

# **Ofcom Broadcast Bulletin**

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## Contents

|              |   |
|--------------|---|
| Introduction | 4 |
|--------------|---|

### Standards cases

#### In Breach

|  |    |
|--|----|
| <b>Gold Breakfast</b>  | 5  |
| Gold (Birmingham), 15 October 2007, 07:30  |    |
| <b>Note to Broadcasters - SMS shortcode (text) entry method used in competitions</b> | 7  |
| <b>Jamie at Home</b>   | 8  |
| Channel 4, 18 September 2007 & 9 October 2007, 20:00                                 |    |
| <b>Britain's Next Top Model</b>  | 10 |
| LIVING, 13 August 2007, 21:00  |    |
| <b>Amores Perros</b>   | 12 |
| TCM, 23 October 2007, 21:00  |    |
| <b>Top Minx, video for 'Smack My Bitch Up' by The Prodigy</b>                        | 14 |
| Chart Show TV, 30 December 2007, 13:45   |    |
| <b>Chop Shop: London Garage</b>  | 15 |
| Discovery Channel, 18 November 2007, 16:00   |    |
| <b>Smallville</b>  | 16 |
| TV3 Sweden, 4 November 2007, 16:15   |    |
| <b>Wednesday Drive Time</b>  | 18 |
| Oban FM, 9 January 2008, 17:00   |    |

#### Resolved

|                                  |    |
|----------------------------------|----|
| <b>Channel 4 News</b>            | 19 |
| Channel 4, 13 August 2007, 19:00 |    |

### Fairness & Privacy cases

#### Partly Upheld

|                                 |    |
|---------------------------------|----|
| <b>Complaint by Mr Guy Wood</b> | 20 |
| GMTV, GMTV, 20 September 2006   |    |

Not Upheld

|  |    |
|--|----|
| <b>Complaint by Mr Peter Houghton on behalf of South West London and St George's Mental Health NHS Trust</b> | 31 |
| Dispatches: Britain's Mental Health Scandal, Channel 4, 9 October 2006                                       |    |
| <b>Complaint by Mr Peter Martin</b>  | 43 |
| The Big Idea, Sky One, 25 November 2006  |    |
| <b>Complaint by Opus Energy brought on its behalf by Bindman and Partners solicitors</b>                     | 49 |
| Watchdog, BBC1, 24 October 2006  |    |
| <b>Complaint by Ribble Valley Borough Council</b>  | 66 |
| Various News Reports, BBC1 (North West), 21 & 22 December 2006   |    |
| Various News Reports, BBC Radio Lancashire, 22 December 2006   |    |
| <b>Complaint by Traditional Norfolk Poultry Limited</b>  | 78 |
| Tonight: Fowl Play, ITV1, 11 June 2007   |    |
| <br>   |    |
| Other programmes not in breach/outside remit   | 84 |

## Introduction

Ofcom's Broadcasting Code ("the Code") took effect on 25 July 2005 (with the exception of Rule 10.17 which came into effect on 1 July 2005). This Code is used to assess the compliance of all programmes broadcast on or after 25 July 2005. The Broadcasting Code can be found at <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>

The Rules on the Amount and Distribution of Advertising (RADA) apply to advertising issues within Ofcom's remit from 25 July 2005. The Rules can be found at <http://www.ofcom.org.uk/tv/ifi/codes/advertising/#content>

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 policy to state the full language used on air by broadcasters who are the subject of a complaint. Some of the language used in Ofcom Broadcast Bulletins may therefore cause offence.

## Standards cases

### In Breach

#### Gold Breakfast

*Gold (Birmingham), 15 October 2007, 07:30*

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#### Introduction

*Gold Breakfast* is the breakfast programme networked across all GCap Media plc's Gold radio stations. During this particular show, the two presenters ran one of a series of daily competitions, offering a chance to win "a limited edition boxed set of all eighteen Elvis singles". Listeners were invited to text the answer to a question and were also instructed to keep a note of each day's correct answer for a chance to win a holiday to Memphis and Tupelo.

On previous days, listeners were informed that answers had to be submitted only within the duration of an Elvis Presley song. However, Ofcom received a complaint from a listener that at no stage before, during, or after the competition on 15 October 2007 did either presenter clearly state that listeners should text their answers during the Elvis Presley song played that day. It was therefore possible that people could have entered the competition before or after the song, when they had no chance of winning.

Ofcom asked GCap Media plc to comment on Rule 2.11 of the Code, which states:

"Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known."

#### Response

GCap Media plc ("GCap") which owns Gold, regretted that the presenters did not "expressly point out that the lines were open at the start of the Elvis song". However, when considering the fairness to listeners of this omission, the broadcaster believed "it [was] necessary to look at the totality of events rather than one incident in isolation". GCap added that, "in the normal course of events, the lines would be declared open from the commencement of the song and would close once the song ended". GCap admitted it was unclear in this instance but believed its "conduct over the whole period that the competition ran was such that the essence of Rule 2.11 was maintained".

The broadcaster stated that entry into the competition was charged at premium rate but that Gold raised no revenue from listeners' text entries. It added that the competition was therefore held only for the benefit of listeners and noted that the complaint to Ofcom had been the only concern expressed on the matter. Nevertheless, GCap apologised "for its oversight on this occasion". It said that measures had been put in place to ensure that start and end times of competitions would be clearly stated on air in future, to avoid recurrence and reduce potential listener confusion.

## **Decision**

Ofcom notes that an ongoing competition was taking place over a number of days (for a chance to win a holiday). However, the feature was primarily a stand-alone competition for a chance to win a boxed set of Elvis Presley singles. It should not therefore have been necessary for listeners to have heard any previous daily competitions to enter it. We therefore consider that clear information about when entries could be made should have been provided on air.

In this case, one presenter announced that the competition was, “coming up in a few moments”. A little later, the other presenter asked the competition question. This was followed by a news bulletin, a weather forecast and then an Elvis Presley single. When the song had finished a presenter talked about it, after which the other presenter brought the winner to air to announce the answer. Given that answers were supposed to be submitted during the song, it therefore appeared that listeners whose entries were received during the news and weather (before the song) or during the presenter’s discussion (after the song) stood no chance of winning the competition. A reliance on listeners having heard such information during previous competitions was unacceptable and unfair to listeners. Further, some listeners paid to enter a competition which they could not have won.

We welcome the action GCap has since taken to avoid recurrence. Nevertheless, the broadcast was in breach of Rule 2.11 of the Code. In the event of a similar breach, Ofcom is likely to consider further regulatory action.

## **Breach of Rule 2.11**

## Note to Broadcasters

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The SMS shortcode (text) entry method used in the competition to which the previous finding (concerning *Gold Breakfast*) referred is a premium rate service<sup>1</sup>. It is therefore used with an intention to raise revenue, which is shared, by agreement, between one or more of the following:

- the premium rate service provider;
- the independent production company (if one is used); and
- the broadcaster.

While a broadcaster may not raise revenue from a specific text or telephone service, it does not necessarily mean that the service is not charged at premium rate. Nor does it mean that entry is free or charged only at the standard rate of the individual listener's network provider.

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<sup>1</sup> PhonepayPlus (formerly ICSTIS), the regulator of premium rate services, offers a 'check a number' service. This is available at: <http://www.phonepayplus.org.uk/>

## **Jamie at Home**

*Channel 4, 18 September 2007 & 9 October 2007, 20:00*

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### **Introduction**

*Jamie at Home* is a 12-part cookery series based at Jamie Oliver's home. The series was not commissioned by Channel 4 but produced by Fresh One Productions, an independent production company owned by Jamie Oliver and Fremantle Media, and purchased by the broadcaster as an acquired programme. The series was made for an international market and not specifically for the UK.

Two viewers expressed concern that on several occasions during the episode broadcast on 18 September 2007, Jamie Oliver made references to, and used, a kitchen utensil trademarked as the 'Jamie Oliver Flavour Shaker'. Ofcom noted a further reference to, and use of, the Flavour Shaker during the episode broadcast on 9 October 2007.

Rule 10.1 of the Code requires broadcasters to maintain the independence of editorial control over programme content.

Rule 10.4 of the Code provides that no undue prominence may be given to any product or service. Undue prominence may result from:

- the presence of, or reference to, a product or service where there is no editorial justification; or
- the manner in which a product or service appears or is referred to in a programme).

Ofcom asked Channel 4 to comment with reference to Rules 10.1 and 10.4.

### **Response**

Channel 4 acknowledged that the two episodes included verbal references to the Jamie Oliver Flavour Shaker and that they were unduly prominent. As soon as this was discovered Channel 4 had contacted the production company to identify and remove all references to the product for any repeat broadcasts. Channel 4 stated closer scrutiny would now be applied to acquired programming. This would include viewing all episodes by a member of the commissioning team responsible for the acquisition and, if required, editing the programme prior to broadcast.

Although the verbal references were unduly prominent, Channel 4 argued that the actual use of the Flavour Shaker in the series was editorially justified, and suggested it was unrealistic to expect that new kitchen devices could not be used. The broadcaster stressed that references were made to other products such as a pestle and mortar or food processor which could achieve a similar result. In addition, no direct references were made to the Flavour Shaker being better than other devices and it said there was no specific call to purchase the product.

### **Decision**

During the episode broadcast on 18 September 2007, there were two verbal references to the Flavour Shaker by name and there followed a sequence of almost two minutes in duration where Jamie Oliver demonstrated how to make an oregano oil using the product. During this segment there were several close up images of the

product as the ingredients were placed into it, two shots of Jamie Oliver shaking the product to camera and two further shots of the Flavour Shaker open on the chopping board; full, and then afterwards, empty. During the episode broadcast on 9 October 2007 there was a further verbal and visual reference to the Flavour Shaker as Jamie Oliver prepared another meal.

Ofcom noted that during the segment broadcast on 18 September 2007 Jamie Oliver did state other products could be used to generate the same effect. He said: *"I'm going to get my Flavour Shaker – you could use a food processor or you could use a pestle and mortar – get oregano – nice little handful into the Flavour Shaker..."* Ofcom further notes that there was no specific call to purchase the device.

However, it is Ofcom's view that there was insufficient editorial justification for the combined way in which the product was both visually presented and verbally referred to. Overall the focus on the product went beyond the level of prominence usually given to a basic kitchen utensil.

Ofcom therefore concluded that the references to the Flavour Shaker were unduly prominent and consequently in breach of Rule 10.4.

With reference to Rule 10.1, Ofcom considered whether the broadcaster maintained the independence of editorial control over the programme content. It is the responsibility of the broadcaster to ensure all programmes meet the requirements of the Code whether they are acquired or commissioned. By failing to apply appropriate compliance checks for *Jamie at Home*, Channel 4 were unaware that the unduly prominent references to the Flavour Shaker were included until after the programmes were broadcast. Channel 4 therefore failed to ensure full editorial control over the content and viewers could have reasonably perceived that the broadcaster's editorial integrity had been compromised. This amounted to a breach of Rule 10.1.

#### **Breach of Rules 10.1 and 10.4**

## **Britain's Next Top Model**

*LIVING, 13 August 2007, 21:00*

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### **Introduction**

*Britain's Next Top Model* is a series broadcast on LIVING, which follows a group of aspiring models competing against each other in a range of tasks to win the title and accompanying prize. The series is sponsored by Vauxhall Tigra.

Three viewers complained about the above programme, broadcast on 13 August 2007. In this programme, the contestants were set a task which involved a photo-shoot with a Vauxhall Tigra car. Viewers were concerned that Vauxhall Tigra was also the sponsor of the series, and that the car was described by make and model.

During the part of the programme featuring the Vauxhall Tigra photo-shoot, the car was visible on screen for several minutes. One of the programme hosts, Jonathan Phang, said to the contestants, *"You're going to be starring in an ad alongside this beautiful Vauxhall Tigra."*

Ofcom requested a statement from Virgin Media TV in relation to Rule 9.5 (formerly Rule 9.6) of the Code, which requires that there must be no promotional reference to the sponsor and that non-promotional references are permitted only where they are both editorially justified and incidental.

### **Response**

Virgin Media TV responded that it believed that the references to the car were non-promotional. It also said that it considered the non-promotional references to be editorially justified and incidental. It confirmed that Vauxhall had no influence whatsoever on the editorial of the programme and that the appearance of the car within the show was not a condition of the overall series sponsorship. It also said that Vauxhall had not paid Virgin Media TV to include the shoot, and that the shoot did not exist solely for the purposes of the programme.

There were similar photo-shoots in the series involving other well-known brands and retailers, and Virgin Media TV said that it believed that viewers, and LIVING viewers in particular, understand and accept that this type of programme will inevitably contain product references. Without them, the show would not be a realistic representation of the modelling industry.

Virgin Media TV said that the programme did not refer to the car in a promotional manner. In the context of the programme, it did not believe that Jonathan Phang's use of the word "beautiful" constituted a promotional reference. Further, this was the only verbal reference to the Vauxhall Tigra or Vauxhall in the sequence. Virgin Media said that the car was mostly seen in long shots, with the camera focussing on the models, and when shown in close-up it was not possible to recognise the make or model of the car.

### **Decision**

There is no absolute prohibition on references to the sponsor in the programme it is sponsoring, provided they are not promotional. However, broadcasters should be aware that a reference to a sponsor within a programme may create a higher

presumption of editorial influence by the sponsor. Non-promotional references are more likely to be acceptable if they appear to occur naturally within the programme.

However, in this particular case, the Vauxhall Tigra was featured within the programme as a result of a deliberate, scripted and advance decision by the programme maker. The presenter also clearly referred to "...*this beautiful Vauxhall Tigra...*", and the programme featured a number of shots of the car. Given that Vauxhall Tigra sponsored the programme, the inclusion within the programme of these references could reasonably have been perceived by the audience as an attempt by the sponsor to influence the programme editorially.

Ofcom's approach to visual or verbal references to a commercial product or service of a sponsor in a sponsored programme (such as those to the Vauxhall Tigra) will naturally be more rigorous than if those same references appeared in a programme which was not sponsored. This is a different – and stricter - test to that under Rule 10.4, which requires that references to products or services must not be unduly prominent.

In this case, the references to the car within the programme were not incidental and the programme was therefore in breach of Rule 9.5

**Breach of Rule 9.5 (formerly Rule 9.6)**

## Amores Perros

TCM, 23 October 2007, 21:00

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### Introduction

The film channel TCM (Turner Classic Movies) is available as part of the general entertainment packages on both satellite and cable. The film *Amores Perros* was classified as an 18-rated film by the British Board of Film Certification (BBFC) in 2001 as it contained “strong violence, sex and coarse language”.

A viewer was concerned about dog fighting scenes at the beginning of the film and believed that dogs must have been harmed in the making of the film.

On viewing the film, Ofcom noted that it opened with a highly-charged car chase involving guns and a badly injured dog bleeding profusely on the back seat of one of the cars. At the end of this car chase, a badly injured woman is seen trapped in her car. The next scene shows an illegal dog-fight gathering, with shots of injured dogs; a brutal dog fight then follows. Seriously offensive language is used from the start of the film. There was no visual or audio warning before the film started about its content.

Ofcom asked Turner Broadcasting for its comments in relation to the following Rules of the Code:

- Rule 1.6: “The transition to more adult material must not be unduly abrupt at the watershed .... For television, the strongest material should appear later in the schedule.”
- Rule 1.21: “BBFC 18-rated films or their equivalent must not be broadcast before 2100 ... and even then they may be unsuitable for broadcast at that time.”
- Rule 2.3: “In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context. Such material may include, but is not limited to, offensive language, violence..... Appropriate information should also be broadcast where it would assist in avoiding or minimising offence.”

### Response

Turner Broadcasting explained that it scheduled its channels according to the audience make up. TCM is a channel with an audience made up almost entirely of adults. As a result, the broadcaster believed this BBFC 18-rated film was appropriate for its audience at 21:00. Viewing figures showed that the audience for this programme was exclusively over 35 years old.

In addition, to ensure that a younger audience did not inadvertently watch the film, a 1953 Western, *Escape from Fort Bravo*, was scheduled immediately prior to *Amores Perros*. The broadcaster believed that this film would have no particular appeal to children.

## Decision

This film is set on the streets of Mexico City amongst the illegal world of dog fighting. The car chase and dog fights at the beginning are just the start of this realistic portrayal of life in the Mexican underworld. The graphic violence and strong language reflect the harsh and brutal world they inhabit.

Ofcom acknowledges that audience demographics may be one of the criteria for considering if a programme has been appropriately scheduled. However, Rule 1.6 (transition to more adult material must not be unduly abrupt at the watershed) and Rule 1.21 (“BBFC 18-rated films or their equivalent must not be broadcast before 2100... and even then they may be unsuitable for broadcast at that time”) are in the Code to protect children and young people under 18 years of age from unsuitable, strong adult material.

We accept that TCM attracts a mainly adult audience. However, this is not a premium subscription film service and is available to many multi-channel homes which purchase a general entertainment package. 18-rated films are, therefore, not protected by a mandatory PIN. Given the graphic violence and offensive language in the opening scenes, the transition immediately after the watershed to more adult material was unduly abrupt. For this reason, this 18-rated film was not suitable for broadcast at 21:00. The scheduling of the film was therefore in breach Rules 1.6 and 1.21 of the Code.

In 2006 Ofcom published research into programme information - *An investigation of current attitudes and behaviours towards programme information* ([http://www.ofcom.org.uk/advice/media\\_literacy/medlitpub/medlitpubrss/pirinvestigation/](http://www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrss/pirinvestigation/)) The research found that many viewers considered programme information helpful. Over half of all adult television viewers who took part in the study claimed that pretransmission information helped to reduce potential offence. The ability of programme information to mitigate offence was felt more strongly by parents and those in multi-channel households.

Offensive material may be shown on television, but Rule 2.3 requires broadcasters to assess the likelihood of this potential offence to viewers by ensuring it is justified by the context. A number of factors need to be taken into account when considering context including the extent to which the nature of the programme can be brought to the attention of the potential audience. In this case, the broadcast of this film carried no audio or visual warning.

Given the content of the film, including the graphic violence, seriously offensive language and savage dog fights, Ofcom considered that information about this content would have been of great help to viewers when making a decision to watch this film. In this case, in particular the lack of clear information before the film was shown about its content, was the most significant factor in Ofcom’s decision overall that the potentially offensive material was not justified by the context. There was therefore a breach of Rule 2.3.

The original complaint concerned the treatment of the dogs in the film. When classifying this film, the BBFC had investigated the staging of the dog fights. It had been satisfied that no harm had come to any of the dogs in the making of the film.

### **Breach of Rules 1.6, 1.21 and 2.3**

## **Top Minx, video for 'Smack My Bitch Up' by The Prodigy**

*Chart Show TV, 30 December 2007, 13:45*

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### **Introduction**

Chart Show TV is a pop music video channel. Two viewers complained about the inappropriate scheduling of this music video, which showed scenes of alcohol abuse, nudity and a simulated sex scene.

Ofcom asked the broadcaster to comment on the broadcast in relation to Rules 1.3, 1.10, and 1.17 of Section One of the Ofcom Broadcasting Code which relate to protecting under-eighteens.

### **Response**

CSC Media Group, which operates Chart Show TV, apologised for the broadcast of this video and acknowledged that it was unsuitable for a pre-watershed broadcast. This was scheduled in error because of a software problem, which has since been rectified. Also the software in question has since been updated and the entire library of post-watershed material was subsequently rechecked and additional procedures put in place to increase the level of security around the scheduling of post-watershed videos to ensure compliance with the Code at all times. The broadcaster assured Ofcom that it took its obligations under the Code very seriously and regretted this isolated error.

### **Decision**

The content of this music video - with scenes of alcohol abuse, nudity and simulated sexual activity - was clearly unsuitable to be broadcast at lunchtime on a pop music video channel when it is likely that a number of children could be watching. This is particularly the case on a weekend during the Christmas holidays. Ofcom welcomes the broadcaster's apology and its assurances of improved compliance. Chart Show TV has, to date, a good compliance record, but in view of the explicit nature of some of the scenes, we consider it appropriate to record a breach of the Code.

### **Breach of Rules 1.3, 1.10 and 1.17**

## **Chop Shop: London Garage**

*Discovery Channel, 18 November 2007, 16:00*

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### **Introduction**

*Chop Shop: London Garage* was a series which followed two individuals as they designed and manufactured cars. Ofcom received a complaint from a viewer concerning the broadcast of the word “fuck” during the episode broadcast on 18 November 2007.

Ofcom asked the Discovery Channel (‘Discovery’) for comments in relation to Rule 1.14 of the Code (the most offensive language must not be broadcast before the watershed).

### **Response**

Discovery said that it apologised to the viewer for any distress caused. The problem arose because the producer had not identified all incidents of swearing in the initial viewing and had not reviewed the programme in real time, after edits had been made, to bleep out the remaining very strong language. Discovery said that it was disappointed that its internal policy had not been adhered to in this case and has taken steps to improve its compliance procedures as a result.

### **Decision**

Broadcasters are under a clear duty to ensure that robust procedures are in place to ensure full compliance with the Code. The language broadcast in this episode of *Chop Shop: London Garage* was the most offensive and should not have been broadcast before the watershed.

Ofcom welcomes Discovery’s additional measures to ensure compliance in this area. However, Ofcom also notes that *UK’s Toughest Jobs*, broadcast on Discovery+1 was recently found in breach of Rule 1.14 (see Broadcast Bulletin 100). Although Ofcom notes that the inclusion of offensive language in that case was due to errors traced to an outside company, it is the responsibility of broadcasters to ensure compliance. Ofcom is therefore concerned about this second similar failure to ensure compliance with the Code.

### **Breach of Rule 1.14**

## **Smallville**

*TV3 Sweden, 4 November 2007, 16:15*

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### **Introduction**

*Smallville* is a well-established US series about the exploits of the superhero Superman. In this episode, the villain Lex Luthor is creating an army of 'super demons'. These demons try to possess human beings. Together with Clark Kent, Lois Lane investigates where these creatures are being bred.

A viewer was concerned about scenes in which the demons appeared to take organs from human beings and Lois Lane is stabbed in her efforts to find these creatures. He felt that these scenes were not suitable at this time of the afternoon when many children would be watching television.

TV3 Sweden is a Swedish language channel operated by Viasat Broadcasting UK Limited. Ofcom asked Viasat for its comments in relation to Rules 1.3 (children must be protected by appropriate scheduling) and 1.11 of the Broadcasting Code (violence must be appropriately limited in pre-watershed programmes).

### **Response**

Viasat explained that TV3 does not aim its Sunday afternoon programming towards children. Audience figures show that generally this slot only attracts about a 7% child audience (3-15 year olds).

The broadcaster believed that the scenes showing the removal of body parts were acceptable within the context of programme and the general fantasy genre of this series. The series is well-established and, in its view, the broadcaster did not believe the scenes were excessively graphic. For these reasons, it considered that these scenes were not in breach of Rules 1.3 and 1.11.

However, after carefully considering the scene in which Lois Lane is stabbed, the broadcaster reviewed its decision to air the programme unedited before the watershed. TV3 therefore apologised for any distress that may have been caused and this episode now carries a post-21:00 restriction. TV3 will also be reviewing the scheduling of this series in the light of this complaint.

### **Decision**

We acknowledge TV3's apology and note the action taken to restrict this episode to post-21:00 broadcast.

*Smallville* is a fantasy series with the main characters possessing supernatural powers. Against this background, most viewers would not be surprised or disturbed at the more bizarre elements of the violent scenes. However, this series does appeal to some children, even though the majority of viewers are young adults. Therefore, broadcasters need to take care in scheduling this series at a time when children are available to view in large numbers as some scenes may be unsuitable.

Ofcom was concerned about the generally violent and dark tone of this episode and, in particular, the scenes concerning the stabbing of Lois Lane and the shots of her removing the knife shown at this time of the afternoon when large numbers of children are available to watch television. We concluded that this episode was in breach of the Code as it was not appropriately scheduled and the violent scenes were not appropriately limited.

**Breach of Rules 1.3 and 1.11**

## **Wednesday Drive Time**

*Oban FM, 9 January 2008, 17:00*

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### **Introduction**

A listener complained that contributions from guest presenter John Macgregor were biased against the local authority, and infringed the privacy of their representatives. The complainant also objected that the presenter, as a local businessman, was able to give undue prominence to his personal views and business interests. Ofcom asked Oban FM to provide a copy of the output.

### **Response**

The station was unable to provide us with a copy of the broadcast as it stated it had experienced problems with its logging system, which have since been rectified.

### **Decision**

In the absence of a recording we were unable to investigate the complainant's concerns further. It is a condition of a radio broadcaster's licence that recordings of its output are retained for 42 days after transmission, and provides Ofcom with any material on request. Whilst we note the station has amended its logging system, the failure to provide a recording is a serious breach of a licence. This will be held on record.

**The station was in breach of Condition 8 of its Licence (retention and production of recordings).**

## Resolved

### Channel 4 News

*Channel 4, 13 August 2007, 19:00*

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#### Introduction

A viewer complained that in an item about the environmental issues surrounding aviation, it was stated that aviation contributed only 2% of the UK's emissions of carbon dioxide. The complainant said this was inaccurate and that the true percentage was closer to 6% of UK emissions.

#### Response

Channel 4 said that this news report examined whether carbon fuel emissions affected the flying habits of the general public, together with the issue of carbon trading of aircraft emissions. During the report a number of statistics were quoted, one of which was that aviation accounts for 2% of the UK's carbon dioxide emissions.

The broadcaster acknowledged this figure was given in error and that the statistic should have been 6%. Channel 4 said this matter had been corrected on the *Channel 4 News* website.

#### Decision

Rule 5.1 of the Code states: "News, in whatever form, must be reported with due accuracy and presented with due impartiality."

We welcome Channel 4's recognition that the figure quoted was inaccurate and we acknowledge its subsequent action. We therefore consider the matter resolved.

#### Resolved

## Fairness and Privacy Cases

### Partly Upheld

#### **Complaint by Mr Guy Wood *GMTV, GMTV, 20 September 2006***

**Summary:** Ofcom has partly upheld this complaint of unfair treatment and unwarranted infringement of privacy in the broadcast of the programme.

Mr Guy Wood complained that he was treated unfairly and that his privacy was unwarrantably infringed in the broadcast of an edition of GMTV's breakfast programme. Twice during the course of the programme, a story was run concerning Mr Wood, a man who said that he was unable to live at home with his family because he suffered from multiple chemical sensitivity ("MCS"), a condition that caused him to be ill if he entered the family home. The programme included live on-location interviews with Mr Wood and his wife. Dr Hilary Jones appeared as a guest in the studio to discuss the case, and messages from callers into the programme were referred to.

Mr Wood complained that: the programme unfairly treated his serious condition with levity and humiliated him; his condition was misrepresented by Dr Jones, who unfairly made an on-air diagnosis of him; he was not given an appropriate and timely opportunity to respond to what was said about him in the studio; and, a spiteful remark by a presenter about calls to the programme was included. Mr Wood also complained that his privacy was unwarrantably infringed in that Dr Jones made a diagnosis of his condition in the programme.

GMTV responded that: Mr Wood was treated with respect; Dr Jones reviewed the medical literature and gave reasons for his opinion about MCS; Mr Wood was given an appropriate opportunity to respond to what was being said in the studio; and, the presenter presented viewers' responses in an accurate and factual way. GMTV further stated that Dr Jones did not attempt to diagnose his condition.

Ofcom found that the presentation of Mr Wood's condition was part of a cumulative and significant allegation about him, namely that he had stopped living with his wife and daughter on the basis of a condition which the programme portrayed as medically unrecognised. In light of this significant allegation Ofcom considered that the broadcaster should have provided Mr Wood with an appropriate opportunity to respond to comments made about him in the studio. Ofcom found that the absence of such an opportunity to respond resulted in unfairness to him. Ofcom found that there was no infringement of Mr Wood's privacy in the broadcast since no personal information was revealed beyond those areas which he had consented to make public.

#### **Introduction**

On 20 September 2006 GMTV aired an edition of its breakfast programme. Twice during the course of the programme, a story was run concerning Mr Wood, a man who said that he was unable to live at home with his family because he suffered from multiple chemical sensitivity ("MCS"), a condition that caused him to be ill if he entered the family home. The programme included live interviews with Mr Wood and his wife

at and outside the family home. Dr Hilary Jones appeared as a guest in the studio to discuss the case and messages from callers into the programme were referred to.

Mr Wood complained that he was treated unfairly in the programme and that his privacy was unwarrantably infringed in the broadcast.

Ofcom's Executive Fairness Group ("EFG") originally considered, and provisionally adjudicated on, this complaint and found that there was no unfair treatment or unwarrantable infringement of privacy in the broadcast of the programme.

Mr Wood requested a review of the provisional finding on the ground that it was flawed.

Ofcom's Fairness Committee (its most senior decision making body with regard to fairness and privacy complaints) met to consider afresh Mr Wood's complaint of unfair treatment and unwarranted infringement of privacy in the programme as broadcast.

## **The Complaint**

### **Mr Wood's case**

In summary, Mr Wood complained that he was treated unfairly in that:

- a) Mr Wood said that the programme attempted to humiliate him and the serious subject of his condition was treated with levity. He was approached by GMTV and asked to tell his story following his participation in a programme on BBC Wales. Having spoken to the GMTV presenter, he agreed to take part and mentioned his desire to help raise awareness of MCS and his wish to touch upon wider issues. He said that he asked the programme makers for, and was explicitly given, assurances that he would be treated with respect and would not be "character-assassinated". However, he complained that this did not happen and the story was treated with levity, for example in its presentation of the family home and a staged display of household cleaning products.
- b) His condition was unfairly misrepresented by Dr Jones. Dr Jones said that he had not heard of MCS, then went on to talk about the condition. Although Dr Jones had spoken to Mr Wood's specialist the day before, he made no mention of her, nor of other specialists who had recognised Mr Wood's illness. Mr Wood said that Dr Jones stated incorrectly that MCS did not exist, despite the diagnosis by Mr Wood's own doctor and opinions of other experts. Dr Jones then took it upon himself to suggest an alternative diagnosis, namely that Mr Wood had a "phobia" or psychological "dislike". He did this at a distance, without having met Mr Wood and without his permission. Dr Jones was not challenged by the presenter.
- c) Mr Wood complained that he was not given a proper opportunity to respond. He was not aware, during the broadcast, of what was being said about him in the studio. Had he known what was being said in the studio, he would have attempted to give a very full reply.
- d) The programme included a spiteful remark by the presenter saying that callers to the programme were suggesting that he was allergic to his family.

In summary, Mr Wood complained that his privacy was unwarrantably infringed in the broadcast of the programme in that:

- e) Dr Jones made unsubstantiated pronouncements on what was “wrong” with Mr Wood. He had not given permission for Dr Jones to make a diagnosis of his condition.

### **GMTV’s case**

In summary GMTV responded to the complaint of unfair treatment made by Mr Wood as follows:

- a) In response to the complaint that Mr Wood was humiliated, GMTV said that he was treated with respect.
- b) In response to the complaint that Dr Jones misrepresented his condition and diagnosed him, GMTV said that Mr Wood had not provided any medical evidence to support his claim that he suffered from MCS. Prior to the broadcast, GMTV approached the doctor named by Mr Wood. Although she was informed of Mr Wood’s participation, she did not respond to GMTV’s requests to discuss his case. Dr Jones, on behalf of GMTV, reviewed the medical literature surrounding the alleged condition of MCS. He stated on the programme that “I think the consensus of medical opinion is that this doesn’t exist”. He gave a number of reasons for his opinion, including the nebulous symptoms described by apparent sufferers. GMTV said that Mr Wood himself described his symptoms as *“a sort of disorientating headache, er dizziness, er maybe swelling glands in the neck, symptoms like that. Erm but just an overwhelming feeling that I’ve got to get out of that place...”* Furthermore GMTV said that Mr Wood said that allergy testing *“...doesn’t really reveal anything because it’s a sensitivity rather than an allergy”*. GMTV argued that Mr Wood’s description of his test results and symptoms matched those discussed in the medical literature reviewed by Dr Jones, which stated that MCS is likely to more of a psychosomatic rather than physical phenomenon.
- c) As regards the complaint that he was not given an appropriate and timely opportunity to respond, GMTV said it regretted that Mr Wood did not hear the programme discussions following the interviews with him, but said that this did not result in the item being unfair to him. At the time of the original interview, the programme makers at Mr Wood’s home decided that it would not be appropriate to provide him with audio feedback from the studio. This was because he seemed nervous and because it was felt that his anxieties about chemical sensitivities might make him more anxious about the use of electronic equipment. Despite the good intentions, GMTV accepted that ideally Mr Wood would have been given the opportunity of hearing what was said in the studios. However, during the interviews with him, the presenter took care to ensure that Mr Wood was able to specifically address all of the areas discussed in the studio by Mr Jones. In particular, Mr Wood described his symptoms, the difference between his family and non-family home, the results of allergy testing and concerns that the condition might be psychosomatic. Furthermore GMTV argued that giving Mr Wood a response to what was said in the studio would not have prevented Dr Jones expressing his view about the condition or the substantial character of the discussion and the item.

- d) In response to the complaint about a remark by the presenter, GMTV said that she said:

*“He’s caused quite a reaction. A lot of people seem to think he’s allergic to his family more than the house, Jonathan. Erm, and we have got lots and lots of texts along that line...”*

This was an accurate and factual representation of viewers’ responses to the interview with Mr Wood.

In response to the complaint of unwarranted infringement of privacy in the broadcast of the programme, GMTV said in summary:

- e) GMTV said that the GMC had rejected Mr Wood’s complaint about Dr Jones and said that there were no grounds on which to conclude that Dr Jones had been attempting to diagnose Mr Wood’s illness. Furthermore, Mr Wood chose of his own volition to take part in the programme and had given interviews to other sections of the media regarding his alleged condition. He was well aware that by doing so he was inviting discussion of the condition itself and of his own health and medical background. The programme therefore only discussed matters which Mr Wood had brought into the public domain and he had many opportunities before and after the programme to verify the medical basis for his claimed diagnosis. GMTV argued that it would have been entirely apparent to anyone watching the programme that Dr Jones had not examined Mr Wood and was discussing the condition and the alleged symptoms generally.

#### **Mr Wood’s additional comments**

Mr Wood requested a review of Ofcom’s Provisional Decision.

In summary and in relation to his fairness complaints Mr Wood stated that:

- a) In relation to the programme’s treatment of him, and of his condition, Mr Wood said that the omission of vital information such as research on indoor air quality would significantly skew the opinion of the general viewer. Mr Wood said that he was given a total brush off by the programme and the audience was denied a fair representation of the subject. Mr Wood also said he was falsely enticed into appearing in the “dumbed down” GMTV programme after contributing to a serious programme for BBC Radio Wales and that this represented a breach of trust.
- b) In relation to his complaint that his condition was misdiagnosed on the programme Mr Wood said that Dr Jones’ view was at odds with the World Health organisation (“WHO”) which recognised sick building syndrome. Mr Wood said Dr Jones did not refer to the official recognition of MCS in Germany or Denmark or its legal acceptance in the USA, nor was there any mention of the diagnosis of his condition by two specialist doctors. Mr Wood said these omissions added up to a blatant misrepresentation of him, and of his condition. Mr Wood also argued that Dr Jones’ remark that he had *“developed a kind of psychological phobia”* was a cavalier diagnosis of his condition and revealed gross ignorance of the whole subject.
- c) In relation to his complaint concerning an appropriate opportunity to respond Mr Wood said that the fact that he was not able to respond to allegations made about him was intrinsically unfair to him. He disputed that when he was

interviewed he was able to give his side of the story properly. He also said that his interview was not given adequate time.

- d) Mr Wood made no further specific comment in relation to the presenter's remark concerning callers to the programme.

In summary and in relation to his privacy complaints Mr Wood made the following comments:

- e) Mr Wood said that psychological illness carried a social stigma which should be taken into account, as should the personal ramifications of pronouncements made in the programme.

### **GMTV's additional comments**

GMTV commented on Mr Wood's request for a review of the Provisional Decision.

In summary and in relation to Mr Wood's fairness complaints GMTV commented as follows:

- a) In relation to the programme's treatment of Mr Wood and his condition, the broadcaster said that Mr Wood appeared to be aggrieved that the discussion on GMTV was insufficiently detailed by comparison to the BBC Radio Wales documentary. GMTV said Mr Wood would have been aware in advance of the length of time that GMTV, given its format, would be able to give to any discussion of the subject.
- b) In relation to the complaint that Mr Wood's condition was misdiagnosed on the programme, GMTV said that it was not within Ofcom's remit, nor helpful to the parties, to enter into discussion as to the merits of any diagnosis, particularly in the context of the GMC's determination in this matter. GMTV said that Mr Wood again appeared to invite Ofcom to disagree with the findings of the GMC, in that what was provided in the programme was an overview given by a General Practitioner, Dr Jones, which was entirely reasonable in the circumstances.
- c) In relation to the complaint concerning an appropriate opportunity to respond, GMTV stated that the reason for the decision not to provide Mr Wood with audio feedback, so that he could hear discussion in the studio, was due to his apparent nervousness and anxieties about chemical sensitivities. It accepted that had he been in the studio he would have been given the opportunity of hearing what was being said there. GMTV said that in the context of the programme the two interviews from Mr Wood were in fact given reasonably significant time. GMTV said that although the frustration of contributors in not having more time to put their case was understood, it was also understood and accepted by contributors interviewed in the context of GMTV, and indeed other television shows of a similar format, that they have to make the points they wish to make succinctly.
- d) GMTV made no further specific comment in relation to the presenter's remark concerning callers to the programme.

In summary and in relation to Mr Wood's privacy complaints GMTV commented as follows:

- e) GMTV made no further specific comment in relation to Mr Wood's privacy complaint.

## 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 in 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, consistent and targeted only at cases in which action is needed. Mr Wood's complaint was first considered by Ofcom's Executive Fairness Group. It was then referred to the Fairness Committee ("the Committee") for review. The Committee considered the complaint and the broadcaster's response, the request for a review of the Provisional Decision and the broadcaster's comments on it, together with a recording and transcript of the programme as broadcast. In its considerations, the Committee took account of Ofcom's Broadcasting Code ("the Code").

In the circumstances of this case the Committee found the following:

- a) The Committee first considered Mr Wood's complaint that despite being given an assurance by the programme makers that he would be treated with respect, this did not happen and he was humiliated and the serious subject of his condition was treated with levity.

In considering this head of complaint, the Committee took into account the following Code Practices. Practice 7.3 of the Code outlines measures likely to result in a contributor's consent to participation in a programme being properly informed. Practice 7.7 states that guarantees given to contributors should normally be honoured. Ofcom also took into account Practice 7.9 which states that 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.

The Committee was aware that there were no records available in relation to any specific guarantees given to Mr Wood concerning his contribution. In the absence of any records, the Committee looked at the context of the GMTV report and the reasonable expectation of a contributor, such as Mr Wood, in relation to a subject of this type.

Looking at the nature of the programme, the Committee noted that GMTV has a range of tone and style of presentation and that the tone and style may vary within this range depending on the subject matter under discussion. On each of the two occasions in the programme when Mr Wood's story appeared, a short report from Mr Wood's family home was followed by a studio discussion between the presenters and a qualified medical practitioner, Dr Jones. This approach was typical in the Committee's view of GMTV's established approach to its subject matter, as was the tone and style of the two reports and the subsequent studio discussions about Mr Wood's condition.

On this basis and given the well-established nature of the GMTV format, the Committee considered it was reasonable for the broadcaster to assume that Mr Wood would have sufficient understanding of the nature and tone of the programme to give informed consent for his participation.

In relation to Mr Wood's specific complaint that the programme attempted to humiliate him and that the serious subject of his condition was treated with levity, the Committee noted that the reporter gave a fair description of Mr Wood's condition and that he was able to respond broadly to what the reporter said. The Committee considered that the reporter presented the issues in a manner in keeping with the general style of the programme. Within this context it did not consider the remark "*imagine having to remove yourself from your home and your family because basically you are allergic to all of them – well maybe not the family, but the home*" attempted to humiliate Mr Wood (this comment is however discussed more fully below at head d)). The Committee noted that the programme included a display of household products and it was satisfied that this was used to illustrate Mr Wood's concerns. Again, in the Committee's view this was a typical and established approach for the programme in a discussion of this nature.

The Committee therefore found no unfairness to Mr Wood in respect of this head of complaint. However its findings in relation to the discussion with Dr Jones and whether Mr Wood's condition was misrepresented; and the Committee's finding on the provision of an appropriate opportunity to respond are considered below at heads b) and c).

- b) The Committee then considered Mr Wood's complaint that his condition was misrepresented by Dr Jones, who said that MCS did not exist, despite the diagnosis by Mr Wood's own doctor, and suggested an alternative diagnosis of his condition.

In considering this head of complaint, the Committee took into account Practices 7.9 of the Code, as set out under decision head a) above. Also Practice 7.11 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. In relation to Mr Wood's suggestion that Dr Jones made an alternative diagnosis of his condition, the Committee noted that the broadcaster's submissions included a letter from the GMC in relation to its consideration of this matter. The letter showed that the GMC had not found any grounds on which to conclude that Dr Jones had attempted to make such a diagnosis and, consequently, had decided not to take any action against Dr Jones.

In relation to its consideration of this head of the complaint the Committee was clear that its statutory remit was confined to considering whether any unfairness resulted to Mr Wood under Rule 7.1 of Ofcom's Broadcasting Code and the relevant practices set out in this section of the Code. In other words, whether unfairness resulted to Mr Wood as a result of the manner in which his condition was presented and whether, if the discussion with Dr Jones contained a significant allegation about Mr Woods, he was given an appropriate and timely opportunity to respond (discussed at head c) below).

The Committee took note of the comments made by Dr Jones in the programme and noted that the presenters did not seek in any way to challenge him on them.

The Committee noted that Dr Jones' did not refer to the diagnosis by Mr Wood's own doctor nor to any Government or other organisation such, as the WHO, having officially recognised sick building syndrome. The Committee was aware that Mr Wood's interview in the first of the two reports included passing references to the World Health Organisation's recognition of sick building syndrome but that this was not picked up on or developed further in either of the following studio discussions with Dr Jones. During his two contributions Dr Jones stated that "*the consensus of medical opinion is that this doesn't exist*" and expressed the following views:

*"He probably does need help but I don't think it is for multiple chemical sensitivity and frankly I don't think it exists but I think that people do, may have been exposed to, maybe at a younger age, noxious chemicals...and therefore he's developed a kind of phobia or psychological dislike"*

*"I think Guy needs to seek some help but not in the area of chemical sensitivity which is not recognised".*

In the Committee's view it was not clear how these remarks related to the medical consensus to which Dr Jones referred. The Committee noted that Dr Jones later expanded on what he meant by "*psychological factors*" and that he referred in the second studio discussion to multiple chemical sensitivity being a "*nebulous term which hasn't really got any place in a medical text book*". Again, no reference was made at this point to any wider debate on the subject.

As a result of these comments, the Committee considered it was very likely that the viewer would have been left with the impression that Mr Wood's condition was not officially recognised by the medical profession. This appeared to contrast with Mr Wood's assertion that his own doctor had diagnosed him with the condition and that it has been recognised by the WHO. The Committee therefore went on to consider (below at head c)) whether there was a cumulative effect to the comments made about Mr Wood which resulted in a significant allegation being made about him to which he should have been given an appropriate opportunity to respond.

- c) Following on from head b) above, the Committee considered the complaint that Mr Wood was not aware, during the broadcast, of what was being said about him in the studio and he was not given an appropriate and timely opportunity to respond to what was being said about him.

In considering this head of complaint, the Committee took into account Practice 7.11 of the Code as set out at Decision head b). The Committee was required first to consider whether the programme had alleged wrongdoing, or incompetence, or made other significant allegations in relation to Mr Wood.

The Committee noted that the programme included live coverage from inside the Wood family home where the reporter interviewed Mr Wood's wife who was with their three-year-old daughter. The reporter asked her about the "*devastating effect on family life*" and how much they missed Mr Wood. Mr Wood was then interviewed outside the house. The Committee observed that in the second piece in the programme, the presenter introduced the item with the following commentary:

*“Imagine having to remove yourself from your home and your family because basically you are allergic to all of them – well maybe not the family, but the home.”*

Mr Wood was also asked by the reporter:

*“Are you sure you’re not trying to duck out of your fatherly responsibilities?”*

And Dr Hilary Jones stated:

*“Guy...probably does need help but I don’t think it is for multiple chemical sensitivity and frankly I don’t think it exists.”*

In the Committee’s view these comments, taken together suggested Mr Wood was leaving his family bereft of a father, on the basis of a condition which the programme allowed viewers to understand as being medically unrecognised. In the Committee’s view these and the other comments referred to in head b) above cumulatively amounted to a significant allegation about Mr Wood, even allowing for the nature of the programme discussed above at head a).

Having established that a significant allegation was made about Mr Wood the Committee next considered whether Mr Wood was given an appropriate and timely opportunity to respond to it.

The Committee took note of the broadcaster’s regret that Mr Wood did not hear what was being said in the studio. The broadcaster explained that the decision had been taken not to provide a live-feed to the studio for Mr Wood as it was felt that a live television interview would have made Mr Wood anxious. The broadcaster explained that Mr Wood had nonetheless been provided with an opportunity to respond during his interview with the reporter who, it said, had taken care to ensure that Mr Wood was able to specifically address all of the areas discussed in the GMTV studio by Dr Jones.

The broadcaster’s stated reasons for not involving Mr Wood in the studio discussion appeared to the Committee to be inconsistent with the fact that Mr Wood was nevertheless interviewed live by the reporter outside his family home. The Committee noted from its viewing of the programme that Mr Wood clearly and articulately set out his symptoms when interviewed by the reporter, including referring to the diagnosis he had received and the impact it was having on him and his family. He also responded to the reporter’s question about whether he was ducking out of his family responsibilities.

Mr Wood stated:

*“No. No one would choose this. No sane person would. No, it is an extreme condition. I have it diagnosed, it is very real and extreme measures are necessary unfortunately.”*

However, the Committee noted that the comments made by Dr Jones were not put to Mr Wood by the reporter and no opportunity was provided to him to respond to them. They were not challenged on his behalf by the presenter in the studio. Given the cumulative effect of the comments made in the programme, the Committee considered that the responses referred to above

did not amount to an appropriate opportunity to respond in the round to the totality of the allegations in the programme as a whole.

The Committee therefore found that the failure to provide Mr Wood with an appropriate opportunity to respond to a significant allegation about him did result in unfairness to him.

- d) The Committee then went on to consider the complaint that the programme included a spiteful remark about Mr Wood by the presenter who said that callers to the programme were suggesting that he was allergic to his family. In its considerations the Committee took into account Practice 7.9 as set out under decision head a) above.

The Committee noted that GMTV regularly invites viewers to call in and give their views on the stories included in the programme. The Committee also noted that as discussed above the presenter opened the second item by suggesting that Mr Wood was allergic to his family, when she said:

*“Imagine having to remove yourself from your home and your family because basically you are allergic to all of them – well maybe not the family, but the home.”*

It was not possible to determine whether or not this remark influenced viewers and triggered texts, but the Committee observed that it was followed later in the broadcast by the presenter’s summary of texts from viewers:

*“He’s caused quite a reaction. A lot of people seem to think he’s allergic to his family more than the house, Jonathan. Erm, and we have got lots and lots of texts along that line...”*

The Committee understood that this comment was likely to be distressing to Mr Wood, but considered that it was in keeping with the programme’s editorial independence to report on texts made to the programme. In the Committee’s view this reference did not in and of itself result in unfairness to Mr Wood. However, the Committee considered that as discussed at head c) above it formed part of a significant allegation about Mr Wood to which he should have been given an appropriate opportunity to respond.

The Committee therefore found no unfairness to Mr Wood in respect of this head of complaint but its finding in relation to the provision of an appropriate opportunity to respond is at head c) above.

The Committee finally considered Mr Wood’s complaint that Dr Jones diagnosed his condition without his consent and that this amounted to an unwarranted infringement of his privacy in the broadcast.

The Committee considered this head of complaint in the light of Rule 8.1 of the Code, which says that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted. The Committee also took into account Practice 8.6 of the Code. Practice 8.6 says that if the broadcast of a programme would infringe the privacy of a person or an organisation, consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

The Committee acknowledges that the line to be drawn between the public's right to information and the citizen's right to privacy can sometimes be a fine one. In considering complaints about the unwarranted infringement of privacy, the Committee will therefore, where necessary, address itself to two distinct questions: First, has there been an infringement of privacy? Second, if so, was it warranted?

In reaching a decision about whether Mr Wood's privacy was infringed in the broadcast, the Committee first sought to establish whether he had a legitimate expectation of privacy. Mr Wood had agreed to take part in the programme, knowing that this would involve a discussion of MCS, and had spoken freely about his symptoms and diagnosis. However, the Committee noted that Mr Wood's psychological health was also a subject of discussion and speculation for example:

Dr Hilary Jones:

*"He's developed a kind of phobia or psychological dislike."*

*"There are psychological factors perhaps in Guy."*

Given that Mr Wood had not been informed that this would form the basis of studio discussion concerning him, the Committee found that he had a legitimate expectation of privacy in respect of this discussion of his psychological health.

The Committee then considered whether Mr Wood's privacy was infringed in the programme as broadcast. In the Committee's view the broadcast contained only speculation about his psychological health but revealed no private information concerning Mr Wood. Given that no private information was revealed, beyond those areas to which he had given consent, the Committee found that there was therefore no infringement of his privacy. In the circumstances, the Committee did not go on to consider the question of whether any infringement was warranted.

The Committee found no infringement of Mr Wood's privacy in the programme as broadcast.

**Accordingly, the complaint of unfair treatment was partly upheld and the broadcaster found in breach of Rule 7.1 of the Code. The complaint of unwarranted infringement of privacy was not upheld**

## Not Upheld

### **Complaint by Mr Peter Houghton on behalf of South West London and St George's Mental Health NHS Trust**

*Dispatches: Britain's Mental Health Scandal, Channel 4, 9 October 2006*

**Summary:** Ofcom has not upheld this complaint of unfair treatment and unwarranted infringement of privacy.

Mr Peter Houghton, Chief Executive of South West London and St George's Mental Health NHS Trust ("the Trust"), complained that the Trust was treated unfairly and that its privacy was unwarrantably infringed in the making of an edition of Channel 4's documentary series *Dispatches*. The programme, entitled *Britain's Mental Health Scandal*, looked at mental health wards in a number of NHS hospitals and raised concerns about the lack of resources and the level of care in some hospitals. One of the hospitals filmed by an undercover reporter was Tolworth Hospital ("the hospital"), which provides services for the Trust. The programme included secretly filmed footage of staff and patients on mental health wards at the hospital and criticisms were made of the care provided at times at the hospital.

Mr Houghton complained that the programme was unfair because the Trust was misrepresented in relation to an allegation that medication was administered to patient illegally; the Trust was also misrepresented in relation to an allegation that a healthcare assistant was put in a room with a patient who killed him, with no way of summoning help; it was alleged that the Trust had not learned lessons from this incident; the Trust was misrepresented in relation to its alarm system for staff; and it was alleged that staff were put at risk. Mr Houghton also complained that secret filming at the hospital without permission was an infringement of the Trust's privacy in the making of the programme.

Channel 4 responded that the allegation that medication was administered illegally was borne out by secretly filmed footage; the death of the healthcare assistant was fairly reported, based on information in the public domain; the programme was justified in suggesting that lessons had not been learned following that incident; the point made in the programme about alarms was justified by secretly filmed footage; the suggestion that staff were put at risk was justified on the basis of the reporter's findings. The infringement of the Trust's privacy was justified by the public interest in the care provided to psychiatric patients.

Ofcom found that the inclusion of the allegation that medication was administered illegally was justified and fairly presented; the programme's presentation of the death of the healthcare assistant was fair; the programme was justified in suggesting that the Trust had not learned lessons from his death; the presentation of concerns about staff personal alarms was fair; and the programme was justified in including concerns about staff safety. The Trust was given an appropriate and timely opportunity to respond to all these criticisms. Ofcom found that the Trust's privacy was infringed in the making of the programme, but that this was justified by a significant public interest in the issues raised.

#### **Introduction**

The Channel 4 *Dispatches* programme looked at mental health wards in a number of NHS hospitals and raised concerns about the lack of resources and the level of care in some hospitals. One of the hospitals filmed by an undercover reporter was Tolworth Hospital ("the hospital"), which provides services for the Trust. The

programme included secretly filmed footage of staff and patients on mental health wards at the hospital and criticism was made of the care provided at times at the hospital.

Mr Houghton, Chief Executive of the Trust, complained that the Trust was treated unfairly in the programme; and that its privacy was unwarrantably infringed in the making of the programme.

## **The Complaint**

### **Mr Houghton's case**

In summary, Mr Houghton complained that the Trust was treated unfairly in that:

- a) The programme gave the impression that a nurse illegally administered medication to a patient. If this had been checked with the Trust, it could have shown that the drugs were prescribed by a doctor. However, it had not been given this opportunity. Channel 4's argument (in a letter to Mr Houghton after the broadcast and before the complaint to Ofcom was entertained) that this impression was "an entirely fair representation of the facts as they were known to us at the time" was unacceptable. The undercover reporter was acting as an unqualified junior member of staff and was not in a position to be able to judge whether or not a drug was administered illegally. She did not have access to all conversations, files or information and in order to perform her duties would have been moving about and therefore not in a position to make assumptions about events she did not witness. The Trust was not able to refute the allegation before broadcast: it is responsible for the provision of mental health services to 15,000 plus patients in treatment at any one time. The only information supplied was that the drug was illegally administered to an aggressive man on a named ward who was upset after a family visit. This was not enough to enable the Trust to identify the patient. As the Trust's request to view the footage in advance of broadcast was denied, it was unable to investigate until after the broadcast, when it was possible to identify the patient and review his notes. His medication chart was signed by a doctor and so it was possible for the Trust to verify that the medication the patient received was prescribed legally.
- b) The programme gave the false impression that Eshan Chattun, a healthcare assistant who had worked at another hospital run by the Trust, had been put in a room with a patient who subsequently killed him, with no way of summoning help. The programme failed to point out that Mr Chattun was put in an office with a telephone and instructed not to go into the secure area where the patient was being held. Channel 4 had asked for the Trust's internal inquiry report into the case but the Trust had been unable to release it as it contained confidential patient information. In any event, the information about Mr Chattun being left in an office and instructed not to enter the locked area where the patient was being held, was in the public domain, as were extensive details of the case, from the Old Bailey court case transcripts. The case had been widely reported in the national press. Information was also available in the external inquiry report into the case on the NHS London website.
- c) The programme implied that lessons had not been learned from Mr Chattun's death by trying to draw inappropriate parallels between two different

environments, namely an intensive care unit in a Victorian building and an acute ward in a modern building.

- d) The programme included footage of an incident in which the undercover reporter failed to attract attention when she set off her personal alarm and no one came to her immediate assistance. The Trust had supplied to the programme makers in advance of transmission evidence of alternative alarm systems to be used in such eventualities, but the programme makers neglected to tell viewers about those systems. Had the reporter activated the wall-mounted alarm, it would have rung in the office and revealed to staff there her exact location. The personal alarm was a back-up and not the main system for calling assistance. This system was covered in the ward induction, which the Trust had evidence that the reporter received.
- e) The programme gave the false impression that the Trust put its staff at risk and did not take staff safety seriously. In fact among NHS providers of mental health beds, the Trust was in the top 20 per cent for staff safety.

In summary, Mr Houghton complained that the Trust's privacy was unwarrantably infringed in making of the programme in that:

- f) Permission was not sought for the undercover filming.

#### **Channel 4's case**

Channel 4 said by way of introduction that the programme sought to investigate the care and conditions on general psychiatric wards in NHS hospitals in the UK. The investigation was motivated by inspection reports by the Healthcare Commission and a number of patient surveys by mental health charities. These revealed a number of causes for concern, ranging from lack of dignity for patients in mixed sex wards to high levels of violence and suicide rates. Studies by professional bodies found major causes for concern in terms of the care of psychiatric in-patients. Research undertaken by the programme making team revealed evidence about poor hospital conditions from service users themselves. The Trust (within the geographical area of which there are four hospitals with acute adult psychiatric wards, including Tolworth Hospital) was given a two star rating by the Health Commission Inspectorate in 2004/05, meaning that the trust was performing well overall but had not quite reached the same consistently high standards throughout. A report on the hospital by the Commission for Health Improvement in 2003 made a number of criticisms of the hospital and found that urgent action was required to ensure the safety of staff and service users.

There was a clear and strong public interest in addressing the issues raised in the programme. Secret filming was necessary to establish the credibility and authority of the true levels of care, and the conditions within psychiatric wards. On the basis of the strength of the evidence, the public interest in addressing the failings in the standard of care to mentally ill patients and the fact that there were reasonable grounds to suspect that further evidence could be obtained, a decision was made at a senior level within Channel 4 to grant permission to the programme makers to begin secret filming in accordance with Ofcom's Broadcasting Code and Channel 4's own rules of best practice. The filming was carried out by an experienced assistant producer, who undertook a number of courses in preparation for her role as a Grade A healthcare assistant. She worked under a strict protocol agreed with Channel 4 to ensure that her duties as a nursing assistant always came before her role as a

reporter and that the safety and welfare of patients, other staff, and herself, remained paramount.

In response to the specific complaints of unfair treatment, Channel 4 responded in summary as follows:

- a) In response to the complaint about the allegation that medication was prescribed illegally, Channel 4 said that the programme showed a male patient who became aggressive after a family visit. He demanded to see a doctor and that his parents return. A healthcare assistant calmly responded, following which three staff members were shown in the office, with a nurse and deputy ward manager proceeding to deal with the patient's request to see a doctor. While the nurse was on the phone tracking down the on-call doctor, the deputy ward manager was shown to be checking the patient's notes. The following exchange took place:

Deputy Ward Manager: *"So no PRN?"*  
Nurse: *"You're joking!"*  
Healthcare Asst: *"We'll have to get him something."*  
Deputy Ward Manager: *"Why don't they put them on PRN, these stupid doctors?"*

Soon after:  
Deputy Ward Manager: *"I'm going to draw up 5...he's not allergic to anything is he?"*  
Nurse: *"Penicillin."*

A short while later, the deputy ward manager left the office with a nurse, who returned to collect some tablets, stating "I'll take these tablets down". A healthcare assistant asks *"Is he going to take them?"* to which the nurse replies *"Yes, he's going to take them"*.

The key claims made in the commentary during this sequence were: the reporter found that the safety of patients on the ward was put at risk on more than one occasion; the patient suddenly became very aggressive after a family visit; when the reporter was called into the office where the three staff members were, the patient was left outside, unobserved; there were around 20 other vulnerable patients on the ward and no staff to protect them; the deputy ward manager wanted to sedate the patient, but when he checked the patient's notes, he could not find the doctor's authorisation to give extra medication if needed (the "PRN"); it is against the law for nurses to prescribe medication, but the deputy ward manager seemed prepared to go ahead; the patient was potentially a risk to others; the patient was given medication to sedate him and had calmed down by the time the on-call doctor had arrived.

In response to points made by the Trust before transmission, Channel 4 said that it was clear from the footage that the deputy ward manager believed that the doctor had not prescribed medication. The information regarding the incident was not available to the reporter as a result of a discussion with her, but as a result of her covertly observing and recording the discussion between nurses. Although Channel 4 accepted that a doctor could give a verbal prescription, nothing was overheard on the footage to suggest that this had been done. It was clear from the footage that some medication was administered to the patient by the deputy ward manager and the nurse. Channel 4 was confident that the recorded material warranted the conclusion that medication had been prescribed by the deputy ward manager without

authorisation by a doctor and was supported by the view of the expert who appeared on the programme, Professor Kevin Gournay, an eminent Professor of Psychiatric Nursing. However, care was taken to qualify the commentary to reflect the remote possibility that this conclusion might be mistaken.

In its response to Ofcom, Channel 4 said that the reporter did not comment on the incident in her position as “an unqualified junior member of staff”, but gathered the footage which was then the subject of detailed analysis by the programme making team, including Professor Gournay and a barrister specialising in mental health law.

The Trust had stated after the broadcast that the medication had in fact been prescribed and written by a doctor, but provided no evidence for this claim. Even taking into consideration the Trust’s later alleged findings (which were not known at the time and had not been backed up by evidence) all the commentary relating to the incident was in all material respects accurate. The programme makers had sought evidence from the Trust that the medication was in fact prescribed by a doctor before the incident. However this had not been provided. The Trust was given a right to reply in relation to this incident at the earliest opportunity, but did not ask for more information.

- b) In response to the complaint that the programme did not fairly represent the circumstances of Mr Chattun’s death, Channel 4 said that his death was reported in the local and national press at the conclusion of the prosecution of the Trust for criminal negligence. The Trust pleaded guilty. There was impartial information available, for example from the Health and Safety Executive (“the HSE”), to suggest that clear instructions on safety were lacking. It was not unfair for the programme not to mention that Mr Chattun was left in an office with a telephone. This was not of great relevance, since once he had left the office, he had no way of summoning help, due to a lack of clear procedures. The Trust informed the programme makers that it did not intend to comment on the case of Mr Chattun “*at this time*”, despite the fact that the case was in the public domain and that the Trust had been successfully prosecuted for negligence. There were no active proceedings to which the rules of strict liability contempt might apply and the Trust had been told what conclusions were being presented in the programme. The commentary in the programme was a brief but fair and accurate summation of the relevant facts. These were the failure of the Trust to provide adequate safety procedures (including personal alarms); the findings of the HSE; and the information in the public domain that was available to the programme makers at the time.
- c) In response to the complaint that the programme implied that lessons had not been learnt from Mr Chattun’s death, Channel 4 said that the programme did make this implication but that any parallels drawn were entirely warranted. The commentary made it clear that Mr Chattun’s death had occurred at a different site (i.e. another hospital) and in a different environment (i.e. a secure unit) from the later personal alarm incident involving the undercover reporter. It was clear that the latter incident took place on a general psychiatric ward at a different hospital. It was not relevant to refer to the different types of building involved. What was relevant were the parallels drawn between Mr Chattun’s case and the ward in which the reporter was working in relation to the safety of staff. It had already been established that there were sometimes dangerous patients on the general psychiatric ward for example the patient referred to under a) above, who was said to have a

history of aggression, and a patient on that ward who had previously threatened to stab another patient, who was shown being warned to keep his distance. In the view of both the programme makers and Professor Gournay it would be ludicrous for a trust to be found to be criminally negligent in respect of a particular case, but then only apply the lessons learned from that case to one of its wards and one of its hospitals, when the risks were similar, if not potentially identical, in other psychiatric wards in hospitals it managed. Later in the programme, the deputy ward manager of another general psychiatric ward in which the reporter worked stated her view that lessons from the death of Mr Chattun had not been learned. It was completely fair and reasonable to use Mr Chattun's case to make the point that the Trust had failed to learn the lessons about lack of personal alarms and lack of training in the management of violent patients in another psychiatric ward: the principles for good safely practice applied just as much on general acute wards as in secure contexts.

- d) In response to the complaint that the programme did not fairly represent the Trust's alarm system, Channel 4 said that no false impression was given of the incident involving the undercover reporter's hand held alarm. It was made clear that the alarm was set off accidentally. The impression was not given that the reporter was in any immediate emergency or danger. The point being illustrated in the sequence was simply that the reporter's hand held alarm was triggered but not responded to. The deputy ward manager's response, shown in the programme, vindicated the point and highlighted that it was a potentially serious matter. It is important that personal alarms provided to staff working alone are audible in all parts of the ward, as it may not always be possible for staff to reach a wall-mounted alarm. It was not unfair to suggest that the failure of the alarm system could, in principle, have put the reporter's safety at risk, given that there were potentially dangerous patients on the ward, whom the reporter was sometimes required to supervise on her own. Had the circumstances in which the alarm went off been genuinely dangerous, no assistance from other staff was immediately forthcoming and the reporter could, arguably, have been seriously harmed by a violent patient. The claimed presence of wall-mounted alarms did not invalidate the points being made in the programme relating to personal alarms. These points were referred to in the initial letter to the Trust about the programme, but the Trust said only that the reporter appeared to have failed to respond to the "alleged incident". The reporter had responded, by reporting the incident to the ward manager. The reporter received no induction training involving the location and use of alarms on the ward or training in the control and management of violent patients at all prior to working at Tolworth Hospital, either by the Trust or ward staff.
- e) In response to the complaint that the programme suggested that the Trust put staff at risk, Channel 4 said that the programme did give the impression that the Trust put its staff at risk and did not take staff safety seriously enough. This was not, however, a false impression. The undercover reporter was a member of staff and she was put at risk, not least because she did not receive an induction before commencing work. The Trust claimed to have evidence that she did receive induction training but had not provided it. The programme included footage of the reporter discussing the issue of staff safety with a deputy ward manager, in which they discussed whether all staff should have an alarm. No extra "spin" was added to the words of the staff member with whom the reporter had the conversation and viewers were left to make up their own minds as to what the words meant.

In response to the complaint of unwarranted infringement of privacy, Channel 4 said in summary:

- f) The programme raised a significant number of matters of important public interest. Clear evidence of failings within hospitals could only have been gathered and brought to the attention of the public by the use of secret filming in the way that was deployed by the programme makers. The public needs to have confidence that NHS psychiatric wards are providing adequate standards of care and safety for their patients. If a hospital is breaching good practice guidelines or falling below acceptable standards of care, it is in the public interest for this to be exposed. In addition to the opinion of the programme makers, Professor Gournay was also of the view that the material could not be gathered other than by secret filming and that the infringement of privacy was proportionate and justified in relation to the serious matters of public interest revealed. It was highly unlikely that the Trust would have given permission to film openly or otherwise at the hospital in any meaningful way. Significant research was carried out by the programme makers into the issues facing mental health prior to the decision to film secretly. The public interest in obtaining further material evidence was considered to be particularly strong in this case. The legitimate public interest in the care provided to psychiatric patients outweighed the hospital's right to privacy.

## 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 in programmes included in such services and from unwarranted infringement of privacy in the making and broadcast of such programmes.

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, consistent and targeted only at cases in which action is needed.

Mr Houghton's complaint was considered by the Fairness Committee, Ofcom's most senior decision making body. The Committee considered the complaint and the broadcaster's response, together with a recording and transcript of the programme as broadcast and a recording of some untransmitted footage ("rushes").

In the circumstances of this case Ofcom found the following:

- a) Mr Houghton complained that the Trust was misrepresented as a result of the allegation that medication was administered illegally to a patient. The Committee viewed rushes of this incident.

In considering this head of complaint, the Committee took into account Practices 7.9 and 7.11 of the Ofcom Broadcasting Code ("the Code"). Practice 7.9 requires broadcasters to 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. Practice 7.11 requires 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.

Although the commentary said that the deputy ward manager “seemed” to be prepared to go ahead (with giving the medication) and referred to the “apparent” giving of unprescribed medication, the programme clearly implied that the medication was administered by the deputy ward manager, without authorisation from a doctor. The Committee noted that the tone of the incident was somewhat different in the rushes from that in the programme, in that it was clear that there was a genuine discussion about the patient’s welfare. However, taking into account the secretly filmed footage, in which it was clear that the deputy ward manager thought there was no authorisation from a doctor to administer the medication to the patient and that the medication was, nonetheless, given to him; and the view expressed by Professor Gournay on the programme that this was a serious breach of nursing practice; the Committee considered that the inclusion of this allegation in these particular circumstances was justified and that it was fairly presented.

The Committee noted that prior to the programme being broadcast, in a lengthy and detailed letter to the Trust dated 12 September 2006 about the proposed programme, the programme makers referred in some detail to this incident. The Trust was informed at this time of the dates when the reporter worked at the hospital and the name of the ward on which the incident took place. The Committee took the view that, in these circumstances, the Trust could have made efforts to trace the incident or could have requested further information from the broadcaster. The Trust, when responding to Channel 4, made general points about medication but did not comment on, or seek further information about, this incident, other than to say that it could not comment on the treatment of individual patients. In these circumstances, the Committee took the view that the Trust was given an appropriately and timely opportunity to respond to the allegation and did provide a response, albeit a general one.

Accordingly Ofcom found no unfairness in this respect.

- b) Ofcom considered Mr Houghton’s complaint that the programme did not fairly represent the circumstances of Mr Chattun’s death.

In considering this head of complaint, the Committee took into account Practices 7.9 and 7.11 of the Code, as set out under a) above.

The Committee noted the Trust’s view that more detailed information about the room in which Mr Chattun was left and the instructions he was given should have been included in the programme. It considered that, in view of the fact that the Trust had pleaded guilty to criminal negligence in relation to Mr Chattun’s death, the programme makers were entitled to rely on information that was put in the public domain by the HSE, the prosecutor in the case, about the incident. It noted, for example, that the HSE said in a press release about the case that Mr Chattun was *“a junior member of staff working alone...without clear procedures, and with inadequate measures in place to check on his safety”*. It was legitimate in these circumstances for the programme makers to include in the programme the view that the Trust had not provided adequate safety procedures in relation to the incident. The programme’s presentation of this issue was fair.

Further, the Committee noted that the programme makers sought information from the Trust about Mr Chattun’s death and in the letter of 12 September

2006 informed the Trust of the concerns raised by Mr Chattun's family about the circumstances of his death. In response, the Trust informed the programme makers it would be inappropriate for it to comment on Mr Chattun's death prior to publication of the official inquiry report. In these circumstances, the Trust was given an appropriate and timely opportunity to respond.

Ofcom found no unfairness in this respect.

- c) Ofcom next considered Mr Houghton's complaint that the programme implied unfairly that lessons had not been learned from Mr Chattun's death.

In considering this head of complaint, the Committee took into account Practices 7.9 and 7.11 of the Code, as set out under a) above.

The Committee noted that the commentary in the programme clearly made this allegation. It considered that the distinctions between the hospital in which Mr Chattun died (a secure unit) and the one where the reporter filmed (a general psychiatric ward) were made clear in the commentary. It was not pertinent to the point being made that different types of buildings (one Victorian and one modern) were involved. The programme's commentary made it clear that changes were made on the secure ward where Mr Chattun died, but suggested that the lessons had not been learned in Tolworth Hospital, where the reporter worked. The programme included secretly filmed footage of a deputy ward manager telling the reporter:

*"They upped our staffing levels for about a year after that happened, 8 months, and then as soon as it died down, they dropped our staffing levels again. They did nothing. We haven't even got an alarm system like you said. I mean...I did bring that up at the staff meeting and I brought it up before..."*

Given the circumstances set out above including this footage, the Committee did not consider it was unfair to the Trust, which was responsible for both hospitals, to claim that lessons had not been learned from Mr Chattun's death.

Although it was not put to the Trust specifically by the programme makers that the programme would allege that lessons had not been learned from Mr Chattun's death, it was clear from the letter of 12 September 2006 that not only would the programme refer to Mr Chattun's death but the issue of staff safety was one that was likely to be included in the programme. In its response to the programme makers the Trust responded to the points made. The Committee therefore took the view that the Trust was given an appropriate and timely opportunity to respond to this criticism.

Accordingly Ofcom found no unfairness in this respect.

- d) Ofcom considered Mr Houghton's complaint that the programme did not fairly represent its alarm system.

In considering this head of complaint, the Committee took into account Practices 7.9 and 7.11 of the Code, as set out under a) above.

The Committee considered that it was clear from the secretly filmed footage that the incident in which the reporter's hand held alarm went off was an accident and that she was not in any actual danger. The programme included the concerns expressed by the deputy ward manager who the reporter informed of this. The programme also included footage of the deputy ward manager telling the reporter "*I think everybody should have an alarm*". In the context of concerns about staff safety (see decision head c) above), it was legitimate for the programme to include this incident and raise concerns about the lack or ineffectiveness of personal alarms. This issue was presented fairly in the programme.

The Committee noted that this issue was put to the Trust in the letter of 12 September 2006 and that the Trust responded by referring to "other alarm systems", including wall mounted alarms. However, it considered that this part of the programme was specifically about personal alarms that could be carried on the person and that it was not, therefore, incumbent on the programme makers to refer to other alarm systems.

With regard to the issue whether the reporter received induction training at the hospital, there was a conflict of evidence between the Trust and the programme makers. 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. The Committee noted that the issue of the induction training was raised with the Trust in the letter of 12 September 2006 and the Trust responded that she did receive such training but did not provide any evidence in relation to this. In the circumstances, the Committee considered that it was legitimate to include the reporter's claim in the programme and that the Trust was given an appropriate and timely opportunity to respond to it.

Taking into account the letter of 12 September 2006 and the Trust's response, the Committee considered that the Trust was given an appropriate and timely opportunity to respond to this criticism.

Accordingly, Ofcom found no unfairness in this respect.

- e) Ofcom went on to consider Mr Houghton's complaint that the programme unfairly suggested that the Trust put its staff at risk.

In considering this head of complaint, the Committee took into account Practices 7.9 and 7.11 of the Code, as set out under a) above.

The Committee considered that this was the impression given in the programme. However, given the matters disclosed in the programme, including the concerns expressed by a deputy ward manager to the reporter about staff safety (see decision heads c) and d) above) and the fact that the programme included part of the Trust's statement for broadcast, in which it said that it took the safety of patients, *staff* [Ofcom's italics] and the public very seriously, the Committee considered it reasonable for the programme to include this criticism.

As regards the conflict between the Trust and the programme makers as to whether the reporter received induction training at the hospital, see d) above.

- f) The Committee considered Mr Houghton's complaint that the Trust's privacy was unwarrantably infringed in the making of the programme in that permission was not sought for the secret filming.

In considering this head of complaint, the Committee took into account Practices 8.5 and 8.9 of the Code. Practice 8.5 says that any infringement of privacy in the making of a programme should be with the person's and/or organisation's consent or be otherwise warranted. Practice 8.9 states that the means of obtaining material must be proportionate in all the circumstances and in particular to the subject matter of the programme.

The line to be drawn between the public's right to information and individual rights to privacy can sometimes be a fine one. 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?

#### Was there an infringement of privacy?

In reaching a decision about whether the privacy of the Trust was infringed in the making of the programme, the Committee first sought to establish whether the Trust had a reasonable expectation of privacy in these circumstances. The Committee noted that Channel 4 appeared to accept that there was an infringement of the Trust's privacy in this case. (In dealing with this complaint, Ofcom was not considering the question of infringement of the privacy of any individuals, whether patients or staff).

The Committee considered that, due to the sensitive nature of a hospital's function, both its patients and the activities of a hospital receive a degree of protection from the public eye. Whilst a hospital might provide a public service, it is not altogether a public place in the same way, for example, as a high street or a public park. Practice 8.8 of the Broadcasting Code recognises places such as a hospital as "potentially sensitive" and therefore attracting a higher expectation of privacy. Although there may be an implied licence to enter a ward for treatment or visits, this could not be said to extend to access for filming.

As regards the general hospital footage, as noted above, the Committee had regard to the fact that hospitals fall within the category of places to which the public may have access but which nevertheless attract a greater expectation of privacy. There was therefore no automatic right to film there without permission. Additionally, the filming had been carried out surreptitiously.

In the circumstances, the Committee found that the Trust's privacy was infringed in the making of the programme because appropriate consent had not been gained to film in the hospital.

#### Was the infringement of privacy warranted?

Surreptitious filming or recording should only be used where it is warranted. Normally it will only be warranted if there is prima facie evidence of a story in the public interest and there are reasonable grounds to suspect that further

material evidence could be obtained and such material is necessary to the credibility and authenticity of the programme.

The Committee considered that the issues raised in the programme, namely the level of care provided to patients on mental health wards and the safety of staff and patients, were of significant public interest. Taking into account the findings of the Commission for Health Improvement in 2003, in particular the concerns raised about staff and patient safety, the Committee considered it was legitimate for the programme makers to carry out filming at Tolworth Hospital.

Further, the Committee considered that consent was unlikely to be forthcoming to film openly in the hospital and that, even if such consent had been given and filming was carried out openly, the programme makers would have been unlikely to witness many of the incidents seen by the undercover reporter. In the circumstances, the use of secret filming was proportionate.

The Committee therefore found that the infringement of the Trust's privacy during the making of the programme was warranted.

**Accordingly the Fairness Committee has not upheld the complaints of unfair treatment and unwarranted infringement of privacy in the making of the programme.**

## **Complaint by Mr Peter Martin**

*The Big Idea, Sky One, 25 November 2006*

**Summary:** Ofcom has not upheld this complaint of unfair treatment by Mr Peter Martin.

On 25 November 2006, Sky One broadcast the final of a series called *The Big Idea*. The series invited inventors to compete for a prize of £100,000 towards pursuing their idea or invention. In the first stage of the competition, the inventors had to show their ideas to a panel of three judges. Thirty six of the inventors made it to the next round, having been put forward by one of the judges. Those 36 then competed for votes to secure a place in the final. Mr Martin took part in the series, but his idea did not make it to the final. The series, including the programme complained of, the final, included brief footage of Mr Martin showing his idea to the judges.

Mr Martin complained to Ofcom that he was treated unfairly in the programme as broadcast.

Ofcom found as follows:

Ofcom noted the negative comments made by the judges in a clip which included footage of Mr Martin. It was clear from untransmitted footage that these comments were not made about Mr Martin. However, Ofcom considered that, taken together with the commentary, viewers would have considered these to be a general round-up of ideas and inventions that did not get through to the final, rather than being specifically about Mr Martin. The details of Mr Martin's progress through the contest and his elimination were not included in the programme and, in these circumstances, there was no unfairness in the portrayal of the judging process in relation to Mr Martin in the programme as broadcast.

### **Introduction**

On 25 November 2006, Sky One broadcast the final of a series called *The Big Idea*. The series invited inventors to compete for a prize of £100,000 towards pursuing their idea or invention. In the first stage of the competition, the inventors had to show their ideas to a panel of three judges. Thirty six of the inventors made it to the next round, having been put forward by one of the judges. Those 36 then competed for votes to secure a place in the final. Mr Martin took part in the series, but his idea did not make it to the final. The series, including the programme complained of, the final, included brief footage of Mr Martin showing his idea to the judges.

Mr Martin complained to Ofcom that he was treated unfairly in the programme as broadcast.

### **The Complaint**

#### **Mr Martin's case**

In summary, Mr Martin complained that he was treated unfairly in that:

With his permission, footage of his presentation to the judges was used in the series, including the final, as "filler" material. However as the series progressed the way the footage was edited became less and less favourable to him and his brand. In the final, the programme complained of, the judges were shown reacting with disdain and

footage of him was preceded by a voiceover saying *"It is safe to say some [ideas] were less than impressive"*. It was followed by one of the judges, Ruth Badger, saying *"It was one of the poorest ideas I've seen on the show"* and the other two judges saying *"No"* (i.e. the two judges considered that the idea should not go through to the next round). In fact, all three judges were highly complimentary about his idea. The final voiceover for this sequence referred to *"half-baked nonsense"*. The judging process was unfair in that, as all three judges put him through to the next round, he should not have been eliminated.

### **Sky's case**

In response to the complaint of unfair treatment, Sky said in summary:

The programme was a televised national competition to find innovative inventions. Mr Martin featured very briefly in three of the six programmes that led up to the final as part of introductory or scene-setting montage packages.

In programme two, Mr Martin was included in a scene demonstrating the really "big" global ideas of inventors who wanted to make a difference. An extract of Mr Martin's pitch to the panel of expert judges was included in a package lasting about eight seconds, during which he said that:

*"My idea is to help other people have ideas to save a bit of time and best of all save the planet"*

The magnitude of Mr Martin's idea was acknowledged by the presenter, who said *"Blimey, that is a big idea"*, and his name and his invention were both captioned during his appearance.

Mr Martin featured very briefly in programme three, when he was shown for less than one second wheeling a trolley containing a dustbin. This footage was included as part of an introductory package demonstrating how many people had attended auditions for the series.

Mr Martin appeared in programme five in a package showing the varied presentation styles of the inventors during their pitches to the judges. Mr Martin and his invention were captioned, with the voiceover describing his pitch as *"enthusiastic"*. This footage of Mr Martin lasted approximately five seconds.

During the live final programme, the programme complained of, Mr Martin was featured for less than one second in part of an introductory package which summarised the contest leading up to the final, alongside a montage of several unsuccessful candidates (who didn't make it to the televised heats), of which Mr Martin was one. Mr Martin did not speak in this programme, nor was there any visual evidence of his name, invention or company brand in either voiceover or caption. It was not the intention of this montage to single out individual inventors by name or brand, but to give a broad impression of the quirky and eccentric nature of some of the ideas and characters that had featured in the series. The clip of Mr Martin used in this montage was not transmitted as part of any of the earlier programmes: it was taken from his initial pitch to the judges and was chosen because it was visually interesting and fun.

It was self evident that the comment in the voiceover that some ideas were *"less than impressive"* was not intended to refer to specific inventions or inventors shown during the montage. It was also clear from the footage of the final that there was a degree of

overlapping in all the voiceover and clips footage and that the voiceover and clips were used as general scene setting.

Sky said that Mr Martin's momentary appearances throughout the series, amounting in total to approximately 15 seconds, could not be considered to be unfavourable due to their brevity and context, whether taken individually or as a collection of appearances over the course of the series. He was not singled out negatively by the editing for particular treatment.

The style of footage used was no different from that adopted by many popular reality television programmes. The television convention of judges and panellists having "extreme" reactions within impressionistic montages was edited in such a way not to be taken literally by either the audience or participants. The aim of the footage was to convey the scale and breadth of both the numbers and "characters" that entered *The Big Idea* and, in televisual shorthand, tell the story of the series up to the final programme. Sky said that no viewer would have taken the voiceover or the edited judges' shots to be statements about Mr Martin.

As regards the complaint that the judging process was unfair, Sky said that the process was split into four stages. At Stage 1, each inventor was given one minute to pitch their invention to the judges (and in fact Mr Martin was allowed three minutes). If none of the judges saw merit in the invention, the inventor left the competition. If any one of the judges saw merit in the idea, the inventor was invited to go to a waiting room until the judges had seen all the inventions to be featured in each programme. The judges did send Mr Martin through to Stage 2 and made positive and encouraging comments about his idea.

Stage 2 involved the judges selecting two inventors each to take through to stage 3. Mr Martin left the competition at this stage, prior to the studio heats, as he was not chosen by any of the judges to progress to the next stage. Stage 3 was the studio heats and this was followed by stage 4, the live final.

Stage 2 was not broadcast for reasons of time and editorial judgement. The programme makers felt that this section was slow and possibly confusing to viewers. The programmes therefore concentrated on those inventors who made it to stage 3 and beyond.

Sky said that the judging process was fair and that the final decision lay with the discretion of the judges.

### **Mr Martin's comments**

In summary Mr Martin said in response to Sky's statement:

In programme 3 the presenter's commentary was complimentary and in programme 5 he was described as "enthusiastic". However in the final there were 10 seconds of footage (rather than one second, as claimed by Sky) showing Mr Martin and his idea. This coverage was not positive, unlike the previous episodes, and did not reflect actuality. Mr Martin said that it appeared from the untransmitted footage that negative comments were "cobbled together" in a 10 second montage that exclusively surrounded footage of him and his product. The actuality of what the judges thought about his idea and its progress appeared to have been lost in selective editing.

## **Sky's comments**

Sky said in summary to Mr Martin's comments:

The presenter's remark "*Blimey, that really is a big idea*" was said in an entertaining manner. Mr Martin featured for less than one second in the footage complained of in the final. Neither he nor his website were credited or represented on screen. This section of the programme summarised that section of inventions that failed to make it to the broadcast stages of the competition and was intercut with the judges' reactions to those ideas that did not make it further in the competition. This was a common television editing convention that did not set out to mislead the audience but to provide them with a snapshot of "the story so far".

## **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 in programmes included in such services. Where there appears to have been unfairness in the making of the programme, this will only result in a finding of unfairness, if Ofcom finds that it has resulted in unfairness to the complainant in the programme as broadcast.

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.

The complaint was considered by Ofcom's Executive Fairness Group. In reaching a decision about this complaint Ofcom considered the written submissions of both parties, a recording and transcript of the programme, recordings and transcripts of other episodes in the series featuring Mr Martin and footage of untransmitted material.

Ofcom's finding in relation to Mr Martin's complaint is outlined below:

Ofcom considered Mr Martin's complaint that the suggestion in the programme that the judges reacted negatively to his idea was inaccurate and unfair and that the judging process resulted in unfairness to him.

In considering this complaint, Ofcom took into account Practice 7.9 of the Ofcom Broadcasting Code ("the Code"). Practice 7.9 states that broadcasters must 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.

Ofcom noted that the untransmitted material submitted by the broadcaster showed that Mr Martin did receive positive comments from the three judges when he was put through from Stage 1 to Stage 2. Ruth Badger said:

*"...I think what you've got is very unique...It's a definite yes from me."*

Lord *Karan Bilimoria* said:

*“...just because I think it’s such a good thing that you’re doing and I think it needs to be shouted from the rooftops I’d recommend you go through to the waiting room.”*

The third judge, Craig Johnston, having been unconvinced about Mr Martin’s idea at first, then said:

*“What Peter’s doing is actually encouraging people to invent. This is a portal...for creative people that wanna save the world. Can I rescind my decision and, and send him through as well?”*

As a result of these decisions, Mr Martin was put through to the second stage of the contest. However, he did not make it to the third stage as none of the three judges selected him to go through to that stage, namely the studio heats.

Ofcom also noted that, although Mr Martin did not get beyond the second stage in the contest, footage of him did appear in the final programme. Mr Martin’s invention was seen in the final during the following exchange:

Commentary

*“Many of the ideas were, it’s fair to say, less than impressive”.*

Brief footage of Mr Martin pulling a pink vacuum cleaner from a metal dustbin.

Ruth Badger

*“I’ll be completely honest; for me it’s one of the poorest ideas that I’ve seen”.*

Lord *Karan Bilimoria*

*“No”.*

Craig Johnston

*“Can’t see it. I’m really sorry”.*

Commentary

*“Fortunately in amongst the half-baked nonsense were occasional glimpses of pure gold”.*

Having viewed the untransmitted footage, Ofcom accepted that these negative comments by the judges were not made about Mr Martin and his idea. However, Ofcom noted that the clip of Mr Martin was very brief, around a second, and did not last for the full duration of the exchange set out above, which lasted approximately 10 seconds. Although Mr Martin’s name and information about his company were included in captions in earlier programmes, there was no caption with the footage of Mr Martin in the programme complained of, so that only viewers who had seen earlier episodes of the series would have known who he was. Taking into account the nature of the footage of Mr Martin, i.e. a brief shot without a caption, Ofcom considered that viewers would have understood the comments by the judges, taken together with the voiceover, to have been a general round-up of ideas and inventions that did not get through to the final, rather than specifically about Mr Martin. In these circumstances, the portrayal of Mr Martin in the final was not unfair.

Ofcom then considered Mr Martin’s complaint that the judging process resulted in unfairness to him. Ofcom was able to consider this aspect of Mr Martin’s complaint

only insofar as it related to any unfairness to him in the broadcast. The details of Mr Martin's progress through the contest and his elimination were not included in the final programme and, in these circumstances, there was no unfairness in the portrayal of the judging process in relation to Mr Martin.

Ofcom therefore found that there was no unfairness to Mr Martin in these respects.

**Accordingly the Executive Fairness Group has not upheld the complaint of unfair treatment in the broadcast of the programme.**

## **Complaint by Opus Energy brought on its behalf by Bindman and Partners solicitors**

*Watchdog, BBC1, 24 October 2006*

**Summary:** Ofcom has not upheld Opus Energy's complaint of unfair treatment.

On 24 October 2006, BBC1 broadcast an edition of its current affairs programme, *Watchdog*. The programme included a report about an electricity supply company called Opus Energy ("Opus"). The programme featured three customers of Opus who felt that they had been misled at the time of entering into a new agreement with Opus and, that the cost of receiving their electricity from Opus was higher than expected. The programme also sent an undercover reporter to work in the sales team of a company that sold Opus electricity contracts. This company was not named in the programme. At the end of the report, a representative from the independent gas and electricity watchdog, Energywatch, took part in a two-way studio interview with the presenter. The representative provided a statistic relating to the proportion of complaints received by his organisation about Opus. During production of the programme, Opus provided the programme makers with a statement for broadcast. Opus withdrew this statement on the day of transmission.

In summary, Ofcom found as follows:

Ofcom found that the programme makers' decision not to name the company where the undercover reporter worked did not result in unfairness. Ofcom considered that the absence of this information did not leave viewers with an unfairly negative impression of Opus.

On the information before it, Ofcom found no evidence to show that the statistic provided by Energywatch had been calculated in an incorrect way. Ofcom also considered that the programme had made it sufficiently clear that the statistic related to complaints originating from the business sector and not the domestic sector. Ofcom found no unfairness to Opus in this respect.

Ofcom found that the programme makers' decision to include extracts from Opus' statement for broadcast (in circumstances where Opus had told the programme makers that it wished to withdraw its statement prior to transmission) did not result in unfairness. In addition Ofcom no unfairness to Opus in relation to the manner in which its statement had been presented in the programme as broadcast.

### **Introduction**

On 24 October 2006, BBC1 broadcast an edition of *Watchdog*, the current affairs programme. The programme included a report about electricity supply company Opus Energy ("Opus").

Three customers, who were proprietors of small businesses, discussed their experience of switching to Opus for their electricity needs. The complaints by these three customers were that they felt that they had been misled at the time of entering into a new agreement with Opus, and that the cost of receiving their electricity from Opus was higher than expected.

The programme sent an undercover reporter to work in the sales team of a company described in the programme as "*one of the companies used by Opus*". This

company, Commercial Electricity Direct (“CED”), was not named in the programme. The report included covertly filmed footage of the sales tactics of CED employees.

During the production process, Opus had been asked by the programme makers to respond to allegations to be made in the programme. Opus provided a statement for broadcast which it later informed the programme makers that it wished to withdraw (because the programme makers would not give Opus a guarantee to broadcast the statement unedited). Opus informed the programme makers of its wish to withdraw the statement for broadcast on 24 October 2006, the day of transmission.

After the report, the presenter in the studio made the following statement:

*“...[Opus] agrees they haven’t acted swiftly enough to sort them. Opus Energy say their unit prices are fixed and they’ve never increased them during a contract. If bills go up, they say it’s because customers have used more electricity than anticipated. As for how people are signed up, that’s done by sales agents who are independent of Opus Energy. Opus Energy say they won’t work with any who mislead customers.”*

The programme then moved to a two-way studio interview with the presenter and a representative from Energywatch<sup>2</sup>, Mr Paul Savage. During this interview, the following exchange took place:

Presenter: *“Just before we leave you, 30-40% of your current complaints at the moment coming into Energywatch are about Opus Energy, that’s true isn’t it?”*

Mr Savage: *“Related to mis-selling, yes. They, they relate to Opus Energy, yeah.”*

Ofcom received a complaint from Opus brought on its behalf by Bindman and Partners solicitors (“Bindmans”). Opus complained that it had been treated unfairly in the programme as broadcast.

## **The Complaint**

### **Opus’ case**

In summary Opus complained that it had been treated unfairly in the programme as broadcast in that:

- a) The programme failed to distinguish between Opus and the independent company CED which recruits customers at its own discretion and by its own means. Opus complained that viewers of the programme would have unfairly concluded that Opus carried out, directed, or was otherwise responsible for acts which had been carried out by CED. Opus said it had made it clear that the actions of CED were not carried out, endorsed or otherwise sanctioned by it.
- b) The programme presented the following material facts in an inadequate and/or misleading manner so as to cause unfairness to Opus:

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<sup>2</sup> Energywatch is an independent gas and electricity watchdog, which has a statutory duty to protect and promote the interests of existing and future gas and electricity consumers in England, Scotland and Wales.

- i) Opus said the statistic provided in the programme in relation to the proportion of complaints received by Energywatch about Opus (*“30-40% of your current complaints...”*), was incorrect. Opus said the statistic suggested that Energywatch had received a “magnitude of complaints”. Opus said viewers were likely to conclude from this that Opus had been aware of a very substantial problem caused by the actions of the independent sales agent, but had failed to take any action. Opus said that it had only received, on average, eight complaints each month from Energywatch, and this could not possibly have comprised 30-40% of mis-selling complaints from business customers; and
- ii) The programme did not present the fact that Opus was compelled by law to rely on customer estimates for electricity consumption, and had not as a matter of fact, increased prices.
- c) The programme unfairly attributed statements directly to Opus in circumstances where Opus had told the programme maker’s of its wish to withdraw its statement for broadcast. Opus said the programme failed to reflect by other means, the material facts of its position.

### **The BBC’s statement in response to the complaint**

The BBC provided a statement in response to Opus’ complaint. In summary the BBC responded as follows:

- a) In response to the complaint that the programme had failed to distinguish between Opus and its sales agent CED, the BBC stated that the programme stated clearly in commentary that Opus and CED were not the same. The BBC referred to the following commentary which had introduced the undercover filming:

*“We sent a researcher undercover to join a sales team at one of the companies used by Opus and he found people were being routinely misled”.*

In light of the above commentary the BBC said that viewers would not have attributed the action of CED to Opus. The BBC said that in the interests of greater clarity it might have been preferable if CED had been named in the programme. However, it did not believe that this omission caused unfairness to the complainant.

The BBC contended that Opus shared some responsibility for the actions of CED, given the relationship between the two companies. The BBC said that while Opus may not have “carried out” or “directed” the acts of CED, the relationship was such that Opus had plainly acquiesced in CED’s questionable activities which were in the mutual interest of the two companies.

The BBC said that it was “inconceivable”, given the scale of the complaints being received by Energywatch and conveyed to Opus on a monthly basis, that Opus was unaware that there were problems with some of its sales agents. The BBC said Opus allowed the mis-selling of its sales agents to persist with no effective measures being put in place to stop it.

The BBC said that *Watchdog*, like Energywatch had received complaints from Opus customers relating to the activities of a number of sales agents, and the cases of customers featured in the programme involved sales agents other than CED. It said the programme was not an investigation into a single rogue sales agent but rather into a supplier on whose behalf a number of sales agents worked. The BBC said it was the spread and persistence of the complaints against the sales agents acting on behalf of Opus that led to Opus, rather than the individual sales agent, being the focus of the investigation.

- b) In response to the complaint that the programme presented material facts in an inadequate and/or misleading manner, the BBC responded as follows:
- i) As regards the complaint that the statistic in relation to the proportion of complaints received by Energywatch about Opus, was incorrect, the BBC said this was simply not the case.

The BBC said the “eight complaints a month” figure provided by the complainant did not include both ‘complaints’ and ‘inquiries’. The BBC said that when assessing the extent of business consumer disadvantage and the relative performance of suppliers, Energywatch gave equal weight to both complaints and inquiries. The BBC explained that those inquiries which had been included in the statistic provided by Energywatch had excluded simple requests for information. Therefore, the BBC said that the inquiries included in Energywatch’s figures would therefore, in normal usage, be called complaints.

The BBC provided a detailed breakdown of mis-selling complaints and inquiries from the business sector in the twelve months to September 2006. The BBC said this data supported the statistic which was given in the programme. It said it also showed that the figures for Opus accounted for 37% of the total complaints in this area, which was significant given that Opus’ market share was estimated to be about 1%.

- ii) The BBC next addressed the complaint that the programme had failed to present information provided by Opus which explained that the complainant was compelled by law to rely on customer estimates for electricity consumption, and had not increased its prices.

The BBC said this complaint suggested the programme had been unfair because it had incorrectly attributed the cause of the higher-than-expected Opus bills, of the customers featured in the programme, to Opus instead of the customers themselves. The BBC said that according to Opus, given that the company had not increased their prices, and by law must rely on customer estimates when agreeing a prospective customer’s electricity consumption, the higher-than-expected-bill therefore was likely to have been caused by the prospective customer not providing accurate consumption figures in the first place. The BBC said that this complaint by Opus misunderstood how the three customers, featured in the programme, had come to agree the estimates for their electricity consumption with the sales agents of Opus. The BBC said that once this was looked at, it was apparent that no unfairness could have resulted to the complainant in this respect.

The BBC said that two of the customers had only just taken over their properties and were therefore simply not in a position to provide any information about past electricity consumption rates at the premises. The BBC said that according to these customers it had been the sales agents of Opus who had estimated their monthly payment plan. The BBC said that in these circumstances, it followed that no unfairness could have resulted from the fact that the programme did not refer to Opus' claim that in estimating monthly payments it had to rely on figures provided by the customers.

The BBC said that in the case of the third customer, initial estimates of electricity consumption had been provided by the customer which had been based on figures taken from the bills of her previous supplier. The BBC said that this figure would have been identical to any figures which Opus might have received if it had been allowed access to the customer's past billing records. Therefore, the BBC said the fact that Opus might have been constrained by having to rely on the customer's information was not relevant in this case.

- c) In response to the complaint that the programme unfairly attributed statements directly to Opus when the company had told the programme maker's that it wished to withdraw its statement for broadcast, the BBC said that all background information provided by Opus which was necessary to understanding the programme and the issues raised by it had been properly reflected in the programme. The BBC said it did not accept that the programme was obliged to present as "material facts" statements made by Opus, which the programme makers contested, simply because Opus had attempted to withdraw its consent for these statements to be attributed to the company.

The BBC said that it would have been "absurd" to present as facts, points made by the company such as "if a customer's bill goes up, it is simply because they are using more electricity than they had anticipated", given that the programme had presented evidence to the contrary. The BBC said the only way to present these claims by the company, was to attribute them to the company. The BBC said that whatever the position on consent (i.e. that Opus had not given consent for the programme makers to use its statement) it could hardly be unfair to attribute to a company a view which it, in fact, holds.

The BBC said that it did not believe that any of the points omitted from Opus' statement were of such significance that unfairness resulted in the programme as broadcast.

### **Opus' comments in response to the BBC's statement**

Opus made comments in response to the BBC's statement, through its solicitors Bindmans. In summary Opus responded as follows:

- a) Opus said that it welcomed the BBC's acceptance that "in the interests of greater clarity, it might have been preferable if CED had been named" in the programme as broadcast. However, Opus maintained that the omission of CED's name did result in unfairness to it. Opus said that the BBC had attempted to defend the omission of CED's name merely on the basis that apparently Opus deserved to be 'tarred with the same brush' as CED. Opus did not accept that this was a proper justification. Opus submitted that the

BBC had no evidence that Opus knew of any shortcomings on the part of CED and so had not made out any proper basis on which to hold Opus so accountable.

Opus said that following the introduction of measures by the company to improve the working practices of sales agents, the number of complaints it received had declined. Opus said that at its height, in November 2005, it had received 19 complaints about marketing for the month. This had decreased to 10 complaints per month immediately prior to the programme in August and Sept 2006. Prior to this in June 2006, complaints had fallen to their lowest level of just three for the month. Opus said it was therefore clearly entitled to conclude that the situation was improving.

- b) In relation to the programme's alleged misrepresentation of material facts, Opus made the following comments:
- i) In relation to the statistic provided by Energywatch, Opus said it was regrettable that the BBC appeared to have adopted as fact, information that was provided to it by Energywatch without any process of verification with Opus or other bodies, such as the industry regulator Ofgem. Opus said that if it had been given an opportunity to respond to the Energywatch statistic, it would have made the following points:
- The electricity industry is regulated by Ofgem;
  - Ofgem advised Opus in a letter dated 24 November 2006 that "mis-selling in the non-domestic market is not at a level that warrants direct regulation"; and
  - Energywatch, as a body representing consumer interests, of course had its own viewpoint which it promoted.

Opus did not accept that 'complaints' and 'inquiries' ought to be treated as the same thing. Opus said that in approximately half of all 'enquiry' cases Energywatch did not even inform Opus of the enquiry and that such an enquiry may be as simple as asking for a telephone number. Opus noted that Energywatch wrote to it in every case of a 'complaint', and Energywatch has a formal procedure to reclassify complaints to mere inquiries if a consumer contact is wrongly classified. Opus said that given this, there was a clear and important difference between 'complaints' and 'inquiries'.

Opus also said that the BBC statement did not address the issue that the programme failed to make it clear that the Energywatch statistic only related to *business* sector complaints (i.e. not the domestic sector).

- ii) In relation to its complaint that the programme did not fairly present the fact that it was compelled by law to rely on customer estimates for electricity consumption and had not increased prices, Opus explained that it does not have any historical data about previous usage at a given site prior to it commencing its supply. Opus said that in a period of weeks following the start of supply, Opus receives the industry record from the previous supplier. At this stage and on the basis of actual consumption record, Opus then increases or decreases the payment plan accordingly.

Opus said the BBC's "evidence" in regards to price increases related solely to the conduct of sales agents. Opus said this conduct by sales agents was regrettable and condemned by it. Opus said the BBC had not provided any evidence that any action by Opus resulted in the price increases complained of.

- c) Opus said the BBC used its withdrawn statement in such a way as to lead the viewer to conclude that the statement was false and not to be relied upon. Opus stated "the device of prefacing each fact with 'Opus say' completely undermined the integrity of the statement". Opus stated that this was entirely different to broadcasting a statement from Opus in its own words. Opus said such a statement would have served as a summary of its position and the viewer could then have evaluated it for themselves and reached their own conclusions. Opus said the programme makers "cherry-picked" selected statements of fact, omitted important points and then presented them in such a way as to completely undermine their veracity.

### **The BBC's second statement in response to the complaint**

The BBC provided a second statement in response to Opus' comments. In summary the BBC responded as follows:

- a) The BBC said Opus had made far too much of the concession that it would have been clearer if CED had been named in the programme. The BBC said there was no lack of clarity in the programme when it spelled out that Opus and the sales agents were separate entities. In support of this, the BBC referred to the following statements in the programme:

*"We sent a researcher undercover to join a sales team at one of the companies used by Opus and he found that people were being routinely misled".*

*"As for how people are signed up that's done by sales agents who are independent of Opus Energy. Opus Energy say that they won't work with any who mislead customers".*

The BBC said that Opus should be judged on the basis of its own lack of action in policing its relationship with CED (and presumably with other sales agents as well); a lack of action which led to the unavoidable inference that Opus was turning a blind eye to the activities of CED which were in the mutual interest of the two companies.

In relation to Opus' comment that there had been a decline in the number of complaints received, the BBC said that according to statistics provided by Energywatch in November 2005 there were 49 complaints (if counting 'inquiries' and 'complaints'). The BBC accepted that if the two six month periods were compared a small reduction was visible. Nevertheless, in the period prior to the programme, from June to August 2006, complaints were shown to be once again on a rising curve: 27, 31 and 46 for the respective months. The BBC said that the August figure of 46 was only just short of the figure for November 2005 which Opus used as a baseline. The BBC therefore contended that Opus' argument that a downward trend could be discerned and attributed to measures by the company, was at odds with the evidence.

- b) The BBC responded as follows to the alleged misrepresentation of facts:

- i) In relation to the Energywatch statistic, the BBC said the programme makers were perfectly entitled to rely upon statistics provided by Energywatch, which is an independent body. The BBC said that if Opus was challenging any of those statistics it should be specific.

The BBC said Opus could not rest the case for its inactivity upon the statement by Ofgem that “mis-selling in the non-domestic market is not at a level that warrants direct regulation”. The BBC said this statement was made in a letter obtained after broadcast of the programme and could not therefore have been part of Opus’ motivation for inaction prior to that.

As regards the inclusion of ‘inquiries’ in the Energywatch statistic, the BBC said it made it clear in its first statement to Ofcom that Energywatch does *not* include simple requests for information. According to Energywatch, this is so that both the ‘complaints’ and ‘inquiries’ can be regarded properly as indicators of performance. The BBC also stated that Energywatch had told it that this fact was made clear to all business suppliers including Opus.

The BBC said it was entirely unnecessary for the programme makers to distinguish between domestic and business complaints. The BBC said the programme itself made it perfectly clear that it was concerned with business customers and their complaints. In support of this the BBC referred to a number of statements from the programme which referred to the customer’s featured in the programme as “*small business owners*” and discussion between the presenter and the Energywatch representative about how “*small businesses could protect themselves*”.

- ii) In relation to the complaint that the programme misrepresented the fact that Opus was compelled by law to rely on customer estimates for electricity consumption and had not increased its prices, the BBC said that Opus appeared to claim that a customer’s payment plans are only revised on the basis of historic records of consumption by that customer. The BBC said this appeared to contradict the statement made by Opus to the programme makers prior to broadcast that “If a customer’s bill goes up it is simply because they are using more electricity than they had anticipated”.

The BBC said the sales pitch used by sales agents of Opus is premised upon the claim that prospective customers can get their electricity cheaper from Opus. The BBC said this claim was based upon estimates of usage by the client. However, the BBC said that some of the complaints to *Watchdog* involved prospective customers being misled because they are not familiar with the relevant tariffs or rates. The BBC said Opus’ failure was that it did not police its contractual agreements with its sales agents, in so far as they concerned possible mis-selling, despite being aware of the high level of complaints being made against those sales agents acting on its behalf.

- c) In relation to the complaint that the programme unfairly attributed statements to Opus when it had told the programme maker’s that it wished to withdraw its statement for broadcast, the BBC said it failed to see how prefacing the points made by the complainant, with “*Opus say*”, could result in unfairness if those points were accurately reflected.

## 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 in 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.

This complaint was considered by Ofcom's Executive Fairness Group. In reaching a decision Ofcom considered a recording and transcript of the programme and the submissions of both parties.

- a) Ofcom first considered the complaint that the programme failed to distinguish between Opus and the independent company CED, and that viewers would have unfairly concluded that Opus carried out, directed, or was otherwise responsible for actions of CED.

In making its decision Ofcom took account of practice 7.9 of Ofcom's Broadcasting Code which states 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 an individual or organisation."*

Having viewed a recording of the programme, Ofcom considered that viewers were likely to have understood from the information provided, that there had been an intermediary involved in the selling of Opus electricity contracts. In particular, Ofcom noted that the following extracts from the programme's commentary explained that Opus had used separate sales agents:

Reporter: *"But we've heard of **one company** that is so desperate for your business **their sales agents** will say anything or pretend to be anyone to sign you up."*

Reporter: *"[All the individuals featured in the programme have] been **targeted by agents of Opus Energy Limited.**"*

Reporter: *"We sent a researcher undercover to join a sales team at **one of the companies used by Opus**, and he found people were being routinely misled."*

(Emphasis added by Ofcom)

In addition, Ofcom noted the following statement, which had been attributed to Opus:

Presenter: *"As for how people are signed up, that's done by sales agents who are independent of Opus Energy. Opus Energy say they won't work with any who misleads customers."*

In Ofcom's view, the above commentary would have further clarified that an intermediary had been involved in the sales process, and also made it clear to viewers that Opus did not condone mis-selling by independent sales agents.

Ofcom next considered whether it was incumbent, in the interest of fairness to Opus, for the programme to state CED's role in the mis-selling of Opus contracts.

Ofcom noted that CED was just one of many sales agents who worked on behalf of Opus. Ofcom also noted that the programme had not just featured the sales activities of CED: the three customers interviewed in the programme had been persuaded to switch to Opus by sales agents from different companies. Ofcom also noted from the information provided that the complaints to Energywatch about Opus had been in relation to a number of different sales agents, not only CED.

Taking these factors into account, it is Ofcom's view that the focus of the programme was not CED's mis-selling of Opus contracts. The focus was rather how a number of Opus customers believed they had been misled into switching to Opus for their electricity needs. In Ofcom's view, the name of one of the sales agents found to be misleading potential Opus customers (e.g. CED), would not have materially affected viewers' understanding that Opus was alleged to have profited from the mis-selling of their electricity contracts by its sales agents.

In these circumstances, Ofcom found the programme makers' decision not to refer to CED when reporting the dissatisfaction of a number of Opus customers did not result in unfairness to Opus. In Ofcom's view, the absence of CED's name did not leave viewers' with an unfairly negative impression of Opus or materially affect viewers' understanding of the allegations made against Opus.

Accordingly Ofcom has not upheld this part of Opus' complaint.

- b) Ofcom next considered the complaint that the programme presented material facts in an inadequate or misleading manner which caused unfairness to Opus. The two elements of this complaint have been set out below:
  - i) Ofcom first considered Opus' complaint that the statistic relating to the proportion of complaints received by Energywatch about Opus, was incorrect and unfairly suggested that Energywatch had received a "magnitude of complaints".

In reaching its decision in relation to this complaint, Ofcom took account of Practice 7.9 which relates to the proper consideration of material facts (as detailed above).

Ofcom noted that the complaint related to the following exchange between the programme presenter and a representative from Energywatch, Mr Paul Savage:

Presenter: *"Just before we leave you, 30-40% of your current complaints at the moment coming into Energywatch are about Opus Energy, that's true isn't it?"*

Mr Savage: *“Related to mis-selling, yes. They, they relate to Opus energy, yeah.”*

In determining whether unfairness resulted from this exchange, Ofcom had regard to Opus’ comments in both its complaint and its second round submission that: the Energywatch statistic had been calculated using both ‘complaints’ and ‘inquiries’ about Opus; and, that the programme had failed to make it clear that the statistic only related to the business sector (i.e. did not include the domestic sector).

Ofcom considered each of these elements of the complaint, below:

#### Inclusion of ‘inquiries’

As regards the complaint that the statistic included ‘inquiries’ Ofcom noted that the BBC had explained in its first statement to Ofcom, that:

*“**Energywatch does not include simple requests for information in these figures**, so that both the ‘complaints’ and ‘inquiries’ recorded can, in Energywatch’s view, properly be regarded as indicators of performance. [Therefore] the inquiries included in these figures would, in normal usage, be called complaints. This Energywatch has told us, has been made clear to all business suppliers including Opus”.*

[Emphasis added by Ofcom]

From this information, it was clear to Ofcom that the statistic given in the programme did not include those ‘inquiries’ which were “simple requests for information” as suggested by Opus. Furthermore, Ofcom considered that Energywatch was best placed to determine which of its own ‘inquiries’ should be included into the statistic that had been provided in the programme. On the information before, it is Ofcom’s view that it was not presented with any evidence to show that Energywatch’s statistical analysis when calculating the figure of “30-40%” was incorrect.

In the circumstances, Ofcom found no unfairness to Opus in this respect.

#### Business sector

Ofcom next turned to Opus’ statement that the programme did not make it clear to viewers that the Energywatch statistic of “30-40%” was a percentage of the business sector only.

In relation to this complaint, Ofcom noted that the programme included a number of statements about the impact that the tactics of sales agents of Opus were having on “small businesses”.

Reporter: *“Running a **small business** can be tough, but you want to succeed. So if someone offers you a good deal on electricity you’re going to think seriously about it. It’s what any switched on **business** would do.”*

Reporter: *“If these had been **domestic customers** then, by law, they’d have a 7 day cooling off period to cancel their contract. **Businesses don’t have that protection**, so even*

*if you think you were misled into signing up, there is no pulling the plug on Opus Energy.”*

Paul Savage (Energywatch):

*“It’s really shocking to see that evidence of how cynical the sales pitches are and how devastating the impact of that activity can be on **small businesses**.”*

Presenter:

*“This kind of story has become **less prevalent with domestic customers, which are increasingly protected by the regulators**, thank goodness, but they’re popping up more and more with **small business**. How can these **small businesses** protect themselves?”*

Paul Savage (Energywatch):

*“The most important message we want to get out is that the choice of energy supplier is yours as a **business consumer**...”*

(Emphasis added by Ofcom)

Taking these comments into account, it is Ofcom’s view that the programme makers took reasonable care to ensure that material facts relating to which sector Opus operated within (i.e. the business sector), were represented in the programme. In Ofcom’s opinion, the programme indicated that its allegations were in relation to small businesses (such as the small businesses featured in the programme) and was not related to the domestic market.

In considering this complaint, Ofcom noted Opus’ statement that if it had been given an appropriate opportunity to respond to the Energywatch statistic, it would have been able to point out that the electricity industry is regulated by Ofgem; that Ofgem had advised Opus in a letter dated 24 November 2006 that “mis-selling in the non-domestic market is not at a level that warrants direct regulation”; and that Energywatch, as a body representing consumer interests, had its own viewpoint which it promoted.

In considering this part of Opus’ complaint Ofcom took account of Practice 7.11 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 noted that on 18 October 2006, the programme makers wrote to Opus and asked what steps it had taken in light of the fact that Energywatch had:

*“...received a significant number of complaints about Opus Energy from customers who felt they were misled into agreeing a verbal contract. As a result, they have contacted your company on behalf of numerous customers”.*

In Ofcom’s view the information provided by the programme makers (above) was sufficient to enable Opus to respond to the point that the programme makers were aware of significant complaints to Energywatch about Opus, and

that the programme makers were making inquiries to find out what steps Opus had taken in light its customers' concerns.

Ofcom also took the view that based on the information provided by the programme makers on 18 October 2006, Opus would have been capable of making the points in relation to Ofgem's responsibilities and Opus' viewpoint; Ofcom was not persuaded that Opus had been prevented from making these points because the programme makers had not provided Opus with the precise Energywatch statistic. Furthermore, in relation to the statement by Ofgem to Opus, that direct regulation was not warranted, Ofcom noted that this point could not have been made prior to broadcast, as Ofgem's letter was dated 24 November 2006 (one month after the programme had been broadcast).

In the circumstances, Ofcom considered that Opus had been provided with an appropriate opportunity to respond to this part of the programme and no unfairness resulted to Opus in the programme as broadcast.

Therefore in relation to Head (b)(i) Ofcom found that the inclusion of the Energywatch statistic about the proportion of complaints it had received about Opus, did not result in unfairness to the complainant.

Accordingly Ofcom had not upheld this part of Opus' complaint of unfair treatment.

- ii) Ofcom next considered Opus' complaint that the programme did not present the fact that it was compelled by law to rely on customer estimates for electricity consumption and had not increased its prices.

In reaching its decision Ofcom took account of Practice 7.9 which relates to the proper consideration of material facts (detailed above).

Ofcom first sought to decide whether, in the interest of fairness, the programme makers had a responsibility to include in the programme, information in relation to whether Opus had increased its prices or the law concerning customer estimates. Ofcom considered this question in light of: the allegations made against Opus in the programme as broadcast; and the fact that Opus had told the programme maker's that it wished to withdraw consent for the programme makers to use its statement for broadcast in the programme.

Ofcom noted that the programme had alleged that business owners, who had switched to Opus, found that their bills were much more expensive than the estimated cost quoted to them, by a sales agent working on behalf of Opus; and after becoming aware of the true cost of switching electricity suppliers, the customers found it very difficult or expensive to cancel their contract with Opus.

Presenter: *"Running a small business can be tough, but you want to succeed. So if someone offers you a good deal on electricity you're going to think seriously about it. It's what any switched on business would do. But we've heard of one company that is so desperate for your business their sales agents will say anything or pretend to be anyone to sign you up..."*

- Presenter: *“But after the first month, [business owner 1]’s bills were nothing like £254 plus VAT, they’d jumped to a total of over £1200.”*
- Business owner 1: *“When we got the bill we thought that there’d been a mistake and after we spoke to Opus Energy and they said ‘no, that’s what the new bill was’, we just felt like we’d been hoodwinked...”*
- Presenter: *“And for just seven months electricity [business owner 2] ended up with a whopping bill of £10,000.”*
- Business owner 2: *“I really hated having to write the cheque. But I felt it was the only, I felt pressurised into doing it...”*
- Business owner 3: *“If I want to get out of this contract, I would now have to pay 10% of the remainder of the three year contract.*
- Business owner 2: *“The attitude [of Opus] seemed to be that ‘we have got you and you’re not getting rid of your contract’. That seemed to be the parting line, so to speak.”*

According to two of the customers featured in the programme, the quote provided by the Opus sales agent (at the time of switching) had not been based on any usage figures provided by them, the customers. And the third customer featured in the programme had provided her own usage figures based on her bills from her previous provider.

In the context of these allegations, Ofcom noted that the statement by Opus, that it must rely on the prospective customers’ own estimates and that its prices had not increased, did not address the programme’s allegations (i.e. that sales agents of Opus led prospective customers to believe they would save money by switching energy suppliers, only to find that their bills were not cheaper than before; and, Opus appeared to benefit from the misleading actions of the sales agents despite it being aware of its customer’s concerns). In the circumstances, Ofcom considered that the information provided by Opus would not have significantly affecting viewer’s understanding of Opus or the allegations which were made against the company and therefore did not amount to material facts. Accordingly Ofcom concluded that the omission of this information from the programme as broadcast did not result in unfairness to Opus.

Ofcom has not upheld this part of Opus’ complaint.

- c) Ofcom next considered the complaint that the programme makers unfairly attributed statements directly to Opus when the company had told the programme makers that it wished to withdraw its statement for broadcast. Opus said that the programme could have reflected its statement in the programme

by other means. Ofcom also considered Opus' complaint that the addition of "Opus say" to their statement undermined the veracity of the information provided by it.

Ofcom noted that on 23 October 2006 Opus wrote to the programme makers with its response to the programme. According to Opus its response consisted of: a general response to the allegations; replies to the programme makers' specific questions; and a statement for broadcast.

The statement for broadcast read as follows:

*"Clearly in the three cases you have brought to our attention, we have not acted swiftly enough to resolve matters. Our business fixes the cost per unit of energy. We are proud of the fact that we have saved our customers over £20 million by fixing their energy prices. We have never increased this cost per unit during a contract so if a customer's bill goes up it is simply because they are using more electricity than they had anticipated. We use over 100 brokers, who are independent businesses representing a number of energy suppliers. Whilst we are not aware of their training processes, we will not work with brokers who mislead customers. We would welcome a requirement by Energwatch for brokers to record all of their sales calls. If applied across the industry, this would stamp out the small number of brokers who may be tempted to bend the rules. We like all other energy suppliers, do not want customers to be misled in any way. Similarly we would welcome the free exchange of energy consumption information across the industry before registering a customer. At present our plans have been based on the customers' estimate of his or her use simply because incumbent suppliers cannot supply details for data protection reasons. A free exchange would be in the customer's best interests as they could be confident that the contract reflects their actual energy use."*

On 24 October 2006 (the day of broadcast) Opus wrote to the programme makers and told them that it intended to withdraw its consent for the use of its statement for broadcast.

In an email sent at 10:59 am it stated:

*"[Opus] has provided a statement which it wishes to be broadcast in full. It sought your agreement to its unedited broadcast and provided a copy of the statement for your consideration. If you are not willing to broadcast its statement unedited, our client may withdraw its statement and reserves it right to do so..."*

In an email sent on after 11:37am it stated:

*"Further to our first letter of today...our client has withdrawn its permission for you to include a statement attributed to it and purporting to be issued on its behalf in your programme...we note your acknowledgement of your duty to present our client's position fairly and trust you will be mindful of all the material facts."*

In circumstances where a contributor attempts to withdraw consent for the use of their contribution the broadcaster must make decisions about how to achieve fairness in the programme. If the broadcaster decides to allow the individual or

organisation to withdraw its contribution, Ofcom's guidance suggests that in circumstances where allegations have been made, the programme should explain the absence of the contribution and reflect any material facts in relation to the position of the individual or organisation, if it would be unfair not to do so. If, on the other hand, the broadcaster decides to refuse the individual or organisation's request to withdraw their contribution (thereby relying on the original consent of the individual or organisation who provided its contribution to the broadcaster for use in the first place) then the broadcaster must ensure that taking this decision to broadcast some or all of the contribution does not result in unfairness.

In this case, Ofcom noted that after receiving notice from Opus that it wished to withdraw its statement for broadcast the programme makers took the decision to include the following parts of Opus' statement for broadcast:

Reporter: *"...The other cases aren't resolved, and [Opus] agrees they haven't acted swiftly enough to sort them. Opus Energy say their unit prices are fixed and they've never increased them during a contract. If bills go up, they say it's because customers have used more electricity than anticipated. As for how people are signed up, that's done by sales agents who are independent of Opus Energy. Opus Energy say they won't work with any who mislead customers."*

Ofcom first assessed whether the inclusion of extracts of Opus' statement, in circumstances where Opus had given notice of its wish to withdraw consent for its use, resulted in unfairness to Opus.

Ofcom noted that Opus had told the programme makers that it intended to withdraw its contribution because the programme makers would not agree to broadcast its statement in full. Ofcom considered the relevant correspondence between the parties and noted that the programme makers had informed Opus prior to broadcast that it had no intention of ceding editorial control in relation to the presentation of Opus' statement for broadcast, and was aware of its responsibility to present the company's response to the allegations in a fair manner. Ofcom also noted that no guarantee had ever been given to Opus that its statement for broadcast would be included in full.

Ofcom also noted that the nature and likely content of the programme (as described to Opus) had not changed between the time of Opus providing its statement for broadcast, and it informing the programme makers of its intention to withdraw the statement. Opus had remained the subject of the programme's investigation throughout this period.

Given the above circumstances Ofcom found that the programme makers' decision not to agree to the withdrawal of the statement (as evidenced by parts of Opus' statement for broadcast appearing in the programme) did not in itself result in unfairness to Opus. In Ofcom's view, the nature and likely content of the programme had not changed in such a way as to alter the basis upon which Opus had originally provided the statement; and, the reasons cited by Opus for wishing to withdraw the statement for broadcast were not of such a nature as to make the programme makers' refusal unfair.

Ofcom next considered whether the presentation of particular extracts from Opus' statement for broadcast resulted in unfairness to the company. Ofcom

compared Opus' full statement for broadcast with the edited version that appeared in the programme. Ofcom also took account of the presenter's use of "*Opus say*" when referring to information provided by Opus.

In Ofcom's opinion, the edited version of Opus' statement for broadcast reflected those parts which were most relevant to the programme's allegations. Ofcom considered that those extracts which had been used in the programme had been presented in a way which reflected their original meaning (as provided by Opus). In Ofcom's view, the editing of the original statement did not remove any information that was material to the allegations being made against Opus in the programme as broadcast (also see Head (b)(ii)).

As regards the use of the phrase "*Opus say*", in Ofcom's opinion, viewers would have simply understood from this that the presenter was relaying information that had been provided by Opus. Ofcom considered that such an impression was fair. Ofcom considered that the use of "*Opus say*" would not have left viewers with a negative impression of the company or in any other way result in unfairness to it.

Taking the above factors into account Ofcom found that the editing of Opus' statement for broadcast and the programme maker's decision to attribute the statement to Opus, did not result in unfairness to the complainant.

Ofcom had not upheld this part of Opus' complaint.

**Accordingly Ofcom has not upheld Opus' complaint of unfair treatment in the programme as broadcast.**

## **Complaint by Ribble Valley Borough Council**

*Various News Reports, BBC1 (North West), 21 & 22 December 2006*

*Various News Reports, BBC Radio Lancashire, 22 December 2006*

**Summary:** Ofcom has not upheld this complaint of unfair treatment by the Ribble Valley Borough Council.

On 21 and 22 December 2006, the BBC broadcast news reports on BBC1 North West and BBC Radio Lancashire, about a decision by the Ribble Valley Borough Council (“the Council”) to grant permission to allow plans for a new mosque to go ahead. The decision itself was taken by a Committee of the Council called the Planning and Development Committee (“the Committee”).

The Council complained that it had been treated unfairly in that: its Committee had not been given an opportunity to give its view prior to making its planning decision; the programmes incorrectly reported the number of planning applications that had been received for a mosque in the last 30 years; the reports gave a misleading impression about the Local Government Ombudsman’s finding into the handling of a different application for a mosque in Clitheroe; and, the reports unfairly edited the Committee chairman’s opening remarks, made during the Committee’s planning meeting.

In summary, Ofcom found as follows:

- Ofcom found it was not incumbent on the programme makers to offer the Committee (or the Council) an opportunity to give its view, prior to the announcement of its decision, and the programme maker’s decision not to seek the Committee (or the Council’s) views therefore did not result in unfairness to the Committee or the Council.
- Ofcom found that it was not unfair for the reports to state that there had been seven applications or attempts to create a mosque in Clitheroe, as this figure was supported by the information provided to Ofcom. In relation to a single news broadcast which had referred to “eight planning applications”, Ofcom found the broadcast did not result in unfairness to the Council as during the same broadcast, the chairman of the Committee was able to respond to the incorrect statement and provide clarification. Ofcom found no unfairness to the Committee or the Council.
- Ofcom found it was not unfair for the programme makers to report on the Local Ombudsman’s findings as it was timely and relevant to the issues surrounding the Clitheroe Muslim community’s most recent application for a mosque. Ofcom found no unfairness to the Committee or the Council in this respect.
- In Ofcom’s view the reports accurately represented the essence of the Committee Chairman Cllr Sherras’ remarks and indicated that the Committee had had to deal with lobbying from both sides which had included elements of racism and abuse. Ofcom found no unfairness to the Committee or the Council in this respect.

### **Introduction**

On 21 December 2006 the Planning and Development Committee (“the Committee”) of the Ribble Valley Borough Council (“the Council”) granted planning permission to allow a former Methodist chapel and factory, to be converted into a mosque. The

planning permission had been sought by the Medina Islamic Education Centre (“the MIEC”). BBC1 (North West) broadcast news reports throughout the day about the Committee’s decision, both before and directly after the decision was announced.

On 22 December 2006, the day after the decision, both BBC1 (North West) and BBC Radio Lancashire broadcast news reports about the Committee’s decision.

The reports by both BBC1 (North West) and BBC Radio Lancashire both included references to the following:

- The successful MIEC application had been the eighth attempt for a mosque in the last 30 years;
- The Committee’s chairman had commented that some of the lobbying in the lead up to its decision had been racist and abusive; and,
- The Council had been criticised by the Local Government Ombudsman over the handling of a previous application for a mosque.

The Council complained to Ofcom that it, through its Committee, had been treated unfairly in the programme as broadcast.

### **The Complaint**

In summary, the Council complained that it had been treated unfairly in the programme as broadcast in that:

- a) The Committee was not given an opportunity to give its view prior to its 21 December 2006 Committee planning meeting (during which the planning decision was announced), despite there being extensive coverage of the impending decision on BBC1 (North West);
- b) It was reported that the successful planning application had been the eighth one to be made over a 30 year period. The Council said this statement was inaccurate and gave a misleading impression about the handling of the applications;
- c) The reports gave a misleading impression about the Local Government Ombudsman’s finding into the handling of an unrelated application for a mosque. The Council said the complaint that was considered by the Ombudsman related to a decision by another Council Committee called the Policy and Finance Committee. Further the chairman of the Committee had explained to the BBC (during an interview given at its planning meeting) that previous Committee decisions had been taken on planning grounds, and had subsequently been upheld as correct by an Independent Planning Inspector. The Council said these comments were not included in the reports; and
- d) The BBC unfairly edited the Committee chairman, Cllr Sherras’ opening remarks, made during the Committee’s planning meeting, to distort the point that the chairman was making. The Committee’s chairman suspected that this was done deliberately to emphasise the ‘race relations’ angle. The Council complained that this had the effect of showing the Committee in a bad light and possibly as racist.

The BBC provided a written statement in response to the complaint. In summary the BBC responded as follows:

- a) In relation to the Council's complaint that it had not been given an opportunity to give its view prior to its planning meeting, the BBC said its coverage of the Council's decision was accurate and balanced. It maintained that there was nothing in the reports which called for a response from the Council, and therefore there was no reason to ask the Council to contribute. The coverage explained the facts of the application, the history of the mosque campaign and the controversy surrounding it. The BBC said none of the reports suggested that the Council had acted improperly in reaching previous planning decisions and the Council's position had been clearly set out.
- b) The BBC said that it had been accurate for the reports to refer to "seven previous applications" (or words to that effect) as there had been a number of separate applications to the Council for a mosque or Muslim place of worship in Clitheroe over the past thirty years. The BBC said it based its reporting on the number of applications that had been submitted by the MIEC (and not just those submitted to the Committee, which the BBC said the complainant appeared to have believed). The BBC listed these seven applications for Ofcom and noted that four of the seven applications were not planning applications (rather they were applications to the Council's Policy and Finance Committee to purchase land which would be used for the purpose of building a mosque). The BBC said that the reports deliberately referred to applications in general rather than specifically describing them as planning applications.

In response to the complaint that the reports unfairly referred to the eight applications as being 'planning applications' the BBC acknowledged that on one occasion on Radio Lancashire the presenter incorrectly referred to "*eight planning applications*". The BBC said this was an isolated error in the context of a live phone-in show. The BBC did not believe that this single inaccuracy was likely to have had a material effect on the understanding of listeners and noted that shortly after the presenter's mistake, the chairman of the Committee appeared on the programme and was able to explain the Council's view.

The BBC said that it did not believe there was any evidence to support the complainant's view that the BBC's reporting gave a misleading impression about the reasons why it rejected previous applications.

- c) In response to the complaint that the news reports gave a misleading impression about the Local Government Ombudsman's decision, the BBC said that a Clitheroe resident had complained to the Local Government Ombudsman after the Council's Policy and Finance Committee had blocked the sale of a piece of land off Kirkmoor Road on which the MIEC wanted to build a mosque. The Ombudsman's finding in November 2006 identified a number of serious failings by the Council, through its Policy and Finance Committee. The BBC said the complainant to the Ombudsman had received compensation because it was concluded that there had been "reasonable grounds to suspect that the decision was unduly influenced by political sensitivity to racially prejudiced or motivated opposition to the proposal to develop a mosque". The BBC said its decision to report this public criticism of the Council's handling of an application for a mosque was entirely justified in the context of the story. The BBC said that this was not an "unrelated application" (as complained of by the Council) but the most recent attempt by the MIEC to find a site for a mosque in Clitheroe.

The BBC maintained that no report on radio or on television made any suggestion that previous planning decisions by the Committee had been taken on anything other than planning grounds.

The BBC said the programme maker's decision not to include the Committee chairman's comments (which had been given during an interview at its planning meeting), fell well within the parameters of the Ofcom Broadcasting Code, and did not result in unfairness to the Council. In this context, the BBC said that once the planning application had been approved, the primary story was the reaction from supporters and opponents, the ordinary members of the public most affected by the Committee's decision.

- d) In response to the complaint that Committee chairman's opening remarks had been unfairly edited, the BBC provided a transcript of the Committee chairman's unedited opening remarks. The BBC said that the recording of the opening remarks had been used once on Radio Lancashire on 22 December 2006. Elsewhere, the opening remarks were carried as reported speech or had been accurately paraphrased. The BBC said the reporting of the chairman's remarks had been full and fair and no editing took place which might have distorted the chairman's meaning. The BBC said there was a race relation angle to the story but it had been clearly explained using the chairman's own words.

#### **The complainant's comments in response to the BBC's statement**

The Council provided written comments in response to the BBC's statement. In summary the Council responded as follows:

- a) In relation to its complaint that the Committee had not been given an opportunity to give its view prior to the planning meeting the Council said the BBC reports omitted inconvenient historical facts. In particular the reports failed to explain that virtually all of the past applications to the Committee were repeats of the same application for the same property at 26 Holden Street. The Council said that by quoting just the number of applications, listeners and viewers were given the impression that they were different sites or 'changed' applications. Further the programme did not include the fact that the Committee's planning decisions in relation to the 26 Holden St site had been upheld by an Independent Planning Inspector.
- b) As regards the programme's reference to eight applications the Council said the main issue of unfairness was not related to the actual number of applications – planning or otherwise – but the fact that “almost all” of the applications had been virtually identical ones for the 26 Holden Street site. Furthermore, the programme did not explain that the Committee's decisions in respect of this property had been upheld by an Independent Planning Inspector. The Council maintained that the BBC's reporting of the story had been one-sided.
- c) In relation to its complaint that the news reports gave a misleading impression about the Local Government Ombudsman's decision, the Council said the BBC had incorrectly quoted the Ombudsman's report in its statement to Ofcom. The Council said the actual report said “The lack of clarity and transparency in the process caused injustice...until the members of the Committee were interviewed as part of this investigation there were reasonable grounds to suspect that the decision was unduly influenced by political sensitivity...”. The report also stated that “The deficiencies [in clarity and transparency] are not so

severe as to render the decision taken by the Committee unreasonable". The Council said that in other words the conclusion by the Ombudsman was that the Council's decision was not unduly influenced by political sensitivity.

The Council said that the Committee chairman's comments (given at the planning meeting) about how past planning decision had been made on planning grounds, should have at least been referred to in the BBC reports.

- d) No additional comments

### **The BBC's second statement in response to the complaint**

The BBC provided a second statement in response to the complaint.

As a general comment the BBC said it was unfair and misleading for the Council to accuse the BBC of distorting the facts in order to create a "racism story". The BBC said that there was a racial element to the story, whether the Council liked it or not. The racial aspect of the mosque proposal was evident from: the letters pages of the local newspapers; the Press Association report of the day; the Local Government Ombudsman investigation; and, even by the chairman of the Committee's opening remarks at the beginning of the planning meeting. The BBC said that it did not promote or sensationalise any racism but accurately reflected one aspect of a long running story.

In response to the Council's specific complaints, the BBC made the following comments:

- a) The BBC said the story of the mosque was essentially the battle for a place of worship for Clitheroe's Muslims. It was not a case of pro-mosque campaigners versus the Council.
- b) As regards the number of planning applications referred to in the reports, the BBC said it was surprised that the Council said the reports misled audiences because they did not make clear that some of the applications were for the same site. The BBC contended that this could only be misleading if there was a presumption on the part of the audience that different applications necessarily related to different sites. The BBC said the complainant had given no reasons for supposing that the audiences would infer that there were applications relating to four different sites rather than four applications referring to the same site.

The BBC said the reporting of the number of applications showed that the applicants had tried repeatedly to get a mosque in the town, which was an important element of the story. The BBC maintained that the reports never suggested that the Council had acted inappropriately or based its decisions on anything other than legitimate planning grounds.

- c) In BBC denied that it had misquoted the Ombudsman's report, as suggested by the complainant. The BBC referred to extracts from the Ombudsman's report in support of its position.

In response to the Council's belief that the reports were unfair because they did not state that two of the Committee's decisions, to reject previous applications, had been upheld by an Independent Planning Inspector, the BBC said it did not

believe that this was an omission which had any impact on the understanding of the audience.

- d) No additional comments.

## 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 in 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.

The Council's complaint was considered by Ofcom's Executive Fairness Group. In reaching its decision, the Group had regard for recordings and transcripts of all of the relevant news reports and both parties' written submissions (including supporting documents).

- a) Ofcom first considered the Council's complaint that it had been treated unfairly in that its Committee had not been given an opportunity to give its view prior to its 21 December 2006 Committee planning meeting (during which the planning decision was announced), despite there being extensive coverage of the impending decision on BBC1 (North West);

In reaching its decision Ofcom took account of Practice 7.9 of the Code 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. Ofcom also took account of Practice 7.11 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 listened to, and watched, recordings of all the news reports transmitted prior to the 21 December 2006 Committee Planning meeting. In Ofcom's view, the reports contained relevant background information relating to the ongoing efforts by the Muslim community in Clitheroe to try to find a place to worship. Ofcom considered that the views of both the campaigners and those opposed to the most recent application were reported in a fair way. Ofcom also noted that one report featured a detailed two-way discussion between a presenter and a reporter which stated that the Council had rejected any claims within the Clitheroe community that its decision to reject other applications for a mosque may have been racially motivated:

Reporter: *"There is a community of some three hundred strong in Clitheroe. They've been there for forty years and they've had seven applications to buy land, or convert premises or build their own mosque turned down by the Council. Some of the people in the community say that's racism, the Council say it's 'nothing of the sort', they've turned down all of the applications on legitimate grounds of planning or highway grounds."*

Ofcom noted that the reports had also highlighted the fact that the Council had been criticised by the Local Government Ombudsman for the way it had handled a previous application for the mosque. After taking account of the relevant information before it, Ofcom found that the programme's reported criticism of the Council had been substantiated by the findings of the Ombudsman's report (see finding (c) below).

Taking these factors into account, Ofcom considered that the BBC took reasonable care to satisfy itself that material facts had not been presented, disregarded or omitted in a way that is unfair to either the Council or the Committee.

Ofcom next considered that Council's specific complaint that the Committee had been entitled to respond to the news reports prior to the 21 December 2006 meeting. In considering this element of the complaint, Ofcom also looked at any possible unfairness which may have resulted to the Council not being offered an opportunity to respond to the programme prior to the 21 December 2006 meeting.

In relation to the Committee, it is Ofcom's view that the reports did not contain any allegations of wrongdoing against it, to which the Committee was entitled to respond. In reaching this consideration, Ofcom noted that prior to the planning meeting the Committee was only referred to directly on two occasions (all of the other reports used the more general term of "*Ribble Valley Borough Council*" when describing who would be making "*a decision*" or "*giving its seal of approval*" to the latest application for a mosque). When the Committee was referred to in the relevant reports, it was not in a pejorative way:

*"The Council Ombudsman has already rebuked the Council for its procedure in turning down an application, and tonight the Planning Committee will have the final say".*

And

*"But I've been speaking to one of the residents who'll actually be talking at the Planning Committee Meeting this evening and he's keen to stress that his concerns and the concerns of many residents are strictly about planning matters".*

As regards the Council, Ofcom noted that the only 'criticism' made in relation to it, had been in reference to the fact that the Council had been "rebuked" or "criticised" by a Local Government Ombudsman over the way it had dealt with an earlier application for a mosque in Clitheroe. As noted above (and in more detail at finding (c) below) Ofcom considered that these comments in the programmes had been substantiated by the findings of the Ombudsman's report and in Ofcom's view, were not warranting of an opportunity to respond from the Council.

In the circumstances, Ofcom considered that it was not incumbent on the programme makers to offer the Committee (or the Council) an opportunity to respond to the reports, as the reports did not contain significant allegations against them which warranted their response. Ofcom concluded that the programme makers decision not to ask for the Committee or the Council's views prior to its planning meeting on 21 December 2006, did not result in

unfairness to the Committee or the Council. Ofcom has not upheld this part of the Council's complaint.

- b) Ofcom next considered the Council's complaint that the BBC had incorrectly reported that the successful planning application had been the eighth one to be made over a 30 year period.

In reaching its decision Ofcom took account of Practice 7.9 of the Code 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.

Ofcom viewed and listened to the 27 BBC news reports relating to the mosque story, which had been broadcast on 21 and 22 December 2006 (11 of these reports were repeated broadcasts). These reports referred to the number of previous applications for a mosque in Clitheroe, in six different ways:

- 1) *[The Muslim community] have been [in Clitheroe] for forty years and they've had **seven** applications to buy land or convert premises or build their own Mosque turned down by the Council.*
- 2) *Clitheroe's Muslim community will find out tonight if after **several** attempts they'll get a mosque in the town.*
- 3) ***Seven** times there have been applications for a mosque here in Clitheroe, seven times those applications have been rejected. Will it be eighth time lucky?*
- 4) ***Seven** previous applications had been refused.*
- 5) *Its taken forty years and **umpte**n attempts but today Muslims in Clitheroe are celebrating the news that the town is to have its first mosque.*
- 6) *Clitheroe's Muslims have got a place to pray after thirty years and **eight planning** applications. Ribble Valley Council last night gave the go-ahead to convert an old factory and former chapel in Lowergate into a mosque.*

[Emphasis added by Ofcom]

Ofcom sought to determine whether these descriptions given above resulted in unfairness to the Council.

According to the information provided by both parties, since 1977 there have been up to ten applications to the Council for a site to be built, or redeveloped to accommodate a place of Islamic worship, education or religious instruction. These applications had been made to two different Council bodies: the Committee; and the Policy and Finance Committee. Ofcom noted that some of the applications were for the same address (26 Holden Street) and not all of these applications specifically stated that permission was being sought for the development of "a mosque". However, taking all these factors into consideration, it was clear to Ofcom, from the information provided, that there

had been a significant number of applications to create a place in Clitheroe which would primarily serve the religious needs of the Muslim community.

Ofcom noted that the news reports broadcast by the BBC had referred to seven of these applications (the one instance where a BBC report referred to “*eight planning applications*” will be dealt with separately below). The BBC explained in its statements to Ofcom that these particular seven applications had been selected because they had been lodged by the MIEC.

Ofcom noted that when referring to the seven previous applications, the reports did not specify which Council body the applications had been lodged with, but rather referred to the applications as being made to the Council generally or as attempts to establish a mosque in the town.

Taking all these factors into consideration, in Ofcom’s view, it was not unfair to the Council (either directly or indirectly via its Committee) for the news reports to state that there had been seven previous applications for a mosque in Clitheroe. In Ofcom’s view, this figure was supported by the information before Ofcom about the number of applications which had been made to the Council since 1977. Furthermore Ofcom did not believe that this understanding about the efforts made by the Muslim community to find a place to receive religious instruction was materially affected by the fact that a number of the applications were for the same location. In the circumstances, Ofcom found no unfairness to the Council in relation to this part of the complaint.

Ofcom next turned to the one instance when a news report stated that:  
*“Clitheroe’s Muslims have got a place to pray after thirty years and eight **planning** applications. Ribble Valley Council last night gave the go-ahead to convert an old factory and former chapel in Lowergate into a mosque.”*  
[Emphasis added by Ofcom]

Ofcom noted that this statement was made by a presenter during a phone in radio programme the day after the Committee had made its planning decision to allow the development of a mosque to go ahead. Ofcom also noted that during the same programme, the Chairman of the Committee Cllr Sherras joined the discussion and was given an opportunity to comment:

Cllr Sherras: *“The one thing that I am a bit disturbed about is the number of references that I’ve heard on your programme to the number of applications that we allegedly have turned down. And I’d just like to clarify that.*”

Presenter: *“Feel free”.*

Cllr Sherras: *“Yes, it keeps getting quoted that there were eight previous applications, the eight being the one last night, that were turned down. But what I need to explain is that there have actually only been four previous applications and these were all for the same property in Holden Street in Clitheroe and two of the alleged applicants were actually appeals against the refusals.*”

Ofcom noted that Cllr Sherras’ comments above appeared to be based on his belief that the news reports had been specifically referring to the number of planning applications considered by his Committee (i.e. four). As outlined above, however, Ofcom found all but one of the reports had referred to the

number of applications made to the Council as a whole, planning or otherwise). Notwithstanding this, Ofcom was satisfied that Cllr Sherras' comments appropriately addressed the incorrect statement by the presenter in the programme that there had been "*eight planning applications*". Given that Cllr Sherras was able to respond to the incorrect statement, it is Ofcom's view that viewers were unlikely to have been left with an unfair impression of the Council (as might have resulted from any unfairness to its Committee) in the programme as broadcast.

In conclusion, Ofcom found that it was not unfair for the programme to state that there had been seven previous applications for a mosque in Clitheroe as the information before Ofcom supported that there had been at least this many applications to the Council for a place of Islamic worship, education or religious instruction since 1977. In relation to the one programme which stated that there had been "*eight **planning applications***". Ofcom found that although all eight were not planning applications, this statement did not result in unfairness to the Council or the Committee as the Committee chairman was able to respond during the programme and clarify his Committee's position. Accordingly, Ofcom has found no unfairness to the Council in this respect.

- c) Ofcom next turned to the Council's complaint that the BBC reports gave a misleading impression about the Local Government Ombudsman's decision. Specifically that the reports did not make it clear that the Ombudsman decision had been in relation to a decision by the Policy and Finance Committee (i.e. not the Committee), and that the Committee's own planning decisions had been upheld as correct by an independent planning inspector.

In reaching its decision Ofcom took account of Practice 7.9 of the Code which relates to the proper consideration of facts (detailed above).

Ofcom first compared the finding of the Ombudsman's full report with the reported finding as they appeared in the programmes as broadcast.

Ofcom noted that the Ombudsman's full report was in response to a complaint by a member of the public who believed a decision by the Council's Policy and Finance Committee, not to sell him land for use as a mosque, was unreasonable.

The Ombudsman's report found that the decision taken by the Policy and Finance Committee was not "unreasonable". However, in making this decision the report also included what Ofcom considered to be, substantial criticisms of the Council:

**"As a result of the Council not adopting good practice in its asset management and of taking the decision on the basis of [a particular report], the decision making lacked clarity and transparency. The deficiencies are not so severe as to render the decision taken by the [Policy and Finance] Committee "unreasonable". Albeit by a process that did not accord with the principles of good administrative practice, the [Policy and Finance] Committee arrived at a decision that it was entitled to make... The lack of clarity and transparency in the process caused injustice to [the complainant] in that until the Members of the [Policy and Finance] Committee were interviewed as part of this investigation there were reasonable grounds to suspect that the decision was unduly**

**influenced by political sensitivity to racially prejudiced or motivated opposition to the proposal to develop a mosque...**

**I consider, therefore, that the way the Council dealt with the sale of the land was maladministration causing injustice to [the complainant] by giving him grounds to believe the Council had not dealt with him fairly.**

Recommendation: The Council should pay compensation of £250 to [the complainant] for his time and trouble in making the complaint. The Council should also ensure that its Asset Management Plan is up to date and reviewed regularly and that future decisions about the use of sale of assets are supported by the information before the decision-makers when they reach a decision”.

[Emphasis added by Ofcom]

In Ofcom’s view, the Ombudsman’s finding in relation to the above complaint was very relevant to the wider issues surrounding the decision by the Committee (on 21 December 2006) about whether or not to grant permission for a mosque in Clitheroe, in that: the Ombudsman’s report was directly related to the Muslim community’s efforts to find a place to worship; and although the report found the decision by the Policy and Finance not to be unreasonable, it nonetheless contained criticisms of the Council about the way they had dealt with the application. In the circumstances, Ofcom considered that it was reasonable for the programme makers to report the finding of the Local Ombudsman as at the time of the broadcast, it was a recent judgement which was relevant to the issues at hand.

In relation to whether or not the reporting of the Ombudsman’s findings resulted in unfairness to the Council, Ofcom noted that the news reports statements that the Council had been “criticised” or “rebuked” for “*the way it had dealt with a previous application*”/ “*the way it rejected a previous application*”/ “*its procedure in turning down an application*” for a Mosque, had been supported by the full report (as discussed above).

Ofcom also considered the Council’s complaint that the reports about the Local Ombudsman’s finding had not made it clear that the Ombudsman decision had been in relation to a decision by the Policy and Finance Committee (i.e. not the Committee) and that the Committee’s own planning decisions had been upheld as correct by an independent planning inspector. Having listened to and watched all of the reports, Ofcom considered that it was unlikely that viewers and listeners would have taken from the reports that the Committee had been the subject of the Ombudsman’s criticisms. This is because when the reports referred to the Ombudsman’s findings it was clearly stated that it was the Council who had been the subject of the Ombudsman’s criticisms, not the Committee.

Taking these factors into account, Ofcom considered that it was highly unlikely that listeners would have attributed the criticism of the Ombudsman’s report to the Committee itself. Rather, viewers and listeners were likely to believe that it was the Council who had been the subject of the criticism, which in Ofcom’s view was not unfair as the decisions made by the Policy and Finance Committee were made for and on behalf of the Council. Given this view, Ofcom considered (in relation to the final element of this complaint) there was therefore no requirement on the programme makers to provide information in relation to

any conclusions made by independent planning inspectors about the Committee's past planning decisions.

In conclusion, Ofcom found to was not unfair for the programme makers to report the Local Ombudsman's finding as it was timely and relevant to the issues surrounding the Muslim community's most recent application for a mosque in Clitheroe. In addition, Ofcom found the programmes as broadcast reported the findings of the Ombudsman in a way which did not result in unfairness to the Committee or the Council. In all the circumstances Ofcom found no unfairness to the complainant in this respect.

- d) Ofcom lastly considered the complaint that the BBC had unfairly edited the Committee chairman's opening remarks, made during the Committee's Planning meeting, to distort the point that the chairman was making.

In reaching its decision Ofcom took account of Practice 7.6 which states that when a programme is edited, contributions should be represented fairly.

Ofcom considered a transcript of the opening remarks of the Committee's chairman, Cllr Sherras, which stated:

*"... The Code of Practice for councillors in planning matters states that committee members should make oral declarations of substantial or oppressive lobbying on a particular application, and I'd like to declare that this has arisen in this case and has come both from objectors to and supporters of this application."*

*"It has ranged from objectors' letters at one extreme being abusive and frankly racist through all grades of opinion, to supporter at the other extreme attempting to discredit the Council by feeding the media with negative spin regarding previous Council decisions, and questioning the integrity of committee members, to the extent of accusing them of institutional racism."*

*"And as a result of this, members are in a Catch 22 situation; they can approve the application and be accused of ignoring the wishes of the majority of the public, or they can refuse the application and be branded a racist. So there's no pressure there then."*

Ofcom also reviewed each of the news reports and paid particular attention to any reference made about the chairman's opening remarks. In Ofcom's view the reports accurately represented the essence of Cllr Sherras' remarks and indicated that the Committee had had to deal with lobbying from both those in favour, and those against the establishing of a mosque. And that lobbying from both sides had included elements of racism and abuse. In the circumstances, Ofcom found the reporting of the Committee chairman's opening remarks did not result in unfairness to the Committee or the Council.

**Accordingly, Ofcom has not upheld this complaint of unfair treatment by the Ribble Valley Borough Council.**

## **Complaint by Traditional Norfolk Poultry Limited**

*Tonight: Fowl Play, ITV1, 11 June 2007*

**Summary:** Ofcom has not upheld this complaint of unfair treatment by Traditional Norfolk Poultry Limited.

This programme looked at the animal welfare standards at two farm-reared organic chicken businesses. One of the farms featured was licensed to rear organic chickens by Traditional Norfolk Poultry Limited ("TNP") who supply organic chickens to supermarkets and other retailers. The programme included secretly filmed footage of the inside of one of TNP's chicken-rearing facilities recorded by Hillside Animal Sanctuary ("the HAS"), a campaign organisation for animal welfare, and it alleged that the chickens were kept in poor conditions.

TNP complained that it was treated unfairly in the programme as broadcast in that it named TNP and unfairly made allegations about it and that although it was given an opportunity to comment on the allegations made in the programme, it did so without seeing the footage beforehand. This resulted in TNP having to comment "blindly", which was unfair.

In summary, Ofcom was satisfied that: it was reasonable for the programme to identify TNP as the company operating the farm and that the programme makers had taken reasonable care in presenting the material used in the programme fairly.

Ofcom also was satisfied that the programme makers had acted fairly towards TNP in giving it an opportunity to respond to the allegations made in the programme and by including extracts of its statement in it. The fact that TNP was not given the opportunity to view the footage before the broadcast of the programme did not result in unfairness to it.

### **Introduction**

On 11 June 2007, ITV1 broadcast an edition of the current affairs programme *Tonight* (formerly called *Tonight with Trevor McDonald*), which was entitled *Fowl Play*. This edition of the programme examined how animal welfare standards differed between factory-reared organic chickens and farm-reared organic chickens and the potential health implications associated with the way the birds are reared.

The programme looked at the animal welfare standards at two farm-reared organic chicken businesses. One of the farms featured was licensed to rear organic chickens by Traditional Norfolk Poultry Limited ("TNP") who supply organic chickens to supermarkets and other retailers. The programme included secretly filmed footage of the inside of one of TNP's chicken-rearing facilities recorded by Hillside Animal Sanctuary ("the HAS"), a campaign organisation for animal welfare, and it alleged that the chickens were kept in poor conditions.

Before the programme was broadcast, the programme makers informed TNP that the programme was being made and invited the company to respond to the allegations that would be made in it. The programme's reporter, Jonathan Maitland, read out extracts from TNP's response in the broadcast in answer to the allegations made in the programme.

TNP complained to Ofcom that it was treated unfairly in the programme as broadcast.

## The Complaint

### TNP's case

In summary, TNP complained that it was treated unfairly in the programme in that:

- a) The programme named TNP and unfairly made allegations about it. In particular, TNP said that:
  - i) The allegation made in the programme that rat droppings were found in one of TNP's chicken sheds was not true and unfairly included. The footage of the rat droppings used in the programme, and allegedly taken by "animal extremists" who had trespassed on TNP's property to film the chicken sheds, was not filmed on TNP property. The "rat droppings" were, in fact, sunflower husks.
  - ii) The allegation made in the programme that TNP did not allow its chickens to go outside their sheds was false. To illustrate this point, the programme unfairly showed footage of mobile bird houses which were, at the time of filming, empty.
- b) Although TNP were given an opportunity to comment on the allegations made in the programme, it did so without seeing the footage beforehand. This resulted in TNP having to comment "blindly", which was unfair.

### ITV's case

In summary, and in response to TNP's complaint, ITV said that:

- a) The unedited footage taken by the HAS, along with two letters from the HAS (both dated 26 June 2007), confirmed the dates when the footage was recorded. From the unedited footage, ITV said that the camera operator, Mr R Holland, who recorded the footage for the HAS, could be seen periodically focusing on signage at the farm to confirm its location and on a Global Positioning System ("GPS") handset which confirmed the date, time and position of the filming. ITV said it was satisfied that all the footage included in the programme was recorded at the farm.
  - i) ITV said that an independent veterinary expert, Mr Bill Swan, reviewed the unedited footage. Both he and Mr Holland (who has lengthy experience in agriculture, gamekeeping and chicken husbandry), were satisfied that the material filmed at the farm was, in fact, rat droppings and not sunflower husks contained in the poultry bedding as suggested by TNP in its response to the allegations. ITV said that this was supported by the evidence of predation on some chicks by vermin elsewhere in the footage. ITV said that the programme reflected TNP's position on the rat droppings issue fairly, but given the evidence supporting the allegation, ITV said that it was not unfair for the programme to suggest that rat droppings were found in one of TNP's chicken sheds.
  - ii) ITV said that the programme did not allege that TNP did not allow its chickens to go outside their sheds. Rather, the programme stated that the HAS had visited the farm several times over a period of months and had not seen any chickens outside. ITV said that this was supported by a

statement made by Mr Holland, the camera operator; the footage recorded just after dawn on 15 February 2007; and, the testimony of the programme's producer who also visited the farm and did not see any chickens.

ITV said that, in an email dated 16 May 2007 to TNP, the programme's producer had referred specifically to the fact that the HAS had observed and filmed the "*lack of free ranging by the birds*". ITV said that TNP did not seek to notify the programme makers that the sheds had been empty on this date and only raised this point in their complaint to Ofcom.

ITV said that, given that the HAS had filmed chickens in the sheds both before and after 15 February 2007 and that they were clearly not ranging outside at the time of filming, it begged the question where else the chickens could have been if they were not, in fact, in the sheds on 15 February 2007. The programme referred fairly to TNP's stated position that its chickens did range during the day and that the sheds were always open. Given the information in the programme makers' possession, and having put TNP on notice of the allegations about lack of ranging, ITV argued that the inclusion in the programme of this footage of the exterior of the sheds was not unfair to TNP.

- b) ITV said that it was an established television practice that broadcasters were not obliged to provide copies of evidential footage to the subjects of programmes when inviting them to respond prior to broadcast. ITV maintained that TNP were given a very full description of what the footage was alleged to disclose and the conclusions to be drawn from it. ITV said that the programme reflected fairly TNP's response to the allegations and that the responses of its organic certifier and one of its significant customers. ITV said that it rejected the suggestion that the non disclosure of the actual footage itself prior to the broadcast of the programme led to any unfairness in it.

## 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 in 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.

This complaint was considered by Ofcom's Executive Fairness Group. In reaching a decision it considered a recording and transcript of the programme and the submissions from both parties.

Ofcom found the following:

- a) Ofcom first considered TNP's complaint that the programme named the company and unfairly made false allegations that rat droppings were found in its chicken sheds and that it did not allow its chickens to roam outside their sheds.

In considering TNP's complaint, Ofcom took account of Practice 7.9 of Ofcom's Broadcasting Code ("the Code") which states 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 an individual or organisation. Ofcom also considered that it was open to programme makers and broadcasters to take a particular viewpoint when commenting on a particular subject. However, any such statements included in a programme should not be presented in a way that could lead to unfairness to others.

Ofcom considered whether or not it was reasonable for the programme makers to present the footage of the "rat droppings" included in the programme as being found in the chicken sheds belonged to TNP. In considering this element of the complaint, Ofcom watched the programme and the unedited footage taken by Mr Holland of the HAS. It noted that the unedited footage on a number of occasions focused on signs at the farm which confirmed the location of the filming and on a GPS handset which also confirmed not only the location but also the date and time the footage was taken. Ofcom also noted a letter (also dated 26 June 2007) from the founder and director of the HAS, Ms Wendy Valentine, in which she confirmed that Mr Holland had filmed at TNP's premise and the dates that he had done so. Given these factors, Ofcom was satisfied that, in the circumstances, it was reasonable for the programme to identify TNP as the company operating the farm.

- i) Ofcom considered whether or not it was unfair and untrue for the programme to allege that rat droppings were found in TNP's chicken sheds. Ofcom noted that Mr Holland, in a letter from the HAS dated 26 June 2007, stated that he had worked and handled poultry for nine years and had been a gamekeeper for 12 years and that he had knowledge of poultry and vermin attacks and was competent in identifying vermin from either their droppings or from the carcasses that they killed. Ofcom also noted that the unedited footage taken by Mr Holland was also shown to an independent veterinary expert, Mr Bill Swann. Mr Swann was satisfied from what he was shown that the material filmed in the chicken sheds was rat droppings and that his opinion was supported by further evidence of presence of body parts in the vicinity. Given the experience of Mr Holland and the expert opinion of Mr Swann, Ofcom was satisfied that the programme makers took reasonable care to ascertain that the material that had been filmed in the chicken sheds was, in fact, rat droppings (rather than sunflower husks used as bedding as suggested by TNP in its complaint) and that this was presented fairly in the programme as broadcast.
- ii) Ofcom then considered whether or not the programme as broadcast unfairly and incorrectly stated that TNP did not allow its chickens to go outside their sheds. In considering this element of the complaint, Ofcom considered the relevant part of the programme's commentary which stated that:

*"Hillside Animal Sanctuary returned several times over a period of months but during that time saw no chickens outside".*

Ofcom noted that Mr Holland stated in his letter of 26 June 2007 that he had filmed at TNP's premises on a number of occasions during January, February (including 15 February, the date that the footage included in the

programme was taken), March and April 2007 and that he did not see any chickens outside the sheds. It also noted that the programme's producer had also visited the farm on 10 April 2007 and had also noticed that there were no chickens ranging outside the sheds.

Ofcom also took note of TNP's assertion that at the time of filming the footage that appeared in the programme, namely 15 February 2007, the chicken sheds had been, in fact, empty. However, Ofcom considered the emails sent on 16 and 25 May 2007 from the programme's producer to TNP which specifically referred to the lack of free ranging by the chickens as observed and filmed by the HAS on a number of occasions. Ofcom noted TNP's apparent lack of response in correcting the programme makers by informing them that the sheds were, in fact, empty on the relevant day of filming.

Ofcom considered that: given that the HAS had filmed the chicken sheds on a number of occasions over a period of four months and had not observed chickens roaming outside; that TNP, although presented with an opportunity to correct the allegation made by the programme makers in the two emails referred to above, had chosen not to; and that the actual commentary did not suggest that TNP did not allow its fowl to go outside their sheds, but instead stated that no chickens had been seen during the period of filming, Ofcom was again satisfied that the programme makers had taken reasonable care in presenting this material fairly.

Taking all the above factors into account, Ofcom therefore found no unfairness to TNP in these respects.

- b) Ofcom went on to consider TNP's complaint that it was treated unfairly in that although it was given an opportunity to respond to the allegations made in the programme, it did so "blindly", without seeing to footage to be included in the programme beforehand.

In considering this element of TNP's 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 noted that the programme makers were not obliged to provide TNP with a copy of the secretly recorded footage taken of the chicken sheds before the broadcast of the programme but rather to provide sufficient information for the company to be able to appropriately respond to the allegations. Ofcom was satisfied that TNP had been given a sufficiently full and detailed description of the allegations, including the content of footage to be broadcast, in the emails from the programme's producer dated 16 and 25 May 2007.

Indeed, TNP's emailed response to the programme makers dated 18 May 2007 specifically addressed the allegations that there was evidence of rat droppings in the sheds and that there appeared to be a lack of ranging by the chickens. It was also clear from the programme's commentary that TNP's response to the allegations was considered and extracts from it were referred to in the programme:

*"Now Traditional Norfolk Poultry, TNP, contest the conclusion we draw from the covert footage... They say their chickens do range during*

*daylight and the sheds are always open... TNP insist that they have no "rat problem", employ proper pest control and what we believed where rat droppings were sunflower husks in the litter."*

Ofcom considered that: TNP were approached by the programme makers with a full and detailed description of the allegations made against it; TNP were afforded an appropriate and timely opportunity to respond to the allegations; it responded by means of a full statement contesting the allegations; and, extracts from its response were included fairly in the programme. Ofcom was satisfied that the programme makers had acted fairly towards TNP in this respect and that the fact the TNP had not been given the opportunity to view the footage before the programme was broadcast did not result in unfairness to it.

Taking all the above factors into account, Ofcom found no unfairness to TNP in this respect.

**Accordingly, Ofcom has not upheld TNP's complaint of unfair treatment in the programme as broadcast.**

## Other Programmes Not in Breach/Out of Remit

22 January to 4 February 2008

| Programme                          | Channel             | Trans Date | Category                     | No of complaints |
|------------------------------------|---------------------|------------|------------------------------|------------------|
| A Girl's Guide to 21st Century Sex | Five Life           | 29/01/2008 | Sex/Nudity                   | 2                |
| Alan Brazil's Sports Breakfast     | talkSPORT           | -          | Inaccuracy/Misleading        | 1                |
| Alex Dyke                          | Isle of Wight Radio | 24/01/2008 | Generally Accepted Standards | 1                |
| Ballet Shoes                       | BBC1                | 26/12/2007 | Substance Abuse              | 1                |
| BBC Radio promo                    | BBC1                | 24/01/2008 | Offensive Language           | 1                |
| Big Fat Quiz of the Year           | C4                  | 30/12/2007 | Generally Accepted Standards | 1                |
| Brainiac: Science Abuse            | Sky Two             | 27/01/2008 | Generally Accepted Standards | 1                |
| Celebrity Wife Swap                | C4                  | 27/01/2008 | Inaccuracy/Misleading        | 1                |
| Chris Moyles Show                  | BBC Radio 1         | 30/01/2008 | Offensive Language           | 1                |
| City of Vice                       | C4                  | 21/01/2008 | Generally Accepted Standards | 1                |
| Derren Brown: The System           | C4                  | 01/02/2008 | Inaccuracy/Misleading        | 1                |
| Eastenders                         | BBC1                | 22/01/2008 | Generally Accepted Standards | 1                |
| Eastenders                         | BBC1                | 31/01/2008 | Generally Accepted Standards | 1                |
| Echo Beach                         | ITV1                | 18/01/2008 | Other                        | 1                |
| Extreme Dreams with Ben Fogle      | BBC2                | 01/02/2008 | Dangerous Behaviour          | 1                |
| Fifth Gear                         | Five                | 21/01/2008 | Dangerous Behaviour          | 3                |
| Foyle's War                        | ITV1                | 06/01/2008 | Advertising                  | 1                |
| George Galloway                    | talkSPORT           | 19/01/2008 | Religious Offence            | 1                |
| GMTV                               | ITV                 | 15/01/2008 | Inaccuracy/Misleading        | 1                |
| Gordon Ramsay: Cooking Live        | C4                  | 18/01/2008 | Offensive Language           | 1                |
| Gordon Ramsay: Cooking Live        | C4                  | 20/01/2008 | Sex/Nudity                   | 1                |
| Honest                             | ITV1                | 09/01/2008 | Offensive Language           | 1                |
| Horizon: How To Kill A Human Being | BBC2                | 15/01/2008 | Generally Accepted Standards | 1                |
| I Didn't Know That                 | National Geographic | 22/01/2008 | Dangerous Behaviour          | 1                |
| Kill It, Cook It, Eat It           | BBC3                | 24/01/2008 | Animal Welfare               | 2                |
| Kill It, Cook It, Eat It           | BBC3                | 29/01/2008 | Animal Welfare               | 2                |
| Little Miss Jocelyn                | BBC2                | 10/01/2008 | Generally Accepted Standards | 1                |
| Make Me A Muslim                   | C4                  | 16/12/2007 | Due Impartiality/Bias        | 1                |
| Music video                        | The Box             | 31/01/2008 | Dangerous Behaviour          | 1                |
| My Crazy Media Life                | C4                  | 24/01/2008 | Sex/Nudity                   | 1                |

|   |             |            |                              |   |
|---|-------------|------------|------------------------------|---|
| Natasha Hogan - My Greek Tragedy: Tonight | ITV1        | 21/01/2008 | Other                        | 1 |
| Pete & Jen Breakfast Show                 | Wire FM     | 25/01/2008 | Generally Accepted Standards | 1 |
| Police Camera Action                      | ITV4        | 30/01/2008 | Inaccuracy/Misleading        | 1 |
| Pretty Woman                              | ITV1        | 27/01/2008 | Scheduling                   | 1 |
| QI  | BBC2        | 18/01/2008 | Generally Accepted Standards | 1 |
| Reaper                                    | E4          | 23/01/2008 | Advertising                  | 1 |
| Richard & Judy                            | C4          | 21/01/2008 | Sex/Nudity                   | 1 |
| Richard & Judy                            | C4          | 21/01/2008 | Animal Welfare               | 2 |
| Scams, Fiddles and Honest Claims          | C4          | 31/01/2008 | Inaccuracy/Misleading        | 1 |
| Sex - with Mum and Dad                    | BBC3        | 27/01/2008 | Generally Accepted Standards | 1 |
| Shameless                                 | C4          | 22/01/2008 | Sex/Nudity                   | 5 |
| Sky Travel                                | Sky 3       | 25/01/2008 | Other                        | 1 |
| South Park                                | MTV One     | 01/02/2008 | Generally Accepted Standards | 1 |
| St Helier sponsorship of The Championship | ITV1        | 20/01/2008 | Inaccuracy/Misleading        | 1 |
| Supersize vs Superskinny                  | C4          | 22/01/2008 | Sex/Nudity                   | 1 |
| The Hidden Story of Jesus                 | C4          | 25/12/2007 | Religious Offence            | 1 |
| The Jeremy Kyle Show                      | ITV1        | 31/01/2008 | Generally Accepted Standards | 1 |
| The One and Only                          | BBC         | -          | Other                        | 1 |
| The Smith Lectures                        | BBC Radio 2 | 26/01/2008 | Offensive Language           | 1 |
| Toonatik                                  | ITV1        | 16/12/2007 | Generally Accepted Standards | 1 |
| Torchwood                                 | BBC2        | 16/01/2008 | Sex/Nudity                   | 1 |
| Torchwood                                 | BBC2        | 23/01/2008 | Generally Accepted Standards | 8 |
| Torchwood                                 | BBC2        | 23/01/2008 | Violence                     | 5 |
| Trial and Retribution                     | ITV1        | 31/01/2008 | Substance Abuse              | 1 |
| Trinny and Susannah Undress the Nation    | ITV2        | 25/01/2008 | Sex/Nudity                   | 1 |
| Trinny and Susannah Undress the Nation    | ITV2        | 01/02/2008 | Generally Accepted Standards | 1 |
| Wild at Heart                             | ITV1        | 27/01/2008 | Animal Welfare               | 1 |