadcaster appeared to have transmitted seven internal breaks. Further, there appeared to have been eight internal breaks during the third broadcast.

To comply with Rule 17, a maximum of six internal breaks was permitted during each of the three broadcasts.

Ofcom wrote to broadcaster asking it to provide comments relating to the matter under Rule 17 of COSTA.

Response

The broadcaster explained that because the programme was the first two hour length programme it had scheduled on The Africa Channel, it had accidentally applied the wrong break patterns. However, following the incident it would be using a new template that is compliant with COSTA which would prevent the issue recurring.

Decision

Ofcom notes that it had previously had cause to seek and obtain assurances from the Africa Channel that it would comply with the minutage rules set out in COSTA. Ofcom is concerned that the broadcaster’s procedures were not adequate to prevent breaches of COSTA’s break pattern rules occurring. Accordingly, we are recording a breach of Rule 17 of COSTA.

Ofcom may consider further regulatory action if this problem recurs.

Breach of Rule 17 of COSTA

¹ <http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/tacode.pdf>

Resolved

Advertising scheduling

ITV1 HD, 12 June 2010, 19:34

Introduction

Rule 12 of the Code on the Scheduling of Television Advertising states: “Where television advertising or teleshopping is inserted during programmes, television broadcasters must ensure that the integrity of the programme is not prejudiced, having regard to the nature and duration of the programme, and where natural breaks occur.” This rule implements the requirements of the Audiovisual Media Services (AVMS) Directive.

During live coverage of the World Cup finals group match between England and USA on the high definition version of ITV1 (“ITV1 HD”) on 12 June 2010, an unscheduled break interrupted coverage at a crucial point in the match.

This break occurred within the first four minutes of the match, at 19:34, and just before England scored the first goal of the match. During the unscheduled break, a ten second sponsorship bumper for Hyundai was played out on ITV1 HD. This bumper was followed by a series of black frames lasting a further 11 seconds. The service was restored after approximately 21 seconds, which meant viewers watching the match on the HD service in England and Wales did not see the goal being scored. Those watching the match on ITV1’s standard definition service – the vast majority of viewers – were unaffected.

Ofcom received 823 complaints from viewers who were disappointed to have missed England’s only goal of the match. Several pointed out that they had paid subscriptions or bought expensive HD televisions in order to watch the World Cup and expressed frustration that the broadcast had been interrupted at an important point in the match.

Ofcom wrote to ITV Broadcasting Ltd (“ITV”), who compiled the programme, asking it to provide comments relating to the incident under Rule 12 of COSTA.

Response

ITV said that it deeply regretted the incident and had apologised publicly to its HD viewers. It said it continually strives to offer its viewers a first class viewing experience which is why it considered this incident to be all the more unfortunate.

ITV explained that the cause of the incident was a human error within the master control room operated by ITV’s transmission provider, Technicolor. It said that a ‘take-next’ trigger had been inadvertently activated which led to the next scheduled item, a Hyundai sponsorship bumper, being transmitted prematurely.

Following the incident, ITV explained that whilst it could not identify what led to the human error, it had hired external consultants to critically review its operational procedures with Technicolor and would be introducing extra precautions to prevent further such incidents. In particular, Technicolor had removed the live edit functionality from the master control area and was manufacturing covers for the

equipment consoles in order to avoid accidental activation of functions that could interrupt programming.

ITV said that whilst it considered the incident to be both inopportune and regrettable, it believed the incident to have affected only a minority of its total audience. ITV estimated that over 90% of viewers watched the match on its standard definition service, ITV1, and were therefore unaffected.

Decision

Ofcom understands that viewers of this crucial World Cup match would reasonably expect ITV1 to provide appropriate coverage of this event. The inclusion of an unscheduled break at a crucial point of the game was understandably disruptive and we appreciate the frustrations of many viewers who complained to Ofcom.

Ofcom notes ITV's acknowledgement of this error and that during half-time coverage of the match, an apology was broadcast to viewers by presenter, Adrian Chiles. Ofcom is also aware that following the match, both ITV and Technicolor apologised for the incident. Ofcom accepts that the incident was an unfortunate error and ITV made no commercial gain from it. We note the operational review ITV is carrying out and the immediate action taken both by ITV and Technicolor, including specific measures to avoid this type of incident recurring. In view of this, we consider the matter, on this occasion, to be resolved.

Resolved

Resolved

Advertising scheduling

Lava, 19 to 30 April 2010, various times

Introduction

Rule 17 of the Code on the Scheduling of Television Advertising (“COSTA”)¹ applies restrictions to the number of advertising breaks during a programme. This rule implements the requirements of the Audiovisual Media Services (AVMS) Directive.

As part of Ofcom’s routine monitoring of broadcasters’ compliance with COSTA, we observed that between 19 and 30 April 2010, there were several separate incidents on Lava, where the number of internal breaks transmitted in a programme exceeded the maximum number permitted.

Ofcom wrote to the broadcaster asking it to provide comments relating to the matter under Rule 17 of COSTA.

Response

The broadcaster explained that it had introduced immediate measures to ensure that it complied with all aspects of COSTA. The broadcaster also explained that it had briefed staff on the importance of complying with COSTA and also improved its technical procedures to prevent further incidents recurring.

Decision

This is the first time Ofcom has had to inform the broadcaster of a break pattern issue occurring on Lava. Ofcom notes the additional steps taken by the broadcaster to improve compliance with COSTA. Consequently, we consider the matter to be resolved.

However, Ofcom will continue to monitor Lava closely and may consider taking regulatory action if this problem recurs.

Resolved

¹ <http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/tacode.pdf>

Resolved

Advertising scheduling

Channel Starz, 16 to 30 April 2010, various times

Channel AKA, 16 to 30 April 2010, various times

Introduction

Rule 17 of the Code on the Scheduling of Television Advertising (“COSTA”)¹ applies restrictions to the number of advertising breaks during a programme. This rule implements the requirements of the Audiovisual Media Services (AVMS) Directive.

As part of Ofcom’s routine monitoring of broadcasters’ compliance with COSTA, we observed that between 16 April and 30 April 2010, there were several separate incidents on Channel Starz and Channel AKA, where the number of internal breaks transmitted in a programme exceeded the maximum number permitted.

Ofcom wrote to Mushroom TV Ltd, the licensee for Channel Starz and Channel AKA, asking it to provide comments relating to the matter under Rule 17 of COSTA.

Response

The broadcaster explained that since Ofcom had notified it of these incidents, it had taken measures to amend its programme and break schedule to ensure all break patterns complied with COSTA.

The broadcaster said it had improved technical procedures and systems across both channels as well as ensuring staff were briefed on the importance of complying with all aspects of COSTA.

Decision

Ofcom notes the additional steps taken by the broadcaster to improve compliance with COSTA across both channels. This is the first time Ofcom has had to inform Mushroom TV Ltd of a break pattern issue occurring on its channels. Consequently, we consider the matter to be resolved.

However, we will continue to monitor Mushroom TV Ltd’s channels closely and may consider further regulatory action if this problem recurs.

Resolved

¹ <http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/tacode.pdf>

Resolved

Advertising minutage

STV, 24 May 2010, 19:00

Introduction

Rule 14 of the Code on the Scheduling of Television Advertising (“COSTA”), states: “Breaks during programmes on public services channels may not exceed 3 minutes 50 seconds, of which advertisements may not exceed 3 minutes 30 seconds”. This rule implements the requirements of the Audiovisual Media Services (AVMS) Directive.

STV informed Ofcom that on 24 May 2010, during the 19:00 clock hour, a break lasting four minutes and 10 seconds had been transmitted (20 seconds more than is permitted).

Ofcom wrote to STV asking it to provide comments relating to the incident under Rule 14 of COSTA.

Response

The broadcaster stated that within the break only 3 minutes and 30 seconds featured commercial advertising with the remaining 40 seconds consisting of promotional content for the channel.

The broadcaster explained that the incident occurred when it discovered a technical fault in a programme it was transmitting. This forced STV to delay the second half of the programme to allow its production team to resolve the issue. To prevent viewers from watching a blank screen, caused by the programme’s delay, a 20 second programme trailer was transmitted.

The broadcaster said that no additional advertising had been transmitted during this period and that the advertising minutage for this clock hour and across the broadcasting day had not exceeded the permitted allowance¹.

Decision

Ofcom understands that this incident was the result of the technical fault with the programme and that no commercial gain had been made by STV. Neither the advertising minutage for the relevant clock hour and across the broadcasting day had been affected as a result of this incident. Consequently, we consider the matter to be resolved.

Resolved

¹ Rule 4 of COSTA states “time devoted to television advertising and teleshopping spots on any channel in any one hour must not exceed 12 minutes. In addition: a) on public service channels time devoted to television advertising and teleshopping spots must not exceed: i) an average of 7 minutes per hour for every hour of transmission time across the broadcasting day; and ii) subject to (i) above, an average of 8 minutes an hour between 6pm and 11pm.

Resolved

Advertising minutage

Attheraces, 3 June 2010, 22:00

Introduction

Rule 4 of the Code on the Scheduling of Television Advertising (“COSTA”), states: “time devoted to television advertising and teleshopping spots on any channel in any one hour must not exceed 12 minutes”. This rule implements the requirements of the Audiovisual Media Services (AVMS) Directive.

As part of Ofcom’s routine monitoring of broadcaster’s compliance with COSTA, Ofcom observed that, during the 22:00 clock hour on 3 June 2010, Attheraces appeared to have transmitted 12 minutes and 23 seconds of advertising (23 seconds more than is permitted).

Ofcom wrote to the broadcaster asking it to provide comments relating to the incident under Rule 4 of COSTA.

Response

The broadcaster acknowledged that a minutage overrun had occurred. It apologised for the overrun which it attributed to human error. Following the incident, Attheraces said that a memo had been circulated to staff informing them of the relevant minutage rules and the importance of complying with COSTA. To mitigate the risks of further overruns, the broadcaster said that it would also be re-training its production staff on COSTA compliance.

Decision

Ofcom notes that this is the first time it has had to inform Attheraces Ltd of an overrun occurring on its channel and welcomes the immediate steps taken by the broadcaster to improve its compliance with COSTA. Consequently, we consider the matter to be resolved.

However, Ofcom will continue to monitor Attheraces and may consider regulatory action if this problem recurs.

Resolved

Resolved

Advertising scheduling

Quest, 3 May 2010, 14:00

Introduction

Rule 17 of the Code on the Scheduling of Television Advertising (“COSTA”)¹ applies restrictions to the number of advertising breaks during a programme. This rule implements the requirements of the Audiovisual Media Services (AVMS) Directive.

As part of Ofcom’s routine monitoring of broadcasters’ compliance with COSTA, we observed that, during an episode of the drama series *Monk*, shown at 14:00 on 3 May 2010, the broadcaster appeared to have transmitted six internal breaks. Under Rule 17, a maximum of five internal breaks was permitted during the broadcast.

Ofcom wrote to broadcaster asking it to provide comments relating to the matter under Rule 17 of COSTA.

Response

The broadcaster explained that the duration of the programme meant that it fell between two programme slot lengths. Whilst the episode included the correct number of breaks for its intended two hour slot, the number of internal breaks was not been reduced when the episode was broadcast in a shorter slot.

The broadcaster said this error was a matter of great concern to it and it had introduced both short and long term measures to prevent this issue recurring. In the short term, the broadcaster said it would update staff on COSTA rules and the importance of compliance. Furthermore, the broadcaster said it was implementing a process whereby an additional notification is put into its computer system listing the number of parts and intended slot duration of any programme. As a long term measure, the broadcaster explained that it would be looking into enhancing its systems to create a function which would prevent a programme from being scheduled with an incorrect break pattern.

Decision

Ofcom notes that this is the first time it has had to inform Quest of a break pattern issue occurring on its channel and welcomes the immediate steps taken by the broadcaster to improve its compliance with COSTA. Consequently, we consider the matter to be resolved.

However, we will continue to monitor Quest closely and may consider further regulatory action if this problem recurs.

Resolved

¹ <http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/tacode.pdf>

Fairness and Privacy Cases

Partly Upheld

Complaint by Ms Farwa Wiechmann

UK Border Force, Sky Three, 1 February 2010

Summary: Ofcom has upheld Ms Farwa Wiechmann's complaint of unwarranted infringement of privacy in the broadcast of the programme, but it has not upheld her complaint of unwarranted infringement of privacy in the making of the programme.

The programme followed the work of officials from the UK Border Agency and part of the programme showed immigration officers carrying out their duties at Heathrow airport's passport control area.

Ms Wiechmann, who had been refused entry to the UK previously, was shown being questioned and formally interviewed by an immigration officer about the purpose of her visit to the UK. Details of her family background and immigration history were disclosed and footage was shown of Ms Wiechmann's luggage being searched. The programme also included footage of her personal documents and of her being fingerprinted and scanned with a hand-held metal detector. The programme concluded with footage of Ms Wiechmann being told by the immigration officer that she was being refused entry to the UK and that she would be put on to the next available flight back to Pakistan.

Ms Wiechmann complained to Ofcom that her privacy was unwarrantably infringed in the making and broadcast of the programme.

In summary, Ofcom found that:

- It would be undesirable for programme makers to be unduly constrained in circumstances where prior consent could not be obtained. In this case, the public interest in obtaining material about the work of the UK Border Agency outweighed Ms Wiechmann's expectation of privacy in relation to being filmed. Ofcom therefore found that there was no unwarranted infringement of Ms Wiechmann's privacy in the making of the programme.
- In the specific circumstances of this case, Ofcom found that Ms Wiechmann had a significant expectation that footage of her in this sensitive situation would not be broadcast to a wider audience. The public interest in showing the work of the UK Border Agency did not justify the significant intrusion into Ms Wiechmann's private life and Ms Wiechmann's privacy was unwarrantably infringed in the programme as broadcast.

Introduction

On 1 February 2010, British Sky Broadcasting Limited ("BSkyB") broadcast on its channel Sky Three an edition of its reality series *UK Border Force*, which follows officials from the UK Border Agency carrying out their duties in controlling migration into the UK.

This edition included footage of Ms Farwa Wiechmann who had been stopped at Passport Control at Heathrow airport as she had been refused entry to the UK on a previous occasion. Ms Wiechmann was shown being questioned by an immigration

officer of the UK Border Agency about the purpose of her visit. During the footage of the officer's investigation, it was revealed that Ms Wiechmann claimed to be visiting the UK to collect GCSE certificates and to attend a wedding. However, the immigration officer became suspicious of her motives for coming to the UK when he discovered that she had arrived with only £2 in coins, a one-way ticket and a folder containing previous work and banking records. The immigration officer stated that Ms Wiechmann had lived in the UK since 2002, when her father's work permit expired and that she and her family had gone back to Pakistan in 2007 after exhausting the immigration appeals process.

The programme showed Ms Wiechmann being interviewed by the immigration officer. Also, footage of her being scanned by a hand-held metal detector, being fingerprinted and her luggage being searched was included. The programme also included footage of personal documents found in her luggage, such as old salary and bank statements, though any identifying details in the documents were obscured.

The programme concluded with Ms Wiechmann being told by the immigration officer that her entry to the UK had been refused and that she would be returned to Pakistan that evening. The immigration officer was shown explaining to her why this decision had been made and advising her about applying for a visa before trying to gain entry to the UK in the future.

While Ms Wiechmann was not named in the programme, her face was clearly shown and her voice could be heard.

Ms Wiechmann complained to Ofcom that her privacy was unwarrantably infringed in the making and broadcast of the programme.

The Complaint

Ms Wiechmann's case

In summary, Ms Wiechmann complained that her privacy was unwarrantably infringed in the making of the programme in that:

- a) She was filmed without her consent.

Ms Wiechmann said that she was asked at the airport if the cameras could follow her and film her as it was for "research" purposes. She said that the programme makers kept following and filming her despite her repeated requests for them not to. The programme makers also filmed her luggage being searched, which made her feel uncomfortable.

In summary, Ms Wiechmann complained that her privacy was unwarrantably infringed in the broadcast of the programme in that:

- b) Footage of her filmed at the airport was included in the programme without her consent.

Ms Wiechmann said that the programme disclosed her immigration history and footage of her luggage being searched was included. She said that the inclusion of the footage of her in the programme as embarrassing that everyone she knew had seen it.

BSkyB's case

In summary, BSkyB responded to Ms Wiechmann's complaint that her privacy was unwarrantably infringed in the making of the programme as follows:

- a) BSkyB said that Ms Wiechmann did not have a legitimate expectation of privacy in relation to the questioning and investigation by the immigration officer because:
- Ms Wiechmann was in a public place when she was stopped and questioned.
 - The UK Border Agency and the relevant authorities at Heathrow airport had consented to the filming by the programme makers in all the areas accessed by them in making the programme.
 - The immigration officer had a legitimate reason to stop and question Ms Wiechmann, namely the fact that she had been refused entry to the UK on a prior occasion. Further investigation by the immigration officer led to Ms Wiechmann once again being refused entry to the UK.
 - The activities and conversations filmed in relation to Ms Wiechmann were not of such a private nature that filming, even in a public place, could involve an infringement of privacy.

BSkyB said that the programme makers were clearly visible to Ms Wiechmann when filming and she was aware that filming was taking place. It said that it was clear from the unedited footage that the immigration officer explained to Ms Wiechmann that she was not being filmed for a live programme, but was being filmed for a programme that would be shown at a later date.

BSkyB said that Ms Wiechmann did not ask for the filming to stop or express any further concern about the presence of the camera crew until she was informed of the decision to refuse her entry to the UK. BSkyB said that at this point the programme makers had asked her if she was happy for them to film her to which she answered "No – I really don't want it to be filmed at all". The programme's director responded by saying "ok I'll just do the back of you here then". BSkyB said that Ms Wiechmann continued her discussion with the immigration officer and did not raise any further concerns regarding the presence of the camera behind her.

BSkyB said that at no point before or during the filming was there any mention that the filming was for "research" purposes. It said that it was clearly stated by the immigration officer that the filming was "for a programme that was going to happen in August".

BSkyB said that if Ofcom considered that the filming of Ms Wiechmann constituted an infringement of her privacy, that infringement was warranted. BSkyB said that there was a clear public interest in the production of programmes which depict the work of the UK Border Agency and, in particular, portray the situations its officers face. It said that there was also a clear public benefit in highlighting the fact that the UK Border Agency deals with a number of visa issues which result in travellers not being allowed entrance in to the UK. BSkyB said that the public interest in filming Ms Wiechmann outweighed any expectation of privacy that she might have had.

In summary, BSkyB responded to Ms Wiechmann's complaint that her privacy was unwarrantably infringed in the programme as broadcast as follows:

- b) BSkyB said that Ms Wiechmann did not have a legitimate expectation of privacy in relation to the inclusion in the programme of footage of her being questioned and investigated by the Immigration Officer and being refused entry into the UK.

BSkyB said that, in addition to the reasons already given in relation to the filming of the footage (see response at head a) above), it did not consider that Ms Wiechmann had legitimate expectation of privacy with respect to the inclusion of footage of her in the programme for the following reasons:

- Her name was not mentioned in the programme.
- The original footage was carefully edited to ensure that the programme only disclosed Ms Wiechmann's background details to the extent necessary to explain the immigration officer's decision to refuse her entry to the UK and his decision-making process.
- The footage of Ms Wiechmann's luggage being searched was limited to the discovery and examination of a number of documents, the detail of which was obscured. No personal luggage items such as clothes or toiletries were revealed.
- The programme did not accuse Ms Wiechmann of any wrong doing and it was made clear in the programme that if Ms Wiechmann had followed the immigration process more closely she would have been granted entry into the UK.

BSkyB said that the events broadcast were not of such a nature that Ms Wiechmann's consent was required prior to broadcast. It said that Ms Wiechmann had made no attempt, either at the time of filming or prior to first broadcast of the programme, to make known to the programme makers her objections to its broadcast.

BSkyB said that, if Ofcom considered that the inclusion of footage of Ms Wiechmann in the programme constituted an infringement of her privacy, it was warranted as there was a clear public interest in programmes depicting the work of the UK Border Agency and, in particular, portraying the situations they face. There was also a clear public benefit in highlighting the fact that the UK Border Agency deals with a number of visa issues which result in travellers not being allowed entrance in to the UK. BSkyB said that the public interest in including footage of Ms Wiechmann in the programme outweighed any expectation of privacy that she might have had in the circumstances.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of

freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision on Ms Wiechmann's complaint, the Ofcom considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and transcript, both parties written submissions and supporting material including the unedited footage. Ofcom also took into consideration its Broadcasting Code ("the Code").

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code, which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes must be warranted.

- a) Ofcom considered Ms Wiechmann's complaint that her privacy was unwarrantably infringed in the making of the programme in that she was filmed without her consent.

Ofcom took into consideration Practice 8.5 of the Code, which states that any infringement of privacy in the making of a programme should be with the person's consent or be otherwise warranted. It also considered Practice 8.7 of the Code which states that if an individual's privacy is being infringed, and they ask for the filming to be stopped, the broadcaster should do so unless it is warranted to do so.

In considering whether or not Ms Wiechmann's privacy was unwarrantably infringed in the making of the programme, Ofcom first considered whether Ms Wiechmann could have had a legitimate expectation of privacy in the particular circumstances that she was filmed.

In considering the extent of privacy that Ms Wiechmann could have legitimately expected when being filmed, Ofcom distinguished between the areas in the airport in which the filming of her took place. Having watched the unedited footage, Ofcom noted that Ms Wiechmann was filmed in the arrivals area of Terminal 3, Heathrow airport. The filming was conducted openly and in full view of members of the public. Ofcom recognised that while this area may not be readily accessible to the general public, it was accessible to members of the public who had arrived as passengers on flights to the UK. In this particular area of the airport, Ms Wiechmann was filmed being escorted by the immigration officer from the passport control area to collect her luggage from the baggage reclaim hall and then to the HM Customs area to have her luggage searched. Ms Wiechmann was also filmed being escorted through the arrivals area to the departures area after being told that she would be returned to Pakistan.

Ofcom recognises that there can be circumstances where an individual can legitimately expect privacy even in a public place or a place where the public have limited access. In the particular circumstances of this case, Ofcom considered that despite the semi-public setting in which the filming took place in

the arrivals area, the sensitive and personal nature of what was being filmed afforded Ms Wiechmann with an expectation of privacy.

Ms Wiechmann was also filmed in a number of rooms that were away from the main arrivals area and that are only accessible by authorised immigration and airport personnel. In these rooms in which access was restricted, Ofcom noted that Ms Wiechmann was filmed being photographed, fingerprinted and scanned with a hand-held metal detector by airport security personnel. Ms Wiechmann was also filmed being questioned and formally interviewed by the immigration officer before being told that her entry to the UK had been refused and that she would be returned to Pakistan on the next available flight. Ofcom also noted that Ms Wiechmann's personal employment and bank related documents were filmed and that her immigration history and that of her family was discussed by the immigration officer with the programme makers and his colleagues. In these circumstances, Ofcom considered that Ms Wiechmann was filmed while in a sensitive situation and that the footage recorded included material of a personal and sensitive nature. Ofcom took the view that since these rooms were not accessible to the public and access to them was restricted to only authorised immigration and airport personnel, and the nature of what was filmed was of a sensitive and personal nature, Ms Wiechmann had a legitimate expectation of privacy in these particular circumstances.

Ofcom concluded, therefore, that the filming of Ms Wiechmann in these circumstances was intrusive into her private life and that she had a legitimate expectation of privacy in relation to being filmed in these circumstances for a television programme.

Given this conclusion, Ofcom then assessed whether the programme makers had secured Ms Wiechmann's consent for the footage of her to be filmed.

Ofcom acknowledged that the programme makers had the consent of the airport authorities and the UK Border Agency to film. Ofcom noted that Ms Wiechmann had been filmed openly and that the programme makers had not concealed the fact they were filming her. It noted from the unedited footage the following exchange between Ms Wiechmann and the immigration officer before her luggage was searched and her case investigated:

Ms Wiechmann: "Erm, these cameras, are they on TV or something?"

Officer: "It's not, what it is purely...it's not now it's not live or anything...it's for a programme that's going to happen in August about here it's been commissioned by the Home Office and it's all about the Immigration Service and stuff like that."

Ms Wiechmann: "Ah ok."

Officer: "Yeah so don't worry. I'll make sure they get your good side."

Ofcom acknowledged the broadcaster's clarification in its submissions that the series, *UK Border Force*, was in fact commissioned by BSkyB and not by the Home Office, as stated by the immigration officer. It also noted that Ms Wiechmann did not raise any objection to being filmed either to the immigration officer or to the programme makers until sometime later when she was informed by the immigration officer at the end of the investigation process that she would

be refused entry to the UK. Ofcom took note of the following exchange between the programme makers and Ms Wiechmann at this point:

Director: "Are you ok for me to film this bit?"

Ms Wiechmann: "No, I really don't want it to be filmed at all."

Director: "Oh, ok I'll just do the back of you here then."

Ofcom noted that Ms Wiechmann, again, did not raise any further objections to the presence of the camera behind her.

Before Ofcom addressed the issue of whether Ms Wiechmann's consent was secured by the programme makers, it considered the extent of privacy that Ms Wiechmann could have expected in relation to the filming of her after she told the programme makers that "No, I really don't want to be filmed at all".

Ofcom noted that Ms Wiechmann had enquired about the nature and purpose of the filming only to be informed incorrectly by the immigration officer that it was for a programme commissioned by the Home Office. It also noted that the programme makers made no attempt to correct this error or to ensure that Ms Wiechmann knew that the filming was for a general factual programme. In Ofcom's view, although Ms Wiechmann had been informed incorrectly by the immigration officer that the filming was for a programme commissioned by the Home Office, she was, nevertheless, aware that she was being filmed and at this point she had not raised any objection to being filmed.

Ofcom went on to note that when the programme makers eventually asked Ms Wiechmann directly whether she was happy for them to film her, she made it clear to them that "No, I really don't want to be filmed at all". Ofcom noted that the programme makers had responded by telling her that "Oh OK, I'll just do the back of you here then". In Ofcom's view, Ms Wiechmann's comment was unequivocal and that the programme makers' response was such that at this point her expectation of privacy that she would not be filmed in these circumstances, given the assurance of the programme maker, was significantly raised.

Taking all the factors given above into account and looking at the particular circumstances, Ofcom considered that Ms Wiechmann had a legitimate expectation of privacy in relation to being filmed in both parts of the airport (i.e. the arrivals area and the separate room where she was interviewed further) and that filming took place without the programme makers having secured her consent.

Ofcom then went on to consider the broadcaster's competing right to freedom of expression and the public interest in examining the work of the UK Border Agency and the situations faced by its immigration officers at the UK's border entry points. In the particular circumstances of this case, Ofcom considered that the need for programme makers to film while events were unfolding made it difficult for them to gain Ms Wiechmann's consent while filming her. Furthermore, it took the view that it would be undesirable for programme makers to be unduly constrained in circumstances such as these where they would be unable to obtain material consent because it could not be gained from those involved prior to filming taking place. In these circumstances, Ofcom considers that what is important is that the broadcaster takes steps to ensure that the subsequent broadcast of material filmed in such circumstances does not result in an

unwarranted infringement of privacy. This issue is dealt with in the decision at head b) below.

Having taken into account all the factors above, Ofcom considered that the broadcaster's right to freedom of expression and to receive and impart information and ideas without interference, in these particular circumstances, outweighed Ms Wiechmann's legitimate expectation of privacy in relation to being filmed in the circumstances.

Ofcom therefore found that there was no unwarranted infringement of Ms Wiechmann's privacy in the making of the programme.

- b) Ofcom considered Ms Wiechmann's complaint that her privacy was unwarrantably infringed in the programme as broadcast in that footage of her was included in the programme without her consent.

Ofcom took into consideration Practice 8.6 of the Code, which states that if the broadcast of a programme would infringe the privacy of a person, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

In considering whether Ms Wiechmann's privacy was unwarrantably infringed in the programme as broadcast, Ofcom first considered the extent to which she could have expected that the footage of her filmed at the airport (including images of her face, footage of her being searched and fingerprinted, as well as information pertaining to her and her family's immigration history) would not be broadcast.

Ofcom noted that the footage of Ms Wiechmann included in the programme had been filmed openly and with her knowledge by the programme makers at Heathrow airport while following an immigration officer as he carried out an investigation into the purpose of her visit to the UK. It noted that Ms Wiechmann's face was shown clearly and unobscured in the programme and that her voice was heard. Ofcom also noted that the programme disclosed information about her immigration history and that of her family. Ofcom considered that Ms Wiechmann was identifiable from this footage included in the programme.

Ofcom also noted that Ms Wiechmann was included in the programme in circumstances where she was being investigated by an immigration officer about the purpose of her visit to the UK. It noted that footage of her luggage being searched was included in the programme, along with footage of her being searched by a hand-held metal detector and having her fingerprints and photograph taken. Ofcom took note that footage of Ms Wiechmann's formal interview with the immigration officer and her being told that her entry to the UK was going to be refused was also included in the programme. Ofcom also noted BSKyB's submission that Ms Wiechmann was not named in the programme and that the footage had been edited to ensure that only background information necessary to explain the decision to refuse her entry to the UK. It noted, too, that the broadcaster stated that the footage of her luggage being searched was limited and the detail of the documents was obscured. Ofcom also noted that BSKyB acknowledged that Ms Wiechmann was not accused in the programme of any wrongdoing. Ofcom considered that the footage of Ms Wiechmann showed her in a particularly vulnerable state and in a sensitive situation. It concluded that that the broadcast of Ms Wiechmann in these circumstances revealed personal information about her and that she had a legitimate expectation of privacy that

this information would not be disclosed in the broadcast to a wider audience in a television programme.

Having found that Ms Wiechmann had a legitimate expectation of privacy in that the footage of her filmed at the airport would not be broadcast to a wider audience in a television programme, Ofcom then assessed whether her consent had been obtained before the footage was broadcast.

Before Ofcom addressed the issue of whether Ms Wiechmann's consent was secured by the programme makers, it considered the extent of privacy that Ms Wiechmann could have expected that the footage of her filmed after she told the programme makers that "No, I really don't want to be filmed at all" being broadcast in the programme.

Ofcom considered that Ms Wiechmann was filmed while in a sensitive situation and that the footage recorded included material of a personal and sensitive nature. As noted in head a) of the Decision above, Ofcom took the view that Ms Wiechmann's comment that "No, I really don't want to be filmed at all" was unequivocal and that the programme makers' response that they would only film from "the back of you here then" was such that at this point her expectation of privacy that the footage of her would not be broadcast was significantly raised.

In Ofcom's view, Ms Wiechmann's comments were unequivocal and that they should have alerted the programme makers to the fact that her consent had not been secured. Ofcom considered that Ms Wiechmann had an expectation of privacy in relation to the information about her that was broadcast and that, given the personal and sensitive nature of the information disclosed, her consent should have been obtained prior to broadcast.

Taking all the factors given above into account, Ofcom considered that Ms Wiechmann had a legitimate expectation of privacy that the footage of her would not be broadcast to a wider audience in a television programme.

Ofcom then went on to consider the broadcaster's competing right to freedom of expression and the public interest in examining the work of the UK Border Agency and the audience's right to receive information and ideas without unnecessary interference. Ofcom considered whether, in the circumstances, there was a sufficient public interest to justify the intrusion into Ms Wiechmann's private life.

Ofcom noted that the public interest justification given by BSkyB in its submission was not in exposing crime, or wrongdoing on Ms Wiechmann's part, but merely that there was a public interest in showing the work of the UK Border Agency. Ofcom recognised that there may be some public interest in following the work of members of the UK Border Agency in carrying out their duties and the situations faced by its immigration officers at the UK's border entry points. Ofcom also recognised that the inclusion of the footage of Ms Wiechmann was an effective way of illustrating one of the situations that immigration officers face in carrying out their duties. However, it considered that the broadcaster's right to freedom of expression to include the of unobscured footage of Ms Wiechmann in a vulnerable and sensitive situation being interviewed, fingerprinted and her luggage searched did not outweigh her right to privacy in such circumstances.

On balance, and in the particular circumstances of this complaint, Ofcom concluded that the public interest in showing the work of the UK Border Agency

did not justify the significant intrusion into Ms Wiechmann's private life. Ofcom therefore found that Ms Wiechmann's privacy was unwarrantably infringed in the programme as broadcast.

Accordingly, Ofcom has upheld Ms Wiechmann's complaint that her privacy was unwarrantably infringed in the programme as broadcast. However, Ofcom has not upheld Ms Wiechmann's complaint of unwarranted infringement of privacy in the making of the programme.

Not Upheld

Complaint by Cereal Partners UK (“Nestlé”)

Dispatches: What’s In Your Breakfast?, Channel 4, 26 October 2009

Summary: Ofcom has not upheld this complaint of unfair treatment made by Nestlé.

Channel 4 broadcast an edition of its documentary series *Dispatches*, entitled *What’s In Your Breakfast?* The programme looked at the nutritional content of breakfast products, including levels of salt and sugar, and the marketing techniques used by the industry, in particular health claims used by manufacturers to sell their breakfast cereals, drinks and bars.

The reporter looked at the evidence to support some of the health claims made by a range of products, and at the content of some breakfast cereals. She also looked at the proposed rules governing the claims that were permitted for products, by baking a cake that would be allowed to make a number of what she described as health claims. The reporter also looked at some products endorsed by HEART UK, a cholesterol charity, and questioned the system of endorsements. Additionally, the programme featured the Clucas family, who experimented with changing their breakfast habits and moving away from the breakfast cereals they were used to having. Nestlé cereals were mentioned in the programme, and the company was referred to.

Nestlé complained that it was treated unfairly in the programme as broadcast.

In summary, Ofcom found the following:

- The programme did not unfairly portray Nestlé as manufacturing products that were bad for health, of making misleading health and nutrition claims in its packaging, or of targeting children inappropriately;
- It was not unfair to Nestlé for the programme, in its discussion of salt and sugar content, to omit to refer to fat and energy levels in the different products featured;
- There was no suggestion in the programme that parents should replace breakfast cereals with chocolate cake or jam doughnuts;
- The programme did not unfairly imply that Heart UK’s endorsement of Nestlé’s products was inappropriate;
- Because no significant allegations of wrongdoing were made about Nestlé in the programme, there was no requirement for the programme makers to offer it a timely and appropriate opportunity to respond to the programme’s contents.

Introduction

On 26 October 2009, Channel 4 broadcast an edition of its documentary series *Dispatches*, entitled *What’s In Your Breakfast?* The programme looked at the nutritional content of breakfast products, including levels of salt and sugar, and at the marketing techniques used by the industry, in particular health claims used by manufacturers to sell their breakfast cereals, drinks and bars.

The reporter questioned whether there was evidence to support the health claims made by some of the products and whether consumers were able to assess the content of products. She looked at the evidence to support some of the claims made and at the content of some breakfast cereals. She looked at the proposed rules on the claims that could be made for products, by baking a cake that would be allowed to make a number of health claims. The reporter also looked at some products endorsed by HEART UK, a cholesterol charity, and questioned the system of endorsements.

Some of the products featured in the programme were made by Nestlé and the company was referred to in the programme.

Cereal Partners UK (“Nestlé”), a Nestlé-related entity which produces and sells Nestlé-branded breakfast cereals in the UK, complained to Ofcom that it was treated unfairly in the programme as broadcast.

The Complaint

Nestlé’s case

In summary, Nestlé complained that it was treated unfairly in the broadcast in that:

- a) The company was unfairly portrayed in that the programme in that:
 - i) The programme included unfair and unsubstantiated allegations that Nestlé makes misleading content, nutrition or health claims in relation to breakfast cereal products. The programme omitted relevant information in that it failed to refer to the fact that all claims on Nestlé products are supported by scientific substantiation, that there are no misleading claims on any Nestlé cereal products and that Nestlé complies fully with all applicable laws and regulations.
 - ii) The programme unfairly included allegations in respect of the salt and sugar content of Nestlé breakfast cereal products, but failed to give due consideration to other key health factors, such as fat and energy. In particular:
 - The commentary said that *“Dispatches wanted to see what food companies will be able to get away with under the proposed rules”* and showed a chocolate cake being made that was claimed to contain less salt and sugar than some of the most popular breakfast cereals. Nestlé said that the proposed rules referred to were draft versions of the Nutrient Profile guidelines issued by the European Commission relating to the use of nutrition and health claims on food. Based on the last draft of the guidelines, which were still under discussion, the cake made on the programme would be categorised in a different class than breakfast cereals. The programme therefore, compared two food products that were not in the same category under anticipated or current Nutrient Profiles regimes.
 - In a section that showed a box of Nestlé Shreddies, the programme unfairly implied that parents would be giving children a more healthy breakfast if they were to give them a jam doughnut or chocolate cake rather than some of the cereals featured in the programme. This was despite the fact that jam doughnuts and chocolate cake contain more saturated fats and less fibre than Nestlé cereals. It was unfair for the

programme to ignore the fat content and other nutrients of the products and to suggest that parents would do better to replace cereals with chocolate cake or doughnuts.

- iii) The programme unfairly alleged that Nestlé inappropriately targeted children and schools in its marketing and advertising activities. The programme alleged that a number of brands, including Nestlé Shreddies, had sites targeted directly at children and included a serious and specific allegation that Nestlé was circumventing the rules regarding advertising foods to children. In particular, the programme unfairly alleged that:
- The Nestlé “box tops for books” and Nestlé Shreddies “knitted by nanas” websites inappropriately targeted children.
 - Nestlé had been underhand by “twisting” the Food Standards Agency Eat Well plate for the Phunky Foods educational worksheet. In fact Nestlé had never had any involvement with the Phunky Foods educational material nor had it stated, as the programme alleged, that had it made any statement that consumers should make sure their breakfast contained some fat and sugary foods.
- iv) The programme unfairly alleged that it was inappropriate for Nestlé products to carry the HEART UK logo. The programme claimed that the HEART UK logo was a misleading marketing practice as accreditations appeared to be directly linked to corporate relationships between charities and manufacturers, with financial incentives as the key factor rather than genuine, nutritional claims about the breakfast cereals concerned. In fact the HEART UK logo only appeared on two Nestlé cereals, Shredded Wheat and Shredded Wheat Bitesize, both of which were made with 100% whole grain wheat and the health relationships between wheat and components of wheat and their contribution to healthy cholesterol levels were supported by widely accepted scientific evidence.
- b) The general commentary throughout the programme unfairly and consistently gave the negative impression that Nestlé sold products that were bad for health or worse. These emotive and serious allegations, particularly in relation to children, were unsubstantiated.

In particular, Nestlé said that the programme had asserted that Nestlé sold “*rotten products*”, “*shovel[s] sugar into children*” and passes on “*whatever dodgy information to kids that companies think they can get away with*”.

- c) Nestlé was not given an appropriate and timely opportunity to respond to the allegations made in the programme, as set out under complaint heads a) and b) above. The programme makers’ only communication with Nestlé prior to broadcast was to ask Nestlé to provide comments on the particular issues of Nestlé’s relationship with HEART UK, Nestlé’s use of the HEART UK logo and related sales figures. The programme makers gave Nestlé no prior indication of the true nature and scope of the serious and significant allegations made in relation to cereal manufacturers and Nestlé products.

Channel 4’s case

In summary and by way of background, Channel 4 said that the programme approached the question of consumer understanding about the contents of breakfast

cereals by combining factual information about the levels of salt and sugar in various products with anecdotal and personal observations from ordinary consumers. The programme's purpose was to examine consumer perceptions of breakfast cereals and to encourage viewers to look beyond the images established by the marketing and packaging of commercially available products to properly and carefully consider the specific ingredients in the cereal prior to purchase. Its central theme was that consumers frequently held assumptions about products which did not accord with their nutritional content but the programme was not a forensic examination of the nutritional values of breakfast cereals.

Channel 4 added that the programme was *not* about Nestlé's products or policies specifically; they were mentioned in the programme, but all references were sourced from information made publicly available by Nestlé themselves. Where Nestlé products featured in the programme, it was not in an examination of their nutritional value but through consumer trials or perception tests. Nestlé products also appeared when the programme was looking at the overall impression given to the consumer by products' packaging. The programme assumed that claims made on packaging, including Nestlé products, were true and considered how that affected consumers. The programme showed that consumer expectations and perceptions, based on accurate or accepted claims made on the packaging, were wrong in some cases.

In summary, Channel 4 responded to Nestlé's specific complaints of unfairness as follows:

a) *Unfair portrayal*

i) *Unfair and unsubstantiated allegations and omission of relevant information*

Channel 4 said that the programme did not say that Nestlé made misleading content, nutrition or health claims in relation to its breakfast products. As the programme made no allegations, it was neither necessary nor helpful to state that "all claims on Nestlé products are supported by scientific substantiation". Channel 4 said that the programme makers did not know whether that was true and that the term had no appreciable meaning.

Channel 4 said that the programme demonstrated the fact that consumers could be misled by the accurate words used to describe, market or brand breakfast cereals: once when teachers and parents were asked, by reference to the actual packaging, to rank cereals in terms of their salt and sugar content; once when members of the public were invited to take part in blind tasting of comparable cereals; and again when members of the public were asked to comment on the likely content of the box containing the *Dispatches* chocolate cake. Each time the underlying theme of the programme was established, namely that consumers' perceptions about breakfast cereals might cause them to be ignorant of the sugar and salt content, despite the actual nutritional labelling on the packaging.

Channel 4 said that it appeared likely that Nestlé's packaging could breach the Consumer Protection from Unfair Trading Regulations, and in the light of those Regulations the programme could not have included a statement such as that Nestlé said was omitted, because it was not in a position to verify whether a statement that Nestlé complied fully with all applicable laws and regulations was accurate.

ii) *Unfair allegations about salt and sugar content and failure to consider other key health factors*

Channel 4 maintained that Nestlé's complaint of unfairness was in fact not one about the absence of fairness or accuracy, but rather an expression of the company's desire that their "spin" on the subjects covered in the programme be included [which was not a requirement of the Broadcasting Code]. Nestlé did not claim that any facts stated in the programme about its products' content were false and so there was no need for any qualifying or explanatory statement. To tell viewers about the comparative fat content would have done nothing to illuminate the question of comparative sugar or salt content.

Channel 4 described the point of this segment of the programme as explaining to viewers how much sugar the cake contained, and demonstrating that claims could be made about the cake that may not be truly reflective of its contents. In this context, it was relevant for the viewer to understand the other kinds of products which had similar levels of sugar (and salt) so that the viewer could consider the claims made by that product or those products in the light of the information about sugar (and salt).

As regards the *Dispatches* cake, Channel 4 said that this part of the programme did not concern nutrition, but looked at marketing claims and the relationship between concepts created about products and their actual contents: consumers might be surprised to learn that a chocolate cake contained less sugar or salt than some of the breakfast cereals that they perceived as being healthy eating choices. Draft European Union regulations proposed that maximum limits of salt, sugar and fat should be set and that where products exceeded those thresholds, they would not be permitted to make health and nutrition claims. The *Dispatches* cake was made so that its constituent parts would not exceed the proposed threshold for cereals and it was therefore appropriate for it to be used in comparison with cereals.

In response to the complaint that the programme suggested that it would be healthier to give a child a jam doughnut than some of the cereals featured in the programme, Channel 4 said the programme did not suggest or imply that parents who gave their children a jam doughnut or chocolate cake would be giving their children a healthier breakfast than Nestlé Shreddies. It pointed out that the relevant section of the programme included a statement by the presenter that *"Health professionals have fought long and hard to force manufacturers to cut back on the salt and sugar in breakfast cereals but [...] three quarters of the most popular children's cereals still have as much sugar per serving as a jam doughnut"*. This was then followed by a statement by Professor Philip James that: *"It really is quite atrocious that we have now developed a society that expects to shovel sugar into children"*.

Channel 4 said that Nestlé was not mentioned in this section of the programme, and that Professor James was referring to what "society" expected to do, rather than to any intentions on the part of specific cereal manufacturers. Channel 4 said that Professor James's comments were intended to make the point that society assumed that high quantities of sugar were necessary for children to acquiesce to having breakfast, and that people did not question the levels of sugar present in cereals. The programme did not suggest or imply that parents would be better replacing cereals with doughnuts or chocolate cake.

iii) *Targeting children*

Channel 4 agreed that the programme stated that Nestlé was deliberately targeting children and said that Nestlé did not dispute that it deliberately targeted

children or that this was done as part of a branding exercise. The word “inappropriate” was not used in this section of the programme, which did not allege that Nestlé inappropriately targeted children. Nor did the programme allege that Nestlé circumvented the regulations regarding advertising foods to children.

Channel 4 said that the programme stated a number of relevant facts, namely that regulations were passed to prevent the advertising on television of certain foods during specified children’s television slots; cereal manufacturers comply with those regulations; at the same time cereal manufacturers advertise their products on television when high numbers of children were known to be watching, used the internet (which is almost completely unregulated) to market to and increase brand awareness in children and engage in other branding and awareness campaigns. Nestlé had not denied these facts.

Channel 4 said this section of the programme was intended to show how food manufacturers continued to reach children through branding following the banning of certain types of advertising during children’s television programming, in order to keep their products at the forefront of children’s experiences. This was followed by a sequence in which children were asked about cereal packaging and their preferences for cereal. Channel 4 said that the points made in the programme about Nestlé’s branding projects were true and valid.

As regards the “box tops for books” website, Channel 4 said that the word “inappropriate” was not used and that the programme stated facts about the website. Head teacher Rob Earrey gave his opinion in the programme that two of the objects of the “box tops for books” scheme were the changing of shopping habits and to appeal to children who would see buying Nestlé products as doing something good for their school. These opinions accorded with the purpose of the Nestlé website and there was nothing unfair in them.

With reference to the “knitting for nanas” website, Channel 4 said that the word “inappropriate” did not appear in the sequence. Channel 4 said that it was “somewhat farcical” for Nestlé to suggest that the website was targeted at over 16s, as the content and terms and conditions of the website clearly contemplated use by under 16s.

Channel 4 said that it was untrue that Nestlé had never had any involvement with the Phunky Foods educational material, which carried the Nestlé logo. The programme pointed out that Nestlé had taken flak in 2008 because of its involvement with Phunky Foods and viewers heard from one of the campaigners (Professor Winkler) who argued, successfully, for the Phunky Foods website to be changed. Channel 4 also said that Nestlé did not assert that the programme’s criticisms of the Phunky Foods material were inaccurate. Nestlé did not dispute that the Phunky Foods sheet stated that children should ensure that their breakfast contained some sugary and fatty foods, that the Food Standards Agency (“FSA”) Eatwell plate was mis-used by Phunky Foods, that Phunky Foods twisted the FSA message to suit its purpose or that, following the campaign, the Phunky Foods material was changed so that the FSA Eatwell plate was not misused in it.

Channel 4 also pointed out that, in his interview, Professor Winkler made clear that Nestlé was likely to suffer harm because it did not have editorial control over the worksheet.

iv) *Heart UK*

Channel 4 said that the programme did not carry any suggestions that there was no sound scientific or other basis for HEART UK's endorsement of Shredded Wheat or Shredded Wheat Bitesize or that the use of the HEART UK was a misleading marketing practice. Fleeting images of the HEART UK endorsement of Shredded Wheat were shown at the beginning of this section of the programme, so as to establish the context of a discussion of the propensity of HEART UK's endorsement to mislead consumers. Nothing detrimental was said about Nestlé products.

Channel 4 said that the issues raised in this section of the programme related to HEART UK and the extent to which its endorsement of products could be misleading and what the public was to make of the endorsements. The issues raised did not concern Nestlé.

b) *Negative impression given by the programme's commentary*

Channel 4 said that at no time did the programme accuse Nestlé of selling products that were "bad for health or worse". As regards the specific commentary referred to by Nestlé in its detailed complaint, Channel 4 said that there was no allegation that Nestlé was "shovelling sugar into children". It pointed out that the relevant section of the programme included a statement by the presenter that "*Health professionals have fought long and hard to force manufacturers to cut back on the salt and sugar in breakfast cereals but [...] three quarters of the most popular children's cereals still have as much sugar per serving as a jam doughnut*". This was then followed by a statement by Professor Philip James that: "*It really is quite atrocious that we have now developed a society that expects to shovel sugar into children*". This section of the programme did not refer to Nestlé and was non-specific about which cereals were the worst offenders. In view of this, Professor James' reference to "*a society that wants to shovel sugar into children*" did not concern Nestlé or its products.

As regards the reference to "*rotten products*", Channel 4 said that the relevant commentary stated:

"For the grid we have used the Food Standards Agency's traffic light scheme which helps consumers identify the salt, sugar and fat levels in food. Red for high, amber for medium and green for low. But nearly all food manufacturers have rejected the scheme".

There then followed a statement from Professor James, who said that a traffic light system was not attractive to "*those companies producing rotten products*" and that such companies "*are working like crazy ... to sabotage the development of traffic lights*". The programme narration then said: "*Cereals makers Kellogg's and Nestlé argue that their existing labelling works well*".

Channel 4 said that there was no serious allegation about Nestlé in this respect and that the programme did not suggest that Nestlé sold "*rotten products*". The programme contained two factual statements: that nearly all the leading food manufacturers had rejected the FSA's traffic light scheme; and that Nestlé supported their existing labelling. Moreover, the programme dealt with the reason for Nestlé's resistance to the scheme – which is based on appropriate portion sizes – by indicating that food manufacturers' alternative labelling schemes were potentially confusing to consumers because they relied on a non-existent uniform

industry concept of “portion size”. The programme compared consumers gauging information from packets with and without the FSA system to show that consumers themselves were less concerned with portion size than with ease of understanding the information provided by the FSA system.

Channel 4 said that the third relevant part of the programme, which dealt with targeting marketing at children, did not state that Nestlé passed on “*whatever dodgy information to kids that it thinks [it] can get away with*”. The programme stated that regulations were passed to prevent the advertising on television of certain food during specified children’s television; that cereal manufacturers complied with those regulations and at the same time advertised their products on television at times when high numbers of children were known to be watching, used the internet to market and increase brand awareness of their products in children and engaged in other branding and awareness campaigns. These were facts that were not denied by Nestlé. Channel 4 said that the point being made in the programme was that Nestlé spent vast amounts of money to ensure that its brand was kept in the forefront of children’s experiences. Nestlé did not deny that this was the case.

c) *Opportunity to respond*

In respect of Nestlé’s opportunity to respond to allegations in the programme, Channel 4 said that, as already stated, no serious allegations had been made about Nestlé in the programme. This meant that Practice 7.11 of the Code, which stipulates that if a programme makes serious allegations, those concerned should normally be given an appropriate and timely opportunity to respond, did not apply. However, Channel 4 said that in sections of the programme where it was appropriate to represent Nestlé’s views, the programme had done so. Channel 4 also said that, despite the complainant’s belief, Nestlé could not be described as a “contributor” to the programme.

Nestlé’s comments on Channel 4’s response

General comments

In response to Channel 4’s general comments, Nestlé disagreed with the premise that the programme did not make allegations against Nestlé in cases where it did not expressly refer to Nestlé by name or show an image of a Nestlé product. Nestlé said their products were heavily featured in the programme and viewers were likely to understand, in the absence of clarification, references to “*the most popular children’s cereals*” as relating to Nestlé’s products. Nestlé said that key sections of the programme should not be considered in isolation, but rather that the overall impression created by the programme was key. Nestlé provided several examples, including:

Where the programme referred to “*rotten products*”, Nestlé said that the allegation was clearly directed at companies who did not support the traffic lights system; Nestlé was referred to immediately afterwards, and the impression was thus that Nestlé sold rotten products.

In response to Channel 4’s insistence that the programme did not say that Nestlé made misleading content, nutrition or health claims in relation to its breakfast products, Nestlé said that the whole purpose of the programme was to highlight what it considered to be examples of misleading marketing by Nestlé and others. Nestlé considered that Channel 4’s own statement, which said that the programme “*does*

make the point that the ordinary consumer may be misled by the words used by cereal manufacturers,” and “the programme demonstrated ... the fact that consumers may be misled”, demonstrated that the programme makers were accusing it of making misleading claims. Moreover, said Nestlé, the programme itself stated: *“We’re really concerned ... it would actually open the door to a lot more products potentially misleading consumers about being healthy.”* It was also untrue to state that the programme did not concern nutritional values because the healthiness or otherwise of breakfast cereals was linked to nutritional values.

Nestlé disagreed with Channel 4’s assertion that all of the statements made in the programme were “undisputed fact”. Nestlé said that it had not sought to dispute every single incorrect statement in the programme but, had it been consulted, it would have provided Channel 4 with information that had been omitted in the programme. It was Channel 4’s responsibility to consult Nestlé to ensure that facts were not presented unfairly.

Nestlé disputed the suggestion that any response it gave would have been a “company line” and said that this claim by Channel 4 demonstrated bias against Nestlé.

Specific comments

Specifically, in response to head a) i) Nestlé refuted any suggestion that it was in breach of the Consumer Protection from Unfair Trading Regulations.

Specifically, in response to Channel 4’s comments on head a) ii), Nestlé stated that even if the cake was in fact made to be within the draft cereal guidelines, it believed the statements used in the relevant passage of the programme were far more general (*“so like a 30g piece of cake”*). Nestlé believed that this would have conveyed to the viewer the message that this was a typical chocolate cake which could be found in any shop, indeed a “rich chocolately cake”.

Specifically, in response to Channel 4’s comments on head a) iii) of its complaint, which dealt with the targeting of products to children, Nestlé said:

Nestlé stated that, in relation to targeting children, it does not specifically target children in advertising; its target market is mothers, who typically make purchases.

PhunkyFoods

- It was false to state that Nestlé produced the PhunkyFoods sheet. Nestlé informed Channel 4 that this was not the case, but was not given the opportunity to explain the precise arrangements the manufacturer has with Purely Nutrition, the company that runs PhunkyFoods. Both are totally independent entities from Nestlé.
- Copies of post-broadcast correspondence between Purely Nutrition and Channel 4 showed that Channel 4 made false and misleading statements regarding the target market of the PhunkyFoods website and the information contained in the “my balanced breakfast” worksheet, as well as demonstrating that Nestlé has no involvement with and takes no responsibility for the content of the material.
- The programme claimed that Nestlé, not PhunkyFoods, had twisted the “Eatwell plate”, which was denied by Nestlé, who did not further feel it appropriate to

respond to accusations about another entity when that entity itself provided its own response.

- The Nestlé logo does appear on the PhunkyFoods website but this merely indicates that Nestlé as a brand (rather than any of its individual products) sponsors the site: the worksheets used by children do not carry any Nestlé branding.

Knitted by Nanas

- The website is not designed specifically to target under 16s but it is fair to say that under 16s may access the site (although parental permission is encouraged).
- The games and content are aimed at a broad spectrum of people, including “nanas”.
- Nestlé Shreddies is not classed as HFSS and therefore not subject to the same advertising restrictions.

Box Top for Books

- The scheme is aimed specifically at schools, and the related website is an aid for parents, teachers and coordinators – this is made clear from the landing page which directs only these people to areas of the site designed for them;
- The tokens are placed on the top of boxes, therefore less likely to be seen by children;
- The Goldilocks activity worksheet (supplied by Channel 4 in its submission) does not refer to particular cereals but only to a range of breakfast alternatives; porridge, the traditional breakfast associated with the story, is of course a breakfast food containing cereals;
- It was unfair not to allow Nestlé to explain the purpose and benefits of the scheme in the programme.

Specifically in relation to Channel 4’s comments on head a) iv) of its complaint, Nestlé said that it was not tenable to suggest that there was nothing detrimental to Nestlé in programme’s criticisms of Heart UK, because the criticism cast doubt on the healthiness of Nestlé’s product (given that the programme included a direct reference to Shredded Wheat).

Specifically, in response to Channel 4’s comments on head b) of its complaint, Nestlé said it was unclear how the broadcaster could deny that the programme accused Nestlé of selling products that were “bad for health or worse”: the programme began by saying it “*all looks so healthy*”, and then went on to set out all the reasons why this notion was misleading (largely because of sugar content).

Channel 4’s final comments

General comments

Channel 4 reiterated that the programme was not about Nestlé’s products, and that viewers would have been able to understand that it contained distinct and separate

parts and keep those distinct parts separate in their minds. The crux of the programme was that health messages such as “source of fibre”, “fortified with vitamins” and similar, while defensible in their own right, did not reveal the whole picture about a wide range of breakfast cereals (in the relevant section, said Channel 4, 32 products were shown of which only 4 were Nestlé products).

In response to Nestlé’s comments about “misleading” claims, Channel 4 said that the only reference to such claims came in a section about Welch’s Purple Grape Juice, plant-based Omega 3 and Actimel. Just because the word “misleading” might have appeared in one context in one aspect of the programme did not mean that this word would have applied to each entity referred to in that programme. Channel 4 drew a distinction between being misled by “health claims” and being misled about and by words, or the positioning of words, or the attractiveness of packaging, or a combination of words, colours and phrases on a cereal packet. Nestlé was never accused in the programme of misleading consumers about “health claims”.

Channel 4 said it had never claimed that the entire content of the programme was undisputed fact; however, it did not believe that any of the factual statements made in the programme about Nestlé resulted in material unfairness to the manufacturer. In response to Nestlé’s comments about its “company line”, Channel 4 said that this description was applied only to Nestlé’s post-broadcast responses and not to any response it might have given.

Specific comments

Specifically, in response to Nestlé’s comments on head a) iii) of its complaint, which dealt with the targeting of products to children, Channel 4 said:

- Nestlé was not adversely affected in any material sense by the PhunkyFoods section of the programme.
- Channel 4 added that it was neither necessary nor relevant to explain whether Nestlé’s Shreddies was or was not an HFSS food.
- While porridge may contain cereals, it is not a “cereal” as that term is used in the programme.

Specifically, in response to Nestlé’s comments in respect of its response to head a) iv) of the complaint, Channel 4 said that the programme was about the potential for Heart UK’s endorsement to mislead consumers, but not in reference to any Nestlé product. Channel 4 added that the programme contained only a fleeting image of Shredded Wheat for context.

Decision

Ofcom’s statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the

principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and a transcript and both parties' written submissions.

In considering this part of the complaint Ofcom took account of Rule 7.1 of the Code, which provides that broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes. Ofcom also considered Practice 7.9, which provides that before broadcasting a factual programme, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to the individual or organisation.

a) i) *Unfair and unsubstantiated allegations and omission of relevant information*

Ofcom first considered the complaints that the programme included unfair and unsubstantiated allegations that Nestlé makes misleading content, nutrition or health claims in relation to breakfast cereal products, and that the programme omitted relevant information.

Ofcom noted that the programme's stated aim, as set out in its introduction was to: "*investigate the multi-billion pound industry behind the most important meal of the day*", to "*reveal what's really in your breakfast*". The programme also set out to examine the application of new European legislation intended to "*curb extravagant health claims*" and to "*reveal how big food companies still manage to target sugary cereals at our children – in spite of rules to stop them*". Ofcom noted that, as well as dealing with breakfast cereals, the programme specifically examined the evidential basis for the claimed health benefits of antioxidants and probiotics. However, in relation to the cereals, one of the key themes of the programme was set out at its beginning:

"Medical experts and regulators have campaigned on our behalf against sugary cereals with salt in them – with some success, but the manufacturers have changed tactics. They've now embraced our health concerns and are now marketing their products as positively good for us. The victim? The confused consumer".

This theme was developed throughout the programme in sequences that gave examples of what it considered to be health marketing messages. For example, during a montage showing eight different cereal packs, the presenter said:

"Take a look at the imagery on these cereal packs – it all looks so healthy."

This statement was followed by a list of health-related claims on breakfast cereal packs, such as "fortified with vitamins" and "source of fibre". The programme then included an interview with Which? Chief Policy Advisor, Sue Davies, who said:

"People use them as an easy way of identifying what are healthier products and so they expect that that is what it says and unfortunately we've often found that when we look at the claim or we look at the nutritional information in more detail products aren't always what they seem".

The presenter then gave an example of a cereal, Honey Cheerios, that she gives to her own five year old instead of Coco Pops, which she said:

“must be healthier because, look, it’s got ‘tasty goodness’ and a wholegrain tick. But whilst making this programme I’ve discovered that appearances, and certainly cereal boxes, can be deceptive. Read the small print and it turns out that Honey Cheerios has more sugar than Coco Pops”.

Other sequences included a consumer perception exercise in which a group of parents and teachers were tested to see *“if they could see past the nutritional marketing claims to assess actual levels of salt and sugar in 18 popular cereals, some designed to look healthy”*. This sequence began with the presenter stating:

“Cereal makers do tell us in tiny letters on the side of the packaging what goes into cereals. So in theory shoppers should be able to weed out those with high amounts of salt and sugar. But how easy is it to understand the labelling?”

The programme showed that participants in the exercise were unable to correctly identify which products were high in salt or sugar by reading the packaging and the programme stated that *“not one member of the group found the nutritional labelling clear and easy to understand”*. The programme also explained that the exercise had used, for its classifications, the FSA’s traffic light labelling scheme¹, which it said *“nearly all the leading food manufacturers have rejected”*, and included an interview with Professor James in which he commented:

“It’s a terrible threat to those companies producing rotten products because if your products are stuffed with fat, sugar and salt, the last thing you want is a traffic light system. So they are working like crazy throughout the world to sabotage the development of traffic lights.”

The programme then stated that *“cereal makers Kellogg’s and Nestlé argue that their existing labelling works well,”* and asked *“how can that be when there isn’t even a uniform way system for measuring how much is in a serving?”*

Ofcom noted that this was the first time that Nestlé had explicitly been mentioned in the programme. There were four other direct references to Nestlé in the programme: two related to marketing to children (see head a) iii) below); one relating to Heart UK approval (see head a) iv) below); and in the context of a taste test between Nestlé Honey Cheerios and Waitrose sugar coated loops, which revealed to a surprised consumer that she preferred the latter *“and this one is cheaper again and has one third less sugar in it”*.

Ofcom then went on to consider whether the programme’s contents amounted to an unfair allegation that Nestlé made misleading content, nutrition or health claims. Ofcom acknowledged the distinction drawn by Channel 4 the broadcaster between being misled by “health claims” and being misled by the overall visual and textual impression created on a cereal packet. Ofcom also noted that Channel 4’s stated intention for the programme was to highlight the possibility of consumers being misled by what might be accurate wording, and to challenge consumer perceptions about breakfast cereals to encourage them to interrogate packaging more closely to find information about, for example, sugar or salt content, which manufacturers would not necessarily promote prominently. Ofcom finally noted Channel 4’s assertion that the programme was not a forensic

¹ This scheme aims to help consumers identify sugar, salt and fat levels in foods by labeling them red for high, amber for medium and green for low.

examination of the nutritional values of breakfast cereals, and that there could be no unfairness to Nestlé unless it was explicitly mentioned in the programme.

Ofcom examined the programme as a whole and noted that Nestlé was explicitly mentioned at various points throughout the programme, and that its products were included in several montages of typical/popular breakfast cereals. Ofcom considered that, on viewing the programme as a whole, viewers were likely to understand that Nestlé was a major cereal manufacturer and, because it was named explicitly throughout the programme, in particular with reference to the FSA's traffic lights system, it was possible that viewers might consider that any and all statements or criticisms about cereal packaging and consumer perception applied to Nestlé, whether it was explicitly mentioned or not.

Ofcom considered that viewers would take from the programme (as exemplified by the sequences above) the message that consumers made assumptions about products based not on factual nutritional information (which they found difficult to understand, missed or even ignored) but on marketing messages on the packaging. It seemed to Ofcom that the likely inference was that that cereal manufacturers were using generic "healthiness" messages to promote their products but that these messages were being incorrectly interpreted by consumers, who, despite all the relevant information being available on pack, still had erroneous perceptions of the sugar and salt content of breakfast cereals and considered the products to be healthier than they perhaps were. In Ofcom's view, this was the programme's central theme as regards cereals and cereal packaging and it was clearly supported by sequences showing consumer misunderstanding.

Further, this theme was clearly underpinned by the reference to the FSA's traffic lights system, and Professor James' comment.

Ofcom agreed that the programme could not accurately be described as a "forensic examination" of the nutritional values of breakfast cereals – in the same way that it looked at the claims made for probiotics or antioxidants – but considered that it did discuss the nutritional content of breakfast cereals in so far as it made frequent references to their sugar and salt content. Ofcom noted that the programme at no point explicitly detailed why products high in sugar and salt were unhealthy, or indeed undesirable as breakfast foods, other than in the inclusion of an interview with Professor Graham McGregor of Consensus Action on Salt and Health (who stated that: *"salt is a chronic long term toxin, a poison that slowly puts up our blood pressure over many many years."*) Despite the absence of detailed explication, however, Ofcom took the view that viewers would understand that sugar and salt were nutrients whose intake should be limited in the interests of good health, and that there was a possibility that these limits could be inadvertently breached as a result of unwitting overconsumption.

Ofcom also considered that the distinction drawn by Channel 4 between misleading health claims and generic messages of "healthiness" was reasonable and, having viewed the programme, concluded that the programme's central theme was not likely to be understood by viewers as a suggestion that cereal manufacturers were deliberately placing misleading content, nutrition or health claims on packaging. Furthermore, Ofcom did not consider that the programme involved a detailed analysis of the nutritional values of breakfast cereals, although it noted that it could reasonably be described as including information about the nutritional content of cereals because of its frequent references to sugar and salt content.

But it was not Ofcom's view that the programme was an examination of the specific health claims made by Nestlé or any cereal manufacturer. Because the programme did not specifically examine the health claims made for cereals but rather was concerned with how generic messages of "healthiness" affected consumer perception of salt and sugar content, Ofcom concluded that it was not unfair to Nestlé to omit information that all of its claims were supported by scientific substantiation, and that the programme makers had taken reasonable care to ensure that the suggestion that consumers were regularly mis-reading or misunderstanding on-pack information by a range of cereal manufacturers was not presented in a way that was unfair to Nestlé.

a) ii) *Unfair allegations about salt and sugar content and failure to consider other key health factors*

Ofcom next considered the complaint that the programme unfairly included allegations in respect of the salt and sugar content of Nestlé breakfast cereal products, but failed to give due consideration to other key health factors, such as fat and energy.

In considering this part of the complaint Ofcom took account of Rule 7.1 of the Code, and had regard to Practice 7.9, as detailed above.

The Dispatches Cake

Ofcom noted that the section of the programme that Nestlé objected to in relation to the first part of this complaint featured a chocolate cake ("the Dispatches Cake"). Ofcom noted that Nestlé believed it contained a comparison that was unfair.

This section of the programme dealt with the proposed European regulations that would restrict the kind of health and nutritional claims that could be made for products high in fat, salt and sugar. The programme noted that the bar for considering a product "high in sugar", for example, was twice as high as the bar for "high in sugar" under current UK guidelines.

Ofcom noted that the sequence was introduced with a comment from consumer expert Sue Davies of Which, who said that:

"A lot of breakfast cereals are carrying claims in any case, whether that's claims about particular health benefits or whether it's claims about particular nutrients, and so we'd hope that this legislation would actually help to ensure that there was a more responsible approach so that consumers wouldn't be drawn to products because they were saying they were low in saturated fat for example when they were high in sugar".

In order to "see what food companies will be able to get away with under the proposed rules" the programme's presenter was then joined by dietician Sue Lloyd to make a chocolate cake. The programme noted the kinds of claims that would be permitted under the current proposals (for example, "rich source of vitamin E", "can be enjoyed as part of a healthy diet") and the presenter commented:

"so looking at this with all these claims on the front of my packet, if you said to me, you just showed me that and said what's inside the box, I think chocolate cake is the last thing on earth that I would guess".

The presenter then concluded this section with the following commentary:

“Sue has also made the Dispatches cake with less sugar or salt than some popular cereals we eat every day”.

The following conversation then took place:

“Dietician: If we look at this we have sugars at 21.1 grams per hundred grams, which is actually less than the amount of sugar that we find in Bran Flakes. We also have less salt than we find in Rice Krispies or Cornflakes”.

“Presenter: That’s astonishing. So if you give a slice of this in the morning, so like a 30gm piece of cake so it’s more healthy than some of the cereals you’ve mentioned?”

“Dietician: In terms of salt and sugar, yes”.

Ofcom considered that viewers would understand that the primary purpose of this section of the programme was to examine the application of the proposed European regulations on health and nutrition claims, by demonstrating the kinds of claims that the proposed European regulation would permit for products that contained sugar and salt at levels currently considered “high” under UK regulations: claims that consumers, as represented by the presenter, would not associate with a product such as a chocolate cake. Ofcom noted that the cake was in fact made according to limits set for cereals, but noted that the limits proposed for the “cake” category would have been even higher, thus allowing for the same kinds of claims to be made.

Ofcom noted that the section was bookended by two references to breakfast cereals – none of which were manufactured by Nestlé - the second of which made a direct, factual comparison, but considered that the programme made clear that any comparison between the cake and cereals was clearly set out as being in relation to salt and sugar. Ofcom also considered that this element was secondary to the primary message of the Dispatches Cake experiment, namely to establish the kinds of legitimate health messages that could appear under the new proposed legislation.

Because the nature of the comparison between the cake and cereals, in as far as it featured in this section of the programme, was clearly set out and fully qualified as relating only to sugar and salt, and because the programme carried no suggestion that parents should replace breakfast cereals with cake, Ofcom did not consider that it was incumbent on the programme makers to include further information about the relative fat content of cereals and chocolate cake to avoid omitting or presenting material facts in a way that was unfair to Nestlé.

Ofcom therefore did not consider that the Dispatches Cake section of the programme resulted in unfairness to Nestlé.

Comparisons with chocolate cake and a jam doughnut

Ofcom then looked at the second part of Nestlé’s complaint at this head, namely that the programme unfairly suggested that parents would be giving their children a healthier breakfast if they gave them jam doughnuts or chocolate cake rather than cereals in the section of the programme that featured Shreddies.

Ofcom identified a section of the programme in which a box of Shreddies was shown, albeit briefly and in a display containing a wide range of other breakfast cereals. After panning across this display, the programme stated:

“Health professionals have fought long and hard to force manufacturers to cut back on the salt and sugar in breakfast cereals. But incredibly the most recent study says that three quarters of the most popular children’s cereals still have as much sugar per serving as a jam donut.”

This was followed by a comment from Professor Philip James that *“the level of childhood obesity is quite astonishing in the UK ... it really is quite atrocious that we have now developed a society that expects to shovel sugar into children”*.

Ofcom noted that, in the sequence featuring Shreddies, there was no reference to chocolate cake, which was discussed in a different part of the programme.

Ofcom again considered that viewers were unlikely to infer from the jam doughnut comparison that it would be a healthier breakfast option for children than either cereals in general or Shreddies in particular (even if that product had been singled out). Moreover, Ofcom noted that Nestlé did not dispute the factual basis for this cereals-doughnut comparison, but was rather complaining that it was unfair to it not to point out that cereals were lower in fat than doughnuts. Because it could identify no suggestion in the programme that a doughnut should in any way be a healthier replacement for cereals in general, nor any direct comparison between Shreddies and doughnuts, Ofcom did not consider that it was incumbent on the programme, in fairness to Nestlé, to include a comparison of other ingredients in doughnuts or a statement that Nestlé cereals in particular were low in fat.

Ofcom therefore found no unfairness to Nestlé in this respect.

a) iii) *Targeting children*

Ofcom next considered the complaint that the programme unfairly alleged that Nestlé inappropriately targeted children in schools and in its marketing activity and misrepresented its role in the production of the Phunky Foods leaflet.

In considering this part of the complaint Ofcom took account of Rule 7.1 of the Code, and had regard to Practice 7.9, as detailed above.

Ofcom first considered the section of the programme that dealt specifically with children, schools and marketing. This was a lengthy sequence, which began with a montage of advertisements, old and new, featuring cartoons and animated characters and well-known jingles, and with the presenter stating in voice-over:

“Since the 1960s, food companies have directly targeted sugary cereals at children using cartoon characters and free gifts.”

The presenter then explained that new regulations introduced in 2007 saw advertisements for foods high in sugar, salt or fat (“HFSS foods”) banned from children’s television. The programme pointed out that this did not prevent children from seeing such advertisements, as they were permitted to be screened around popular programmes watched frequently by children such as *The X Factor*. The programme went on to say:

“Manufacturers are now banned from advertising cereals that are high in sugar during children’s television programmes – but that ban doesn’t extend to the internet. So there are a lot of eye-catching, bright, colourful sites popping up to promote well known children’s cereal”.

After showing children interacting with these sites, the programme stated that *“Weetos, Coco Pops, Shreddies, Sugar Puffs ... all have sites directly targeted at children.”*

The programme then went on to look at the way in which manufacturers provide branded educational tools to schools. It stated:

“UK companies including food manufacturers still spend an estimated three hundred million pounds a year on marketing in schools (...) Marketing gets into schools in the form of education packs which teachers use in lessons. And some of this material is heavily branded.”

Richard Watts, of the Children’s Food Campaign, gave his view in interview of this technique:

“The fact that they are trying to do it in the classroom gets around a lot of the slightly stricter regulations there is now about more traditional forms of advertising and is a better way of doing it because if the information is passed to the children by the teacher they’re more likely just to see it as fact and accept it instead of trying to look at it critically.”

The programme then turned to Nestlé’s “Box Tops for Books” scheme and website, which the programme said *“has worksheets based around literacy”* such as a worksheet for 5- to 7-year-olds *“which encourages children to talk about breakfast cereal.”*

The worksheet itself was submitted by Channel 4 as part of its response. Ofcom noted that the worksheet featured the Goldilocks story, with no reference to cereals, but also included a questionnaire “Activity Sheet 5”, which asked children aged 5-7 to identify a range of breakfast foods, including porridge, eggs, milk, fruit, bread and cereal, and to complete the sentences: “Eating a good breakfast gives us ...” and “Breakfast cereals are made from grains like ...”. The worksheet carried Nestlé branding in the top left-hand corner.

Returning to the programme, Ofcom noted that the sequence continued with a specific discussion of Phunky Foods educational packs. The programme stated that:

“Nestlé came under fire from the Children’s Food Campaign for its involvement in another website. Last year the Phunky Foods education packs went out into primary schools across the country”

It then included the following interview with Professor Jack Winkler, Director of the Nutrition Policy Unit, London Metropolitan University:

“Let me give you an example of how it can go wrong. Nestlé a little while ago produced a sheet called Phunky Foods which included a statement you should make sure your breakfast contains some sugary and fatty foods. And beside it, in support of this, the Eatwell Plate produced by the Food Standards Agency. That’s a total misuse of what the Food Standards Agency is doing.”

They produced the Eatwell Plate to show that you should limit the amount of fat and sugar and salt you get in your diet and Nestlé was twisting the message to say that you had to make sure that you had some. That's what happens when you don't have editorial control over a worksheet".

The programme then stated that "*Phunky Foods has now changed its website*" and included an interview with a head teacher who no longer uses the packs in his school. Finally, after several other examples, including Kellogg's Frosties' sponsorship of sports and healthy living campaigns, the programme returned to Richard Watts for his view that:

"... effectively this is an entirely unregulated market, a free market to pass on whatever dodgy information to kids that companies think they can get away with".

Phunky Foods

Ofcom first considered how the criticisms of *Phunky Foods* were presented in the programme. Ofcom noted that the programme stated that Nestlé was "involved in" *Phunky Foods* website and that it had been directly criticised by a campaign group for that involvement. Meanwhile, the specific criticisms of the worksheet were voiced by Professor Winkler.

Ofcom considered first whether it was fair to say that Nestlé was "involved" in *Phunky Foods*. Ofcom noted that Nestlé did not dispute its sponsorship of *Phunky Foods*, or that the website carried Nestlé branding. Similarly, Ofcom noted that Channel 4 conceded that Nestlé may not have had editorial control over the content of the worksheet, but argued that, as sponsor, the company carried a degree of responsibility and had been criticised itself for the content in any event. Ofcom concluded on balance that it was not unfair to characterise Nestlé as "involved" in the *Phunky Foods* website.

Ofcom then considered whether the programme had unfairly suggested that Nestlé was editorially involved in the *Phunky Foods* worksheet. Ofcom noted the programme's statement that Nestlé "*came under fire*" for its involvement in the website. Furthermore, Professor Winkler stated that "*Nestlé ... produced a sheet called Phunky Foods*" and was "*twisting the message*". On the information available to Ofcom, it appeared that Nestlé had indeed received criticism from the Children's Food Campaign, but that it had no editorial control over the worksheet's contents. Ofcom therefore considered that a misleading inference could have been drawn from Professor Winkler's statement – that Nestlé wrote the sheet itself – from his use of "*produced*" and "*twisted*" in relation to Nestlé. Ofcom noted, however, that Professor Winkler's contribution ended with his qualification that "*that's what happens when you don't have editorial control over a worksheet*". Ofcom conceded that viewers might have been confused by this seemingly contradictory statement but on balance considered that the programme made clear that: Nestlé had been criticised for its involvement with *Phunky Foods*; and it had no editorial control over the website.

Ofcom agreed that the programme presented Professor Winkler's arguments that the worksheet was misleading and acknowledged that the question of whether *Phunky Foods* itself had used the Eatwell Plate incorrectly was a matter for debate, and that Purely Nutrition, the company that actually had editorial control over the worksheet, had contacted Channel 4 after the programme was broadcast to argue the worksheet was accurate, and explain that it had been

removed from the website only as part of a regular update of educational material and not as a result of pressure from the Children's Food Campaign.

However, Ofcom noted that it was not its role to establish whether the worksheet was accurate but to assess whether the programme had treated the material facts surrounding Nestlé's involvement with *Phunky Foods* educational material with reasonable care. As noted above, Ofcom considered that the programme fairly and accurately stated that Nestlé was involved with the *Phunky Foods* website and had received public criticism, and made clear that it had no editorial control over the worksheet itself.

On that basis, Ofcom considered that the programme makers had taken reasonable care to ensure that they presented Nestlé's involvement in *Phunky Foods* and the criticisms aimed at the *Phunky Foods* worksheet in a way that was fair to Nestlé.

Targeting Children

Ofcom turned to the wider question of marketing targeted at children by noting that there was some disagreement between Channel 4 and Nestlé as to whether or not Nestlé "deliberately targeted children" in its marketing, but also noted that it was not its role to establish the deliberate nature of Nestlé's marketing policies beyond doubt; rather, it was for Ofcom to decide whether the programme had presented material facts about Nestlé's marketing activities in a way that was fair to it.

In respect of Box Tops for Books, Ofcom considered that, taken as a whole, the above sequence clearly indicated to viewers that cereal manufacturers in general and Nestlé in particular provided various materials to schools and parents that were intended for use by children, and designed websites deliberately to appeal to young children. Ofcom noted that Nestlé was referred to in this sequence explicitly and therefore that within the context of the entire sequence, it was reasonable to assume that viewers would have taken away the message that Nestlé, too, prepared material that was targeted at children. Ofcom noted that Nestlé denied that the Box Tops for Books scheme was targeted at children, but considered the statement in the programme related only to the activity sheet itself. In light of the nature of the activity sheet's contents, as described above, Ofcom considered that, in implying that the sheet was "targeted at children", Channel 4 had taken care not to present material facts in a way that was unfair to Nestlé.

In respect of Shreddies, Ofcom noted that the programme had stated explicitly that the Shreddies site was targeted at children. Ofcom noted that this, too, was contested by Nestlé. It appeared to Ofcom that the statement was merely a subjective observation on the programme makers' part based on a visit to the Shreddies Knitted By Nanas site.

Ofcom then considered whether this subjective observation resulted in unfairness to Nestlé. Ofcom considered that it could be argued that the Shreddies site appealed to different age groups but did not believe that the fact that over-16s could visit the site, as pointed out by Nestlé, definitively meant that it was *not* aimed at or attractive to children. On balance, it seemed to Ofcom that the Shreddies website may not have been the best example of targeting products directly at children, but it was reasonable for the programme makers to

subjectively observe that it was likely to appeal to children. Ofcom therefore found no unfairness to Nestlé in this regard

Inappropriate targeting and circumvention of the rules

Finally Ofcom turned to the issue of whether such targeting by Nestlé was presented by the programme as inappropriate or an attempt to circumvent regulations. It was clear to Ofcom that the programme indicated that this marketing activity was an attempt to reach children in the context of newly introduced restrictions specifically of television advertising, by pointing out that *“that ban doesn’t extend to the internet. So there are a lot of eye-catching, bright colourful sites popping up to promote well known children’s cereal”* and stating that *“all have sites targeted directly at children”*.

There was, in Ofcom’s view, a suggestion that such activity was undertaken as an alternative to television advertising, and that this activity was extremely effective in terms of its appeal to children. For example, seeing children interact positively with various cereals’ websites suggested that they found such sites engaging. Ofcom considered that the programme made clear that there were regulations preventing manufacturers from advertising some products during children’s programmes, but that these regulations did not cover other broadcasts that went out at times when high numbers of children could be watching (e.g. *The X Factor*) – nor did they apply to other marketing activities, such as websites, sponsorship and branding. The programme then stated that cereal manufacturers used the internet to market and increase brand awareness of their products in children and engaged in other branding and awareness campaigns. Ofcom concluded that these were factual statements and that the programme did not suggest that any of these activities were anything other than legitimate marketing techniques. In Ofcom’s view, viewers were left to take a decision themselves as to whether or not such activity was appropriate or desirable, or whether regulation should be extended beyond children’s television.

For these reasons, Ofcom considered that the programme makers had taken care to avoid presenting material facts in relation to marketing materials targeted at children in a way that was unfair to Nestlé.

a) iv) *Heart UK*

Ofcom then considered the complaint that the programme unfairly alleged that it was inappropriate for Nestlé Products to carry the HEART UK logo.

In considering this part of the complaint Ofcom took account of Rule 7.1 of the Code, and had regard to Practice 7.9, as detailed above.

Ofcom first noted what was said in the programme about Heart UK.

The programme explained that Heart UK was a charity that charged £25,000 for product approval and brand endorsement through permission to carry the charity’s logo – a tick and the words: *“Heart UK – the Cholesterol Charity”*. The programme questioned the meaning that consumers would take from this endorsement in relation to a brand of grape juice:

“Heart UK and Welch’s say the approval is not and has never been an attempt to suggest that the juice has cholesterol lowering properties. Really? What else could it possibly mean to the consumer looking at it?”

The programme then featured another interview with Professor James, in which he explained his objections to approval schemes such as this:

“That is actually a big disadvantage because quite often there are very good products, maybe even better products that don’t have that endorsement because they haven’t paid the organization and therefore the consumer is being misled”.

In relation to Nestlé, the programme then stated:

“Cereal brands Kellogg’s Optivita and Nestlé Shredded Wheat also carry the charity’s logo. But how useful is that approval to the Heart UK consumer?”

The programme then went on to question the charity’s refusal to declare that the most senior nutritionist on its approval panel once served as an advisor to the Association of Cereal Food Manufacturers (although the programme said that this advisor, Professor Tom Sanders, *“always openly declares any conflict of interest”*).

Ofcom considered that it would have been clear to viewers from this section of the programme that it was critical of paid-for approval schemes such as Heart UK because they created an artificial distinction between products that carried the charity’s endorsement and those that did not – but might have exactly the same health benefits. Ofcom took the view that there was no suggestion that the approval that had been granted was granted inappropriately, merely that paid-for approval per se was not in the best interests of consumer understanding of the health benefits of foods. Additionally, Ofcom concluded that any criticism of the Heart UK logo as misleading (in relation to its cholesterol lowering benefits) was clearly aimed at Welch’s and not at Nestlé, and that in any event Welch’s denial of this criticism was included in the programme.

For that reason, Ofcom did not consider that the programme presented any material facts in relation to Heart UK’s endorsement in a way that was unfair to Nestlé and has not upheld this head of complaint.

b) *Negative impression given by the programme’s commentary*

Ofcom then went on to consider the complaint that the programme’s general commentary unfairly and consistently gave the negative impression that Nestlé sold products that were bad for health or worse.

In considering this part of the complaint Ofcom took account of Rule 7.1 of the Code, and had regard to Practice 7.9, as detailed above.

Ofcom noted that Channel 4 denied that the programme accused Nestlé of selling products that were “bad for health or worse”.

As regards the possibility that the programme accused Nestlé of “shovelling sugar into children”, Ofcom noted that the relevant section of the programme included a statement by the presenter that *“Health professionals have fought long and hard to force manufacturers to cut back on the salt and sugar in breakfast cereals but [...] three quarters of the most popular children’s cereals still have as much sugar per serving as a jam doughnut”*. This was then followed by a statement by Professor Philip James that: *“It really is quite atrocious that we have now developed a society that expects to shovel sugar into children”*.

Ofcom noted that this section of the programme did not refer to Nestlé. Ofcom considered, as above, that it was possible that viewers would understand Nestlé as manufacturing some of those high sugar cereals referred to, but noted that the programme did not single out any specific cereals. Moreover, in Ofcom's view, Professor James' reference to *"a society that wants to shovel sugar into children"* would have been understood as laying the blame for overconsumption of sugar firmly at the door of the UK's regulatory systems and its social attitudes rather than of the manufacturers.

Ofcom then moved on to consider commentary that referred to *"rotten products"*. Once again, as above, Ofcom noted that the programme stated:

"For the grid we have used the Food Standards Agency's traffic light scheme which helps consumers identify the salt, sugar and fat levels in food. Red for high, amber for medium and green for low. But nearly all food manufacturers have rejected the scheme".

This was followed by a statement from Professor James, which referred to opposition to the traffic lights scheme by *"those companies producing rotten products"*. The programme narration then said: *"Cereals makers Kellogg's and Nestlé argue that their existing labelling works well"*.

Ofcom noted that Nestlé did not dispute the fact that it was opposed to traffic light labelling, as stated in the programme, and, although the programme did not go into detail about the basis for this opposition, noted that it made clear that the alternative proposed by manufacturers was based on serving size.

Ofcom took the view that the proximity of the phrase *"rotten products"* and the reference to Nestlé would not have been understood by viewers as an allegation on the part of the programme makers that Nestlé's products were unhealthy. This was because, although Ofcom conceded that Professor James' description of certain types of products *"rotten"* was highly coloured, it would have been obvious to viewers that this was his own opinion of products that were high in fat, salt and sugar, which he was entitled to express. Moreover, Ofcom considered that it was reasonable for the programme to include a factual reference to Nestlé's opposition to the scheme, (that *"nearly all food manufacturers have rejected the scheme"*) alongside Professor James' opinion of the reasons for manufacturers' opposition, followed, importantly, by the statement that *"Kellogg's and Nestlé argue that their existing labelling works well"*.

Finally, Ofcom turned to the part of the programme that referred to passing on *"dodgy information to kids"*. Ofcom noted that this comment came at the end of the sequence that examined marketing to children and stated:

"Effectively this is an entirely unregulated marketing, a free marketing to pass on whatever dodgy information to kids that companies think they can get away with."

Ofcom noted that it was technically inaccurate to state that the internet was totally unregulated, but took the view that this comment related not only to the internet but to the wide range of marketing practices discussed in the preceding section of the programme (including sponsorship and educational materials). Ofcom considered that this was a critical comment, which could potentially amount to a serious allegation that such marketing routes allowed *"dodgy information"* to be passed on to children. Ofcom considered that, in the context of the preceding

sequence, viewers would understand that cereal manufacturers were among those who could exploit that possibility.

However, Ofcom concluded that the inclusion of this comment stopped short of an allegation that they did so and, further, that Nestlé was one of those that had done so. Ofcom recognised that it was possible that, because of the accusations of inaccuracy levelled at *Phunky Foods* worksheet, viewers might connect the term “dodgy information” to the worksheet directly, but, as discussed in head a) iii) above, concluded that this was unlikely to create the impression that Nestlé was targeting children inappropriately with inaccurate information. In any event, it did not appear likely to Ofcom that viewers would infer from a reference to inaccurate information that the products manufactured by Nestlé were detrimental to health.

Finally, Ofcom noted that Nestlé considered the statement, which came at the beginning of the programme, “it all looks so healthy” was likely to be interpreted as meaning that, in reality, the products that this statement referred to – breakfast cereals – were just the opposite. Ofcom noted that this statement was followed by a list of health-related claims on breakfast cereal packs, such as “fortified with vitamins,” and “source of fibre” and then, as discussed above, by a comment from Sue Davies of Which that “*products aren’t always what they seem*”.

As set out in head a) i) Ofcom considered that the overall message of the programme was that claims of “healthiness” were sometimes made for breakfast cereals that were also high in sugar or salt and that consumers were rarely aware of this. Again, Ofcom took the view that viewers would understand that sugar and salt were nutrients whose intake should be limited in the interests of good health and that there was a possibility that these limits could be inadvertently breached as a result of unwitting overconsumption. In Ofcom’s view, this did not amount to an allegation that these products were actually detrimental to health.

For those reasons, Ofcom concluded that the overall tone of the programme did not portray Nestlé unfairly as manufacturing products that were “bad for health or worse”.

- c) Finally, Ofcom considered the complaint that Nestlé was not given an appropriate opportunity to respond to the allegations made in the programme, as set out in heads a) and b) above, and was given no indication of the nature and scope of the allegations to be made.

In considering this part of the complaint Ofcom took account of Rule 7.1 of the Code, and had regard to Practice 7.11 of the Code, which states that if a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond. Ofcom also had regard to Practice 7.13, which states that where it is appropriate to represent the views of a person or organisation that is not participating in the programme, this must be done in a fair manner. Ofcom also had regard to Practice 7.3 of the Code, which states that those invited to make a contribution to the programme should normally be told the nature and purpose of the programme.

As detailed in heads a) and b) above, Ofcom took the view that in so far as the programme commented on cereal manufacturers in general, the likely inference was that cereal manufacturers were using generic “healthiness” messages to promote their products but that these messages were being incorrectly

interpreted by consumers. Ofcom also noted that the programme contained information about the nutritional value of cereals in relation to sugar and salt, but considered these to be factual statements none of which could be considered serious allegations of wrongdoing or incompetence either about cereal manufacturers in general or Nestlé specifically. Ofcom also noted that, in this context, the programme fairly reflected Nestlé's view that a different system of conveying nutritional information (the FSA traffic lights scheme) was not desirable.

In relation to marketing to children, Ofcom considered that the programme stopped short of implying that it was inappropriate for cereal manufacturers in general, or Nestlé specifically, to target children using alternative techniques in the wake of restrictions on advertising, and that the programme had presented criticism of the company's involvement with *Phunky Foods* fairly. Nor did Ofcom find that the programme unfairly characterised Nestlé's products as unhealthy. Finally, Ofcom did not consider that the programme unfairly stated or implied that it was misleading or inappropriate for Nestlé products to carry the Heart UK logo.

Ofcom considered, therefore, that it was not necessary in the interests of fairness to offer Nestlé an opportunity to respond to the programme. Ofcom noted that Channel 4 did contact Nestlé on 14 October to inform it that it was producing a programme "looking at food, in particular breakfast foods" which "intends to examine the nutritional value of such foods and seeks to assess any advertised health benefits of them". In that letter, Channel 4 asked only for comments about Nestlé's involvement with Heart UK. Having reviewed the correspondence, it appeared to Ofcom that the questions asked at that stage did not in fact relate to any allegations about Nestlé that were later included in the programme (as noted in head b) above, Ofcom considered that no allegations of wrongdoing had been made about Nestlé in relation to Heart UK).

Finally, because Nestlé had not been invited to contribute, Ofcom found that there was no requirement for the broadcaster to inform it in advance about the nature of the programme's contents.

In light of this, Ofcom has not upheld this head of complaint.

Accordingly Ofcom has not upheld Nestlé's complaint of unfair treatment.

Not Upheld

Complaint by Kellogg's

Dispatches: What's In Your Breakfast?, Channel 4, 26 October 2009

Summary: Ofcom has not upheld this complaint of unfair treatment made by Kellogg's

Channel 4 broadcast an edition of its documentary series *Dispatches*, entitled *What's In Your Breakfast?* The programme looked at the nutritional content of breakfast products, including levels of salt and sugar, and the marketing techniques used by the industry, in particular health claims used by manufacturers to sell their breakfast cereals, drinks and bars.

The reporter looked at the evidence to support some of the health claims made by a range of products, and at the content of some breakfast cereals. She also looked at the proposed rules governing the claims that were permitted for products, by baking a cake that would be allowed to make a number of what she described as health claims. The reporter also looked at some products endorsed by HEART UK, a cholesterol charity, and questioned the system of endorsements. Additionally, the programme featured the Clucas family, who experimented with changing their breakfast habits and moving away from the breakfast cereals they were used to having. Kellogg's cereals were mentioned in the programme, and the company was referred to.

Kellogg's complained that it was treated unfairly in the programme as broadcast.

In summary, Ofcom found the following:

- The programme contained no implication that Kellogg's was shovelling sugar into children. It was not unfair to Kellogg's to state that it was targeting children or that three children would eat 14kg less sugar every year if they stopped eating their current breakfast cereals;
- The programme made no allegations of duplicity by Kellogg's, and it was not unfair to omit information provided by Kellogg's about its GDA labelling or its reasons for objecting to a labelling scheme proposed by the Food Standards Agency;
- The programme did not omit material facts in respect of salt and sugar content in a way that was unfair to Kellogg's, nor did it unfairly compare Kellogg's products with a chocolate cake;
- Because no significant allegations of wrongdoing were made about Kellogg's in the programme, there was no requirement for the programme makers to offer it an opportunity to respond to the programme's contents. Moreover, the nature of the communications between programme makers and Kellogg's prior to the broadcast did not result in unfairness to Kellogg's in the programme as broadcast.

Introduction

On 26 October 2009, Channel 4 broadcast an edition of its documentary series *Dispatches*, entitled *What's In Your Breakfast?* The programme looked at the nutritional content of breakfast products, including levels of salt and sugar, and the marketing techniques used by the industry, in particular health claims used by manufacturers to sell their breakfast cereals, drinks and bars.

The reporter questioned whether there was evidence to support the health claims made by some of the products and whether consumers were able to assess the content of products. She looked at the evidence to support some of the claims made and at the content of some breakfast cereals. She also looked at the proposed rules governing the claims that were permitted for products, by baking a cake that would be allowed to make a number of what she described as health claims. The reporter also looked at some products endorsed by HEART UK, a cholesterol charity, and questioned the system of endorsements. The programme also featured the Clucas family, who experimented with changing their breakfast habits and moving away from the breakfast cereals they were used to having.

Some of the products featured in the programme were made by Kellogg's and the company was referred to in the programme.

Kellogg's complained to Ofcom that it was treated unfairly in the programme as broadcast.

The Complaint

Kellogg's case

In summary, Kellogg's complained that it was treated unfairly in the programme as broadcast in that:

- a) The programme as broadcast portrayed the company unfairly by including of a number of unfair allegations and criticisms and omitting material information provided by Kellogg's. In particular:
 - i) In respect of children:
 - The programme included a clear implication that Kellogg's was "*shovelling sugar into children*", despite Kellogg's pointing out that there was less sugar in a serving of Coco Pops or Frosties than in a banana or glass of orange juice.
 - By stating that "*cereal branding creeps into every aspect of children's lives. Over the past 10 years Kellogg's has spent more than £1m on school breakfast clubs, and it has recently increased that investment*", the programme implied that Kellogg's was deliberately targeting children as a branding exercise, despite Kellogg's having informed the programme makers that the food featured in these breakfast clubs was not branded and was chosen by the club organisers.
 - In relation to the Clucas family, the programme said that "*over a year the three children would eat 14kg less sugar simply by cutting out their favourite breakfast cereals*" and implied that making that reduction would

address the obesity issue in the UK. Kellogg's said that, in the context of a programme that looked at sugar as a contributory factor to increasing children's weight levels, this unfairly ignored evidence that those who eat breakfast cereal – regardless of sugar content – tend to be slimmer than those who do not, and the programme failed to include their response on this point.

ii) In respect of marketing and labelling:

- The programme included an allegation that *"...when you look at the claim or look at the nutritional information in more detail, products aren't always what they seem"* and that *"Cereal makers do tell us in tiny letters on the side of the packaging what goes into cereals"*, implying duplicity in the claims made by Kellogg's for its products and in the nutritional information given on pack. This was despite Kellogg's having told the programme makers that all their claims could be backed by science and that the Guideline Daily Amounts (GDA) on the front of the pack exceeded legal requirements and were there in addition to the nutrient labelling on the side.
- The programme said of the Food Standards Agency's traffic light food labelling scheme *"But nearly all the leading food manufacturers have rejected the scheme. They don't say why. Cereal makers Kellogg's and Nestlé argue that their existing labelling works well"*, omitting to give the reasons provided by Kellogg's for disagreeing with the scheme and favouring an alternative, thus giving viewers the impression that the manufacturer was disengaged from the debate and opposed the FSA's labelling scheme for no real reason.

iii) In respect of salt and sugar content:

- The programme included the statement that *"Kellogg's UK profits soared when it introduced its two-week Special K Diet Plan, heavily marketing the product as a slimming option, even though it has high levels of sugar"*, despite Kellogg's pointing out to the programme makers that the sugar content in Special K was not high in comparison to the amount found in a glass of fruit juice, a banana or a low-fat fruit yoghurt.
- The programme said of the *Dispatches* chocolate cake, *"If we look at this, we have sugars at 21.1g per 100g, which is actually less than the amount of sugar that we find in Bran Flakes. We also have less salt than we find in Rice Krispies and in Cornflakes"*. This unfairly made comparisons with certain selected products rather than others and oversimplified the science of nutrition.

b) Kellogg's was not given an appropriate and timely opportunity to respond to the allegations made in the programme, as set out under complaint head a) above, and the responses that it did give to these allegations were not reflected in the programme. In particular:

- The programme makers denied Kellogg's information about the allegations to be made about the company in the programme and who was making them. A programme maker contacted Kellogg's late on 14 October 2009, naming two products and asking for responses to nine brief questions. This email

contained no questions about Special K. Kellogg's was asked to respond by 4pm on 16 October 2009.

- In a phone call on 15 October, a programme maker misled Kellogg's about the company's rights as a contributor and made a promise that was not kept. He informed Kellogg's that the programme was at the research stage and that there were no preconceptions as to the editorial line it would take. Kellogg's believed that this was a deliberate attempt to mislead the company, as on 19 October 2009 Channel 4 posted programme information and referred to breakfast in the UK being "far from healthy" and the ability of manufacturers to "stay ahead of the regulators".
- Information provided by Kellogg's to the programme makers was largely ignored and allegations about Special K were not put to Kellogg's.
- A statement provided by Kellogg's to the programme makers for broadcast was rejected on the grounds that it was "verbose and self-serving".

Channel 4's case

In summary and by way of background, Channel 4 said that the programme approached the question of consumer understanding about the contents of breakfast cereals by combining factual information about the levels of salt and sugar in various products with anecdotal and personal observations from ordinary consumers. The programme's purpose was to examine consumer perceptions of breakfast cereals and to encourage viewers to look beyond the images established by the marketing and packaging of commercially available products to properly and carefully consider the specific ingredients in the cereal prior to purchase. Its central theme was that consumers frequently held assumptions about products which did not accord with their nutritional content but the programme was not a forensic examination of the nutritional values of breakfast cereals.

Channel 4 added that the programme was *not* about Kellogg's products or policies specifically; they were mentioned in the programme, but all references were sourced from information made publicly available by Kellogg's themselves. Where Kellogg's products featured in the programme, it was not in an examination of their nutritional value but through consumer trials or perception tests.

Channel 4 also maintained that Kellogg's complaint of unfairness was in fact not one about the absence of fairness or accuracy, but rather an expression of the company's desire that their "spin" on the subjects covered in the programme be included [which was not a requirement of the Broadcasting Code]. As an example, Channel 4 cited Kellogg's assertion that any reference to the high sugar content of *Special K* be accompanied, in the interests of fairness, by a statement to the effect that this level of sugar is comparable to that in fruit or other products. Channel 4 disputed this assertion and pointed out that:

- a) the amount of sugar in a serving of Special K was not affected by the amount of sugar in any other product; and
- b) Special K contained refined sugar, unlike the sugar in fruit, and the impact on health of these two types of sugar was different.

Channel 4 said that this was one example of Kellogg's attempt to argue that a failure to include their "company line" in the programme resulted in unfairness to them. Indeed, Channel 4 added, in some cases including the "company line" would have required proper investigation to ensure it reflected facts and avoid misleading viewers.

In summary, Channel 4 responded to Kellogg's specific complaints of unfairness as follows:

a) i) *In respect of children: "shovelling sugar"*

Channel 4 said that the programme contained no allegation that Kellogg's was "shovelling sugar into children". It pointed out that the relevant section of the programme included a statement by the presenter that "Health professionals have fought long and hard to force manufacturers to cut back on the salt and sugar in breakfast cereals but [...] three quarters of the most popular children's cereals still have as much sugar per serving as a jam doughnut". This was then followed by a statement by Professor Philip James that: "It really is quite atrocious that we have now developed a society that expects to shovel sugar into children".

Channel 4 said that Kellogg's was not mentioned in this section of the programme, and that Professor James was referring to what "society" expected to do, rather than to any intentions on the part of specific cereal manufacturers. Channel 4 said that Professor James's comments were intended to make the point that society assumed that high quantities of sugar were necessary for children to acquiesce to having breakfast, and that people did not question the levels of sugar present in cereals.

Channel 4 added that, even if the programme had carried the implication that Kellogg's was "shovelling sugar into children", the comparison with fruit and fruit juice would be irrelevant (for the reasons explained above) and it would be critical to note that both Frosties and Coco Pops (manufactured for and marketed to children) were high in sugar. Moreover, Channel 4 said, in response to part of Kellogg's full complaint, it had not been conclusively established that people who eat breakfast cereals regardless of the sugar content are slimmer than those who do not (see below) and therefore any argument that it was unfair to omit this information was flawed.

In respect of children: deliberate targeting

Channel 4 agreed that the programme stated that Kellogg's was deliberately targeting children by promoting brand awareness to children in various ways: school breakfast clubs; Government healthy eating campaigns; and sponsorship of the Amateur Swimming Association. None of this was disputed by Kellogg's.

Channel 4 said this section of the programme was intended to show how food manufacturers continued to reach children through branding following the banning of certain types of advertising during children's television programming, in order to keep their products at the forefront of children's experiences. It said that there was no detailed discussion of the structure of the breakfast clubs, and no implied or direct statement about Kellogg's influence over those clubs.

Channel 4 said that the points made in the programme about Kellogg's branding projects were true and valid, irrespective of whether Kellogg's influenced the choice of items offered at the breakfast clubs.

In respect of children: cutting down on sugar & obesity

Channel 4 pointed out that the reduction of obesity levels in British children was not the programme's subject matter. The reference made to the Clucas family's potential reduction in refined sugar was factually correct, and it was also correct (and undisputed by Kellogg's) that replacing their favourite cereals with the alternatives trialled in the programme would result in such a reduction. It was also a matter of simple fact that such a reduction was likely to result in weight loss if an appropriate diet was otherwise maintained.

In respect of the evidence cited by Kellogg's that people who eat breakfast cereals tended to be slimmer, Channel 4 responded that, firstly, the programme was not advocating skipping breakfast, but rather challenging pre-conceptions people might have about breakfast cereals being unquestionably good for you; and secondly, that the evidence cited by Kellogg's was not conclusive and did not show a causal relationship. That is, said Channel 4, this evidence might show that there was an association between those who ate breakfast cereal and those who were slimmer, but not that the cereal itself made them slimmer – an important qualification.

Channel 4 also added that, even if the evidence cited by Kellogg's were incontrovertible, there would be no unfairness to Kellogg's in omitting any reference to it because one could understand one notion – that replacing high sugar cereals would lead to a reduction in sugar intake – without being aware of the other – that people who eat cereals tend to be slimmer. Channel 4 said that the two issues were not inextricably linked.

a) ii) *In respect of marketing and labelling: packaging information*

Channel 4 pointed to the wording of the relevant section of the programme:

“Cereal makers do tell us in tiny letters on the side of the packaging what goes into cereals. So in theory shoppers should be able to weed out those with high amounts of salt and sugar. But how easy is it to understand the labelling?”

Channel 4 said that nothing in this wording implied duplicity on Kellogg's part; the narration was an accurate statement of the size of the composition information on Kellogg's packaging. The point was made in order to illustrate the programme's main contention: that consumers' perception of various products, built up through long exposure to advertising campaigns, was so strong that it over-rode their ability to make informed choices by examining carefully the nutritional information carried by every product. This was demonstrated by a consumer test in the programme.

Channel 4 added that the point was limited to a comment on the clarity of the packaging information to the consumer, and did not stray into a discussion of the adequacy of the GDA information on pack; nor did it challenge whether any on-pack claims were supported by science. There was therefore no requirement in the interests of fairness to qualify that comment with a statement that Kellogg's claims were supported by science or to refer to the GDA information on-pack.

In respect of marketing and labelling: the FSA's traffic light food labelling scheme

Channel 4 first said that the complaint, as entertained by Ofcom, had misquoted the programme. The programme did not state that cereal manufacturers “*don't say why*” they have rejected the FSA's food labelling scheme. Channel 4 pointed to the relevant section of the programme, which stated:

“For the grid we have used the Food Standards Agency's traffic light scheme which helps consumers identify the salt, sugar and fat levels in food. Red for high, amber for medium and green for low. But nearly all food manufacturers have rejected the scheme”.

There then followed a statement from Professor James, who said that a traffic light system was not attractive to “*those companies producing rotten products*” and that such companies “*are working like crazy ... to sabotage the development of traffic lights*”. The programme narration then said: “*Cereals makers Kellogg's and Nestlé argue that their existing labelling works well*”.

Channel 4 said that there was therefore no allegation in the programme that Kellogg's “*don't say why*” it objects to the FSA's scheme, but rather two factual statements: that many leading food manufacturers oppose the FSA's scheme; and that Kellogg's and Nestlé support their existing labelling. Moreover, the programme dealt with the reason for Kellogg's resistance to the scheme – which is based on appropriate portion sizes – by indicating that food manufacturers' alternative labelling schemes were potentially confusing to consumers because they relied on a non-existent uniform industry concept of “*portion size*”. The programme compared consumers gauging information from packets with and without the FSA system to show that consumers themselves were less concerned with portion size than with ease of understanding the information provided by the FSA system.

Channel 4 added that the aim of the programme as a whole was not to analyse the complex arguments surrounding the provision of nutritional information to UK consumers, but rather to highlight the need to scrutinise the information provided before purchase. It was not, therefore, necessary in the interests of fairness, to reflect in detail the views of interested entities.

a) iii) *In respect of salt & sugar content: Special K Diet Plan*

Channel 4 noted that Kellogg's did not dispute that sugar levels in Special K were high. Channel 4 disputed that it was necessary in the interests of fairness to include a comparison with sugar levels of other products, given the programme's exclusive focus on pre-packaged breakfast foods.

Channel 4 said that the relevant part of the programme introduced the consumer test of the *Special K Diet Plan*, and showed Mr Clucas losing weight on it. The overall purpose of this section of the programme was to analyse the fact that *Special K* is a market leader as a slimming product and regarded as likely to be low in sugar and salt and unlikely to contribute to weight gain despite having high quantities of sugar, and despite these high sugar levels (and medium salt levels) being clearly stated on pack.

Comparisons with other products would therefore merely have served to reiterate Kellogg's “*company line*” but would have been irrelevant to the point being made in the programme.

In respect of salt & sugar content: comparisons with the Dispatches chocolate cake

Channel 4 pointed Ofcom to the relevant section of the programme, which featured a dietician and the presenter making a chocolate cake and selecting what they described as “health claims” that could legally be made under European legislation for the finished product. The dietician also pointed out that the cake contained less sugar per 100g than Bran Flakes, and less salt than in Rice Krispies or Corn Flakes. Channel 4 said it was not clear what unfairness arose from these comparisons, the factual nature of which was not disputed by Kellogg’s.

Channel 4 described the point of this segment of the programme as explaining to viewers how much sugar the cake contained, and that claims could be made about the cake that may not be truly reflective of its contents. In this context, it was relevant for the viewer to understand the other kinds of products which had similar levels of sugar (and salt) so that the viewer could consider the claims made by that product or those products in the light of the information about sugar (and salt).

Channel 4 said that this section of the programme related to marketing claims and the relationship between concepts created about products and their actual contents: consumers might be surprised to learn that a chocolate cake contained less sugar or salt than some breakfast cereals that they perceived as healthy eating choices.

As it did not concern nutrition, the complaint regarding the oversimplification of the science of nutrition demonstrated a misunderstanding of the purpose of the cake demonstration. Channel 4 acknowledged that one comment might be seen as relating to nutrition, and that was that, in terms of salt and sugar, a 30 gram slice of the cake was healthier than some cereals. Channel 4 pointed out that the cake also contained less fat than some pre-packaged breakfast cereals, but that this was not mentioned as the focus of the programme was salt and sugar. Channel 4 said that there was no suggestion that the cake was healthier in every respect than some cereals, and no reasonable viewer could have drawn this conclusion from what was said in the programme. As no such allegation was made, no unfairness could result to Kellogg’s as a result of this section of the programme.

- b) In respect of Kellogg’s opportunity to respond to allegations in the programme, and the complaint that its response was not reflected in the programme:

Channel 4 said that, as already stated, no serious allegations had been made about Kellogg’s in the programme. This meant that Practice 7.11 of the Code, which stipulates that if a programme makes serious allegations, those concerned should normally be given an appropriate and timely opportunity to respond, did not apply. However, Channel 4 said that there were sections of the programme where it was appropriate to represent Kellogg’s views, and that in these sections the programme had done so. Channel 4 also said that, despite the complainant’s belief, Kellogg’s could not be described as a “contributor” to the programme.

In terms of the contact that the programme makers had with Kellogg’s, Channel 4 said that the programme was made in a short period of time and its content finalised only the day before broadcast, with research continuing until 23 October 2009. As often happens, the research drove the editorial content of the

programme. It was correct, at the stage when the programme makers contacted Kellogg's, to say that the programme was at "research stage" and "stage one of the process". Kellogg's assertion that it was deliberately misled by the programme makers was therefore unfounded.

Channel 4 said that the programme makers contacted Kellogg's during this research stage and the company was apparently able and had sufficient time at that stage to answer the nine questions it was posed. Further, there was no question of these responses being "ignored"; they were considered by the programme makers and by Channel 4, and as a direct consequence of the responses, sections of the programme were altered or removed. Channel 4 said that there was no requirement in the Code to include Kellogg's comments every time the company or one of its products was mentioned. Channel 4 considered that this was a further example of Kellogg's belief that the programme should have reflected their "company line".

In response to Kellogg's complaint that their statement was rejected as "verbose and self-serving", Channel 4 pointed out that very little of the statement prepared by the complainant was directly relevant to the issues under discussion, but was rather about its philosophy of breakfast, its rationale for why its products were good for consumers and aspects of its views about nutrition generally. None of these comments illuminated the programme's subject matter. Finally, Channel 4 said that there is no requirement for statements provided to broadcasters for broadcast do not have to be used in full.

Kellogg's comments in response to Channel 4's statement

General comments

Kellogg's voiced a concern that the discussion of the complaint was disintegrating into an exercise in unpicking the programme's script, rather than an examination of how the company was treated fairly as a contributor. Kellogg's wanted to reiterate to Ofcom that information had been withheld at the production stage, and how its responses were inadequately reflected in the programme as broadcast.

Kellogg's also said that it was disingenuous for Channel 4 to suggest that the programme was not an examination of the nutritional values of breakfast cereals, which Kellogg's suggested was an excuse for the programme makers not giving due consideration to the facts around nutrition. The point of the programme was clearly to call into question the nutritional credentials of this food category and Kellogg's brands.

Specific comments

In respect of head a) i) Kellogg's said that Channel 4's criticism of the scientific basis for Kellogg's claim that people who ate breakfast tended to be slimmer – irrespective of sugar content – was groundless. Kellogg's maintained that there was very strong and universal observational scientific data that categorically showed that eating breakfast cereals was associated with having a better body mass index. Kellogg's submitted a list of 26 scientific papers to support their contention, explaining that the previously mentioned study by Dela Huntley & Ashwell only summarised the association between breakfast consumption and healthy weight that it referred to in its complaint. Kellogg's pointed out that observational studies were commonplace in nutrition science, and were the basis for the 5-a-day recommendation from the Department of Health.

In respect of head a) iii) Kellogg's responded to the distinction drawn by Channel 4 on the issue of the sugar content of Special K. Kellogg's said that there was no scientific basis for the suggestion that there is a difference between the way in which a body processes naturally occurring as opposed to refined sugar, and the suggestion was fundamentally untrue. Kellogg's said that, had it been given an opportunity to comment on this by Channel 4, it could have explained that our bodies assimilate sugar in exactly the same way whether it comes from a banana or a sugar bowl. Kellogg's said that their complaint that, by not making clear that a bowl of cereal such as Special K contained the same amount of sugar as a banana was not an attempt to push the company line but rather that by omitting information such as this the programme implied that there was a correlation between the amount of sugar in Special K and how healthy it was (implying that it was an unhealthy product). The previous point in respect of observational studies made clear that the studies showed sugar content in cereals did not in fact affect weight gain. Kellogg's maintained, therefore, that omitting the comparison between Special K and other products that contained similar sugar levels was unfair.

In respect of head a) i), Kellogg's disagreed with Channel 4's statement that it did not dispute that it promoted its brand awareness to children through, amongst other things, the school breakfast clubs. Kellogg's said that none of the breakfast clubs supported by Kellogg's carried any branding whatsoever and none of the clubs were required to serve the manufacturer's cereals; if they did, it was of their own volition (again, said Kellogg's, this was information supplied to Channel 4 and not reflected in the programme as broadcast).

Channel 4's final response

General comments

Channel 4 once again said that the programme was not only not condemnatory of Kellogg's in particular or of breakfast cereals in general. The programme drew the viewer's attention to the marketing techniques used to promote breakfast cereals as generally and generically "looking healthy" by pointing to the use of phrases and descriptions which, legitimate in their own right, contributed to the notion that the product was healthy in all respects – a perception that was often wrong. The programme advocated a proper examination of the detail on the packaging. In any event, the programme did not focus on Kellogg's or any claims made by Kellogg's specifically and there was no requirement for Channel 4 to give Kellogg's "company line" at every instance in the programme where it might have been seen as possibly referring to Kellogg's or its products.

Channel 4 also disputed that Kellogg's could be said to be a contributor to the programme. In as far as it was required to put any serious allegations to Kellogg's and to fairly reflect its response, Channel 4 had done so.

Specific comments

Channel 4 responded specifically on the following heads only:

In respect of head a) i) of the complaint, in relation to Kellogg's marketing to children, Channel 4 said that the programme did not state that the breakfast clubs supported by Kellogg's were required to serve Kellogg's cereals or that the clubs themselves were specifically branded as Kellogg's clubs. Channel 4 noted that Kellogg's did not deny that it supported the clubs, and argued that there could only be one reason for doing so: to promote brand awareness and thereby target children. The fact that it

does not insist on the clubs carrying branding or serve its products was not relevant in this case.

In respect of head a) iii) Channel 4 said that it did not dispute that different types of sugars were assimilated by the body in the same way. However, the impact on health of refined and naturally occurring sugars was different: refined sugar was a high glycemic food and therefore a breakfast cereal would have a higher glycemic impact on the body than a banana. In any event, said Channel 4, the programme made no mention of the way the body assimilated sugar.

Channel 4 disputed that the programme carried the implication that Special K was unhealthy. It pointed out that being misled about any by words, or the positioning of words, colours and phrases on a cereal packet is quite different from being misled about whether or not a product is healthy. The programme did not suggest that Special K was unhealthy, but that consumers might assume that it contained less sugar or salt than it actually does. In this way the programme sought to encourage consumers to look beyond packaging and marketing and interrogate the published contents of the product. The point of the programme was not to suggest that breakfast cereals should not be eaten or that they were unhealthy, but rather that consumers should consider a cereal's contents more carefully before purchase. In that context, said Channel 4, studies which demonstrated that those who eat breakfast cereals tend to be slimmer than those who do not was not relevant.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and a transcript and both parties' written submissions.

Before going on to set out its decision on the individual heads of Kellogg's complaint, Ofcom considered that it was important to address the issue of the overall message the programme carried in respect of breakfast cereals and the extent to which this would relate to Kellogg's individually.

Ofcom noted that the programme's stated aim, as set out in its introduction was to: *"investigate the multi-billion pound industry behind the most important meal of the day"*, to *"reveal what's really in your breakfast"*. The programme also set out to examine the application of new European legislation intended to *"curb extravagant health claims"* and to *"reveal how big food companies still manage to target sugary cereals at our children – in spite of rules to stop them"*. Ofcom noted that, as well as dealing with breakfast cereals, the programme specifically examined the evidential basis for the claimed health benefits of antioxidants and probiotics. However, in relation to the cereals, one of the key themes of the programme was set out at its beginning:

“Medical experts and regulators have campaigned on our behalf against sugary cereals with salt in them – with some success, but the manufacturers have changed tactics. They’ve now embraced our health concerns and are now marketing their products as positively good for us. The victim? The confused consumer”.

This theme was developed throughout the programme in sequences that gave examples of what it considered to be health marketing messages. For example, during a montage showing eight different cereal packs, the presenter said:

“Take a look at the imagery on these cereal packs – it all looks so healthy”.

This statement was followed by a list of health-related claims on breakfast cereal packs, such as “fortified with vitamins,” and “source of fibre”. The programme then included an interview with Which? Chief Policy Advisor Sue Davies, who said:

“People use them as an easy way of identifying what are healthier products and so they expect that that is what it says and unfortunately we’ve often found that when we look at the claim or we look at the nutritional information in more detail products aren’t always what they seem”.

In Ofcom’s view, this sequence was a consumer perception exercise in which a group of parents and teachers were tested to see *“if they could see past the nutritional marketing claims to assess actual levels of salt and sugar in 18 popular cereals, some designed to look healthy”*. The programme showed that participants in the exercise were unable to correctly identify which products were high in salt or sugar by reading the packaging and the programme stated that *“not one member of the group found the nutritional labelling clear and easy to understand”*.

Ofcom acknowledged the distinction drawn by Channel 4 the broadcaster between being misled by “health claims” and being misled by the overall visual and textual impression created on a cereal packet. Ofcom also noted that Channel 4’s stated intention for the programme was to highlight the possibility of consumers being misled by what might be accurate wording, and to challenge consumer perceptions about breakfast cereals to encourage them to interrogate packaging more closely to find information about, for example, sugar or salt content, which manufacturers would not necessarily promote prominently. Ofcom finally noted Channel 4’s assertion that the programme was not a forensic examination of the nutritional values of breakfast cereals, and that there could be no unfairness to Kellogg’s unless it was explicitly mentioned in the programme.

Ofcom examined the programme as a whole and noted that Kellogg’s was explicitly mentioned at frequent points throughout the programme, and its products were included in several montages of typical/popular breakfast cereals. Ofcom considered that, on viewing the programme as a whole, viewers were likely to understand that Kellogg’s was a major cereal manufacturer and, because it was named explicitly throughout the programme, it was possible that viewers might consider that any and all statements or criticisms about cereal packaging and consumer perception applied to Kellogg’s, whether it was explicitly mentioned or not. Ofcom also noted that, there was also a large section of the programme devoted to looking at the way breakfast cereals are marketed at children. Here Kellogg’s was arguably most keenly in focus, with references to several of its products, as well as to its sponsorship of breakfast clubs and the Amateur Swimming Association.

Ofcom considered that viewers would take from the programme (as exemplified by the sequences above) the message that consumers made assumptions about products based not on factual nutritional information (which they found difficult to understand, missed or even ignored) but on marketing messages on the packaging. It seemed to Ofcom that the likely inference was that that cereal manufacturers were using generic “healthiness” messages to promote their products but that these messages were being incorrectly interpreted by consumers, who, despite all the relevant information being available on pack, still had erroneous perceptions of the sugar and salt content of breakfast cereals and considered the products to be healthier than they perhaps were. In Ofcom’s view, this was the programme’s central theme as regards cereals and cereal packaging and it was clearly supported by sequences showing consumer misunderstanding.

Ofcom agreed that the programme could not accurately be described as a “forensic examination” of the nutritional values of breakfast cereals – in the same way that it looked at the claims made for probiotics or antioxidants – but considered that it did examine the nutritional content of breakfast cereals in so far as it made frequent references to their sugar and salt content. Ofcom noted that the programme at no point explicitly detailed why products high in sugar and salt were unhealthy, or indeed undesirable as breakfast foods, other than in the inclusion of an interview with Professor Graham McGregor of Consensus Action on Salt and Health (who stated that: “*salt is a chronic long term toxin, a poison that slowly puts up our blood pressure over many many years.*”) Despite the absence of detailed explication, however, Ofcom took the view that viewers would understand that sugar and salt were nutrients whose intake should be limited in the interests of good health, and that there was a possibility that these limits could be inadvertently breached as a result of unwitting overconsumption.

Ofcom considered that the distinction drawn by Channel 4 between misleading health claims and generic messages of “healthiness” was reasonable and, having viewed the programme, concluded that it was not likely to be understood by viewers as suggesting that cereal manufacturers were deliberately placing misleading content, nutrition or health claims on packaging. Furthermore, Ofcom did not consider that the programme involved a detailed analysis of the nutritional values of breakfast cereals, although it noted that it could reasonably be described as including information about the nutritional content of cereals because of its frequent references to sugar and salt content. But it was not Ofcom’s view that the programme was an examination of the specific health claims made by Kellogg’s or any cereal manufacturer.

a) i) *In respect of children: “shovelling sugar”*

Having established the overall message of the programme in relation to cereal manufacturers in general, Ofcom turned to its consideration of Kellogg’s complaint that the programme as broadcast portrayed the company unfairly by including of a number of unfair allegations and criticisms and omitting material information provided by Kellogg’s, in particular, in respect of children.

In considering this part of the complaint Ofcom took account of Rule 7.1 of the Code, which provides that broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes. Ofcom also considered Practice 7.9, which provides that before broadcasting a factual programme, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to the individual or organisation.

Shovelling sugar

Ofcom first considered whether the programme had unfairly suggested that Kellogg's was "*shovelling sugar into children*" while omitting to state that a bowl of Coco Pops or Frosties contained less sugar than a banana, a glass of fruit juice or a low-fat yoghurt.

Ofcom noted that the relevant section of the programme included a statement by the presenter that:

"Health professionals have fought long and hard to force manufacturers to cut back on the salt and sugar in breakfast cereals. But incredibly the most recent study says that three quarters of the most popular children's cereals still have as much sugar per serving as a jam doughnut".

This was then followed by a statement by Professor Philip James, Chairman of the International Obesity Task Force, that:

"The level of childhood obesity is quite astonishing in the UK, we have one of the worst rates in Europe. And it really is quite atrocious that we have now developed a society that expects to shovel sugar into children when in fact no nutritionist would advocate that that was good for them".

Ofcom noted that this section of the programme did not refer to Kellogg's or indeed single out any specific cereals. As noted above, Ofcom considered that it was possible that viewers would understand that Kellogg's manufactured some of the high sugar cereals referred to throughout the programme – however, in this case, it was Ofcom's view that Professor James' reference to "*a society that wants to shovel sugar into children*" would have been understood as laying the blame for overconsumption of sugar firmly at the door of the UK's regulatory systems and its social attitudes rather than of the manufacturers.

Because Ofcom considered there was no implication in the programme that Kellogg's or any cereal manufacturer was "*shovelling sugar into children*", the omission of the comparative sugar content in bananas or other products did not amount to the omission of a material fact in such a way as to result in unfairness to Kellogg's.

Deliberate targeting

Ofcom then went on to consider the section of the programme that dealt specifically with children, schools and marketing. This was a lengthy sequence, which began with a montage of advertisements, old and new, featuring cartoons and animated characters, and familiar jingles, and with the presenter stating in voice-over:

"Since the 1960s, food companies have directly targeted sugary cereals at children using cartoon characters and free gifts".

The presenter then explained that new regulations introduced in 2007 saw advertisements for foods high in sugar, salt or fat ("HFSS foods") banned from children's television. The programme pointed out that this did not prevent children from seeing such advertisements, as they were permitted to be screened around popular programmes watched frequently by children such as *The X Factor*. The programme went on to say:

“Manufacturers are now banned from advertising cereals that are high in sugar during children’s television programmes – but that ban doesn’t extend to the internet. So there are a lot of eyecatching, bright, colourful sites popping up to promote well known children’s cereal”.

After showing children interacting with these sites, the programme stated that *“Weetos, Coco Pops, Shreddies, Sugar Puffs ... all have sites directly targeted at children.”*

At that point, the programme stated:

“Kellogg’s told us that in 2007 they announced an end to marketing to children over the internet and a move to family focused promotions. But this is at odds with the games we found on their website”.

The programme showed two young girls playing a game on the Coco Pops website and then went on to look at the way in which manufacturers provide branded educational tools to schools. It stated:

“UK companies including food manufacturers still spend an estimated three hundred million pounds a year on marketing in schools (...) Marketing gets into schools in the form of education packs which teachers use in lessons. And some of this material is heavily branded”.

Richard Watts, of the Children’s Food Campaign, gave his opinion in interview of this technique:

“The fact that they are trying to do it in the classroom gets around a lot of the slightly stricter regulations there is now about more traditional forms of advertising and is a better way of doing it because if the information is passed to the children by the teacher they’re more likely just to see it as fact and accept it instead of trying to look at it critically”.

After discussing a website sponsored by Nestlé, the programme included the following segment:

“Cereal branding creeps into every aspect of children’s lives. Over the past ten years, Kellogg’s has spent more than £1 million on school breakfast clubs. And it’s recently increased that investment. It’s even a sponsor of the Government’s healthy eating campaign, Change4Life. And take a look at this swimming badge ... there’s the Kellogg’s branding. And in the corner is the Frosties logo. Frosties is one of the most highly sugared cereals on the market. And yet it’s become linked to sport and fitness in youngsters’ minds as it’s part of Kellogg’s three million pound sponsorship deal with the Amateur Swimming Association”.

Ofcom considered that viewers would understand from this section of the programme not only that cereal manufacturers were targeting children through websites and educational materials, but that Kellogg’s in particular was using websites, school breakfast clubs and its sponsorship of the Amateur Swimming Association as a tool to market its products to children. Ofcom noted that Kellogg’s disputed that it deliberately targeted children and that the school breakfast club programme constituted marketing to children because the exercise was not branded and because it did not require these clubs to carry its branded products.

Ofcom was therefore required to establish whether the omission of this information resulted in unfairness to Kellogg's. Ofcom took account of Channel 4's argument that, irrespective of whether or not the clubs carried Kellogg's branding or its products were mandatorily carried by the clubs, the aim of the clubs could only be to promote brand awareness. Ofcom noted also that Kellogg's did not dispute the fact of its significant investment in the school breakfast clubs programme; on the other hand, it also appeared to Ofcom that neither party disputed that Kellogg's did not require the breakfast clubs to carry its branding or products.

Ofcom considered that there was a point of dispute between Kellogg's and Channel 4 relating to the aim of the breakfast clubs. However, Ofcom noted that it was not its role to establish beyond doubt the motivation behind Kellogg's marketing strategies, but rather to assess whether the programme presented material facts around its marketing activities fairly. It seemed clear to Ofcom that the programme stated that Kellogg's marketing was targeted at children, and implied that the breakfast clubs were part of that strategy. However, the breakfast clubs were not the only example given to illustrate the notion that Kellogg's marketing was directed at children: other examples included websites and sponsorship.

Although Ofcom considered that it might have been more accurate to mention in the programme that Kellogg's branding did not feature in the clubs and its products did not have to be provided by the clubs (or indeed to avoid using this as a clear-cut example of targeted branding activity) including this information would not have materially affected viewers' perception of its role in marketing to children in the light of the other examples of branded marketing given in the programme. Therefore Ofcom concluded that this did not constitute the omission of a material fact that resulted in unfairness to Kellogg's.

Cutting down on sugar & obesity

Ofcom noted that the relevant section of the programme came in the context of the Clucas family experiment, which involved replacing the children's typical breakfast of popular cereals with a lower salt and sugar menu prepared by a nutritionist. The programme stated:

"On their usual diet of sugary cereals the three children ate as much as 300 grams of sugar – ten times the amount they were eating on their new breakfast diet (...) Over a year the three children would eat 14 kilograms less sugar – simply by cutting out their favourite breakfast cereals".

Ofcom noted that this section of the programme did not touch upon the question of obesity, which was referred to only once in the programme (by Professor James, as mentioned above) in a much earlier section of the programme. Ofcom acknowledged that, although it was not a central theme, the issue of childhood obesity was raised in the programme and that it would have been connected in viewers' minds to sugar content in general, partly as a result of Professor James' earlier comment. Ofcom acknowledged that the statement in respect of the 14 kilogram reduction in sugar was a factual statement but considered that it would have been understood by viewers in the context of the programme as a whole, which was based on the assumption that high sugar intake was not desirable in the context of weight control, in part because the programme clearly stated that nutritionists advocated a reduction in the sugar (and salt) content of breakfast cereals. The argument that those who ate breakfast cereals, irrespective of sugar

content, tended to be slimmer was therefore not strictly speaking irrelevant to the discussion of whether it was desirable to reduce sugar intake at breakfast.

That said, Ofcom noted that it was not its role to establish whether or not eating high sugar breakfasts was desirable or conducive to weight loss. Ofcom's role was, rather, to consider whether the presentation of the position that it was desirable to reduce sugar intake at breakfast (in particular for children) resulted in unfairness to Kellogg's. In Ofcom's view, the programme as a whole would be understood by viewers as advocating a reduction in sugar intake at breakfast, but noted that, in doing so, the programme relied on the established view of the scientific community and on the basic principle that reducing sugar intake could result in weight loss. The programme was not, however, suggesting that it was impossible to lose weight by continuing to eat sugary breakfast cereals. Ofcom considered that it was reasonable for Channel 4 to rely on generally accepted principles and the views of the scientific community and therefore that no unfairness resulted to Kellogg's as a result of the omission of information that some scientific studies showed that weight loss was observed in those who ate breakfasts irrespective of sugar content.

a) ii) *Marketing and labelling: packaging information and the FSA's food labelling scheme*

Ofcom next turned to Kellogg's complaint that the programme implied duplicity on the part of Kellogg's in the claims made for its products and the nutritional information given on pack, and failed to give its reasons for rejecting the FSA's traffic lights' system, thus implying that it was disengaged from the debate and opposed the scheme for no real reason.

In considering this part of the complaint Ofcom took account of Rule 7.1 of the Code, and had regard to Practice 7.9, as detailed above.

Ofcom noted that the programme included the statement by Sue Davies (as mentioned in the introductory section, above) that *"when we look at the claim or we look at the nutritional information in more detail products aren't always what they seem"*.

Ofcom also noted that, following Sue Davies' comment, the programme featured a consumer perception exercise in which a group of parents and teachers were tested to see *"if they could see past the nutritional marketing claims to assess actual levels of salt and sugar in 18 popular cereals, some designed to look healthy"*. This sequence began with the presenter stating:

"Cereal makers do tell us in tiny letters on the side of the packaging what goes into cereals. So in theory shoppers should be able to weed out those with high amounts of salt and sugar. But how easy is it to understand the labelling?"

The programme showed that participants in the exercise were unable to correctly identify which products were high in salt or sugar by reading the packaging and the programme stated that *"not one member of the group found the nutritional labelling clear and easy to understand"*. The programme also explained that the exercise had used, for its classifications, the FSA's traffic light labelling scheme¹,

¹ This scheme aims to help consumers identify sugar, salt and fat levels in foods by labeling them red for high, amber for medium and green for low.

which it said “*nearly all the leading food manufacturers have rejected*”, and included an interview with Professor Philip James, in which he commented:

“It’s a terrible threat to those companies producing rotten products because if your products are stuffed with fat, sugar and salt, the last thing you want is a traffic light system. So they are working like crazy throughout the world to sabotage the development of traffic lights.”

The programme then stated that “*cereal makers Kellogg’s and Nestlé argue that their existing labelling works well,*” and asked “*how can that be when there isn’t even a uniform way system for measuring how much is in a serving?*”

Ofcom considered that neither of the statements “*products aren’t always what they seem*” or “*Cereal makers do tell us in tiny letters on the side of the packaging*” referred specifically to Kellogg’s but, as noted above, also considered that viewers could attribute any critical comments directed at cereal manufacturers to Kellogg’s specifically. Ofcom considered, then, whether these comments were likely to be seen as implying that cereal makers were acting duplicitously and whether, in fairness to Kellogg’s, the programme should have made clear that Kellogg’s exceeded all relevant requirements on the presentation of Guideline Daily Amounts (“GDA”) and that all of its claims were scientifically supported.

Ofcom noted that the statement that “*cereal makers do tell us in tiny letters on the side of packaging what goes into cereals*” came in the context of a consumer perception test which aimed to establish how consumers understood the information that was on pack. Ofcom considered that viewers would have understood from that section of the programme that all the relevant information was given by manufacturers, but that consumers simply ignored or did not understand it.

Ofcom considered that this was underlined by the discussion of the FSA’s traffic lights system that immediately followed this section of the programme, in which the programme suggested that this system would be a greater aid to consumer understanding and made clear that “*Kellogg’s and Nestlé argue that their existing labelling works well*”. Ofcom therefore considered that there was no suggestion in the programme that food manufacturers in general, or Kellogg’s in particular, were being deliberately duplicitous, merely that they were in conflict with the FSA about what was the clearest presentation for nutritional information. For that reason, Ofcom concluded that it was not incumbent on the programme makers to include, in the interests of fairness to Kellogg’s, information that it exceeded the legal requirements for presenting GDA information.

As stated in the introductory section, above, Ofcom took the view that the programme did not claim or imply that cereal makers in general or Kellogg’s in particular made misleading health or nutrition claims. For that reason, Ofcom did not consider that the omission of a statement that all of Kellogg’s claims were scientifically supported constituted the omission of a material fact that resulted in unfairness to Kellogg’s.

Staying with the question of the FSA’s proposed labelling scheme, Ofcom noted that Kellogg’s did not dispute the fact that it was opposed to traffic light labelling, as stated in the programme. Although the programme did not go into detail about the basis for this opposition, Ofcom considered that it made clear that the alternative proposed by manufacturers was based on serving size. In Ofcom’s

view, therefore, Channel 4 took reasonable steps to ensure that material facts in relation to Kellogg's opposition to the traffic lights labelling scheme was not presented in a way that was unfair to Kellogg's.

Ofcom therefore found no unfairness to Kellogg's in this respect.

a) iii) *Salt and sugar content*

Ofcom then considered the complaint that the programme made unfair allegations and omitted material information in respect of salt and sugar content, in particular in its treatment of Special K and in the comparison between a chocolate cake and breakfast cereals.

In considering this part of the complaint Ofcom took account of Rule 7.1 of the Code, and had regard to Practice 7.9, as detailed above.

Special K Diet Plan

Ofcom noted that Special K was one of the products singled out by the programme for a specific experiment, in which Mr Cynan Clucas attempted the two week diet suggested by Kellogg's in its "Drop a Jean Size" weight loss challenge. The experiment was introduced to viewers as follows:

"Kellogg's UK profits soared in 2000 when it introduced its two week Special K diet plan – heavily marketing the product as a slimming option – even though it has high levels of sugar. It was claimed three million people took part in the weight-loss challenge (...) It may only look like a cereal, but according to a study quoted by Kellogg's up to three quarters of the people who followed its two week 'kick start plan' slimmed down".

The programme then followed Mr Clucas's progress, as he ate a bowl of Special K for breakfast and lunch (followed by a dinner of his choice). Mr Clucas was critical of the regime because he said it left him hungry and irritable and, he said, *"my energy and concentration have definitely dipped"*. The programme concluded by stating that Mr Clucas had lost 1kg on the plan.

Ofcom noted that Kellogg's complaint here, as in head a) i), was again that, in omitting to state that Special K contained as much sugar as a banana, a glass of fruit juice or a low fat yoghurt, the programme was unfair to Kellogg's.

In this instance, Ofcom considered whether the issue of comparative sugar content was a relevant and material factor that would have altered viewers' perception of Special K. It appeared to Ofcom that viewers may have been surprised to learn that a "slimming option" was one that contained high sugar, and that their surprise might have been lessened if they discovered that other products that they perhaps associated more traditionally with slimming – such as fruit or low fat yoghurt – contained the same amount of sugar. However, that in itself was unlikely to have significantly altered their opinion of Special K – particularly as it was shown in the programme as resulting in Mr Clucas losing weight – and for that reason Ofcom did not consider that the omission of the comparison suggested by Kellogg's was unfair to it.

Comparisons with the Dispatches Cake

Ofcom noted that this section of the programme dealt with the proposed European regulations that would restrict the kind of health and nutritional claims that could be made for products high in fat, salt and sugar. The programme noted that the bar for considering a product “high in sugar”, for example, was twice as high as the bar for “high in sugar” under current UK guidelines.

Ofcom noted that the sequence was introduced with a comment from consumer expert Sue Davies of Which, who said that:

“A lot of breakfast cereals are carrying claims in any case, whether that’s claims about particular health benefits or whether it’s claims about particular nutrients, and so we’d hope that this legislation would actually help to ensure that there was a more responsible approach so that consumers wouldn’t be drawn to products because they were saying they were low in saturated fat for example when they were high in sugar”.

In order to “see what food companies will be able to get away with under the proposed rules” the programme’s presenter was then joined by dietician Sue Lloyd to make a chocolate cake (“the Dispatches Cake”). The programme noted the kinds of claims that would be permitted under the current proposals (for example, “rich source of vitamin E”, “can be enjoyed as part of a healthy diet”) and the presenter commented:

“... so looking at this with all these claims on the front of my packet, if you said to me, you just showed me that and said what’s inside the box, I think chocolate cake is the last thing on earth that I would guess”.

The presenter then concluded this section with the following commentary:

“Sue has also made the Dispatches cake with less sugar or salt than some popular cereals we eat every day”.

The following conversation then took place:

“Dietician: If we look at this we have sugars at 21.1 grams per hundred grams, which is actually less than the amount of sugar that we find in Bran Flakes. We also have less salt than we find in Rice Krispies or Cornflakes”.

“Presenter: That’s astonishing. So if you give a slice of this in the morning, so like a 30gm piece of cake so it’s more healthy than some of the cereals you’ve mentioned?”

“Dietician: In terms of salt and sugar, yes”.

Ofcom considered that viewers would understand that the primary purpose of this section of the programme was to examine the application of the proposed European regulations on health and nutrition claims, by demonstrating the kinds of claims that the proposed European regulation would permit for products that contained sugar and salt at levels currently considered “high” under UK regulations: claims that consumers, as represented by the presenter, would not associate with a product such as a chocolate cake.

Ofcom noted that the section was bookended by two references to breakfast cereals – the second of which made a direct, factual comparison – but considered that the programme made clear that any comparison between the cake and cereals was clearly set out as being in relation to salt and sugar. Ofcom also considered that this element was secondary to the primary message of the Dispatches Cake experiment, namely to establish the kinds of legitimate health messages that could appear under the new proposed legislation.

Ofcom also noted that the three products specifically mentioned in this section of the programme were manufactured by Kellogg's. Ofcom considered that the comparisons with Bran Flakes, Rice Krispies and Cornflakes were factually accurate.

Because the nature of the comparison between the cake and cereals, in as far as it featured in this section of the programme, was clearly set out and fully qualified as relating only to sugar and salt, Ofcom did not consider that the comparison was not presented in a way that was unfair to Kellogg's.

- b) Finally, Ofcom considered Kellogg's complaint that it had not been given an appropriate or timely opportunity to respond to allegations made in the programme, and any responses that it did give were not adequately reflected in the programme.

In considering this part of the complaint Ofcom took account of Rule 7.1 of the Code, and had regard to Practice 7.11 of the Code, which states that if a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond. Ofcom also had regard to Practice 7.13, which states that where it is appropriate to represent the views of a person or organisation that is not participating in the programme, this must be done in a fair manner. Ofcom also had regard to Practice 7.3 of the Code, which states that those invited to make a contribution to the programme should normally be told the nature and purpose of the programme.

As detailed in the decision on head a) above, Ofcom took the view that, in so far as the programme commented on cereal manufacturers in general, the likely inference was that cereal manufacturers were using generic "healthiness" messages to promote their products but that these messages were being incorrectly interpreted by consumers, and the broadcaster had taken reasonable care to present that proposition fairly. Ofcom also noted that the programme contained information about the nutritional value of cereals in relation to sugar and salt, but considered these to be factual statements none of which amounted to serious allegations of wrongdoing or incompetence either about cereal manufacturers in general or Kellogg's specifically.

In relation to children, Ofcom considered that the broadcaster had not made a serious allegation of wrongdoing in respect either of the sugar content of Kellogg's cereals or of its branding and marketing activities or presented the information about these issues in a way that was unfair to Kellogg's.

Ofcom considered, therefore, that it was not necessary in the interests of fairness to offer Kellogg's an opportunity to respond to the statements made about it in the programme, or to any of the general comments about cereal manufacturers.

Ofcom noted that Channel 4 did contact Kellogg's on 14 October to inform it that it was producing a programme "looking at food, in particular breakfast foods" which "intends to examine the nutritional value of such foods and seeks to assess any advertised health benefits of them". In that letter, Channel 4 asked for comments about Kellogg's involvement with Heart UK (in particular in relation to Heart UK's endorsement of Optivia). Having reviewed the correspondence, it appeared to Ofcom that the questions asked at that stage did not in fact relate to any allegations or statements about Kellogg's that were later included in the programme. Kellogg's was also told that the programme would be looking at Special K, but asked for no information about the cereal. Finally, it was asked what activities for and in schools it was involved in, how much it paid in the past five years to the Amateur Swimming Association and what it got in return for sponsorship.

Ofcom considered that the information given to Kellogg's about the nature and content of the programme was relatively limited and concerned issues that were not, in the end, all raised in the programme as broadcast. Ofcom also took note of the fact that the programme makers made no explicit mention of any intention to look at the marketing of cereals directly to children, but did ask Kellogg's what school activities it was involved in. However, Kellogg's had been told that the programme would "examine the nutritional value" of foods such as breakfast cereals, Ofcom also noted that, having received this limited information, Kellogg's responded in detail to the programme makers, answering the questions they had posed and informing them, to a large degree unprompted, of the comparative salt and sugar content of different products, of its new self-imposed guidelines on marketing to children, and the details of its sponsorship programmes. Kellogg's also provided Channel 4 with a statement outlining the benefits of cereal as a breakfast food and requested that it be read in full in the programme.

Ofcom noted that it is not a requirement of the Code for the broadcaster to include any response or statement submitted to it by organisations in full, and that what a programme maker chooses to include in a programme is a matter of editorial discretion, provided the inclusion or omission of information does not result in unfairness. As noted above, Ofcom considered that Channel 4 had included Kellogg's statement that it "*in 2007 they announced an end to marketing to children over the internet and a move to family focused promotions*" and, found that the omission of other information provided by Kellogg's had not resulted in unfairness to it (for example, about GDAs and comparisons with other products' sugar content). Ofcom also noted that, where issues were discussed that had not arisen in its pre-broadcast correspondence with Kellogg's (for example, the FSA's traffic lights scheme), the programme had also reflected Kellogg's views on the subject. Therefore Ofcom considered that the broadcaster had reflected Kellogg's views fairly.

Ofcom noted that Kellogg's was aggrieved at the treatment it had received prior to the broadcast from Channel 4, at the broadcaster's description of its statement as "verbose and self-serving", and at what it considered to be deliberate obfuscation on the broadcaster's part. It also noted that Kellogg's considered itself to be a contributor to the programme and therefore believed it should have been more fully informed about the nature and content of the programme. Ofcom acknowledged that the information Kellogg's had received was limited and that communications between the broadcaster and Kellogg's had not been entirely harmonious. However, Ofcom considered that Kellogg's had not been invited to contribute to the programme and there was no strict requirement to inform it about the nature and content of the programme. Ofcom also pointed out that it

could record a breach of the Fairness section of the Code only if there was unfairness in the programme as broadcast.

Because Ofcom found that the programme was not unfair to Kellogg's, and made no serious allegations of wrongdoing about it, it has not upheld this complaint.

Accordingly Ofcom has not upheld complaint of unfair treatment.

Not Upheld

Complaint by Professor Tom Sanders

Dispatches: What's In Your Breakfast?, Channel 4, 26 October 2009

Summary: Ofcom has not upheld this complaint of unfair treatment made by Professor Tom Sanders.

Channel 4 broadcast an edition of its documentary series *Dispatches* that looked at breakfast cereals. The programme looked at the nutritional content of breakfast products, including levels of salt and sugar, the health claims made for them and the marketing techniques used by the industry. In a section of the programme that looked at endorsement of products by HEART UK, a cholesterol charity, the programme included footage of Professor Tom Sanders, a professor of nutrition and dietetics and a member of the HEART UK approval panel.

Professor Sanders complained to Ofcom that he was treated unfairly in the programme.

In summary Ofcom found that, although Channel 4 stated that the Professor Sanders was not the focus of the programme's criticism, viewers would have understood the programme to be suggesting that Professor Sanders was compromised in his work with the charity as a result of his former involvement with the Association of Cereal Manufacturers. This was a serious allegation to which he was entitled an opportunity to respond. He was not given such an opportunity, but Channel 4 took reasonable steps to ensure that his views were, nonetheless, represented in the programme. As a result he was not unfairly treated in the programme.

Introduction

On 26 October 2009 Channel 4 broadcast an edition of its documentary series *Dispatches*, entitled *What's In Your Breakfast?* The programme looked at the nutritional content of breakfast products, including levels of salt and sugar, and the marketing techniques used by the industry, in particular health claims used by manufacturers to sell products. The reporter questioned whether there was evidence to support the health claims made for some of the products and whether consumers were able to assess the content of products.

In the course of her investigation, the reporter looked at some products endorsed by HEART UK, a cholesterol charity. Professor Philip James, Chairman of the International Obesity Task Force, expressed his concern in the programme that consumers could be misled by endorsements such as those given by HEART UK. The reporter went on to say that HEART UK did not tell consumers that the most senior nutritionist on its approval panel, Professor Tom Sanders, had once served as an adviser to the Association of Cereal Food Manufacturers and that in 2005 the Health Select Committee had alleged that he had been part of a food industry campaign to discredit the Committee's report on obesity. Archive footage was included of Mr David Hinchliffe, the Committee's chairman, speaking in Parliament and suggesting that Professor Sanders had been "*wheeled out to do a hatchet job*" on behalf of the food industry. The reporter said that Professor Sanders had dismissed this as "*spiteful and false*" and that he had done nothing wrong as he always declared any conflict of interest. Archive footage of Professor Sanders was also included in the programme.

Professor Sanders complained to Ofcom that he was treated unfairly in the programme as broadcast.

The Complaint

Professor Sanders' case

By way of background, Professor Sanders said that he had been Honorary Nutritional Director for HEART UK since its inception, because of his knowledge and expertise regarding the effects of diet on blood lipids and cardiovascular risk. He said that he had served as an adviser to the WHO/FAO Expert Consultation on the role of fats and fatty acids in human nutrition. He said that he had been Professor of Nutrition and Dietetics and King's College, London, since 1994 and was head of the Nutritional Sciences Division at King's College. He said that his research was principally funded by the Food Standards Agency.

In summary, Professor Sanders complained that he was treated unfairly in that:

- a) The programme misrepresented material facts about the role of breakfast cereals in human nutrition by omitting information and by exaggerating the significance of their sugar content in the overall context of the whole diet. In particular, the omission of the scientific evidence that wholegrain and oat-based cereals contribute to maintaining a healthy heart/blood cholesterol resulted in an insinuation that there was no sound scientific basis for HEART UK to endorse Shredded Wheat and Optivita. Instead the programme implied that as a scientific adviser to HEART UK, who had worked as a consultant to the cereal industry, Professor Sanders had a vested interest in endorsing those products. It was not made clear that the work Professor Sanders did for the charity was *pro bono* and unpaid. Professor Sanders said that, in this respect, the programme makers had indulged in a personal vendetta designed to besmirch his professional reputation.
- b) The programme's inclusion of footage from Mr Hinchliffe's speech in the Houses of Parliament allowed the programme makers to repeat a malicious attack on Professor Sanders that, if repeated outside Parliament, would have been libellous. This re-used footage had no direct relevance to the breakfast cereals that were the focus of the programme and the false allegation that he was part of a food industry campaign to discredit the obesity report was made with the intention of maligning his professional reputation.
- c) The programme unfairly implied that Professor Sanders could not be trusted, as a result of the inclusion of Mr Hinchliffe's statement that "*Tom Sanders acts as an adviser and consultant to the food industry, and was obviously wheeled out to do a hatchet job on its behalf*".
- d) Professor Sanders was not given an appropriate and timely opportunity to respond to the allegations made in the programme or to have his views represented.

Channel 4's case

By way of background, Channel 4 said that the programme approached the question of consumer understanding of the contents of breakfast cereals by combining factual information about the levels of salt and sugar in various products with anecdotal and personal observations from ordinary consumers. The aim of the programme was to

encourage viewers to look beyond the images established by the marketing and packaging of commercially available breakfast cereals to properly and carefully consider the specific ingredients in the cereal prior to purchase. The programme was not, however, a forensic examination of the nutritional values of breakfast cereals.

In summary, Channel 4 responded to Professor Sanders' complaint as follows:

- a) Channel 4 responded first to the complaint that the programme omitted scientific evidence that wholegrain and oat-based cereals contributed to maintaining a healthy heart/blood cholesterol and therefore insinuated that there was no sound scientific basis for HEART UK to endorse Shredded Wheat and Optivita and that Professor Sanders had a vested interest in endorsing those products.

Channel 4 said that the programme did not carry any suggestion that there was no sound basis, scientific or otherwise, for HEART UK's endorsement of either Shredded Wheat or Optivita. Fleeting images of the HEART UK endorsement of Shredded Wheat and Optivita were shown at the beginning of the segment of the programme that looked at HEART UK endorsement, so that the context of what followed, namely a discussion about the propensity for HEART UK's endorsement to mislead consumers, could be established.

Channel 4 said that the programme was clear as to the issues it raised in relation to HEART UK, which were that:

- i) where a manufacturer paid for the endorsement of a charity, how was the consumer to know the relative efficacy of particular products of a similar type when the consumer did not know why a particular product had been endorsed or whether other products would be endorsed if they made application for endorsement and paid the appropriate fee;
- ii) where the endorsing charity did not reveal to consumers, at any point, the possibility of conflicts of interest arising how could the consumer have faith in the endorsing charity; and
- iii) once it had been conceded by Welch's and HEART UK that there had never been any attempt to suggest that Welch's Purple Grape Juice had cholesterol reducing properties, what value was the consumer to attach to the HEART UK endorsement of that product.

Channel 4 said that these issues concerned parties other than Professor Sanders and that the points were put to the relevant parties, namely Welch's and HEART UK, whose responses were represented in the broadcast.

As far as Professor Sanders was concerned, Channel 4 said that there was no suggestion that he had a vested interest in endorsing products for HEART UK and that the commentary said:

"Professor Sanders has done nothing wrong, as he always openly declares any conflict of interest".

This unambiguous statement clearly reflected Professor Sanders' position, namely that he was not at fault.

Channel 4 said that the programme did not state whether Professor Sanders' work for HEART UK was paid or was *pro bono* as this was not relevant to the

allegations about HEART UK. As the programme sought to make clear, the obligation on any endorsing charity should be to disclose to the consumer any relevant actual or perceived conflict of interest. In this Professor Sanders' case, the capacity for conflict to arise came about because of his historical activities, not because he was or was not paid by HEART UK. As the programme made it clear that Professor Sanders always disclosed relevant conflicts of interest, there was no possibility that any viewer would think he had committed any wrong.

- b) Channel 4 next responded to the complaint that the programme included footage of a malicious attack on Professor Sanders that, if repeated outside Parliament, would have been libellous and was not directly relevant to the breakfast cereals that were the focus of the programme and that a false allegation that he was part of a food industry campaign to discredit the obesity report was made with the intention of maligning his professional reputation.

Channel 4 said that the footage of Mr Hinchliffe's statement in Parliament was included for a proper purpose. The statement was well-publicised when Mr Hinchliffe made it and Professor Sanders' written objections to it were prominently and widely published. Channel 4 said that Mr Hinchliffe's statement was and remained protected by Parliamentary privilege, as was any fair reporting of the statement. Channel 4 said that the footage was directly relevant to the issue of the value a consumer could place on HEART UK endorsements, which was the section of the programme in which Mr Hinchliffe's statement was featured, and demonstrated the objective fact that Professor Sanders' history with food manufacturers had been the subject of public criticism in Parliament. The footage helped make the point that it was incumbent on HEART UK to advise consumers of any actual or perceived conflicts that might rise in relation to the endorsements they provided.

Channel 4 said that the programme carried an unambiguous and clear statement that represented Professor Sanders' position on the statement by Mr Hinchliffe, when the commentary said that he had "...dismissed this attack as *"spiteful and false"*".

Channel 4 said that viewers were in no doubt that Professor Sanders had a history with the food industry that was at times controversial. The only relevant point made in the programme was that, given that history, it was fundamentally unsound for HEART UK to fail to disclose to consumers any perceived or actual conflict of interest occasioned by its selection of advisers.

- c) As regards the complaint that the programme implied that Professor Sanders could not be trusted, Channel 4 said that, for the reasons set out in its response at head b) above, the programme could not have carried an implication that Professor Sanders was untrustworthy. Channel 4 said that the programme included the unambiguous statement that "*Professor Sanders has done nothing wrong*". This section of the programme was not criticising Professor Sanders, but focusing on HEART UK.
- d) Channel 4 then responded to the complaint that Professor Sanders was not given an appropriate and timely opportunity to respond to the allegations made in the programme or to have his views represented. Channel 4 said that the programme did not make any allegations about Professor Sanders. Where the programme referred to Professor Sanders' views, those views were fairly represented. In particular, his statement in a letter to the programme makes that he declared conflicts of interest was expressly made as part of the programme.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision on Professor Sander's complaint, Ofcom considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and a transcript and both parties' written submissions.

- a) Ofcom first considered the complaint that the programme omitted scientific evidence that wholegrain and oat-based cereals contributed to maintaining a healthy heart/blood cholesterol and therefore insinuated that there was no sound scientific basis for HEART UK to endorse Shredded Wheat and Optivita and that Professor Sanders had a vested interest in endorsing those products.

In considering this part of the complaint Ofcom took account of Rule 7.1 of the Code, which provides that broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes. Ofcom also considered Practice 7.9, which provides that, before broadcasting a factual programme, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to the individual or organisation.

Ofcom first noted that it was not its role to decide which evidence should have been included in the programme, as that was an editorial decision for the programme makers, provided that no unfairness resulted from the omission of any material.

Ofcom considered the relevant section of the programme, in which the reporter looked at the endorsement of Welch's Purple Grape Juice by HEART UK, a cholesterol charity¹. The reporter stated that both Welch and HEART UK said that HEART UK's approval was not and never had been an attempt to suggest that Purple Grape Juice had cholesterol-lowering properties. The reporter questioned what else the endorsement would mean to consumers and explained that manufacturers had to pay an annual fee of £25,000 for approval of a product. A clip of Professor James' interview then followed, in which he said that he was concerned that the system of endorsements meant that consumers could be misled, as non-endorsed products could be equally good or better, but were not endorsed by the charity as the manufacturers had not paid for endorsement. The reporter went on to say that Kellogg's Optivita and Nestlé's Shredded Wheat both carried the HEART UK approval logo and asked how useful that approval was to the consumer and said:

¹ The words "The Cholesterol Charity" feature as part of the HEART UK logo.

“What HEART UK doesn’t tell you is that the most senior nutritionist on its approval panel also once served as an adviser to the Association of Cereal Food Manufacturers”.

She then said:

“In 2005 the Health Select Committee in Parliament alleged that Professor Tom Sanders had been part of a food industry campaign to discredit the Committee’s report on obesity”.

Archive footage of Mr Hinchliffe was included, in which he said:

“Tom Sanders acts as an adviser and consultant to the food industry, and was obviously wheeled out to do a hatchet job on its behalf”.

The reporter said that Professor Sanders had dismissed this as *“spiteful and false”* and that:

“Professor Sanders has done nothing wrong as he always openly declares any conflict of interest. But we asked Heart UK whether they thought they should tell consumers that one of their approval panel has had close links to the cereal industry”.

The reporter then relayed HEART UK’s response to this question, namely that it said it did not believe this would be appropriate and this section of the programme ended with Professor James stating that:

“The nutritionist or scientist should be very careful about being involved first with a food manufacturer and then a charity that endorses those products even if not doing the two things at the same time”.

In Ofcom’s view this section of the programme was looking primarily at the system of endorsements and concerns that these could be misleading to consumers. In these circumstances, Ofcom did not consider that it was necessary for it to assess the impact of the omission of scientific evidence in relation to wholegrain and oat-based cereals, but that its role was to consider whether any there was any unfairness to Professor Sanders as a result of the programme’s investigation of endorsements. Ofcom also took the view that it was not incumbent on the programme makers to refer to the fact that Professor Sanders was not paid for his work with HEART UK, as this was not directly relevant to the question of endorsements.

Ofcom noted Channel 4’s position that this part of the programme concerned the behaviour of HEART UK and did not focus on Professor Sanders or suggest he had a vested interest in endorsing products for HEART UK. Ofcom considered that viewers were likely to have understood the primary focus of this part of the programme.

However, Ofcom considered that viewers were also very likely to have understood the programme to be criticising Professor Sanders for his role with HEART UK and his history as a former adviser to the Association of Cereal Manufacturers. This was because it appeared to Ofcom that one of the criticisms levelled against HEART UK related to its use of Professor Sanders on its approval panel. Inherent to this criticism was the implication that Professor Sanders was not a suitable member of the panel as his previous involvement with

the Association of Cereal Manufacturers created a conflict of interest that prevented his involvement with HEART UK being in the best interests of the consumer. In Ofcom's view, notwithstanding Channel 4's statement that it was not the programme's intention to criticise Professor Sanders, this part of the programme was likely to lead to viewers concluding that Professor Sanders was compromised and was not acting in the best interests of consumers.

Taking all of the above into account, Ofcom took the view that, in such circumstances, it was incumbent on the broadcaster to take steps to avoid presenting material facts in a way that was unfair to Professor Sanders. Ofcom noted that his views (namely that he refuted Mr Hinchliffe's comments, that he had "*done nothing wrong*" and "*always openly declares any conflict of interest*") were represented in the programme, and concluded that the broadcaster had therefore taken reasonable steps to ensure that material facts were not presented in a way that was unfair to Professor Sanders.

Ofcom therefore found no unfairness in this respect.

- b) & c) Ofcom considered the complaint that the programme included footage of a malicious attack on Professor Sanders that, if repeated outside Parliament, would have been libellous and was not directly relevant to the breakfast cereals that were the focus of the programme and that a false allegation that he was part of a food industry campaign to discredit the obesity report was made with the intention of maligning his professional reputation. It also considered the complaint that, as a result of the inclusion of footage of Mr Hinchliffe, the programme implied that Professor Sanders could not be trusted.

In considering this part of the complaint Ofcom took account of Practice 7.9 of the Code and of Practice 7.8, which states that broadcasters should ensure that the re-use of material, i.e. use of material originally filmed or recorded for one purpose and then used in a programme for another purpose or used in a later or different programme, does not create unfairness.

It is not Ofcom's role to consider whether a programme contains libellous material, but to consider whether a programme resulted in unfairness.

Ofcom noted that the footage of Mr Hinchliffe included in the programme was taken from a discussion in Parliament about the Health Select Committee's report on obesity. Mr Hinchliffe spoke in that discussion of responses to the report and criticisms made of the Select Committee. It was in this context that he made his comment about Professor Sanders. Mr Hinchliffe's remark related to comments Professor Sanders made about the obesity report when it was published and, in reporting those comments, the programme was simply reminding viewers of a debate that had been widely discussed when the report was published, which it was entitled to do. Ofcom noted Professor Sanders' view that Mr Hinchliffe's remark was not directly relevant to the point being made at this point in the programme, namely the questioning of the value to consumers of the HEART UK endorsement. However, the inclusion of such footage is a matter of editorial discretion, and Ofcom's role is to consider whether its use resulted in unfairness. In Ofcom's view this archive footage appeared to have been included as a further means of bolstering the programme's criticism of Heart UK's endorsements and was therefore likely to have compounded the criticism of Professor Sanders referred to at head a) above. However, as noted in head a), Ofcom considered that his views were represented fairly in the programme and therefore that the

broadcaster had taken reasonable steps to ensure that material facts were not presented in a way that was unfair to Professor Sanders.

Ofcom therefore found no unfairness to Professor Sanders in this respect.

- d) Ofcom considered the complaint that Professor Sanders was not given an appropriate and timely opportunity to respond to allegations made about him in the programme or to have his views represented.

In considering this part of the complaint Ofcom took account of Practice 7.11 of the Code, which states that if a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond. Ofcom also took account of Practice 7.13, which states that where it is appropriate to represent the views of a person or organisation that is not participating in the programme, this must be done in a fair manner.

As set out under decision heads a) to c) above, Ofcom took the view that, notwithstanding the fact that the main focus of this part of the programme was the question of endorsements of products by HEART UK and the extent to which they might assist or mislead consumers, the programme would also have been understood by viewers to be criticising Professor Sanders for his role in the endorsements provided by HEART UK. It also considered that the use of the footage of Mr Hinchliffe's criticisms of Professor Sanders would have added to this impression. Ofcom acknowledged that the programme makers did not consider that the programme made any significant allegations about Professor Sanders, but, as set out above, Ofcom did not share that view. Ofcom noted that, in circumstances where a programme makes significant allegations against an individual, an opportunity to respond should normally be given.

Ofcom noted that the programme makers did not contact Professor Sanders during the making of the programme. However, the programme makers did write to HEART UK and put a number of points to the charity for its response, including questions about whether it was appropriate for Professor Sanders to sit on the HEART UK approval panel. HEART UK informed Professor Sanders of the letter and he contacted the programme makers. In his letter he said that any insinuation in the programme that he had used his position as adviser to the Breakfast Cereals Information Service² to influence product approval by HEART UK would be unfair. He provided an explanation of his different roles and interests and that said that any conflicts of interest had been openly declared.

Ofcom noted that, although the programme's criticisms were not put to Professor Sanders at the time this programme was made, the reporter stated in the programme that, with reference to Mr Hinchliffe's remark, Professor Sanders had "*dismissed this attack as spiteful and false*" (a view Professor Sanders had in fact given in an article in The Times newspaper at the time, rather than directly to the programme makers). She also conveyed Professor Sanders' assertion directly to Channel 4 that he had "*done nothing wrong, as he always openly declares any conflict of interest*". Ofcom considered that it would have been desirable if the programme's criticism of Professor Sanders had been put to him directly during the making of the programme, so that he could provide a specific response to the issues raised. However, Ofcom took the view that the commentary sufficiently

² The Breakfast Cereals Information Service is part of the Association of Cereal Food Manufacturers.

reflected Professor Sanders' response, taken from a newspaper article at the time, to Mr Hinchliffe's remark and his response to the criticism that he was compromised, namely that he had done nothing wrong and declares any conflicts of interest. In these circumstances, Ofcom concluded that the broadcaster had fulfilled its requirements to take appropriate steps to ensure that Professor Sanders' views were, albeit briefly, adequately represented in the programme as broadcast and that the broadcaster's failure to give Professor Sanders a direct opportunity to respond did not result in unfairness to him.

Ofcom has therefore not upheld this complaint.

Accordingly Ofcom has not upheld Professor Sander's complaint of unfair treatment.

Not Upheld

Complaint by Mr Paul Parry on his own behalf and on behalf of Mrs Delyth Parry (his wife), Mrs Jean Tudor (his mother-in-law) and Rhys Parry (his son)

The Ferret, ITV1 Wales, 21 May 2009

Summary: Ofcom has not upheld this complaint of unfair treatment and unwarranted infringement of privacy in the making and broadcast of the programme.

ITV Wales broadcast an edition of its consumer affairs programme *The Ferret* in which a report about a conservatory built by Mr Parry was included.

Mr Parry complained that he was treated unfairly and that his privacy and that of his family was unwarrantably infringed in the making and broadcast of the programme.

In summary, Ofcom found that:

- Mr Parry was not treated unfairly in the programme (including when serious allegations of wrongdoing were made against him). In addition, Mr Parry was offered an appropriate and timely opportunity to respond to any serious allegations and his response was represented fairly in the programme as broadcast.
- Mr Parry and his family did not have a legitimate expectation of privacy with regard to the filming or the broadcast of footage of the outside of Mr Parry's home.

Introduction

On 21 May 2009, ITV1 Wales broadcast an edition of its consumer affairs programme *The Ferret*. This edition featured a report about a conservatory that Mr Paul Parry had built for a customer, Mrs Anita Lewis.

The reporter, Mr Segar, interviewed Mrs Lewis at her home, who showed him her conservatory and expressed her dissatisfaction with it. The programme said that Mrs Lewis had instructed Mr Parry to build her conservatory to the same height and roof specifications as that of her neighbour but that Mr Parry failed to adhere to these instructions. In particular, it said that Mrs Lewis had complained that Mr Parry installed a flat roof, rather than a sloped one and that because of this rain water was beginning to leak into the conservatory.

Mr Parry did not appear in the programme however part of the report took place outside his home which was shown with his company van on the drive way.

Mr Parry complained to Ofcom that he was treated unfairly in the programme and that his privacy and that of his wife, mother-in-law and son had been unwarrantably infringed in the making and broadcast of the programme.

The Complaint

Mr Parry's case

In summary, Mr Parry complained that he was treated unfairly in the programme as broadcast in that:

- a) He was portrayed unfairly in that:
 - i) The report stated that he was a 'specialist' when he had never made such a claim. His only claim was that he had been in the trade for more than 20 years and had a good reputation for a good standard of workmanship and materials.
 - ii) The report stated that Mrs Lewis' instructions were that she wanted a conservatory similar to the one at the neighbouring property. However, it can be seen from the contract (which was faxed to ITV) and from the programme itself that Mrs Lewis' conservatory differed in virtually every respect from the neighbouring conservatory.
 - iii) The report gave the impression that the entire construction was erected by Mr Parry. However, the base, walls and external door opening were already in place before he was contacted by Mrs Lewis.
 - iv) the programme's presenter gave his opinion on several elements of the build despite not being qualified to do so.
 - v) the scene was "stage managed" as there was no reason for towels being laid out on the internal window ledges at the start of the programme because it was filmed on a dry day.
- b) He did not have an adequate opportunity to respond to the points set out in head a).

Mr Parry said that he was first informed that the programme was being made on 14 May 2009 in a letter sent by the programme makers on 13 May 2009 and that this letter said that the programme would be aired 'shortly'. He replied on 18 May 2009 and the programme was broadcast on 21 May 2009.

In summary, Mr Parry complained that his privacy and that of his wife, mother-in-law and son had been unwarrantably infringed in the making of the programme in that:

- c) A film crew arrived at his home and filmed his wife and son leaving the home and entering the van.

Mr Parry's mother-in-law was also in his home at the time of filming.

In summary, Mr Parry complained that his privacy and that of his wife, mother-in-law and son's had been unwarrantably infringed in the broadcast of the programme in that:

- d) His home with shown with his company van parked in the driveway.

By way of background, Mr Parry said that he and his family lived in a small community and that his house was clearly identifiable.

ITV's case

In summary, ITV responded to Mr Parry's complaint that he was unfairly treated as follows:

- a) ITV responded to the complaint that Mr Parry was unfairly portrayed.
- i) The broadcaster first addressed the section of this head of the complaint in which Mr Parry complained that the report said he was a specialist when he had not made such a claim.

ITV noted that the report said that Mr Parry was a "*windows specialist*". It argued that given that in his complaint Mr Parry had said that he had been in the trade for twenty years and that both his business signage and online advertising made it clear that his areas of work are windows, doors, porches, patios and conservatories and that the name of his business is "Paul Parry uPVC Windows and Doors" this was not an unfair description.

- ii) ITV responded to the complaint that the report said Mrs Lewis had instructed him to build a conservatory like that of her neighbour while the contract between them (and the images of the conservatory in the programme) showed that Mrs Lewis' conservatory differed from her neighbours in virtually all respects.

It said that Mrs Lewis had confirmed to the programme that her original request to Mr Parry had been for a conservatory similar to her neighbours. It argued that because Mrs Lewis was not a windows specialist or builder the contract had not made the differences to the neighbouring conservatory clear to her and that this had only become obvious once her conservatory was largely built. ITV added that the content of the contract did not disprove Mrs Lewis' contention that she originally asked Mr Parry for a conservatory like that of her neighbour.

- iii) ITV denied that the report gave the impression that the entire conservatory structure was built by Mr Parry when the base, walls and external door opening were already in place before he was contacted by Mrs Lewis.

The broadcaster said that the report dealt with the concerns that Mrs Lewis had about Mr Parry's significant part in the project and that the programme contained a clear visual and verbal reference to the preparatory work, namely, the section of the report in which Mrs Lewis's concern about "*what's happening where the new panels meet the original wall*" was raised.

- iv) ITV responded to the complaint that the presenter gave his opinion on several elements of the build despite not being qualified to do so.

The broadcaster said that the presenter (Mr Segar) explained to viewers the issues being reported on. It noted that he had 45 years of experience in dealing with consumer disputes with builders and argued that it was proportionate and fair for him to comment on the slope of the roof, the pictures of accumulated slit and mess, and the bulging and bowing of parts of the structure. ITV said that these faults were clear to the naked eye and did not require a specialist to point them out and that Mr Segar's opinions were honest responses to the clear facts before him. It added that Mr Parry was

given an opportunity to respond to those observations and that his response was fairly represented in the programme.

- v) ITV responded to the complaint that the scene was 'stage managed' as there was no need for towels to be laid out on the window ledges of the conservatory given that it was dry on the day that the filming took place.

The broadcaster denied that this was the case. It said that the conservatory was filmed as the crew found it and noted that if the structure was potentially leaking it would have been perfectly reasonable for Mrs Lewis to have towels in place given the changeability of the UK's weather.

- b) ITV responded to the complaint that Mr Parry was not given an adequate opportunity to respond to the points set out in head a) above because he only received a letter inviting him to comment on 14 May 2009 and this letter informed him that the programme would be aired 'shortly'. He therefore replied on 18 May 2009 and the programme was broadcast on 21 May 2009.

The broadcaster said that the interview with Mrs Lewis took place on 11 May 2009 and that the programme makers wrote to Mr Parry on 13 May 2009 to outline Mrs Lewis' concerns, inform him that they intended to include the report in the programme "shortly" and to offer him an opportunity to comment. ITV also said that the letter made clear that an interview could be arranged "at the soonest mutually convenient time". The broadcaster said that no pressure was put on Mr Parry to reply in an unreasonably short time. It noted that Mr Parry faxed a response on 18 May 2009 and in that response he stated "I am not prepared to comment any further on this story". The broadcaster said that the reporter and crew then attended Mr Parry's business address in order to film some pieces to camera, rather than to seek an interview or 'doorstep' Mr Parry, and that they did not know that his business was located at his home until they arrived. ITV explained that Mr Parry's father-in-law invited the reporter into the house to meet Mr Parry, and that Mr Parry made some further comments, which were fairly represented in the programme, but declined to take part in a filmed interview.

ITV noted that despite threatening to do so Mr Parry did not launch injunction proceedings against it on the basis that he had not had sufficient opportunity to respond but that if he had it would have considered delaying transmission to enable him to make a further comment. However, it argued that given that on 18 May Mr Parry had said in a faxed letter that he would not make any further comment and that on the same day he declined an opportunity to be interviewed, it believed that he had been given more than sufficient opportunity to respond.

ITV then argued that the programme accurately and fairly reflected Mr Parry's response to the programme makers and noted the ways in which it had done so.

In addition, ITV said that the reporter's closing statement made it clear that Mr Parry had offered to pay for someone else to do the work if Mrs Lewis did not want him to do it personally.

In summary, ITV responded to Mr Parry's complaint that his privacy and that of his family was unwarrantably infringed in the making of the programme as follows:

- c) ITV said that while the reporter (Mr Segar) was recording a piece to camera Mr Parry's wife, son and mother-in-law appeared briefly in shot as they left the house and walked in front of Mr Parry's van. Mr Segar immediately told the cameraman

to stop filming which he did after a few moments. The broadcaster said that Mr Parry's wife and child were not filmed entering the vehicle but that the back of the vehicle (which was Mr Parry's liveried business van) was filmed. ITV also said that as agreed with Mr Parry at the time neither this footage nor the other footage of Mr Parry's family walking past the side of the van was subsequently used in the programme. It added that while it considered that Mr Parry's business address was in the public domain (via Yellow Pages and other sites as well as his branded vehicle - which it noted he parked outside his home) when the programme makers discovered that his business was located at his home they filmed in a way designed to ensure that they recorded no footage that contained information which would explicitly identify Mr Parry's specific address.

In summary, ITV responded to Mr Parry's complaint that his privacy and that of his family was unwarrantably infringed in the broadcast of the programme as follows:

- d) ITV said that the programme makers took steps to make sure the footage of Mr Parry's home used in the programme was not explicitly identifiable. Notably, pieces to camera were shot from a distance with no street names or numbers in view and shots of Mr Parry's van were shown in close up but concentrating on the branding and advertising claims on the vehicle. ITV added that only a small section of unidentifiable brickwork from Mr Parry's house was shown in the programme. In light of this the broadcaster argued that nothing in the report would have identified his property to someone other than those who already know that he lives and operates his business from his home address.

Ofcom did not request a second round of responses from the parties. However, it did request and receive from ITV a copy of the unedited footage of Mrs Lewis' conservatory and Mr Segar's interview with Mrs Lewis.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision on Mr Parry's complaint, Ofcom considered all the relevant material provided by both parties. This included a recording of the programme as broadcast, unedited footage of Mrs Lewis' conservatory and Mr Segar's interview with Mrs Lewis, a transcript of the report on Mr Parry as broadcast and both parties' written submissions (including copies of correspondence between them).

Fairness

In Ofcom's view the complaint at heads a) i) to v) (that Mr Parry was unfairly portrayed in relation to a number of points made or images included in the programme) and at head b) (that Mr Parry was not given an appropriate opportunity to respond to these points) were linked in that they were both about the same series

of points in the programme. It therefore considered these heads of complaint together.

The timeliness of the opportunity given to Mr Parry to respond is considered in detail in the section of the decision relating to the second sub-head of this complaint below.

a) and b)

In considering these sections of Mr Parry's complaint Ofcom took account of Rule 7.1 of the Ofcom Broadcasting Code ("the Code"), which provides that broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes. Ofcom also considered Practices 7.9, 7.11 and 7.6 of the Code. The first of these provides that before broadcasting a factual programme, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to the individual or organisation. The second provides that if a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond. The third provides that when a programme is edited, contributions should be represented fairly.

Ofcom looked at each of the points which Mr Parry had indicated were unfair to him in turn. Ofcom noted that in considering these heads of complaint its role was not to establish conclusively from the broadcast programme or the submissions and supporting material, whether these points were true or not but rather to address itself to the issue of whether the programme makers took reasonable care in relation to material facts, and whether the statements made constituted serious allegations of wrongdoing.

Ofcom considered the complaint that the programme said Mr Parry was a specialist when he had not made such a claim.

Ofcom noted that at the beginning of the report on Mr Parry's work on Mrs Lewis' conservatory Mr Segar described Mr Parry as a "*windows specialist*". It observed that the name of Mr Parry's business was "Paul Parry uPVC Windows & Doors", and that in his complaint Mr Parry said that he had "been in the trade for more than 20 years" and that he believed he "had a reputation for a good standard of workmanship and materials". Ofcom also recognised that, as noted by ITV in its response to the complaint, Mr Parry advertised his areas of work (via online listings sites and his work vehicle) as: windows, doors, porches, patios and conservatories.

Ofcom considered that viewers would have understood the phrase "*windows specialist*" to mean someone who worked with windows and had done so either for a number of years and/or as a considerable portion of their work, and thereby understood both how to install them correctly and the features of and problems relating to the installation of windows.

Given Mr Parry's description of his previous work history and the fact that he operated a business fitting windows and conservatories Ofcom concluded that the description of him in the programme as a "*windows specialist*" would not have resulted in his being unfairly portrayed.

It therefore found no unfairness to him in this respect.

Ofcom did not consider that the claim that Mr Parry was a “*windows specialist*” was a serious allegation of wrongdoing. Therefore, it was not incumbent upon the broadcaster to offer the complainant an appropriate and timely opportunity to respond to it.

In light of this Ofcom found no unfairness to Mr Parry in this respect.

Ofcom considered the complaint that the programme said Mrs Lewis had instructed Mr Parry to build a conservatory like that of her neighbour while she had agreed to a contract for a conservatory with different specifications.

Ofcom noted that the presenter of the programme started his report by saying:

“New conservatory here at Bryn near Port Talbot, Anita wanted it built the same height and slope as the one next door. When Anita Lewis wanted a new conservatory at the back of her house her brief to windows specialist Paul Parry from Cwmavon, who charged £6,400, was simple: I want one like next door’s, with a sloping roof and about the same height. Once it went up she complained to Mr Parry straight away that it wasn’t what she wanted or had asked for. She said it was too high and too flat - and as a result it was leaking.”

Ofcom also noted that Mrs Lewis was shown in the programme saying that she had told Mr Parry that she thought the roof was too high and because of this “*the water’s seeping in through the windows*”. In addition, Ofcom observed that Mrs Lewis was shown describing how water would stand on the conservatory roof and that she and the reporter were seen discussing how both water and silt from the main roof seeped in through the conservatory roof. It also observed that the presenter was shown picking some dirt out from under the internal rim of the conservatory roof (where it met the main roof) and asking Mrs Lewis if some of the panelling beneath this rim was damaged due to the ingress of water. Specifically, Mrs Lewis was shown saying “*I think the water must have been coming through*”, the programme then showed an image of the panelling with some of its outer vinyl covering buckled away and alongside this image Mr Segar said: “*Because all this is starting to bow and bulge isn’t it, along here?*” and Mrs Lewis replied “*yes yes*”.

It was therefore clear to Ofcom that the programme said that Mrs Lewis had asked Mr Parry to build her a conservatory like that of her neighbour but that in her view he had failed to do so, notably in that the conservatory roof did not have the same slope on it as her neighbour’s conservatory, and that because of this her conservatory was allowing both water and silt to seep in via the roof and thereby causing internal damage.

In considering whether it was unfair for the programme to make these claims about Mr Parry Ofcom looked at the source of this information.

Ofcom observed that the programme had based the claims that Mr Parry had not built the conservatory in line with Mrs Lewis’ original brief and that as a result it leaked on information supplied to it by Mrs Lewis, photos of the silt from the main roof lying on top of the conservatory roof (also supplied to it by Mrs Lewis) and the reporter’s own inspection of the conservatory.

In Ofcom’s view Mrs Lewis was a credible witness regarding, the brief she had originally given to Mr Parry and the condition of her conservatory throughout the

period since it had been built. (Ofcom will consider Mr Segar's observations about the conservatory in the programme under a separate sub-section of this head complaint below). It was not for Ofcom to determine whether or not Mr Parry had failed to fit the conservatory according to Mrs Parry's brief and whether it had leaked as a result, rather it was for Ofcom to determine whether the issue of what Mrs Lewis had agreed to had been portrayed fairly.

In making this assessment, Ofcom first considered the information available to the programme makers. Ofcom noted that they had at their disposal the testimony of and photos supplied by Mrs Lewis, as well as the reporter's inspection of the conservatory at the time of filming, and considered that it was reasonable for them to rely on this evidence that the condition of the conservatory was not satisfactory. However, Ofcom also noted that there appeared to be a difference of opinion on the nature of the specification given to Mr Parry for the conservatory and subsequently agreed to by Mrs Lewis.

Ofcom considered that the claim in the programme that Mr Parry had failed to build the conservatory in the way originally specified by Mrs Lewis and that it had leaked as a result was a serious allegation of wrongdoing. Therefore, it was incumbent upon the broadcaster to offer the complainant an appropriate and timely opportunity to respond to it.

Ofcom then went on to assess if the broadcaster gave Mr Parry such an opportunity and if so whether it was fairly represented in the programme as broadcast.

Ofcom noted that Mr Parry was invited to respond to the claims in the programme about the conservatory he had built via a letter sent to him by Mr Segar on 13 May 2009. It observed that this letter set out Mrs Lewis' concerns about specific differences between her conservatory and that of her neighbour, asked Mr Parry to say how he would ensure that Mrs Lewis had a leak-proof conservatory, described the roof glazing as "dead level", and alleged that rain was ingressing. It also informed Mr Parry that the story would be included in the series "shortly" and that the programme makers could "do an interview at the soonest mutually convenient time".

Ofcom observed that on 18 May 2009 Mr Parry faxed the programme makers a letter with his response to the claims which he had been told would be made about the conservatory in the programme. The letter was accompanied by some of Mr Parry's previous correspondence with Mrs Lewis and a copy of a letter he had received from Neath Port Talbot Trading Standards regarding Mrs Lewis' dissatisfaction with the conservatory.

In this context, Ofcom observed that when they visited Mr Parry's business address in order to film a piece to camera the programme makers discovered that Mr Parry's business was located within his home and that during this visit they inadvertently met with him. Mr Parry then made several further comments about the conservatory to the reporter but refused the offer of a filmed interview.

On 19 May 2009 Mr Parry faxed Mr Segar again, this time to inform him that the manager of the company which supplied the roof was willing to speak to him, to

ask if he “still intend[ed] to feature this programme on Thursday 21 May¹”, and to ask if Mr Segar’s confirmation [given during the inadvertent meeting at Mr Parry’s home] that neither his wife nor his son would appear in the programme still stood. Finally, on 20 May 2009 Mr Parry faxed a letter to ITV’s Head of Legal Services in which he reiterated some of the points he had made in response to Mrs Lewis’ concerns and threatened to take out an injunction against ITV if it did not stop the broadcast. On 21 May 2009 ITV’s Director of Programme Compliance spoke to Mr Parry on the telephone and sent him a follow-up letter responding to his fax of 20 May 2009.

Ofcom noted that the letter inviting Mr Parry to comment placed no specific deadline upon him to do so beyond using the words “shortly” and “soonest” and made it clear to him that the programme makers’ offer of an interview was for a “mutually convenient time”. It also observed that in his initial response to ITV of 18 May 2009 Mr Parry said “I am not prepared to comment any further on this story” and did not respond to the offer of an interview on camera and that while Mr Parry did make some additional comments to Mr Segar during the reporter’s inadvertent meeting with him on the afternoon of the same day he again refused to take up the offer of an interview on camera.

In light of the observations noted above Ofcom considered that Mr Parry was given an appropriate and timely opportunity to respond to the claims made about the conservatory he built in the programme and it therefore found no unfairness to him in this respect.

Ofcom then went on to consider how Mr Parry’s responses to the claims made about him were represented in the programme.

Having assessed Mr Parry’s written responses to the programme makers Ofcom noted that in his first letter to them he made several points in relation to the claims about Mrs Lewis’ conservatory including the following:

- that “the structure [i.e. the conservatory] was erected to specifications explained to Mrs Lewis at the time and fully approved by her”;
- that he took “any such issue [i.e. a complaint from client] seriously” and had “attended her [Mrs Lewis’s] property with the manager of the roof supplier; an independent roofer, and an independent fitter. All categorically stated that this structure was fit for purpose.”;
- that following correspondence with Mrs Lewis and Trading Standards he visited Mrs Lewis’s property again and “suggested a solution to Mrs Lewis’s problem. She unreasonably refused to let me take such steps on the grounds that I would botch it up”;
- and that the “suitable offer to remedy the situation” remained in place but that he could not “commence any such work without Mrs Lewis’ consent”.

Ofcom also noted that two of Mr Parry’s letters to Mrs Lewis regarding this matter were forwarded by him to the programme maker. In the first of these (dated 2 March 2009) Mr Parry said:

¹ Mr Parry was informed that ITV1 Wales intended to broadcast the programme on 21 May 2009 in a fax sent to him by the programme maker on 18 May 2009 to acknowledge his initial response to Mr Segar’s letter.

- that the base of the conservatory was pre-existent when he measured for the it; that the wall height could have been lowered but this was not acceptable;
- that if the height of the [glass roof] frames and the door were lowered as Mrs Lewis suggested the ring beam height would be below eye level and therefore not fit for purpose and that the door at 183 cm high could not be used by the vast majority of people without difficulty.

In addition he:

- noted that the box gutter option discussed and agreed with Mrs Lewis in January had now been rejected but argued that it would allow the door to remain at the existing height;
- explained that leaving the original guttering in place would not have been an option because it would have meant the wall plate could not have been secured to the property and that the dirt from the bungalow roof could be diverted by putting a flashing trim over the wall plate as he had suggested before Christmas.

The second letter from Mr Parry to Mrs Lewis (dated 27 March 2009 and sent following contact from Trading Standards) again indicated that he considered that if the height of the glass frames in the conservatory roof were lowered, “it would not be fit for purpose” and that the dirt from the bungalow roof could be “diverted by putting a flashing trim up”. He added that he would be willing to do so at Mrs Lewis’ convenience and that he would be happy to meet with the representative from Trading Standards.

Lastly, Ofcom noted that in his letter to ITV’s Head of Legal Services (dated 20 May 2010) Mr Parry argued that the complaint was “wholly unfounded and based on Mrs Lewis’ misunderstanding of the term ‘self-cleaning’ glass, building regulations and basic construction techniques and design”; that he had spent “seven months trying to resolve this” and that he had “offered a range of alternatives (at no cost to the client) such as boxed guttering or a lowering of the original brickwork which was already in place when [his] company began the work”.

Ofcom was not supplied with a note of the comments about the conservatory which Mr Parry made to the reporter (Mr Segar) when the latter filmed a piece to camera outside his home.

Ofcom recognised that having given Mr Parry an appropriate and timely opportunity to respond to claims made about him the broadcaster was required to ensure that his “contributions should be represented fairly” in the programme (as set out in practice 7.6 of the Code).

It observed that, as noted by ITV in its response to the complaint, the programme included a number of Mr Parry’s points in relation to the claims about the conservatory he had built. Specifically:

- in relation to the possibility of lowering the roof: *“Mr Parry told us that lowering the roof would make it claustrophobic and the side door would be too low”* and

- in relation to the suggestion that the roof was dead level: *“Mr Parry said he used a 6ft level that showed a drop, he’s also suggested an extra gutter to trap water and dirt from the roof”*.

Ofcom also observed that the reporter included the following sections of Mr Parry’s written response:

- *“The structure was erected to specifications explained to Mrs Lewis at the time and fully approved by her”*.
- *“Shortly after the completion of the work Mrs Lewis did indeed complain about these alleged problems. I take any such issues seriously and have attended the property with the manager of the roof supplier, an independent roofer and an independent fitter. All categorically stated that the structure was fit for purpose”*.
- *“Mr Parry said after discussions with Trading Standards he suggested a solution to Mrs Lewis’ problems [but] she unreasonably refused to let me take any such steps on the basis that I would botch it up”*.
- *“While the work was to a sufficiently high standard, I am always sensitive to my customers’ needs and therefore made a suitable offer to remedy the situation. That offer remains”*.

In addition, Ofcom noted that at the end of the piece the reporter said: *“Well we’ve passed on Mr Parry’s re-stated offer to Mrs Lewis. He’s also said he’ll even pay for someone else to go to complete the job if she doesn’t want him back there, which is indeed the case”*.

In Ofcom’s view these comments included a full and fair reflection of the responses to the allegations made about Mr Parry in the programme. They included all of the pertinent points made in his written responses, in particular – in relation to this head of complaint – Mr Parry’s assertion that the structure was erected to specifications explained to Mrs Lewis at the time and fully approved by her. Also included was his response to the suggestion that the roof was dead level, and the fact that he had not only reiterated his offer of a solution to Mrs Lewis but had also offered to pay for someone else to carry out the work.

In light of the evidence above in relation to the second sub section of heads a) and b) of this complaint, Ofcom found that that Mr Parry was given an appropriate and timely opportunity to respond to the allegations made against him in the programme, that his response to these allegations was fairly represented and that the programme makers had taken care to avoid presenting material facts in a way that was unfair to Mr Parry.

Ofcom considered the complaint that the programme gave the impression that the entire conservatory structure was built by Mr Parry when the base, walls and external door opening were already in place before he was contacted by Mrs Lewis.

Ofcom noted that the programme included footage of both the inside and outside of Mrs Lewis’ conservatory and that the breeze block wall forming the base of the conservatory was clearly visible a number of times. In addition, Ofcom noted that alongside one image in which the internal view of the wall was visible Mr Segar

said: *“Anita’s also worried about what’s happening where the new panels meet the original wall”*.

In light of the inclusion of this comment alongside this and the other images of the wall in the programme, Ofcom considered that viewers would have understood that Mr Parry erected the conservatory (i.e. the glass panels and the uPVC framework in which they were fitted) on top of a breeze block base with an external brick facade which was already in place.

Ofcom therefore found no unfairness to Mr Parry in respect of the complaint that the programme gave the impression that he had built the entire conservatory structure.

Given the conclusion noted above, it was Ofcom’s view that the programme did not claim that Mr Parry had built the entire conservatory structure. Therefore it was not necessary for it to go on to consider whether this was serious allegation of wrongdoing and if so whether or not it was incumbent upon the broadcaster to offer the complainant an appropriate and timely opportunity to respond to it.

Ofcom therefore found no unfairness to Mr Parry in respect of the complaint that the programme did not offer him an opportunity to respond to this claim.

Ofcom considered the complaint that the presenter gave his opinion on several elements of the build despite not being qualified to do so.

As noted above, Ofcom observed that the programme included footage of Mr Segar picking some dirt out from under the internal rim of the conservatory roof (where it met the main roof) and asking Mrs Lewis if some of the panelling beneath this rim was damaged due to the ingress of water. It also observed that alongside an image of a spirit level on top of the conservatory roof with an air bubble sitting between two central marker lines Mr Segar said: *“when we put a spirit level on the roof it was dead level”*.

Ofcom considered that Mr Segar’s comments were not presented as those of an expert and that it would have been clear to viewers that they were made on the basis of his conversation with Mrs Lewis and his observations during the visit to the property. In addition, as noted in the decision in relation to the second sub section of heads a) and b) of this complaint, Mr Parry was given an appropriate and timely opportunity to respond to the points made in the programme about the conservatory he built (including this claim) and his response was represented fairly.

In light of these factors, Ofcom considered that the programme makers took reasonable care in relation to presenting material facts regarding the comments made in the programme about the conservatory by Mr Segar.

It therefore found no unfairness to Parry in respect of the complaint that the presenter gave his opinion on several elements of the build despite not being qualified to do so.

Ofcom considered the complaint that the section of the programme showing Mrs Lewis’ conservatory was ‘stage managed’ as there was no need for towels to be laid out on the window ledges of the conservatory given that it was dry on the day that the filming took place.

Ofcom noted that in one section of the programme Mrs Lewis was seen walking into her conservatory and placing some folded towels on the window ledge.

It also noted that in the unedited footage of the programme Mrs Lewis was seen doing this several times.

Ofcom recognised that when filming a camera crew will often ask a contributor, in this case Mrs Lewis, to repeat an action or a comment in order to secure the best visual angle or a better quality sound recording or to ensure that the sense of a conversation or comment can be conveyed clearly to viewers in the programme as broadcast. In this context, Ofcom noted that the editing of material is a matter of editorial judgement although, as noted above, broadcasters must ensure that the programme as broadcast does not result in unfairness to an individual or organisation.

Ofcom took account of the broadcaster's denial that the programme makers had asked Mrs Lewis to place the towels on the window ledge and the fact that Mr Parry had not provided any evidence within his complaint to support his claim that she had not placed the towels there of her own accord other than his observation that it was dry when filming took place.

It also noted that in any case it would have been clear to viewers from the other information included in the programme that Mrs Lewis was dissatisfied with the conservatory Mr Parry had built for her because it was leaking and letting in dirt. Given this Ofcom concluded that the inclusion of footage Mrs Lewis placing the towels on the window ledge would not have had a material effect upon viewers' opinion of him.

Ofcom also recognised that, as noted above, it had concluded that the programme gave a fair representation of Mr Parry's responses to the criticisms of the conservatory (including the claim that it leaked).

Taking account of these considerations, Ofcom found that Mr Parry was not treated unfairly in respect of the complaint that the images of Mrs Lewis laying towels out on her window conservatory ledge was 'stage managed'.

In light of the evidence above Ofcom found that that Mr Parry was not portrayed unfairly in relation to the various points which he said were unfair to him in the programme (including those which Ofcom considered were serious allegations of wrongdoing). In addition, for the reasons noted above Ofcom found that where it was incumbent upon the broadcaster to give him an opportunity to respond to claims made about the conservatory it had done so and subsequently represented that response fairly in the programme as broadcast.

Privacy

Ofcom went on to consider the heads of Mr Parry's complaint which related to the alleged unwarranted infringement of his privacy and that of his family in both the making and the broadcast of the programme.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing right of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights.

Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes, must be warranted.

- c) Ofcom considered Mr Parry's complaint that his privacy and that of his family was unwarrantably infringed in the making of the programme in that filming took place at his home, his wife and son were filmed leaving their home and entering a van, and his mother-in-law was in his home at the time of filming.

In considering this part of the complaint Ofcom took account of Rule 8.1 of the Code as well as Practice 8.5 of the Code which states that any infringement of privacy in the making of a programme should be with the person's consent or be otherwise warranted.

In considering whether or not the privacy of Mr Parry and his family was unwarrantably infringed in the making of the programme, Ofcom first assessed the extent to which they had a legitimate expectation of privacy in respect of the footage that the film crew recorded during the making of the programme on the visit to Mr Parry's business address and whether any expectation was affected by the way the footage was obtained.

Ofcom observed that, as noted above, the reporter and camera crew had gone to Mr Parry's business address in order to film a piece to camera and that only when they arrived did they discover that Mr Parry's business was located at his home. The crew then filmed from the street outside Mr Parry's property.

Ofcom observed that the footage recorded did not include any identifiable features indicating the exact location of Mr Parry's home. Specifically it did not include any street names or numbers, the footage of Mr Parry's van was shot in close up to show his business livery and advertising claims and did not include any number plates. The only section of his property filmed in close-up was a patch of unidentifiable brick work. Ofcom also observed that while the crew were filming Mr Parry's wife, son and mother-in-law appeared briefly in shot as they left the house and walked in front of Mr Parry's business van. Ofcom noted that when this happened the reporter told the cameraman to stop filming and that he did so after a few moments. Ofcom recognised that Mr Parry claimed that his wife and son were filmed entering the van while ITV said that this was not so and the camera crew only filmed the back of the van which was emblazoned with the livery of Mr Parry's business.

It also recognised that Mr Parry advertised the location of his business which, as previously noted, was the also the location of his home, via online websites and his liveried business vehicles which were parked outside his home.

Ofcom then considered whether or not Mr Parry and his family had a legitimate expectation of privacy in relation to each of the elements noted in the complaint.

Filming of footage of the outside of Mr Parry's home

Ofcom concluded that Mr Parry and his family did not have a legitimate expectation of privacy in relation to the filming of footage of the outside of Mr Parry's home given that this footage was filmed from the street (i.e. a place to

which the public had open access) and was filmed in a manner specifically designed not to include information indicating its exact location to anyone not already very familiar with the area and Mr Parry's vans (i.e. who did not already know that Mr Parry parked his business vehicles outside and operated his business from his home address).

Mr Parry's mother-in-law being present inside Mr Parry's home

Ofcom concluded that Mr Parry's mother-in-law did not have a legitimate expectation of privacy in relation to being present in Mr Parry's home at the time that filming took place given that no filming took place inside Mr Parry's home. While she may have seen the reporter in the house, on the information available to it it appeared to Ofcom that he had been invited into the house to talk to Mr Parry by Mr Parry's father-in-law.

Filming of Mr Parry's wife, son and mother-in-law as they left the house

Ofcom again noted that that this footage was filmed in a public place (i.e. from the street). It also noted that Mr Parry's wife, son and mother-in-law were not the focus of the footage being filmed and that this was clearly indicated by the following points:

The reporter and crew had gone to Mr Parry's business address in order to film a piece to camera which was designed to give a representation of Mr Parry's responses to the criticisms which would be made about the conservatory in the programme; and the reporter ordered filming to stop as soon as he became aware that Mr Parry's wife, son and mother-in-law had walked across the camera shot.

In addition, Ofcom noted that nothing of a private nature to Mr Parry's wife, son and mother-in-law was recorded during the unintended filming of them as they left the house.

In light of these factors, Ofcom concluded that they did not have a legitimate expectation of privacy in relation to the filming of this footage.

Taking all of these factors into account, Ofcom found that there was no unwarranted infringement of the privacy of Mr Parry or his family in the making of the programme.

- d) Ofcom then considered Mr Parry's complaint that his privacy and that of his family was unwarrantably infringed in the programme as broadcast in that his home was shown with his company van parked in the driveway outside.

In considering this part of the complaint Ofcom took account of Rule 8.1 of the Code as well as Practices 8.2 and 8.6 of the Code. Practice 8.2 provides that information which discloses the location of a person's home or family should not be revealed without permission, unless it is warranted and the second that if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

In considering whether or not the privacy of Mr Parry and his family was unwarrantably infringed in the broadcast of the programme, Ofcom assessed the extent to which they had a legitimate expectation of privacy in respect of the

material that was broadcast (i.e. the images of Mr Parry's home and business vehicle).

Ofcom observed that the footage of Mr Parry's home included in the programme was filmed in a public place (i.e. the street outside Mr Parry's property) and it was shown because it was also the location of Mr Parry's business (which was the focus of the report). Ofcom also observed that the footage in the programme did not include any features which would have made the exact location of Mr Parry's home identifiable to viewers who were not already very familiar with the area in which he lived. In particular, the footage shown did not include a full shot of Mr Parry's property – the programme included what appeared to be a side view of his home shown from a distance and the only section of the property shown in close-up was a patch of plain unidentifiable brickwork – or any street names or numbers and the close-up images of Mr Parry's vehicle showed his business livery and did not include a number plate or telephone number.

Ofcom therefore concluded that neither Mr Parry nor his family had a legitimate expectation of privacy with regard to inclusion of this footage in the programme.

In light of this conclusion Ofcom found that that there was no unwarranted infringement of the privacy of Mr Parry or his family in the programme as broadcast.

Accordingly Ofcom has not upheld Mr Parry's complaint of unfair treatment or unwarranted infringement of privacy in either the making or broadcast of the programme.

Not Upheld

Complaint by Jeremy Davies on behalf of Woodland Healthcare Limited, the directors of Woodland Healthcare Limited and Ms Jane Delaney

Can Gerry Robinson Fix Dementia Care Homes?, BBC2, 8 December 2009

Summary: Ofcom has not upheld this complaint of unfair treatment made by Mr Jeremy Davies on behalf of Woodland Healthcare Limited, the directors of Woodland Healthcare Limited and Ms Jane Delaney.

The BBC broadcast a documentary in which Sir Gerry Robinson investigated the UK's care system for people suffering from dementia and raised concerns about the system as a whole. He looked at a number of care homes, including Woodland House, which was rated as "average" by the Care Quality Commission ("CQC"). Sir Gerry observed the home and its residents over the course of a typical day. He visited again during a monthly audit visit by the owners of the home, Mr Davies and Mrs Pearl Jackson, and raised concerns about staff morale following the withdrawal of their free food and drink allowance, and the experience of residents at the home. Sir Gerry then tried to arrange a visit to Woodland House by the consultant behind a home rated as "excellent", but Mr Davies and Mrs Jackson declined the visit. In a final visit to Woodland House, Mr Davies and Mrs Jackson showed Sir Gerry initiatives they had implemented and the improvements achieved.

Mr Davies complained to Ofcom that Woodland Healthcare Limited and its directors and Ms Delaney were treated unfairly in the programme.

In summary Ofcom found the following:

- It was clear from the footage included in the programme that Woodland House cared for residents with advanced dementia. There was no suggestion that Ms Delaney was in charge of clinical care, but she was accurately portrayed as the manager of the home.
- There was no requirement for the BBC to use any particular proportion of the footage recorded, the programme did not sensationalise the issues and the issue of the change in the food policy for staff was presented fairly.
- Filming was not carried out without consent, nor was footage of staff at Woodland House included without their consent. A clip of Ms Delaney was included that she would have preferred not to have been used, but this was justified as it illustrated Sir Gerry's concern about her role as manager.

Introduction

On 8 December 2009, BBC 2 broadcast the first part of a two part documentary, in which Sir Gerry Robinson investigated the UK's care system for people suffering from dementia. He expressed his desire to "*see if I could do something to improve the business of care*" and, in the first programme, he looked at a number of care homes, ranging from one rated "excellent" by the Care Quality Commission ("CQC") to one that was close to failing.

The programme opened with Sir Gerry visiting Woodland House, a privately-owned and local authority-funded dementia care home, rated “average” by the CQC. Sir Gerry described it as *“typical of the kind of home perhaps half of us will end up in”*. He was shown observing the home and its residents over the course of a typical day. This section of the programme also introduced Ms Jane Delaney, whom Sir Gerry described as a new manager, who had no previous experience of running a home for dementia sufferers. Ms Delaney spoke to Sir Gerry about her qualifications, her first impressions of her new role and working with people with dementia. Ms Delaney said that the home was rated “poor” (which Sir Gerry explained in voiceover was incorrect) and said that she felt *“a bit out of my depth”*. Sir Gerry then asked: *“How can you have someone running a home like that with no dementia training?”* and queried the fact that *“it passes as acceptable to have someone in charge of this home who at best is hazy about what the job involves”*.

After visiting two other homes, Sir Gerry returned to Woodland House during a monthly audit visit by its owners, Mr Davies and Mrs Pearl Jackson. This section of the programme showed Mrs Jackson inspecting the kitchen, after ending her staff’s free food allowance, and questioning the cook about a loaf of bread left out for night staff. Sir Gerry spoke to staff, who were not happy with the policy change, and said that he would not *“risk staff morale for a few pence”*.

After being impressed by his visit to a home in Warwickshire that was rated “excellent”, Sir Gerry attempted to arrange a visit to Woodland House by Mr David Sheard, the consultant behind the Warwickshire home. Mr Davies and Mrs Jackson met with Mr Sheard but decided against him visiting Woodland House. The programme featured one final visit to Woodland House, in which the owners showed Sir Gerry the initiatives they had implemented and the successes achieved in the three months that had passed.

This final sequence was followed by Sir Gerry’s conclusion to the programme:

“I am convinced that dementia care in this country doesn’t have to be this way” and that *“you can get by with adequate care: it meets all the regulations but fails to address the point that life could be so much better”*.

Mr Davies complained to Ofcom that Woodland Healthcare Limited and its directors and Ms Delaney were treated unfairly in the programme.

The Complaint

Mr Davies’ case

In summary, Mr Davies complained on behalf of Woodland Healthcare Limited and its directors, and on behalf of Ms Jane Delaney that they were treated unfairly in the programme as broadcast in that:

- a) Woodland House was portrayed unfairly and shown in a bad light. In particular, Mr Davies complained that:
 - i) The programme failed to explain that there were various stages of dementia and did not indicate that Woodland House only catered for those patients in the latter stages of dementia and with mental health problems. There was therefore a lack of compatibility with the other homes featured in the programme.

- ii) The programme portrayed Ms Delaney as being in charge of clinical care at the home. In fact, Ms Delaney was the acting part-time manager and the programme makers were aware that her role was as an interim part-time administrative manager only. Mr Davies said that at the time of filming there was a “clinical lead” in post and that towards the end of filming a suitably qualified manager had been appointed, neither of whom were filmed.
- b) The programme was edited in a way that unfairly portrayed the home in a bad light. In particular, Mr Davies complained that:
- i) The many hours of footage taken was cut down to only 20 minutes in the programme as broadcast. This resulted in the programme presenting an unbalanced view of the Home.
 - ii) The aim of the editing was to create a sensationalised programme rather than to educate and inform. This was not the approach the company was expecting from a programme they had been told was jointly commissioned by the BBC and the Open University, and that they had understood would help to explain the impact of dementia on residents, their relatives and the general public.
 - iii) The editing of Mrs Pearl Jackson’s discussion about food completely reversed the point that was being made, portraying her in a bad light when a positive point was being made.
- c) Filming was carried out and footage used without consent. In particular:
- i) Staff comments about the food and management were made at a time when the home’s staff believed they were not being filmed.
 - ii) Staff were assured that some of the footage taken would not be used in the programme.
 - iii) Ms Delaney was assured that a first take, in which she had been nervous, would not be used but, although a second take was filmed, the programme used the first take in order to achieve its own aims.

The BBC’s case

The BBC said by way of background that the format of the programme was similar to Sir Gerry’s previous critically acclaimed series, *Can Gerry Robinson Fix the NHS?*, broadcast in 2007. Mr Davies told the programme makers he had seen the series and was aware of the style and tone of the programme and the tough approach that Sir Gerry had taken.

The BBC responded to the complaint of unfair treatment as follows:

- a) The BBC responded first to the complaint that Woodland House was portrayed unfairly and shown in a bad light.
 - i) As regards the complaint that the programme failed to explain that there were various stages of dementia and did not indicate that Woodland House only catered for patients in the latter stages of dementia and with mental health problems, the BBC said that the programme gave an accurate and fair impression of the nature of Woodland House and its residents.

The BBC said that, for the first programme, Sir Gerry visited three different homes in the south west of England that had been judged by the CQC to meet different standards of care. These were Woodland House and Thornfield, both of which, at the time of filming, were judged to be “adequate”, and Silverleigh, which achieved an “excellent” rating. Sir Gerry initially described Woodland House in the programme as “...a dementia nursing home for 24 residents” and he later explained that it was “...an elderly, mentally infirm home which means there’s people with high level of dementia care needs”.

The BBC said that the nature of the Woodland House was also clearly demonstrated during the programme. Within the first 10 minutes Ms Delaney explained it was the first EMI (Elderly Mentally Infirm) home she had worked in and that this meant it was for people with “advanced dementia”. The footage of the home also gave viewers a clear impression of the type of people living there, with many residents noticeably less active and lucid than those at Silverleigh and clearly requiring a greater degree of help to perform basic tasks. The BBC said that viewers would therefore have understood that Woodland House was a “dementia nursing home” for “people with high level of dementia care needs”.

The BBC said that the programme also gave an accurate description and visual portrayal of the two other homes featured in the programme and the level of needs of their residents. The footage showed that, as at Woodland House, residents at Thornfield were less active and appeared more disorientated than those at Silverleigh.

The BBC said that the aim of the programme was to feature a number of homes which were representative of the range of nursing and residential care which elderly people with dementia might receive and to see how changes could be made to improve the standard for all residents. Those taking part were clearly informed that the portrayal of each home would depend on the issues that Sir Gerry found and the response to any changes which he thought would help to improve the care of residents. This was set out in a letter of understanding, the “Written Brief for Dementia series with Gerry Robinson”, which formed the basis for Woodland House’s inclusion in the programme. Given that agreement, Woodland Healthcare Limited could have been in no doubt that the way Woodland House was featured in the programme would depend on Sir Gerry’s impression of the way it was run and the level of care he found during his visits. There was no commitment that the care provided at Woodland House would be judged more favourably because some of the home’s residents might have more advanced forms of dementia and Woodland Healthcare Limited could have had no such expectation.

The BBC said that Sir Gerry based his findings solely on the management of the homes and the level of care he observed at each home, which was not dependent on the degree of dementia suffered by residents. Sir Gerry concluded that the central issue in relation to better care was offering residents appropriate personal attention and contact, and providing them with a stimulating and engaging environment, regardless of how advanced the dementia of residents might be. Given that Woodland House was judged to be only adequate, it was not surprising that Sir Gerry saw considerable scope for improvement. However, many of the failures in care which Sir Gerry identified were common to both Woodland House and Thornfield, such as problems with staffing, residents being left alone for long periods, lack of

engagement at mealtimes and staff spending too little time talking to residents.

The BBC also said that experts in dementia agreed that the needs of people with the condition and the approach to caring for them were the same regardless of the severity or progression of their condition. Ms Cathy Baldwin from the Alzheimer's Society explained in the programme that elderly people with dementia had the same fundamental needs however advanced their dementia, namely carers who understood how they saw the world and a supportive and engaging environment. The BBC said that this view was supported by the latest NHS dementia awareness campaign accompanying the National Dementia Strategy.

- ii) The BBC then responded to the complaint that the programme portrayed Ms Delaney as being in charge of clinical care at the home, when in fact she was the acting part-time manager.

The BBC said that the programme accurately described Ms Delaney as the manager of Woodland House. It showed her involved in a range of managerial tasks and responsibilities including looking after residents, overseeing care plans and updating risk assessments. The programme makers also filmed Ms Delaney chairing staff meetings, managing staff performance and discussing the care of residents with relatives. The BBC said that the programme did not portray Ms Delaney as the person in charge of clinical care, a role which primarily involved overseeing the distribution of medication.

The BBC said that Ms Delaney consistently referred to herself as the manager and she was the person that staff, residents and relatives considered to be in charge of running the home. The programme-makers conducted a number of interviews with Ms Delaney and on each occasion she described herself as the manager and talked at length about her role and responsibilities and her plans to improve the home. The owners of Woodland House also repeatedly referred to Ms Delaney in terms which made it clear they considered her to be the person responsible for managing the home. The BBC said that Ms Delaney's role as the person running Woodland House was accurately portrayed in the programme. However, the BBC said that Ms Delaney was not shown as being in charge of clinical care at the home.

The BBC also said that Mr Davies and Ms Jackson were shown a version of the programme before transmission to enable them to address any factual errors, following which they made a number of comments. Mr Davies emailed the programme makers a series of concerns but did not raise any objection to the way Ms Delaney was portrayed in the programme or express any concern that it gave the misleading impression that she was in charge of clinical care. He was concerned that the programme did not show that the subsequent appointment of an appropriately experienced manager and the programme was edited to make it clear that a new manager had been appointed and some changes had been made at the home.

- b) The BBC then responded to the complaint that the programme was edited in a way that unfairly portrayed the home in a bad light.
 - i) As regards the complaint that many hours of footage were filmed but cut down to only 20 minutes in the programme as broadcast, resulting in the

programme presenting an unbalanced view of the home, the BBC said that the question of which material to include in a programme was an editorial decision for the programme makers and that it was not incumbent on programme-makers to use any particular proportion of material recorded.

The BBC said that the programme presented an accurate impression of the conditions that Sir Gerry encountered during his visits to the home and showed typical examples of the way residents were cared for, such as sitting for hours at a time in the lounge with nothing to do and a lack of engagement at mealtimes. Sir Gerry concluded that Woodland House was poorly run, with key members of staff lacking the necessary training, members of staff being demoralised and management reluctant to embrace new ways of working. The BBC said that the programme was clearly presented as Sir Gerry's own crusade to try to improve the care provided to elderly people with dementia, and viewers would have understood any criticisms of particular homes were based on his impression and his desire to make things better.

- ii) The BBC next responded to the complaint that the aim of the editing was to create a sensationalised programme rather than to educate and inform and that this was not the approach the company was expecting from a programme jointly commissioned by the BBC and the Open University.

The BBC said that the remit of the programme was agreed with the contributors in advance and that Sir Gerry honoured the terms of that agreement throughout. He worked with the owners, the staff and the residents of Woodland House to find ways to improve the care offered at the property, identified some key failings with the care of residents and proposed some major changes. The programme presented an honest and frank portrayal of what Sir Gerry found in the homes he visited. He included the owners' responses to his criticisms in the programme. He gave them the opportunity to act on his recommendations and allowed the owners of Woodland House to explain in their own words why they chose not to implement them.

The BBC said that the programme was a co-production with the Open University, as part of which the Open University provided three academics who acted as consultants to the programme. The programme was also supported by a number of groups involved in dementia care, including the Chief Executive of the Alzheimer's Society and the Chief Executive of Alzheimer's Research Trust. These were independent experts who clearly believed that the programme took a serious approach to a serious subject and highlighted problems that were widely recognised across the industry.

- iii) As regards the complaint about the editing of Mrs Jackson's discussion about food, the BBC said that during the period that the programme makers filmed at Woodland House, the management introduced a significant change to the policy on staff meals in order to cut costs. Staff had previously been entitled to free meals, tea and coffee while on shift but the new policy was that staff who wished to continue eating at the home would have a contribution taken from their wages and those who chose not to pay for meals were no longer entitled to help themselves to food, tea or coffee provided by the home. This change led to considerable ill feeling among the staff and was frequently raised during interviews with Sir Gerry and during staff meetings filmed by the BBC.

The programme showed Ms Jackson carrying out an audit of the kitchen and questioning whether a loaf of bread had been left out to be eaten by members of the overnight staff who had not paid for meals. The sequence accurately portrayed her attempts to ensure her new rule was being enforced and her concern that staff were continuing to help themselves to free food. Ms Jackson raised this issue again, unprompted, during a meeting with Ms Delaney in which she offered feedback on her audit of the home, part of which was included in the programme. The BBC said that the programme accurately showed that Ms Jackson was determined to tackle any abuse of the new ruling but also that it was an issue that had created considerable discontent among staff members, who felt that the change in policy was unreasonable.

The programme also showed that a similar change in policy had been made at Thornfield Care Home in an attempt to reduce overheads. Sir Gerry's conclusion in both cases was that a positive, motivated workforce was essential to run a care home effectively and he regarded attempts to save money by changing the food policy as counterproductive.

- c) The BBC responded next to the complaint that filming was carried out and footage used without consent.
- i) As regards the complaint that staff comments about the food and management were made at a time when the home's staff believed they were not being filmed, the BBC said that all filming at Woodland House was carried out by a cameraman and a separate sound engineer using professional equipment, including a shoulder or tripod-mounted camera. The sound engineer was visible in some of the untransmitted footage, holding a large microphone on an extension pole. It was also clear from the untransmitted footage that the members of staff on this occasion were aware they were being filmed. Sir Gerry asked a series of questions about the changes the owners had made to the food policy for employees and the two women responded openly and honestly, expressing genuine anger at the decision. The movement of the camera, panning back and forth between Sir Gerry and the two interviewees, suggested that the cameraman would have been constantly moving the camera to frame the shots appropriately, an action which would have been clearly visible to the contributors.

The BBC said that the sequence demonstrated that staff felt undervalued and regarded the approach of the owners on this issue as petty and unfair. Staff morale was an issue which Sir Gerry identified as one of the keys to success in running a good residential care or nursing home and it was reasonable to include the views of disgruntled workers in the programme.

- ii) With reference to the complaint that staff were assured that some of the footage taken would not be used in the programme, the BBC said that the programme makers signed a legal Access Agreement with ADL plc ("ADL"), the parent company of Woodland Healthcare Limited. ADL agreed to provide the programme makers with "unrestricted access to film, record and photograph all aspects of the Premises including (but without limitation) all aspects of the day-to-day running of ADL, including all aspects of management of ADL care homes, staffing, models of care, ADL residents (where consent is given), financial aspects of the business and relationships with outside bodies necessary to make the programme". ADL also agreed to "on camera interviews with residents who have given their consent to be

filmed and other members of ADL staff as requested to be filmed by the BBC”.

The BBC said that it was therefore clear that the programme makers were granted “unrestricted access” to film at ADL premises and all aspects of the day-to-day running of the home, including staffing. The BBC said that programme makers did not give an assurance that any material would be excluded from the broadcast programme and that Woodland Healthcare Limited could have had no expectation than any particular footage would be excluded.

- iii) The BBC next responded to the complaint that Ms Delaney was assured that a first take, in which she had been nervous, would not be used but, although a second take was filmed, the programme used the first take in order to achieve its own aims.

The BBC said that the footage was filmed during Sir Gerry’s first visit to the home and that it was appropriate to include his initial impressions of the home. The clip complained of, in which Ms Delaney could not remember what EMI stood for, clearly demonstrated her lack of experience of dealing with residents with dementia and her lack of knowledge about the subject. Ms Delaney also said that she felt poorly prepared to take over the management of a home with so many residents with dementia and that she felt out of her depth. The BBC said that Ms Delaney did not know the rating that the home had been given and repeatedly said it was “poor”, even after she had been corrected by the programme makers and that Sir Gerry had concluded that she did not have the appropriate experience, training or support to manage the home successfully. This was based on his observations, Ms Delaney’s own comments and her apparent lack of knowledge.

The BBC accepted that Ms Delaney might have been embarrassed that she could not remember what the initials EMI stood for during her interview with Sir Gerry and that she made an informal request to the programme makers not to use that particular interview clip. However the BBC said that it was apparent from her delivery and tone of voice that she was not expressing a serious concern. In any event, the BBC said that the programme makers did not give any assurance that this particular clip would not be used, either at the time or subsequently off-camera.

Decision

Ofcom’s statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and

transcript, both parties' written submissions and recordings and transcripts of untransmitted footage.

- a) Ofcom first considered the complaint that Woodland House was portrayed unfairly and shown in a bad light.

In considering this part of the complaint Ofcom took account of Rule 7.1 of the Code, which provides that broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes. Ofcom also considered Practice 7.9, which provides, that before broadcasting a factual programme, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to the individual or organisation.

- i) Ofcom considered the complaint that the programme failed to explain that there were various stages of dementia and it did not indicate that Woodland House only catered for those patients in the latter stages of dementia and with mental health problems.

Ofcom noted that Sir Gerry opened the programme by saying:

“Dementia care is our guilty conscience. It is a huge business that consumes our taxes and, for the most part, hides people away to stagnate in empty lounges... In the next 20 years, over a million of us will have dementia and we will have little choice but to join a broken system that desperately needs to be fixed”.

In Ofcom's view, these opening comments made it clear that Sir Gerry was concerned about the dementia care system as a whole. He then visited three homes, Woodland House and Thornfield, both of which were rated as “adequate” by CQC, and Silverleigh, which was rated as “excellent”, in order to discover and illustrate what worked, where the problems lay and what could be done to improve care for dementia sufferers.

Ofcom noted that in discussion with Sir Gerry, Ms Delaney said that Woodland House was the first EMI home she had ever worked in and that this meant it was for people with “advanced dementia”. The footage of the home and its residents also suggested that people living at Woodland House were in an advanced state of dementia, needing significant help to perform basic tasks and with very limited ability to communicate. This was in clear contrast to the residents at Silverleigh. Taking into account both the discussions with Ms Delaney and the footage of the residents, Ofcom considered that it would have been clear to viewers that Woodland House was a care home catering for residents in an advanced state of dementia, whose needs were very different from the very different type of residents being cared for at Silverleigh and that it was being judged on that basis.

Ofcom found no unfairness in this respect.

- ii) Ofcom considered the complaint that the programme portrayed Ms Delaney as being in charge of clinical care at the home, when in fact, she was the acting part-time manager and, at the time of filming, there was a “clinical lead” in post.

Ofcom noted that, just before meeting Ms Delaney, Sir Gerry said in commentary that:

“Woodland House have just got a new manager, a nurse who had until now been managing a non dementia care home within the same company”.

Sir Gerry later referred to Ms Delaney as “*running*” the home. When Sir Gerry brought Mr Sheard to meet Ms Jackson and Mr Davies, with a view to him attending Woodland House and sharing his ideas, Ms Jackson described in the programme her reluctance to allow a third party to offer advice to her manager on running the home as follows:

“[Jane] was demoralised by the inspection on Tuesday.... I’m very conscious of protecting my managers from the constant criticism...”.

At the same meeting, Mr Davies said:

“This week has been a terrible week... and it’s just Pearl feels it’s too much on a young new manager...”

In Ofcom’s view, the programme accurately and clearly portrayed Ms Delaney as being in a managerial position at Woodland House, as a result of her own comments and those of Sir Gerry and of Mr Davies and Mrs Jackson. Ofcom noted that, while Ms Delaney was shown in a caring role with the residents, there was no detailed discussion in the programme of clinical care and in Ofcom’s view there was no suggestion or implication at any point in the programme that Ms Delaney was in charge of clinical care at the home.

Ofcom noted that when Mrs Jackson and Mr Davies viewed the programme before transmission, they expressed concern that the programme did not show that an “appropriately experienced manager” had subsequently been appointed and the programme as broadcast included a reference to this appointment. However, Mrs Jackson and Mr Davies raised no concerns about the programme’s portrayal of Ms Delaney.

Ofcom therefore found no unfairness to Woodland House or to the directors of Woodland Health Care Limited in these respects.

- b) Ofcom next considered the complaint that the programme was edited in a way that unfairly portrayed the home in a bad light.

In considering this head of complaint, Ofcom took account of Practice 7.6 of the Code, which states that when a programme is edited, contributions should be edited fairly.

- i) Ofcom considered the complaint that many hours of footage filmed was cut down to only 20 minutes in the programme as broadcast, resulting in the programme presenting an unbalanced view of the home.

It is important to note that the editing of a programme is an editorial matter for a broadcaster and that it is not incumbent on programme makers to use a large amount of material recorded in lengthy interviews or other recorded footage. However, in editing such footage, broadcasters must ensure that the

programme as broadcast does not result in unfairness to an individual or organisation.

Ofcom viewed a substantial amount of untransmitted footage recorded during the making of the programme. This included footage of staff and residents at Woodland House and interviews with Ms Delaney and Mrs Jackson. Ofcom noted that extracts of interviews with both Ms Delaney and Mrs Jackson were included in the programme, in which they discussed the care given at Woodland House, their concerns about the home and their aspirations for the home. Ofcom took the view that these extracts fairly reflected the parts of the interviews that had not been used in the broadcast.

Ofcom considered that it was clear from the “Written Brief for Dementia Series with Gerry Robinson” provided to ADL that Sir Gerry would discuss what he found at each of the homes he visited. In Ofcom’s view, the programme included both his findings and his views on the differences between the homes, his concerns about Woodland House and the responses given by Mr Davies and Mrs Jackson. These were presented in the programme in a balanced way.

Ofcom therefore found no unfairness in this respect.

- ii) Ofcom next considered the complaint that the aim of the editing was to create a sensationalised programme rather than to educate and inform. This was not the approach the company was expecting from a programme they had been told was jointly commissioned by the BBC and the Open University, and that they had understood would help to explain the impact of dementia on residents, their relatives and the general public.

Ofcom considered that it was clear from the programme that Sir Gerry was passionate on the issue of dementia care and was very frustrated by some of what he saw in care homes featured in the programme, including Woodland House. It also considered that the programme included disturbing images of people suffering from dementia and raised serious questions about the level of care provided at some of the homes. Having spent some time at Woodland House, Sir Gerry said:

“... it felt as though nothing that had happened in their lives mattered any more. Here they were, like broken vessels, sitting in this room with absolutely nothing to do”.

Later Sir Gerry said of mealtimes at Woodland House:

“...it felt like the residents were being serviced. This felt more like keeping people alive than helping them to live”.

It was clear therefore that Sir Gerry had serious concerns about what he found at Woodland House. However, Ofcom also noted that the programme made it clear that providing care for dementia sufferers was a difficult task and that the owners of Woodland House were taking steps to make improvements at the home. For example, when Sir Gerry was shown returning to Woodland House at the end of the programme making period, Mrs Jackson said:

“This is the secure garden. We’ve not completely finished yet, but...we can lock up the gate and people can go outside and get fresh air, which we couldn’t do before”.

A little later she said:

“We’re on a real positive high note at the moment with the Remember Me branding and things that go with that, low staff turnover, the accidents and injuries have reduced. We’ve got a low death rate and considering the average age is between 80 and 90, that’s pretty good because we’ve had no deaths this year”.

Ofcom noted that the programme was indeed made with the Open University and that one of the advisors to the programme, Dr Carol Komaromy, a senior lecturer in health studies, said on the Open University website that:

“The programme highlights the need for specialist training and the difference this can make to the experience of living with dementia. It is a sad indictment of society that providing care resources for people with dementia seems to have a low level of priority. More than this, as the series shows, there is so much more that could be done even within limited resources”.

The programme also had the support of a number of groups involved in dementia care, including the Chief Executive of the Alzheimer’s Society, Neil Hunt, who said on the Alzheimer’s Society website that his organisation hoped the documentary would “be instrumental in raising awareness of what good care is and challenging our perception of what care homes should be like”. As well as Sir Gerry’s first hand impressions of the homes he visited, the programme also therefore had significant input and support from experts in the field of dementia care.

In Ofcom’s view, notwithstanding the criticisms and concerns Sir Gerry had about some of what he saw at Woodland House, the programme did not present the issues in a sensationalised way, but was a measured look at the problems of caring for people with dementia and some of the ways in which homes could improve the care offered, and was supported by experts in the field of dementia care.

Ofcom found no unfairness in this respect.

- iii) Ofcom considered the complaint that the editing of Ms Jackson’s discussion about food completely reversed the point that was being made, portraying her in a bad light when a positive point was being made.

Ofcom noted that before Sir Gerry’s visit to Woodland House, staff at the home had been entitled to free meals and drinks, but that policy had changed so that staff had to make a financial contribution if they wanted food and drink. The relevant sequence in the programme was introduced as follows:

“In this home, just like the other home I’d been looking at, the perk of this poorly paid job, free food, had recently been taken away. And Pearl was looking out for signs that her new rule was being undermined.”

A member of staff told Sir Gerry how she felt about the new rule:

“Now the only thing we’re allowed is hot water, we don’t even get tea and coffee ... that is just so harsh, not even worth a cup of tea ... you feel as if you’re worthless.”

The programme then showed Sir Gerry discussing the issue with Mrs Jackson and Ms Delaney and saying:

“Isn’t there a bigger issue in terms of just pissing them off over half a loaf of bread?”

He then commented:

“...nit picking about a few staff meals, you know, in financial terms is neither here nor there. It’s irrelevant, but what’s relevant is staff morale. In fact in this business it’s the secret of success. You know, in a business where the staff are so directly responsible for care of the residents, and these are people who are operating on barely little more than minimum wage, I wouldn’t risk the staff morale for a few pence.”

Ofcom viewed untransmitted footage relating to the issue of food for staff at the home. The footage showed Mrs Jackson inspecting the kitchen and raising concerns that the new rule was not being adhered to. It showed staff explaining how unhappy they were with the change and then showed Sir Gerry discussing with Mrs Jackson why he felt that the impact on staff morale outweighed the financial benefits of the change. Ofcom also noted that in the untransmitted footage, Mrs Jackson explained to Sir Gerry that she had found over-ordering of food at a different home and that she had felt she had to tackle abuse of the homes’ food stocks. This footage did not appear in the programme. Ofcom appreciated that Mrs Jackson would have preferred her explanation for the change in policy to appear in the programme, but Ofcom considered that it would have been clear to viewers from Sir Gerry’s comments that Mrs Jackson had business reasons for the change, but that Sir Gerry felt that these were outweighed by the negative impact of the decision on staff morale.

Ofcom took the view that the programme fairly reflected the reasons for the new rule, staff feelings about it and Sir Gerry’s views on the subject.

Ofcom therefore found no unfairness in this respect.

- c) Ofcom went on to consider the complaint that filming was carried out and footage used without consent.
 - i) Ofcom considered the complaint that staff comments about the food and management were made at a time when the home’s staff believed they were not being filmed.

Ofcom noted that the programme showed staff at Woodland House discussing the withdrawal of free food with Sir Gerry. One member of staff said:

“You feel as if you’re worthless, you really do. You feel as if you’re just not worth anything”.

Having viewed the untransmitted footage of staff discussing the new food policy with Sir Gerry, Ofcom took the view that the camera crew would have been clearly visible to those staff members and that they would have been aware that the conversation was being filmed.

Given that the food policy and its impact on staff was one of the concerns highlighted by Sir Gerry and discussed with Mrs Jackson, it was reasonable for the programme to illustrate this by the inclusion of footage showing how staff felt about the issue.

Ofcom found no unfairness in this respect.

- ii) Ofcom then considered the complaint that staff were assured that some of the footage taken would not be used in the programme.

Ofcom noted that Mr Davies did not provide examples, other than that dealt with at head c) iii) below, of footage that staff were told would not be used in the programme. Ofcom also noted that nothing in the untransmitted footage indicated that staff did not want particular footage used. Ofcom also took into account the Access Agreement between the BBC and ADL, which included a clause allowing the BBC:

“unrestricted access to film, record and photograph all aspects of the Premises including (but without limitation) all aspects of the day-to-day running of ADL, including all aspects of management of ADL care homes, staffing, models of care, ADL residents (where consent is given), financial aspects of the business and relationships with outside bodies necessary to make the programme”.

This agreement clearly envisaged filming of all aspects of Woodland House and did not make any exceptions in relation to filming of staff.

Taking into account both the footage viewed and the nature of the untransmitted footage, Ofcom took the view that no material was included in the programme that staff were assured would not be used.

Ofcom therefore found no unfairness in this respect.

- iii) Ofcom then considered the complaint that Ms Delaney was assured that a first take, in which she had been nervous, would not be used but, although a second take was filmed, the programme used the first take in order to achieve its own aims.

Ofcom noted that the programme included footage of Ms Delaney’s interview with Sir Gerry. When Ms Delaney told Sir Gerry that Woodland House was the first EMI unit she had worked in, Sir Gerry asked her what EMI stood for. Ms Delaney could not remember and said:

“It’s the mental, like it’s EMI unit, I can’t pronounce it”.

When Sir Gerry prompted her by saying “People who have kind of advanced...”, she replied “Advanced dementia”.

Ofcom noted that in the untransmitted footage, Ms Delaney said:

“Sorry, I didn’t know what EMI was, it just totally went in my head. Don’t put that on camera. Please don’t put that on film across the nation”.

Although the BBC considered that this was not a serious request on Ms Delaney’s part for the footage not to be included, Ofcom considered that she was clearly embarrassed by what she had said at a very early stage in the interview with Sir Gerry, when she may have experienced nerves, and genuinely wished for the clip not to be included in the programme.

However, Ofcom took the view that the use of the clip was justified in illustrating why Sir Gerry was concerned that Ms Delaney was not equipped to manage a home like Woodland House. He said shortly afterwards in the programme:

“I like Jane. She said she felt out of her depth. I have to say that’s putting it mildly...How can you have someone running a home like that with no dementia training? This industry is regulated, it’s inspected and yet it passes as acceptable to have someone in charge of this home who is at best hazy about what the job involves”.

It was clear from this that Sir Gerry was talking about what he perceived as a failure in the system, in allowing someone who lacked the necessary expertise and experience to manage a home for people with advanced dementia. Notwithstanding Ms Delaney’s embarrassment about the clip, it was reasonable for Sir Gerry’s concern to be illustrated in this way.

Ofcom therefore found no unfairness to Ms Delaney in this respect.

Accordingly, Ofcom has not upheld Mr Davies’ complaint of unfair treatment.

Not Upheld

Complaint by Mr Edward Saleh on his own behalf and on behalf of his son

Revelations: Divorce Jewish Style, Channel 4, 2 August 2009

Summary: Ofcom has not upheld this complaint of unfair treatment made by Mr Edward Saleh. It has also not upheld the complaint of unfair treatment and unwarranted infringement of privacy in the programme as broadcast made on behalf of himself and his son.

This programme was one of a series that explored the impact of religion on the lives of believers and non-believers in the UK today.

The programme investigated the Orthodox Jewish divorce process and the procedure for obtaining a Get, the document of divorce in Orthodox Judaism. In particular, the programme examined the difficulties some wives face in obtaining a Get. The programme included interviews with several wives who claimed to have had difficulties in obtaining a Get. One of the women in the programme was Mrs Miriam Saleh, the former wife of Mr Edward Saleh.

Mr Saleh complained to Ofcom that he was treated unfairly in the programme and that his privacy and that of his son had been unwarrantably infringed in the broadcast of the programme.

In summary, Ofcom found the following:

- It is a fact that Mr Saleh has not yet given his wife a Get within the Orthodox Jewish divorce process and it was not unfair for Channel 4 to refer to Mrs Saleh as a “chained wife”.
- Mr Saleh was not the focus of Mrs Saleh’s comments. Rather, her contribution focused on her frustrations with the Orthodox Jewish divorce process and the inconsistencies she has experienced with different Beth Din.
- The reasons why Mr Saleh has not given Mrs Saleh a Get were not relevant to Mrs Saleh’s contribution. It is for this reason that it was not unfair for Channel 4 not to give Mr Saleh an opportunity to respond.
- Mr Saleh’s privacy, and that of his son, was not unwarrantably infringed in the programme as broadcast.

Introduction

On 2 August 2009, Channel 4 broadcast an edition of its documentary series *Revelations*. This edition investigated the process and issues surrounding Orthodox Jewish divorce. In particular, the programme examined the process by which a Get, the document of divorce in Orthodox Judaism, is obtained and the difficulties some wives face in obtaining a Get, which can only be given with the consent of the husband. The programme stated that:

“This controversial law gives the husband the power of refusal and critics say this means the refusing husband can be guilty of keeping his unfortunate wife chained to a dead marriage”.

The programme included interviews with several wives who claimed to have had difficulties in obtaining a Get. One of the women in the programme was Mrs Miriam Saleh, the former wife of Mr Edward Saleh. Mrs Saleh’s participation in the programme was in two parts, and can be read as follows:

Part One:

Narrator: *“It’s not a subject that Orthodox Jews are comfortable with talking openly about but one young woman did agree to tell us about her own difficult experience as a chained wife”.*

Mrs Saleh: *“When I met my ex-husband, I was very much in love and very young and naive. I always wanted to, settle down and have a family of my own and, just grow and live together for ever and ever.”*

Narrator: *“But married life did not turn out as she expected.”*

Mrs Saleh: *“I was very unhappy and I felt it was wrong to carry on like this. I felt if I didn’t do something, it would just get worse and worse. After my second child I decided that um, I wanted a divorce.”*

Narrator: *“So Miriam applied for a divorce petition in the civil divorce court. Though it’s not legally binding, since 2002, the English divorce laws have encouraged Orthodox Jewish couples to agree on the Jewish divorce document, the Get at the same time as their civil divorce.”*

Mrs Saleh: *“It was part of the petition that I wanted a Get. I got the Decree Nisi, I have my Absolute, I have it, but I still do not have a Get.”*

Narrator: *“The actual Get, is a document written on the husbands behalf in ancient Assyrian script by a scribe and then given to the wife in a divorce ceremony. If the Get has no legal status in this country, why is it so vital to Miriam?”*

Mrs Saleh: *“Because in Jewish law, I’m still married to this man, and, to be unmarried I need to have this Jewish divorce which is a Get. I am a religious Orthodox Jewish woman and it’s very, very important to me. But you can’t meet anybody, you can’t have a relationship, you can’t get married. If you do do that and, you marry under the Orthodox Jewish way. You’d have to marry reform or something that isn’t what I believe in and it, it is something that I have no power whatsoever, over. This is purely, from the husband that he has to do.”*

Part Two:

Narrator: *“With Karin Gabay, different Beth Din’s have obviously come to very different conclusions. This apparent lack of consistency amongst them is also reflected in Miriam Saleh’s case where the Sephardi Beth Din has supported her attempts to obtain a Get, but now, yet another Beth Din in London has got involved with the case.”*

Mrs Saleh: *“The Beth Din, the Jewish courts within the Jewish religion all have the same guidelines – why are they all different, why are they all holding different bits and areas, why aren’t they all singing the same tune because it just makes it all, much more difficult. Where did you go, who do you talk to, who’s best to speak to, I just feel I’m at a loss.”*

Mrs Saleh: *“I have been to, four Beth Din’s, um, and I feel that it’s very much male-orientated, there are some women, very few, I could probably count them on one hand in the four that I’ve attended to, um, they don’t see it from a woman’s point of view, it’s from a man’s point of view. I have received letters from, various, Beth Din’s and, they are asking, my husband, what is it you want. Now, I’m not asked what I want. I don’t want anything, I want a Get.”*

Mrs Saleh: *“In Israel they name them and shame them, they freeze their bank accounts, this doesn’t happen in this country.”*

Mrs Saleh: *“If pressure was put, on these men, it would make their lives very difficult to carry on and to lead.”*

At the conclusion of the programme, it was stated that:

“Although Miriam Saleh remains committed to the orthodox faith, she has gone down a non-orthodox route to obtain a Get which will not be officially recognised”.

Mr Saleh was not named directly in the programme, and although a picture of Mr and Mrs Saleh’s wedding was shown, Mr Saleh’s face was obscured. A picture of two children was in the background during Mrs Saleh’s interview, but their faces were also obscured.

Mr Saleh complained to Ofcom that he was treated unfairly in the programme and that his privacy and that of his son, had been unwarrantably infringed in the programme as broadcast.

The Complaint

Mr Saleh submitted his complaint to Ofcom on 13 October 2009, together with supporting materials. Ofcom entertained Mr Saleh’s complaint, based on these submissions, on 15 November 2009. This Entertainment Decision was accepted by both parties. Channel 4 submitted their statement in response to Mr Saleh’s entertained complaint on 18 January 2010. Mr Saleh submitted comments to Channel 4’s response on 1 February 2010, which Ofcom admitted as material. Channel 4 was given an opportunity to respond to these comments, and submitted their response on 19 February 2010. Mr Saleh submitted comments on Channel 4’s response of 19 February 2010 on 8 March 2010. Those comments were also taken into account in determining this matter, however they did not raise new points in relation to which Channel 4 had not already given its view.

Mr Saleh also wrote to Ofcom on 23 February 2010 requesting that it ignored in its entirety a letter¹ included in Channel 4’s submission of 19 February on the basis that it contains legally privileged information. Ofcom has, however, taken parts of this letter into account, but only insofar as it contains information that it believed was relevant to determining whether or not there has been a breach of the Code in the

¹ From Mr Whiteman to the Jewish Chronicle dated 7 December 2009.

programme as broadcast. Ofcom has not taken into account legally privileged material which, in its view, was not relevant to the issues it had been asked to determine.

Entertained Complaint 15 November 2009

In summary, Mr Saleh complained that he was treated unfairly in the programme as broadcast in that:

- He was portrayed unfairly in that the programme failed to appropriately assess the veracity of Mrs Saleh's claims.

Mr Saleh said that the actual reason for Mrs Saleh not obtaining a Get was because she refused, on the advice of her lawyer, to participate in the Beth Din² process.

- He was not given an opportunity to respond to the allegation that he was to blame for Mrs Saleh's failure to obtain a Get.

In summary, Mr Saleh complained that his privacy and that of his son had been unwarrantably infringed in the programme as broadcast in that:

- Their identity was revealed in the programme without his consent, in the context of false allegations.

Mr Saleh said that the programme deliberately used Mrs Saleh's married name and not her pre-marriage name, which she also used.

Channel 4's case – 18 January 2010

In summary, Channel 4 responded to Mr Saleh's complaint of unfair treatment as follows:

- a) Channel 4 said that the only claim Mrs Saleh made in the programme was that she wanted a Get and was frustrated with the process. Mr Saleh did not contest the fact that Mrs Saleh did not yet have a Get. Channel 4 said that as the programme did not discuss the reasons for Mr Saleh's refusal to provide a Get to Mrs Saleh, there was no requirement that there be any investigation into the veracity of her claim, except to the extent that it was necessary to confirm that Mr Saleh had not consented to the provision of a Get. Nevertheless, Channel 4 said that the programme makers had fully investigated and researched Mrs Saleh's story before transmission, both with her and her lawyer, and they were happy with its accuracy.
- b) Channel 4 said that the programme did not contain significant allegations about Mr Saleh and that the programme was confined to the reporting of fact alone. It said that the programme stated the following matters about Mr and Mrs Saleh:
 - Mrs Saleh had a civil divorce but not a Get;
 - Under orthodox Jewish law, Mrs Saleh not could obtain a Get without her husband's consent;
 - Mrs Saleh had not obtained the Get she wanted;

² The Jewish court which presides over the divorce process.

- Mrs Saleh considered that the Jewish religious divorce process was skewed towards the husband;
- Beth Dins (the dispenser of Gets) took different approaches but in Mrs Saleh's opinion they generally favoured the husband's viewpoint; and
- Because of the difficulties she has faced, Mrs Saleh was taking a non-Orthodox route to obtain a Get.

Channel 4 said that Mr Saleh did not dispute that he had not, to date, provided a Get to Mrs Saleh and that, under the laws of Orthodox Judaism, he was the only person who could consent to the provision of the Get. Channel 4 said that the programme was confined to stating that undisputed fact. It said that Mrs Saleh's contribution was focused on her personal frustrations with the traditional Jewish religious divorce process, not complaints about Mr Saleh's conduct.

In summary, Channel 4 responded to Mr Saleh's complaint of unwarranted infringement of privacy in the programme as broadcast as follows:

- c) Channel 4 said that the only way in which Mr Saleh could be identified was through the use of the contributor's surname. It said that it was a fact that Mr Saleh remained married to Mrs Saleh under Jewish law. Channel 4 said that as the subject of the programme was divorce and as Mrs Saleh, under Jewish law, was still a married woman, it would have been inappropriate for her to have used her pre-marriage name, particularly in a programme of this nature.

The fact of a marriage is a public matter; in a civil sense, a marriage is a declaration in law, made in a public setting. In a religious sense, it is a declaration made before God and the religious community. There is no inherent privacy in those matters and, consequently, there can be no intrusion in the reporting of those facts.

With regards to Mr Saleh's son, Channel 4 said that although a picture of two children could be seen in the background during Mrs Saleh's interview, the children were not identifiable. It said that Mr Saleh's son was not mentioned by name or otherwise identified in any way in the programme. Channel 4 said that in these circumstances, Mr Saleh's complaint that his son's privacy was unwarrantably infringed cannot be supported.

Mr Saleh's comments – 1 February 2010

In summary, Mr Saleh made the following points as to why he was treated unfairly in the programme as broadcast:

- Channel 4 omitted to state that Mrs Saleh had refused to co-operate with the Beth Din process, with the result that she was presented as an "innocent victim" and Mr Saleh was presented as a "villain".
- That, despite being asked by Mr Saleh to either remove Mrs Saleh's contribution from the programme or to check everything with him before broadcasting the programme, Channel 4 failed to do so. This meant that the story regarding their Jewish divorce situation was false.
- That it was unfair for Channel 4 to refer to Mrs Saleh as a "chained wife" without examining why she didn't have a Get. Failure to do this has resulted in his character being besmirched by implication. He refers, in particular, to an e-mail

from Ms Gloria Proops co-founder of the Agunot campaign to corroborate his view that the term “agunah” has been incorrectly used in respect of his ex-wife. This email has been included in the bundle of materials that have been shared with Channel 4 in the course of determining this complaint.

- It was unfair of Channel 4 not to give him an opportunity to comment on the reasons why Mrs Saleh does not have a Get (namely that she has refused to participate in the Beth Din process).

In summary, Mr Saleh also made the following points as why he is of the view that this privacy, and that of his son, has been unwarrantably infringed:

- His son was teased at school as a result of the programme having been broadcast
- The programme identified Mr Saleh and his children sufficiently well to enable a reporter from the Jewish Chronicle to locate him.
- Matters pertaining to his marriage breakdown were not relevant to the programme and reference should not have been made to them.

Channel 4's Comments in Response – 19 February 2010

In summary, Channel 4 made the further points:

- Mrs Saleh is entitled to report the fact of her civil divorce and her wish to obtain a Get. She is also entitled to use her married name (and, in fact, has informed Channel 4 that she intends to do so until she is granted the Jewish divorce she seeks).
- It is important to note that the term “agunah” was not applied to Mrs Saleh in the programme either by herself or the programme’s narrator. It also submitted an e-mail from Ms Sandra Blackman, who cofounded the Agunah Campaign alongside Ms Proops, referred to by Mr Saleh in his comments of 1 February 2010. In Ms Blackman’s e-mail, sent to Channel 4 3 August 2009 (a day after the programme was broadcast) it stated:

“I think that last night’s documentary gave a fair overview of a complicated subject. You managed to screen both ex-agunot and on-going agunot. Miriam is one of the latter and her ex-husband has been asked on a number of occasions to provide her with a get but to date has failed to do so despite the fact that the Decree Nisi was granted in 2005.”

- Whilst there may be a difference of opinion between Mr Saleh and his wife on the meaning of the word, the programme exhibited no inaccuracy in employing the term.
- The programme does not explore her grievances about the breakdown of her marriage, nor does it imply that Mr Saleh is to blame for the failure to provide a Get to Mrs Saleh.
- That, in accordance with its relevant legal obligations and the Ofcom Code, it properly investigated and researched Mrs Saleh’s claims prior to transmission of the programme.

Mr Saleh's comments – 8 March 2010

In summary, Mr Saleh stated that Channel 4's assertion that Mrs Saleh did not state on air that she was an Agunah was contradictory, as the whole thrust of the programme was what happens when a husband refuses a wife a divorce and leaves her chained. He reiterated that he had co-operated with the Jewish Divorce process and that his ex-wife, with her solicitor's guidance, had refused to accept the Beth Din's role in the process. By omitting to include this information, Channel 4 had presented him unfairly. Finally, in response to Channel 4's reference to the email received from Mrs Blackman, Mr Saleh again referred to the contrary email received from Gloria Proops which specifically states:

“if she [Mrs Saleh] had [attended a Religious Court with her husband to obtain a Get], she would indeed be an Agunah and he would be considered a recalcitrant husband.”

Again, Mr Saleh's point is that Mrs Saleh is not an Agunah and that by presenting her as such (either expressly or impliedly), Channel 4 has unfairly cast him as a recalcitrant husband.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and transcript, both parties' written submissions and their supporting materials.

Unfair treatment

When considering complaints of unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of the Code. Ofcom had regard to Rule 7.1 when reaching its decisions on the individual heads of complaint detailed below.

- a) Ofcom considered the complaint that Mr Saleh was unfairly portrayed as a result of the programme makers failing to assess the veracity Mrs Saleh's claims.

In considering this part of the complaint, Ofcom had regard to Practice 7.9 which states that before broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation; and anyone whose omission could be unfair to an individual or organisation has been offered an opportunity to contribute.

Ofcom first examined the contribution provided by Mrs Saleh to the programme. Ofcom noted the following two excerpts of Mrs Saleh's discussion of the process and her own experience:

"The Beth Din, the Jewish courts within the Jewish religion all have the same guidelines – why are they all different, why, why are they holding in different bits and areas, why aren't they all singing the same tune [...] because it just makes it all, much more difficult. Where do you go, who do you talk to, who's best to speak to, I just feel I'm at a loss".

She later said:

"I have been to, four Beth Din's, um, and I feel that it's very much male-orientated, there are some woman, very few, I could probably count them on one hand in the four that I've attended to, um, they don't see it from a woman's point of view, it's from a man's point of view. I have received letters from, various, Beth Din's and, they are asking my husband, what is it you want? Now, I'm not asked what I don't want anything, I want a Get."

Ofcom took the view that Mrs Saleh was commenting on the inconsistencies she had found between the Jewish courts, her perception of the male dominance in the courts and her resulting frustrations with them. It considered that the crux of her contribution was that she was seeking to obtain a Get from her husband and had been unable to do so. Ofcom considered that at no stage during her contribution did Mrs Saleh discuss Mr Saleh's character or behaviour regarding the process, or speculate on his reasons for not giving the Get.

Ofcom also noted the following comments from Mrs Saleh's contribution:

"Because in Jewish law, I'm still married to this man, and, to be unmarried I need to have this Jewish divorce which is a Get. I am a religious Orthodox Jewish woman and it's very, very important to me. But you can't meet anybody, you can't have a relationship, you can't get married. If you do do that and, you marry, you can't marry under the Orthodox Jewish way. You'd have to marry reform or something that isn't what I believe in and it, it is something that I have no power whatsoever, over. This is purely, from the husband that he has to do."

Ofcom considered that it was clear that Mrs Saleh had not yet obtained a Get and that it was for the husband to grant a Get. Ofcom also noted that neither Mr Saleh nor Mrs Saleh disputed these facts.

Ofcom did however note that there was a dispute as to whether or not Mrs Saleh could be classed as an "agunah". Ofcom noted Mr Saleh's submission from Ms Proops, a co-founder of the Agunah Campaign which stated that Mrs Saleh could not be classed as an "agunah" as she had not attended a "Religious Court". Ofcom also noted that Channel 4 had submitted an email from Ms Blackman, another co-founder of the Agunah Campaign which stated that Mrs Saleh was an "on-going agunah". It was clear, therefore that both parties disagreed on this point.

With regards to this issue, it is important to note that Ofcom's remit is to consider and adjudicate on complaints of unfair treatment and unwarranted infringement of privacy and as such is not required to resolve conflicts of evidence as to the nature or accuracy of particular accounts of events but to adjudicate on whether

the complainant has been treated unfairly in the programme as broadcast and/or its privacy unwarrantably infringed in the making of the programme or the programme as broadcast. Ofcom could not therefore adjudicate on whether or not Mrs Saleh is, as a matter of fact, an “agunah”. Instead, Ofcom had to adjudicate on whether or not Channel 4 had reasonable grounds on which to refer to Mrs Saleh as a “chained wife” and whether or not in doing so this resulted in unfairness to Mr Saleh.

Although Mrs Proops does not appear to accept that Mrs Saleh is currently an agunah, Ofcom has had to consider whether or not there is a legitimate basis upon which Channel 4 could have taken the opposite view. Ofcom has noted the comments made in Ms Blackman’s email to Channel 4 that Mrs Saleh is in fact an Agunah. Like Ms Proops, Ms Blackman is a co-founder of the Agunah Campaign, and on that basis Ofcom has accorded their respective views equal weight. Although there is a difference in opinion between these two commentators, Ofcom has not been persuaded that Ms Blackman’s view was necessarily an incorrect interpretation of the facts of the Salehs’ divorce or that, consequently, Channel 4 was wrong to refer to Mrs Saleh as a “chained wife”. Ofcom considered that, in light of this, Channel 4’s reference in the programme to Mrs Saleh being a “chained wife” could not have resulted in unfairness to Mr Saleh.

Furthermore, in Ofcom’s view, Mrs Saleh’s comments were limited to explaining why obtaining a Get was important to her and questioning the fact that the “power” in the process lay with the husband in principle. Ofcom considered that it would have been clear to viewers that Mrs Saleh was commenting on the problems she faced because of the process that she was required to pursue, not because of any specific actions on the part of her husband.

Ofcom noted that in Mr Saleh’s complaint he stated the reason for Mrs Saleh not obtaining a Get was because she refused, on the advice of her lawyer, to participate in the Beth Din process. As set out above, Ofcom took the view that Mrs Saleh’s comments related to the process in and of itself rather than constituting a criticism of her husband’s actions. In view of this it was not incumbent on the programme makers to include any reasons that referred to the specific circumstances that lay behind Mr and Mrs Saleh’s situation.

Ofcom concluded that, because Mrs Saleh’s contribution related to her frustrations with the Orthodox Jewish divorce process and Mr Saleh was not the subject of her critical comments, there were no facts that were presented, disregarded or omitted in the programme that caused unfairness to Mr Saleh.

Ofcom therefore found no unfairness in this regard.

- b) Ofcom then considered the complaint that Mr Saleh was not given an opportunity to respond to the allegation that he was to blame for Mrs Saleh’s failure to obtain a Get.

In considering this head of complaint, Ofcom had regard to Practice 7.11 of the Code which states that if a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.

Ofcom first considered whether an allegation of such a nature was made towards Mr Saleh. In doing so, Ofcom referred to its finding in head a). Ofcom found that Mrs Saleh commented on her frustrations with the Jewish divorce process, and

her criticisms of it. Ofcom took the view that Mrs Saleh did not at any stage apportion personal blame on Mr Saleh for the difficulties she is facing in obtaining a Get.

Ofcom took the view that it would have been clear to viewers that Mrs Saleh's husband had not yet granted a Get, but considered that this was a fact, not disputed by either party, and therefore could not be categorised as an allegation. Therefore, in the absence of any allegations of wrongdoing or incompetence, or any other significant allegation made towards Mr Saleh, it was not incumbent on the programme makers to provide Mr Saleh with an opportunity to respond to the programme.

Ofcom therefore found no unfairness in this regard.

Privacy

- c) Ofcom considered the complaint that Mr Saleh's identity and that of his son was revealed in the programme without his consent, in the context of false allegations, and that Mr Saleh said that the programme deliberately used Mrs Saleh's married name and not her pre-marriage name, which she also used.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing right of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in Rule 8.1 of the Code which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes, must be warranted. In considering complaints about the unwarranted infringement of privacy, Ofcom will therefore, where necessary, address itself to two distinct questions: First, has there been an infringement of privacy? Second, if so, was it warranted? Ofcom also had regard to Practice 8.6 of the Code which states that if the broadcast of a programme would infringe the privacy of a person or organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

Ofcom first considered whether Mr Saleh or his son had a legitimate expectation of privacy in relation to the information disclosed in the programme as broadcast. The Code explains that "legitimate expectations of privacy will vary according to the place and nature of the information, activity or condition in question, the extent to which it is in the public domain (if at all) and where the individual concerned is already in the public eye".

Ofcom recognised that the information contained in the programme was:

- The fact of their identity (by virtue of Mrs Saleh using her married name and choosing not to disguise herself);
- The fact that a civil divorce had been obtained;
- The fact that Mr Saleh has not given a Get and his wife still does not have one that is recognised by orthodox authorities; and
- A blurred photograph of Mr Saleh's son in the background.

Ofcom considered that a civil divorce is a matter of public record; however, it is not clear that the same can be said of the Get process. On balance, Ofcom has come to the view that the fact of Mr Saleh's identity as a man who has not given his wife a Get may create a legitimate expectation of privacy for him and his son. Ofcom noted that neither Mr Saleh nor his son were directly referenced in the programme, either by name or by the images shown.

The second question to determine is whether or not there has been an unwarranted infringement of privacy, taking into account that Channel 4 and Mrs Saleh both have a right to freedom of expression. As part of that right, Ofcom considers that Mrs Saleh is entitled to use her married name, elect to appear on television without a disguise, inform others that she does not have a Get; and express her frustration with the Beth Din process. Ofcom further noted the limited information given in relation to Mr Saleh (his surname) and his son (a blurred photograph).

Taking the above factors into account, and balancing Mr Saleh and his son's legitimate expectation of privacy against Mrs Saleh's and Channel 4's right to freedom of expression, Ofcom is satisfied that there has not been an unwarranted infringement of Mr Saleh's or his son's privacy.

Accordingly, Ofcom has not upheld Mr Saleh's complaint that he was treated unfairly and that his privacy and that of his son's was unwarrantably infringed in the broadcast.

Not Upheld

Complaint by Painted Children UK Limited

Channel S News, Channel S, 27 October 2009

Summary: Ofcom has not upheld this complaint of unfair treatment made by Painted Children.

A news item reported that charity Painted Children had pretended to perform Qurbani (the sacrifice of livestock during the Muslim festival of Eid Ul Azzha) for the people of Sunamganj in Bangladesh. The report alleged that staff of Painted Children filmed a video of charity representatives apparently performing Qurbani on more than 100 cows, but that in fact they only tried to sacrifice two cows and then left without distributing any meat to the villagers.

Painted Children complained to Ofcom that it was treated unfairly in the programme as broadcast.

In summary, Ofcom found that the broadcaster took reasonable steps to satisfy themselves that the material facts had been presented fairly and offered Painted Children an appropriate and timely opportunity to respond to the allegation included in the programme.

Introduction

On 27 October 2009, Channel S broadcast an edition of its news programme. The bulletin included a report about Painted Children UK Limited (“Painted Children”), a London-based charity. The report stated that Painted Children had pretended to perform Qurbani (the sacrifice of livestock during the Muslim festival of Eid Ul Azzha) for the people of the village of Sunamganj in Bangladesh. The programme alleged that staff of Painted Children filmed a video of charity representatives apparently performing Qurbani on more than 100 cows, but that in fact they only tried to sacrifice two cows and then left without distributing any meat to the villagers. The report then said:

“The issue of the organisation called Painted Children who came to distribute meat, doing video recording of more than hundreds of cows, and leaving without distributing the meat has raised a concern to any foreign organisation or to any individual”.

Painted Children complained to Ofcom that it was treated unfairly in the programme as broadcast.

The Complaint

- a) The programme wrongly and unfairly said that:
 - i) The charity filmed the whole incident as a publicity stunt.
 - ii) The programme wrongly and unfairly stated that Painted Children collected donations for the slaughter from the UK.

By way of background, Painted Children said the report stated that the charity was responsible for advertising that a slaughter would take place, collected donations for it, and then did not carry out the slaughter at all. Painted Children said that they had no involvement whatsoever with any slaughter.

- b) Painted Children was not given an appropriate and timely opportunity to respond to the allegations in the programme in that the programme makers did not contact Painted Children nor put any questions to the charity prior to broadcast.

Channel S's case

In summary, Channel S responded to Painted Children's complaint as follows:

- a) i) In response to the complaint that the programme wrongly and unfairly stated that the charity filmed the whole incident as a publicity stunt, Channel S said that the comments from the villagers were sufficient to show that the event was a publicity stunt. Channel S said that Painted Children asked for 100 cows but that once the filming and photo session was over, Painted Children said that only two cows were for Qurbani. Channel S said that there were also representatives of other popular press and media present covering the event as it had been announced that the Qurbani was to take place and that 100 cows would be sacrificed.
- a) ii) In response to the complaint that the programme wrongly and unfairly stated that Painted Children collected donations for the proposed slaughter from the UK, Channel S said that it was Mr Ezzal Ahmed, head of the Bangladesh Chapter of the charity, who admitted that Painted Children was a London-based Organisation, and so it must have collected funds from the UK at some stage.
- b) In response to the complaint that Painted Children was not given an appropriate and timely opportunity to respond to the allegations in the programme, Channel S said that the programme makers had given opportunities for the charity to comment in Bangladesh. Channel S said that the programme makers got a statement from a Painted Children representative, Mr Islal Ahmed who said that the charity had gone to the village to distribute the Qurbani meat of two cows among the poor villagers, but he chose not to provide his statement on camera. Channel S said that there may have been a lack of communication with the UK office but because this was a news item, it was reported accurately.

Painted Children's Comments

Painted Children said that no such sacrifice was held and that Channel S intentionally reported the story to create a religious sentiment against the charity. Painted Children said that one of its field workers went to the village to distribute some warm clothes and dry food items to the poor villagers. Painted Children said that it only collected donations for humanitarian activities and not for anything related to a sacrifice or any religious matter. It said that Painted Children UK has an office in Bangladesh, as Bangladesh is its working area.

Channel S's comments

Channel S said that nobody knew why Painted Children visited the village and why they left without making any sacrifice. It said that the video footage and the information provided by the grocer and the villagers were strong evidence that Painted Children had gone to the village to sacrifice cows with the coordination of Mr Islal Ahmed. Channel S said that Mr Ahmed did not appear to have any clothes with

him apart from the red t-shirt he was wearing. It said that Painted Children had two cows and that the rest came from a nearby farm. Channel S said that before the slaughter, the cows managed to escape. As a result, the charity did not slaughter any cows at all.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision, Ofcom considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and the translated transcript, both parties' written submissions and their supporting materials.

When considering complaints of unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of the Code. Ofcom had regard to Rule 7.1 when reaching its decisions on the individual heads of complaint detailed below.

- a) Ofcom first considered the complaint that the programme wrongly and unfairly stated that the charity filmed the whole incident as a publicity stunt and that Painted Children collected donations from the UK for the slaughter.

In considering this part of the complaint, Ofcom had regard to Practice 7.9 which makes clear that when broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation.

- i) In considering the complaint that the programme wrongly and unfairly stated that the charity filmed the whole incident as a publicity stunt:

Ofcom noted that there was a conflict of evidence regarding Painted Children's involvement in the proposed sacrifice in Sunamganj, in that the charity asserts it had no involvement at all whereas Channel S assert that the charity had performed a publicity stunt by claiming it would carry out a slaughter of more than a hundred cows but only intended to slaughter two. Ofcom is not required to resolve conflicts of evidence as to the nature or accuracy of particular accounts of events but to adjudicate on whether a complainant has been treated unfairly in a programme.

In doing so therefore, Ofcom first considered whether the programme contained such an assertion, and, if so, what steps the programme makers took in formulating the report.

Ofcom noted that the programme's reporter stated:

“An organisation named Painted Children has been alleged for cheating with the expatriates’ donation in the name of distributing the meat of Qurbani among poor and needy people of Sunamganj. This event was discovered on Tuesday by the local people when it had been tried to shoot a video of pretending for doing Qurbani of more than one hundred cows by doing only two in real in a dairy farm of Sunamganj.”

After interviewing two local villagers who appeared to substantiate these claims, the reporter, said in conclusion:

“They [Painted Children] came here to give Qurbani two cows and distribute the meat among the poor people of Sunamganj. The issue of the organisation called Painted Children who came to distribute meat, doing video recording of more than hundreds of cows, and leaving without distributing the meat – has raised a concern to any foreign organisation or to any individual”.

Ofcom took the view that this passage suggested to viewers that Painted Children purported to sacrifice more than hundred cows for the people of Sunamganj, shot a film which suggested that it was carrying out the sacrifice as advertised, but in actual fact only intended to sacrifice two cows.

Ofcom therefore considered that viewers would have drawn from this passage that there was an allegation that Painted Children had misrepresented its actions during the festival of Qurbani and engaged in a publicity stunt.

Ofcom then examined what steps the programme makers took in satisfying themselves that material facts were represented fairly in the report. Ofcom noted that Channel S had taken the testimonies of two local villagers and had also taken into account that other media organisations were covering the same story. It was also self-evident that Channel S themselves had both a camera crew and reporter who witnessed and filmed the scene in which the alleged publicity stunt took place. Ofcom took into account that each separate source of information for the programme makers appeared to corroborate the story.

In view of the congruence amongst the several sources the programme makers relied upon, Ofcom concluded that the programme makers did take reasonable steps to satisfy themselves that the material facts had been presented fairly.

- ii) Ofcom considered the content of translated transcripts of the news item provided by both parties and found two passages germane to the complaint that Painted Children had taken funds from the United Kingdom to fund their participation in Qurbani.

The first passage reported the allegation that Painted children had been using donations from expatriates to fund distribution of the meat of Qurbani in Sunamganj. The second passage reported that Mr Ahmed had admitted that Painted Children is a London-based organisation.

Ofcom concluded that viewers would have understood that it was being alleged in the item that the charity was collecting donations from the UK for

the slaughter of more than hundred cows, but that no such slaughter had taken place.

Ofcom took the view that given it was not in dispute that Painted Children was a London-based charity and given Ofcom's finding in decision head a) i) above that it was reasonable for Channel S to include the story in the news bulletin, no unfairness could arise from the assertion that Painted Children would have collected donations from the UK in order to carry out its activities, even if they were carried outside the country in which the charity was based.

Ofcom therefore found no unfairness in this regard.

- b) Ofcom then considered the complaint that Painted Children was not given an appropriate and timely opportunity to respond to the allegations in the programme.

Ofcom first considered whether the programme included serious allegations about Painted Children. As set out under decision head a) above, Ofcom noted that the programme alleged that Painted Children said they would sacrifice more than hundred cows for the people of Sunamganj, shot a film which suggested that it was carrying out the sacrifice as advertised, but in actual fact only intended on sacrificing two cows. In Ofcom's view, this amounted to an allegation that Painted Children were seeking to deceive the public. Painted Children was entitled therefore to be given an appropriate and timely opportunity to respond.

Ofcom examined what steps the programme makers had taken to get a statement from Painted Children. Ofcom noted that Channel S said that the programme makers had tried to get a statement from Mr Ahmed, but that he refused to provide one on camera. It further noted that this was reflected in the report. It said:

"Mr Islal Ahmed did not want to talk in front of the camera, but he agreed that this is a London-based organisation."

Ofcom also noted that Channel S appeared not to have approached the charity in London. On this point, Ofcom took the view that it was not necessarily incumbent on the programme makers to approach the London base given its approach to the Painted Children representative present at the incident itself. In Ofcom's view it would have been reasonable for the programme makers to assume that the Painted Children representative present at the incident, was the best person to approach for a response, and once that representative did not wish to offer a response, they did not, in the interests of fairness, need to then search for further sources.

Ofcom therefore concluded that Channel S did offer Painted Children with an appropriate and timely opportunity to respond, and therefore found no unfairness in this regard.

Accordingly, Ofcom has not upheld this complaint of unfair treatment made by Painted Children.

Not Upheld

Complaint by Ms Geraldine Stevens

Motorway Cops, BBC1, 5 May 2010

Summary: This complaint of unwarranted infringement of privacy in the programme as broadcast has not been upheld.

This programme looked at the work of police officers from the Central Motorway Police Group. It included footage of Ms Geraldine Stevens being questioned by the police about the status of her car insurance and subsequently being arrested for obstructing the police in carrying out their duties.

Ms Stevens complained to Ofcom that her privacy was unwarrantably infringed in the programme as broadcast.

While Ofcom recognised that Ms Stevens had a legitimate expectation of privacy in the circumstances, it concluded that the public interest in showing the work of the police outweighed the intrusion into Ms Stevens' private life and that her privacy was not unwarrantably infringed in the programme as broadcast.

Introduction

On 5 May 2010, BBC1 broadcast an edition of its reality series *Motorway Cops*, which looked at the work of police officers who patrol the nation's motorways.

This edition included footage of two police officers of Central Motorway Police Group who had stopped a car on a routine "stop-check" to ascertain whether or not the driver was insured to drive the vehicle. The driver, Ms Geraldine Stevens, was shown being questioned by the police officers about the status of her insurance and her identity. Initially, she had given her name as "Brenda Ploughman" but it became apparent to the police officers as the questioning went on that she was not telling the truth. The police officers decided to search her hand bag and found her passport, which confirmed that she was "Geraldine Stevens" and not "Brenda Ploughman", who was her sister.

Ms Stevens was shown being arrested for obstructing the police in carrying out their duties and she was taken to a police station. Following a series of further checks by the police, it transpired that Ms Stevens was the holder of a provisional driving licence, despite driving unaccompanied, and had not passed her driving test. The programme concluded by stating that Ms Stevens was:

"...convicted of obstructing the police, driving without a full licence and having no insurance. She received six points on her provisional licence and was fined a total of £150."

Ms Stevens' full name was disclosed in the programme and her face was shown unobscured. Footage of her being questioned by the police in the police car and her subsequent arrest was shown, as was footage of her in the police station being fingerprinted and sitting in a police cell. An extract of audio footage of Ms Stevens' formal interview with a police officer was also included in the programme.

Ms Stevens complained to Ofcom that her privacy had been unwarrantably infringed in the programme as broadcast.

The Complaint

Ms Stevens' case

In summary, Ms Stevens complained that her privacy was unwarrantably infringed in the programme as broadcast in that footage of her was shown without her consent.

In particular, Ms Stevens said that she had not wanted people to see the mistake she made at a time when she was taking medication. She said that the programme makers could have blanked out her face and used a false name when using the footage of her.

BBC's case

In summary and in response to Ms Stevens' complaint of unwarranted infringement of privacy in the programme as broadcast, the BBC said that Ms Stevens had committed three offences, namely driving unaccompanied without a full driving licence, without insurance and, later, obstructing the police in the course of their duties, by lying repeatedly about her identity, the ownership of the car she was driving and the status of her driving licence. The BBC said that in such circumstances, Ms Stevens had an extremely limited expectation of privacy and that, in any event, there was a clear public interest in including the footage of her in the programme.

The BBC said that there was no doubt that the drawing of the public's attention to Ms Stevens' actions was unwelcome to her, but that the inclusion of the footage allowed the programme to throw light on a specific point of potential public concern. It said that after the footage of Ms Stevens being interviewed in custody was shown, the programme's narration stated:

Narrator: *"It's taken three hours to get to the truth, and PC Lynott thinks there's a quicker and simpler way".*

PC Lynott: *"I personally would like to see everyone, if they're driving a vehicle, would have to carry a photo driving licence with them. That would solve a lot of our problems, as in the case of this lady today, we are scratching around for quite a long time until we could positively identify her".*

The BBC said that there was a clear public interest in including the footage of her in the programme, to demonstrate the work of the police in such situations.

Decision

Ofcom's statutory duties include the application, in the case of all television and radio services, of standards which provide adequate protection to members of the public and all other persons from unfair treatment and unwarranted infringement of privacy in, or in the making of, programmes included in such services.

In carrying out its duties, Ofcom has regard to the need to secure that the application of these standards is in the manner that best guarantees an appropriate level of freedom of expression. Ofcom is also obliged to have regard, in all cases, to the

principles under which regulatory activities should be transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

In reaching its decision on Ms Stevens' complaint, Ofcom considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and a transcript of it along with written submissions provided by both parties.

In Ofcom's view, the individual's right to privacy has to be balanced against the competing right of the broadcaster to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of Ofcom's Broadcasting Code ("the Code") which states that any infringement of privacy in programmes or in connection with obtaining material included in programmes must be warranted. Ofcom also had regard to Practice 8.6 of the Code which states that if the broadcast of a programme would infringe the privacy of a person, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

Ofcom considered Ms Stevens' complaint that her privacy was unwarrantably infringed in the programme as broadcast in that footage of her was shown without her consent.

In considering whether or not there had been an unwarranted infringement of Ms Stevens' privacy in the programme as broadcast, Ofcom first considered the extent to which Ms Stevens' could have legitimately expected that the footage of her involvement with the police would not be broadcast without her consent.

Ofcom noted that some of the footage of Ms Stevens included in the programme had been filmed by the programme makers inside a police car after she had been stopped for by the police for a routine car insurance check. The programme showed footage of her being questioned about her identity and the ownership of the car and being arrested and handcuffed for obstructing the police. The programme included footage of Ms Stevens sitting in a cell and then an interview room in the police station and being fingerprinted. An extract of audio footage of her formal interview with a police officer was also included in the programme. Ofcom noted that the footage of Ms Stevens that was shown in the programme had been filmed openly. Ofcom took the view that the footage of Ms Stevens in these circumstances showed her in a vulnerable state and in a sensitive situation.

Ofcom also noted that Ms Stevens' face was shown unobscured in the programme, her voice was heard and her full name was also mentioned, as were the names of other members of her family. Ofcom considered therefore that Ms Stevens was identifiable from the footage of her included in the programme.

Taking all the factors given above into account, Ofcom considered that Ms Stevens had a legitimate expectation that footage of her involvement with the police would not be broadcast to a wider audience in a television programme without her consent.

Ofcom then went on to weigh the broadcaster's competing right to freedom of expression and the public interest in examining the work of the police and the audience's right to receive information and ideas without unnecessary interference.

In this respect, Ofcom considered whether, in the circumstances there was a sufficient public interest to justify the intrusion into Ms Stevens' expectation of privacy.

Ofcom noted that at the end of the programme, the commentary confirmed which offences Miss Stevens was convicted for as follows:

"The woman was convicted of obstructing the police, driving [unaccompanied] without a full licence and having no insurance. She received six points on her provisional licence and was fined a total of £150".

Ofcom also took note of the difficulty in which the police officers' experienced in trying to establish Ms Stevens' true identity when faced with her obstructive behaviour.

Ofcom considered that showing the varied and often difficult incidents experienced by police officers in dealing with traffic offences and in developing the public's understanding of the range of situations dealt with by the police was a matter of public interest. In particular, Ofcom considered that the public interest in showing the work of the police in circumstances which illustrated the challenges faced by police officers when obstructed in carrying out their duties was significant.

Ofcom therefore concluded that, in all the circumstances given above, the broadcaster's right to freedom of expression to include the unobscured footage of Ms Stevens in the circumstances she found herself in outweighed her right to privacy. Ofcom found there was no unwarranted infringement of Ms Stevens' privacy in the programme as broadcast.

Accordingly, Ofcom has not upheld Ms Stevens' complaint of unwarranted infringement of privacy in the programme as broadcast.

Other Programmes Not in Breach

Up to 2 August 2010

Programme	Transmission Date	Broadcaster	Categories	Number of complaints
118 118's sponsorship of ITV Movies	09/07/2010	ITV4	Sexual material	1
5 Live Breakfast	28/07/2010	BBC Radio 5 Live	Generally accepted standards	1
60 Minute Makeover	23/07/2010	ITV1	Violence and dangerous behaviour	1
Alan Carr: Chatty Man	18/07/2010	Channel 4	Offensive language	16
America's Next Top Model (trailer)	12/07/2010	Living	Sexual material	1
America's Next Top Model (trailer)	12/07/2010	Living +1	Sexual material	1
An Audience with Michael Bubl�	23/05/2010	ITV1	Sexual material	1
Anthony Davis	19/07/2010	LBC 97.3FM	Due accuracy	1
Banzai	12/05/2010	4Music	Under 18s in programmes	1
BBC News	08/07/2010	BBC 1	Generally accepted standards	1
BBC News	09/07/2010	BBC News Channel	Generally accepted standards	6
BBC News	10/07/2010	BBC 1	Generally accepted standards	2
BBC News	11/07/2010	BBC 1	Generally accepted standards	1
BBC News	22/07/2010	BBC News Channel	Animal welfare	1
BBC News at One	28/04/2010	BBC 1	Privacy	8
BBC News at Six	28/04/2010	BBC 1	Privacy	6
BBC News at Ten	29/04/2010	BBC 1	Elections/Referendums	1
Big Brother 11	08/07/2010	Channel 4	Religious/Beliefs discrimination/offence	1
Big Brother 11	09/07/2010	Channel 4	Generally accepted standards	1
Big Brother 11	09/07/2010	Channel 4	Race discrimination/offence	1
Big Brother 11	16/07/2010	Channel 4	Animal welfare	6
Big Brother 11	19/07/2010	Channel 4	Generally accepted standards	1
Big Brother 11	19/07/2010	Channel 4	Violence and dangerous behaviour	1
Big Brother 11	23/07/2010	Channel 4	Generally accepted standards	1
Big Brother 11	27/07/2010	Channel 4	Generally accepted standards	1
Big Brother 11	29/07/2010	Channel 4	Gender discrimination/offence	1
Big Brother Live	13/07/2010	E4	Generally accepted standards	1
Big Brother Live	17/07/2010	Channel 4	Generally accepted standards	1

Big Brother Live	17/07/2010	E4	Generally accepted standards	1
Big Brother Live	18/07/2010	Channel 4	Undue prominence	1
Big Brother Live	28/07/2010	Channel 4	Generally accepted standards	1
Big Brother's Big Mouth	23/07/2010	E4	Disability discrimination/offence	1
BMIbaby.com's sponsorship of ITV Granada Weather	29/07/2010	ITV1 Granada	Generally accepted standards	1
BMIbaby.com's sponsorship of ITV Granada Weather	various	ITV1 Granada	Generally accepted standards	1
Breakfast	14/07/2010	BBC 1	Violence and dangerous behaviour	1
Breakfast	19/07/2010	BBC 1	Drugs, smoking, solvents or alcohol	1
Brighter Side promo	various	ITV1	Violence and dangerous behaviour	1
Britain's Broken Roads: Tonight	08/07/2010	ITV1	Due accuracy	1
Britain's Next Top Model	12/07/2010	Living	Sexual material	2
Capitalism: A Love Story	22/05/2010	Channel 4	Advertising content	1
Casanova	04/07/2010	BBC 3	Scheduling	1
Casualty	17/07/2010	BBC 1	Sexual material	1
Casualty	31/07/2010	BBC 1	Race discrimination/offence	1
Celebrity Come Dine with Me	15/07/2010	Channel 4	Offensive language	1
Channel 4 News	24/07/2010	Channel 4	Violence and dangerous behaviour	1
Channel 4 News	22/07/2010	Channel 4	Due impartiality/bias	1
Channel ident	27/07/2010	Dance Nation UK	Harm	1
Colourful Breakfast with Bonsu and Juju	06/07/2010	Colourful Radio	Race discrimination/offence	1
Come Dine with Me	17/07/2010	Channel 4	Offensive language	1
Come Dine with Me	27/07/2010	Channel 4	Sexual material	1
Come Dine with Me	30/07/2010	Channel 4	Generally accepted standards	1
Come Dine With Me	20/07/2010	Discovery Realtime	Animal welfare	1
Concorde's Last Flight	12/07/2010	Channel 4	Undue prominence	1
Concorde's Last Flight	12/07/2010	Channel 4	Offensive language	1
Continuity announcement	09/07/2010	BBC 1	Sexual material	1
Continuity announcement	22/07/2010	Comedy Central +1	Religious/Beliefs discrimination/offence	1
Coronation Street	19/07/2010	ITV1	Drugs, smoking, solvents or alcohol	4
Coronation Street	19/07/2010	ITV1	Sexual material	2
Countdown	20/07/2010	Channel 4	Nudity	1
Crank	21/07/2010	ITV1	Generally accepted standards	1
Criminal Minds	30/07/2010	Living	Generally accepted standards	1
CSI: Crime Scene Investigation	21/07/2010	Five	Offensive language	1
Dance India Dance	19/06/2010	Zee TV	Product placement	1

Danny Kelly	17/05/2010	BBC Radio WM	Generally accepted standards	7
Darts	24/07/2010	Sky Sports 1	Gender discrimination/offence	1
Deal or No Deal	11/07/2010	Channel 4	Generally accepted standards	1
Dispatches	12/07/2010	Channel 4	Sexual material	1
Dispatches: Britain's Witch Children	26/07/2010	Channel 4	Race discrimination/offence	2
Dive	09/07/2010	BBC 2	Generally accepted standards	1
Doc Martin	16/07/2010	ITV1	Materially misleading	1
Doctors	21/07/2010	BBC 1	Offensive language	1
Dreams Beds' sponsorship of various programmes	various	ITV / Sky	Sponsorship	1
EastEnders	08/07/2010	BBC 1	Religious/Beliefs discrimination/offence	13
EastEnders	15/07/2010	BBC 1	Religious/Beliefs discrimination/offence	27
EastEnders	19/07/2010	BBC 1	Sexual material	2
EastEnders	08/07/2010	BBC 1	Violence and dangerous behaviour	3
EastEnders	13/07/2010	BBC 1	Sexual orientation discrimination/offence	1
EastEnders	13/07/2010	BBC 1	Race discrimination/offence	1
EastEnders	19/07/2010	BBC 1	Disability discrimination/offence	1
EastEnders	20/07/2010	BBC 1	Religious/Beliefs discrimination/offence	10
EastEnders	20/07/2010	BBC 1	Sexual material	6
EastEnders	20/07/2010	BBC 1	Generally accepted standards	1
EastEnders	20/07/2010	BBC 1	Religious/Beliefs discrimination/offence	1
EastEnders	22/07/2010	BBC 1	Religious/Beliefs discrimination/offence	1
EastEnders	22/07/2010	BBC 1	Sexual material	1
EastEnders	23/07/2010	BBC 1	Violence and dangerous behaviour	1
EastEnders	23/07/2010	BBC 1	Religious/Beliefs discrimination/offence	1
EastEnders	26/07/2010	BBC 1	Religious/Beliefs discrimination/offence	2
EastEnders	26/07/2010	BBC 1	Sexual orientation discrimination/offence	1
EastEnders	27/07/2010	BBC 1	Race discrimination/offence	1
EastEnders	27/07/2010	BBC 1	Religious/Beliefs discrimination/offence	2
EastEnders Omnibus	11/07/2010	BBC 1	Religious/Beliefs discrimination/offence	1
EastEnders Omnibus	18/07/2010	BBC 2	Religious/Beliefs discrimination/offence	1
Edinburgh Festivals: Wind of Change	17/03/2010	STV	Due Impartiality/Bias	1
Edinburgh Festivals: Wind of	17/03/2010	STV	Sponsorship	1

Change				
Elite Nights	11/04/2010	Elite TV	Sexual material	1
Emmerdale	22/07/2010	ITV1	Generally accepted standards	1
Emmerdale	23/07/2010	ITV1	Generally accepted standards	1
Fags, Mags and Bags	13/07/2010	BBC Radio 4	Offensive language	2
Family Guy	17/07/2010	BBC 3	Sexual orientation discrimination/offence	1
Five News	14/07/2010	Five	Violence and dangerous behaviour	1
Five News	23/07/2010	Five	Animal welfare	1
George Michael "Fast Love"	15/07/2010	Heart Oxfordshire	Offensive language	1
GMTV	22/07/2010	ITV1	Due impartiality/bias	1
GMTV	12/07/2010	ITV1	Materially misleading	1
GMTV	22/07/2010	ITV1	Offensive language	1
Going Out With Alan Carr	03/07/2010	BBC Radio 2	Disability discrimination/offence	1
Hit40UK	20/07/2010	4 Music	Sexual material	1
Ian Collins	15/07/2010	Talksport	Generally accepted standards	1
It Shouldn't Happen at a Vets'	22/07/2010	BBC 1	Animal welfare	1
It Shouldn't Happen at a Vets'	22/07/2010	BBC 1	Generally accepted standards	1
ITV News	12/07/2010	ITV1	Due impartiality/bias	1
ITV News	10/05/2010	ITV1	Due impartiality/bias	12
ITV News	14/07/2010	ITV1	Due impartiality/bias	2
ITV News	16/07/2010	ITV1	Due impartiality/bias	1
ITV News	22/07/2010	ITV1	Due impartiality/bias	1
ITV News	23/07/2010	ITV1	Due impartiality/bias	1
ITV News	26/04/2010	ITV1	Elections/Referendums	10
ITV News	28/04/2010	ITV1	Elections/Referendums	6
James Corden's World Cup Live	25/06/2010	ITV1	Race discrimination/offence	2
Jeremy Vine	21/07/2010	BBC Radio 2	Animal welfare	1
Jeremy Vine	28/04/2010	BBC Radio 2	Elections/Referendums	2
John Vernon-Smith	17/06/2010	BBC Three Counties	Animal welfare	1
Killer Couples	25/07/2010	Crime and Investigation Network	Materially misleading	1
Kiss Breakfast	12/07/2010	Kiss 101	Offensive language	1
Lee Nelson's Well Good Bits	26/07/2010	BBC 3	Generally accepted standards	1
Lie to Me	01/07/2010	Sky1	Flashing images/risk to viewers who have PSE	1
Live Aid: Against All Odds	13/07/2010	BBC 4	Offensive language	1
London Tonight	12/07/2010	ITV1	Due impartiality/bias	1
Loose Women	21/07/2010	ITV1	Sexual material	1
Lucozade's sponsorship of The Mentalist	18/06/2010	Five	Flashing images/risk to viewers who have PSE	1

Magic Numbers	17/07/2010	ITV1	Premium rate services	4
Magic Numbers	24/07/2010	ITV1	Premium rate services	1
Match of the Day Live	23/06/2010	BBC 1	Generally accepted standards	1
Matt Forde	02/08/2010	Talksport	Religious/Beliefs discrimination/offence	1
Mickey Mouse Clubhouse Campervan tour	24/07/2010	Playhouse Disney	Materially misleading	1
Midsomer Murders	21/07/2010	ITV1	Nudity	1
Midsomer Murders	28/07/2010	ITV1	Sexual material	1
Mike Parry and MG Graham	23/07/2010	Talksport	Race discrimination/offence	1
Mongrels	11/07/2010	BBC 3	Race discrimination/offence	1
Mussolini	20/07/2010	Five	Violence and dangerous behaviour	2
My Family	09/07/2010	BBC 1	Disability discrimination/offence	1
My Pet Shame	21/07/2010	Sky1	Generally accepted standards	1
My Weird and Wonderful Family	21/07/2010	Channel 4	Sexual orientation discrimination/offence	1
My Weird and Wonderful Family (trailer)	20/07/2010	Channel 4	Sexual orientation discrimination/offence	1
Neighbours competition	12/05/2010	Five	Competitions	1
News	09/07/2010	BBC News Channel / Sky News	Generally accepted standards	3
News	11/07/2010	BBC News Channel / Sky News	Generally accepted standards	1
News	20/07/2010	BBC Radio Scotland	Generally accepted standards	1
News	10/07/2010	Classic FM	Generally accepted standards	1
News	13/07/2010	Sky News / BBC News Channel	Generally accepted standards	1
Newspaper Review	28/07/2010	Sky News	Due impartiality/bias	1
Nick Ferrari	21/07/2010	LBC 97.3FM	Due accuracy	1
Panorama	19/07/2010	BBC 1	Violence and dangerous behaviour	1
Paul Gascoigne interview	09/07/2010	Real Radio Northeast	Generally accepted standards	3
Peter Andre: The Next Chapter	16/07/2010	ITV2	Undue prominence	1
Police, Camera, Action!	29/07/2010	ITV1	Age discrimination/offence	1
Rev	12/07/2010	BBC 2	Religious/Beliefs discrimination/offence	1
Rev	31/07/2010	BBC 2	Religious/Beliefs discrimination/offence	1
Robin Banks	25/06/2010	Mercia FM	Gender, including Transgender discrimination	1
Seerat e Ma'sumeen	13/07/2010	Hidayat TV	Outside of remit / other	1
Sex With Mum and Dad	n/a	BBC 3	Generally accepted	1

			standards	
Sikh Channel	14/05/2010	Sikh Channel	Materially misleading	1
Sky News	09/07/2010	Sky News	Generally accepted standards	6
Sky News	10/07/2010	Sky News	Due accuracy	1
Sky News	10/07/2010	Sky News	Due impartiality/bias	1
Sky News	10/07/2010	Sky News	Generally accepted standards	8
Sky News	11/07/2010	Sky News	Due impartiality/bias	3
Sky News	15/07/2010	Sky News	Generally accepted standards	2
Sky News	16/07/2010	Sky News	Generally accepted standards	1
Sky News	16/07/2010	Sky News	Violence and dangerous behaviour	2
Sky News	22/07/2010	Sky News	Due impartiality/bias	1
Sky News	28/04/2010	Sky News	Elections/Referendums	26
Sky News	28/04/2010	Sky News	Fairness & Privacy	4
Sky News	10/07/2010	Sky News	Due impartiality/bias	1
South Park	12/07/2010	Viva	Generally accepted standards	1
Stand Up for the Week	23/07/2010	Channel 4	Religious/Beliefs discrimination/offence	103
Stand Up for the Week	11/07/2010	Channel 4	Race discrimination/offence	1
Stand Up for the Week	18/07/2010	Channel 4	Generally accepted standards	1
Street Wars	23/07/2010	Sky 3	Generally accepted standards	1
Suck My Pop: Top 50	23/07/2010	Viva	Offensive language	1
Sunday Morning Live	01/08/2010	BBC 1	Crime	1
Takbeer TV	02/04/2010	Takbeer TV	Religious/Beliefs discrimination/offence	4
Taking the Stage	14/07/2010	MTV	Offensive language	1
Tastybingo.com's sponsorship of Judge Judy	13/04/2010	ITV2	Generally Accepted Standards	1
Ten Mile Menu	28/07/2010	ITV1	Violence and dangerous behaviour	2
Ten Mile Menu	29/07/2010	ITV1	Violence and dangerous behaviour	1
That Mitchell and Webb Look	13/07/2010	BBC 2	Generally accepted standards	1
That Mitchell and Webb Look	13/07/2010	BBC 2	Offensive language	1
That Mitchell and Webb Look	20/07/2010	BBC 2	Sexual orientation discrimination/offence	1
That Mitchell and Webb Look	27/07/2010	BBC 2	Religious/Beliefs discrimination/offence	1
The 5 O'Clock Show	21/07/2010	Channel 4	Sexual material	1
The 5 O'Clock Show	23/07/2010	Channel 4	Materially misleading	1
The Alan Brazil Sports Breakfast	29/07/2010	Talksport	Due impartiality/bias	1
The Chase	15/07/2010	ITV1	Generally accepted standards	2
The Crush	22/07/2010	4 Music	Sexual material	1

The Daily Politics Election Special	29/04/2010	BBC 2	Fairness	1
The Fairies	18/07/2010	Nick Jr 2	Offensive language	1
The Fairy Jobmother	13/07/2010	Channel 4	Generally accepted standards	2
The Fairy Jobmother	13/07/2010	Channel 4	Materially misleading	1
The Gadget Show	10/05/2010	Five	Programme Related Material	1
The Hoobs	17/07/2010	Channel 4	Offensive language	1
The Hotel Inspector (trailer)	18/07/2010	Five	Offensive language	1
The Inbetweeners	27/07/2010	Channel 4	Animal welfare	2
The IT Crowd	16/07/2010	Channel 4	Undue Prominence	1
The Jeremy Kyle Show	14/07/2010	ITV1	Gender, including Transgender discrimination	1
The Jeremy Kyle Show	19/07/2010	ITV1	Animal welfare	1
The Jerry Springer Show	27/07/2010	Virgin 1	Sexual material	1
The Late Show with Ian Collins	13/07/2010	Talksport	Generally accepted standards	1
The Mike Read Show	07/07/2010	Total Star (Bath)	Advertising/editorial separation	1
The Morning Show	15/07/2010	Radio Hartlepool	Offensive language	1
The One Show	21/07/2010	BBC 1	Drugs, smoking, solvents or alcohol	1
The Politics Show	11/07/2010	BBC 1	Offensive language	1
The Ugly Face of Beauty	13/07/2010	Channel 4	Nudity	2
The Ugly Face of Beauty	20/07/2010	Channel 4	Under 18s in programmes	1
The Ugly Face of Beauty	20/07/2010	Channel 4	Nudity	1
The Ugly Face of Beauty	27/07/2010	Channel 4	Materially misleading	1
The Weakest Link	12/07/2010	BBC 1	Generally accepted standards	2
This Morning	12/07/2010	ITV1	Due accuracy	1
This Morning	20/07/2010	ITV1	Disability discrimination/offence	1
This Morning	21/07/2010	ITV1	Materially misleading	1
This Morning	29/07/2010	ITV1	Violence and dangerous behaviour	1
Tony Horne in the Morning	13/07/2010	Metro Radio	Generally accepted standards	1
Top Gear	18/07/2010	BBC 2	Violence and dangerous behaviour	5
Top Gear	25/07/2010	BBC 2	Religious/Beliefs discrimination/offence	3
Top Gear	11/07/2010	BBC 2	Sexual material	1
Top Gear	11/07/2010	BBC 2	Offensive language	1
Top Gear	18/07/2010	BBC 2	Sexual orientation discrimination/offence	2
Top Gear	20/07/2010	BBC 2	Violence and dangerous behaviour	3
Top Gear	30/05/2010	BBC 2	Sexual orientation discrimination/offence	1
Tour De France 2010	10/07/2010	ITV4	Competitions	1

Highlights				
Tour De France 2010 Highlights	20/07/2010	ITV4	COSTA	1
True Stories: The Cove (trailer)	19/07/2010	Channel 4	Generally accepted standards	1
Urban Fox Attack	04/07/2010	More4	Animal welfare	2
Virgin Media's sponsorship of Star Trek Voyager	16/07/2010	Virgin 1	Materially misleading	1
Wimbledon	23/06/2010	BBCi	Generally accepted standards	1
Wives	25/07/2010	Sky 3	Race discrimination/offence	2
World Cup Live	23/06/2010	ITV1	Race discrimination/offence	1
Young, Dumb and Living Off Mum	29/07/2010	BBC 3	Age discrimination/offence	1
You've Been Framed! Kids Special	17/07/2010	ITV1	Under 18s in programmes	2