

Ofcom Content Sanctions Committee

Consideration of Sanction against **Kiss FM Radio Limited, in respect of its service Kiss 100FM**

For

(1) An upheld fairness and privacy complaint

- under Ofcom's (ex-Broadcasting Standards Commission) Fairness and Privacy Code of Guidance (and taking into account another similar upheld complaint)

(2) Standards breaches of

- Section 1.2(b) (protection of Younger Listeners) of Ofcom's (ex-Radio Authority) Programme Code
- Section 3.4.1 ('wind-ups') of Ofcom's (ex-Radio Authority) Programme Code
- Rule 7.1 (fairness) of Ofcom's Broadcasting Code: Section Seven: Fairness
- Rule 8.1 (privacy) of Ofcom's Broadcasting Code: Section Eight: Privacy
- Rule 1.3 (appropriate scheduling) of Ofcom's Broadcasting Code: Section One: Protecting the Under-Eighteens
- Rule 1.5 (when children are particularly likely to be listening) of Ofcom's Broadcasting Code: Section One: Protecting the Under-Eighteens
- Rule 1.14 (most offensive language) of Ofcom's Broadcasting Code: Section One: Protecting the Under-Eighteens; and
- Rule 1.17 (discussion of sexual behaviour) of Ofcom's Broadcasting Code: Section One: Protecting the Under-Eighteens

(see Annex 1 for full Code extracts)

On Fairness and Privacy: 5 July 2005 (taking into account 29 July 2005)

Standards: 27 and 28 April 2005, 13 and 21 June 2005, 19 and 21 September 2005 and 15 November 2005

Decision to Fine

In respect of the upheld fairness and privacy complaint (taking into account another similar complaint): £75,000

standards breaches: £100,000

In aggregate: £175,000

Summary

For the reasons set out in full in the Decision, the Ofcom Content Sanctions Committee found as follows:

- (1) Kiss FM Radio Limited (“the Licensee” or “the broadcaster”) is licensed by Ofcom to run the service known as Kiss 100FM (“Kiss 100”).
- (2) Ofcom received 10 complaints about Kiss 100’s output broadcast on 27 and 28 April 2005, 13 and 21 June 2005, 5 and 29 July 2005, 19 and 21 September 2005, and 15 November 2005. In summary two of the complaints (one of which has been published previously) concerned two so-called “wind-up” or prank calls in which the broadcaster failed to seek consent from the participants who were identifiable. Both items were unfair to the ‘victims’ and unwarrantably infringed their privacy in both the making and the broadcast of the item. Eight of the complaints concerned the scheduling of inappropriate material, such as offensive language and sexual content which was broadcast at breakfast time when children are likely to be listening.
- (3) The above upheld fairness and privacy complaints and breaches of the standards codes were believed to be serious and repeated. The fairness and privacy contravention of 5 July 2005 was also considered to be very serious in its own right. The Licensee was invited to attend before the Content Sanctions Committee (“the Committee”) to give oral representations. It appeared (by its managing director and representatives of its parent company (Emap Radio Limited)) before the Committee at its meeting on 5 June 2006.

Fairness and Privacy Complaint (see full adjudication at Annex 2)

- (4) The programme telephoned a member of public (the complainant, “Mr R” who wishes to remain anonymous) who had inadvertently left his telephone number on the presenter’s (“Streetboy”) voice mail, believing it to be his Human Resources officer’s voice mail. Streetboy then returned Mr R’s call posing as the Human Resources officer. Mr R had called his Human Resources officer in the hope of discussing redeployment opportunities in the company following his redundancy. The telephone call was recorded and broadcast on air without the complainant’s permission (a breach of Ofcom’s (ex-Radio Authority) Programme Code).

- (5) Streetboy, posing as the Human resources officer, told Mr R that “it doesn’t seem like you have the qualifications...I mean you are really not what we are looking for”. Streetboy then went on to exclaim “you thought you had a chance!” and then continued with “could you not bother calling me again, ‘cos you’re wasting my time to be quite frank”. Mr R, clearly upset, continually apologised to Streetboy. Streetboy then pushed further and asked Mr R if “you honestly thought you was in with a chance?”. Streetboy then decided to ask him “you tell me why you should have the job..sell yourself to me”. As Mr R ran through his experience, Streetboy replied “I don’t like show offs”. Mr R stated he was “slightly taken aback” and apologised again saying “Sorry Sir...right....ok...apologies for wasting your time”. As it was becoming increasingly apparent that Mr R was distressed, Streetboy told Mr R “to go and flip burgers or something” and also that he should go back into training and that he was “only being honest”. When Mr R asked “where he fell down on his application”, Streetboy said “if you don’t know mate, you should be able to see these things for yourself”. At the end of the conversation Mr R again apologised saying “I’m sorry I’ve upset you in anyway..oh dear..oh dear...sorry to have offended you”.
- (6) When the item ended, the presenters were heard laughing and acknowledging that Streetboy was “dealing with this guy’s whole future and career...oh my God”. There then followed some small applause.
- (7) Emap Radio told the Committee that it agreed that this was a “horrible intrusion into someone’s privacy and degrading someone in public...it was also extremely bad for the radio station”. Emap Radio described the decision to broadcast the item (which was pre-recorded) as “inexplicable” because even the presenter had acknowledged after the programme that it had gone too far.
- (8) In Ofcom’s view the case of Mr R was the most serious case of unwarranted infringement of privacy it had heard. In its view, the broadcast was devoid of any justification of public interest and could have had a serious effect on the individual concerned, whose deep distress was evident.
- (9) The decision by the Licensee to transmit this material was not one which had required a fine judgement on its part. Unlike other cases of potential infringement of privacy, this was not a case where the Licensee was required to make a difficult editorial judgement balancing such factors as freedom of expression, the public interest and privacy of the individual concerned.
- (10) In the Committee’s view, to have conducted the hoax telephone call with Mr R was a serious offence in its own right, to then broadcast it was incomprehensible, but to broadcast it without consent was inexcusable, and to broadcast it without anyone with responsibility for the station’s output listening was an abject failure of both compliance procedures and management.
- (11) In view of the very serious nature of the upheld fairness and privacy case in respect of Mr R, the Committee decided that a financial penalty was appropriate. The seriousness with which this case is viewed is demonstrated by the fact that this is the first time Ofcom has imposed a fine on a Licensee for an upheld fairness and privacy complaint. This is also the largest fine ever imposed for such an offence . For the reasons outlined below (and taking into account similar compliance failures in the case of another upheld fairness and privacy complaint broadcast on 29 July 2005 which has been published previously), the Committee concluded that, in respect of the upheld fairness and privacy complaint from Mr R, the Licensee should be fined

£75,000 (all fines are payable to HMG and once received, by Ofcom, are forwarded to the Treasury).

Standards Breaches

- (12) The material in question was transmitted over a period of just over six months and breached rules primarily concerning the protection of children. The material was broadcast in the Bam Bam Breakfast show and therefore at a time when children are likely to be listening. Section 319(2)(a) of the Communications Act 2003 specifically requires Ofcom to secure “that persons under the age of eighteen are protected”.
- (13) The material included the following studio discussions, phone-ins and ‘wind-up’ calls:
- The use of inappropriate language in a discussion about a programme on the sex industry with references to anal sex (see paras 12-15) (27 April 2005)
 - The treatment of a discussion about “daisy chaining” (a reference to teenagers engaging in group sex) in a flippant and irresponsible manner, which had the potential to condone under-age group sex (see paras 16-21). (28 April 2005)
 - inappropriate and aggressive language during a ‘wind-up’ call (see paras 22-25). (13 June 2005)
 - Repeated use of offensive language (paras 26-29). (21 June 2005)
 - Use of inappropriate language (paras 30-34). (19 September 2005)
 - Inappropriate sexual discussion (paras 35-38). (21 September 2005)
 - Ineffective or non-existent bleeping of the word “fuck” and its derivatives in a pre-recorded ‘wind-up’ call. (paras 39-43). (15 November 2005)
- (14) Emap Radio admitted that their procedures were not “up to spec” at the time of the Kiss 100 complaints, and that some of the content on the breakfast show in the past had not been acceptable. Emap Radio also admitted that they could not defend some of the material which had been broadcast, and made no attempt to do so at the hearing.
- (15) Emap Radio said that some of the compliance failures could be put down to the preparation for their consolidation with Scottish Radio Holdings, since their main focus was on this, rather than compliance of the station’s output.
- (16) Emap Radio stated that as a result of a previous fine (£125,000) against another of its radio stations (Key 103 FM Manchester), it had introduced a centralised group-wide system for complaints-handling in March 2005. However, when the Kiss 100 complaints continued mounting up, it became clear that that system was not working, and was not sufficient. Since Ofcom’s investigation, they had put a number of further compliance measures in place to ensure that complaints are dealt with swiftly and any trends are spotted and that all relevant staff are fully conversant with Ofcom’s Broadcasting Code.
- (17) The Committee recognises that Kiss 100 is intended to be what the Licensee describes as “an edgy station aiming at an edgy audience” with presenters who are “jagged edged”. Ofcom would not wish to discourage challenging and provocative material. However, such programming carries with it certain responsibilities. The

Licensee must ensure that appropriate compliance procedures are in place to produce such programmes, and that they are appropriately scheduled. Furthermore, programming which is likely to cause offence should be justified by the context. There was a clear failure by the Licensee to put in place the necessary management structure to oversee its “talent”. In the Committee’s view, the compliance procedures in place at the time of the breaches were wholly inadequate and there were some totally inexcusable broadcasts, which showed an almost wilful disregard by the Licensee for not only Ofcom’s Codes but also the station’s own audience.

- (18) Emap Radio, when making oral representations on the level of any fine that might be imposed, had expressed the view that the commercial radio sector had had a difficult financial year and any substantial fine, on top of losses they had already incurred for terminated contracts, would only mean that providing compelling programming would be harder.
- (19) In considering what level of fine to impose on the Licensee, the Committee took into account the various actions taken by Emap Radio and the very real efforts they had made in response to the series of complaints. However, in view of the serious number of standards breaches including repeated breaches concerning the same breakfast show during the period, the Committee decided that a financial penalty of £100,000 was appropriate (all fines are payable to HMG and once received by Ofcom are forwarded to the Treasury).

Conclusion

- (20) In Ofcom’s view, the number and seriousness of the breaches between April and November last year suggests that for a substantial period of time the compliance of the show was evidently not under proper control. There appeared to be a total inability of management to impose structures to ensure that there was adequate compliance with Ofcom’s Codes and that the station broadcast acceptable material at this time. Senior management at the company admitted to, what they referred to, as taking their “eye off [their] core duty”. These failures meant that an Ofcom investigation of some very serious complaints was not adequately dealt with. For instance, the material relating to the most serious fairness and privacy complaint Ofcom had received was not listened to by anyone senior at the station for four weeks. It appeared to Ofcom that Emap Radio had little control or sight of local management and was not seeing any warning signs until it was too late. Emap Radio admitted that the new procedures they had put in place after another of its licensees (Key 103 FM Manchester) was fined by Ofcom were not sufficient. The Licensee was unable to manage its “talent” and the result was the termination of a number of contracts of on and off air staff. However, the Committee took into account the new processes and procedures that the station had implemented. It was also noted that, since 15 November 2005, Ofcom had not recorded any further breaches by the Licensee of the Broadcasting Code in respect of the Kiss 100 service. Nevertheless, for these reasons and the others set out in the Decision, Ofcom has fined Kiss FM Radio Ltd an aggregate amount of £175,000 - the largest financial penalty that has ever been imposed on a commercial radio station. All fines are payable to HMG and once received by Ofcom are forwarded to the Treasury.

Background

- 1 Kiss FM Radio Limited (“the Licensee” or “the broadcaster”) is an independent local radio station based in London and part of the Emap Radio Group since 1992. The broadcaster is licensed by Ofcom to run the commercial radio service known as Kiss 100FM (“Kiss 100”). The station’s Format provides for “A dance music station aimed at young Londoners, primarily aged 15 to 25”; the Format includes “hourly local/regional news weekday peaktimes, what’s-ons/club listings/gig guides and other information relevant to the target audience”.
- 2 The Bam Bam breakfast show, which started in September 1999, was broadcast weekdays from 0600 to 0900. The presenter, Bam Bam, was assisted by his sidekick, Streetboy. The show had an anarchic and irreverent style. It often featured Streetboy’s exploits, including secretly recorded ‘wind-up’ calls and stunts.
- 3 Between 27 April 2005 and 15 November 2005, Ofcom received 10 complaints concerning items broadcast in Kiss 100’s breakfast show. In summary, the complaints concerned inappropriate material being repeatedly broadcast in breakfast time when children were likely to be listening and two ‘wind-up’ calls which were transmitted without the consent of the participants resulting in both unfairness and unwarranted infringements of privacy in the making and broadcast.

Fairness and Privacy

5 July 2005 - Upheld Fairness and Privacy complaint made by “Mr R”. (See Annex 1 for full adjudication.)

- 4 A member of the public who was the subject of a ‘wind-up’ call complained that his telephone call was broadcast, without his prior permission, and that the manner in which he had been treated by the presenter was “in poor taste and upsetting”. He complained that he was treated unfairly and his privacy had been unwarrantably infringed.
- 5 The complainant (referred to as Mr R, since he wishes to remain anonymous) had called the mobile phone number of a member of his employer’s Human Resources department. The call had been diverted to Streetboy’s mobile telephone. Mr R left a message on what he thought was the Human Resources officer’s voice mail. Streetboy then returned Mr R’s call posing as the Human Resources officer. Mr R had called the number in the hope to discuss redeployment in the company as he was being made redundant. The telephone call was recorded and broadcast on air without the complainant’s permission.
- 6 Mr R explained to, who he thought was the Human Resources officer, that he had applied for several jobs and was waiting to hear about his applications. Streetboy replied telling Mr R that “it doesn’t seem like you have the qualifications...I mean you are really not what we are looking for”. Streetboy then went on to exclaim “you thought you had a chance” and then continued with “could you not bother calling me again, ‘cos you’re wasting my time to be quite frank”. Mr R, clearly upset, continually apologised to Streetboy. Streetboy then pushed further and asked Mr R if “you honestly thought you was in with a chance”. Streetboy then decided to ask him “you tell me why you should have the job..sell yourself to me”. As Mr R ran through his experience, Streetboy replied “I don’t like show offs”. Mr R stated he was “slightly

taken aback” and apologised again saying “Sorry Sir...right....ok...apologies for wasting your time”. As it was becoming increasingly apparent that Mr R was distressed, Streetboy told Mr R “to go and flip burgers or something” and also that he should go back into training and that he was “only being honest”. When Mr R asked “where he fell down on his application”, Streetboy said “if you don’t know mate, you should be able to see these things for yourself”. At the end of the conversation Mr R again apologised saying “I’m sorry I’ve upset you in anyway..oh dear..oh dear...sorry to have offended you”.

- 7 When the item ended, the presenters were heard laughing and acknowledging that Streetboy was “dealing with this guy’s whole future and career...oh my God”. There then followed some small applause.
- 8 The broadcaster said that it was in “bad taste for our breakfast show to take advantage of both the mistaken phone number divert, and the person whom (sic) received the return call”. Ofcom was also informed that that the call had been broadcast without gaining consent.
- 9 There was obvious distress and unfairness to the complainant in the broadcast of the programme as well as an unwarranted infringement of privacy in both the making and broadcast of the item. The programme-makers’ treatment of Mr R was totally unacceptable. They showed a serious disregard for the consequences of their actions.
- 10 This complaint was upheld under Ofcom’s (ex-Broadcasting Standards Commission) fairness and privacy code of guidance, and was also in breach of the ex-Radio Authority Programme Code (Section 3.4 (1) – ‘wind-up’ calls) since it was transmitted without permission. The compliance failures, in this case, were particularly serious and warranted consideration of the imposition of a statutory sanction in their own right.

29 July 2005 - Upheld Fairness and Privacy Complaint made by Dr Liu and Mr Reitz of the Hendon Traditional Chinese Medicine Centre

- 11 In considering the level of statutory sanction to impose on the Licensee for the case of Mr R, Ofcom also took into account the above case (published in Ofcom’s Broadcast Bulletin 54 on 20 February 2006). It was relevant to take into account, when considering the seriousness of the compliance failure which led to the 5 July 2005 incident, that the same compliance failures, involving secret recording of identifiable members of the public and the broadcast of the resulting material without consent, had also occurred on 29 July 2005.

Standards Breaches

27 April 2005 - Discussion about a television programme on the sex industry

- 12 A discussion broadcast on 27 April 2005, at 0830, concerned a television programme that had explored aspects of the sex industry. A listener, who was travelling to school with her three children, complained that the discussion was an unsuitable topic for breakfast time when children were likely to be listening. The presenters discussed a woman in the programme who had entered into “hard-core porn” and said that “she’s getting rogered by three blokes” and that it was “600 quid for a triple way bunk up” and that she was “pricking around for £600 a go”. The show then took a call from a listener who referred to the woman refusing to take “£50 extra for anal” and the presenter responded with the comment “back passage bonus”.

- 13 When first contacted by Ofcom, the Licensee responded that “the...broadcast was topical and relevant for discussion and that the presenters intended to discuss the woman’s motivation for moving into porn ... and had an effective moral debate with regard to her family....”. The broadcaster argued that the use of language was in no way offensive or titillating, but there would be times, inevitably, in a live programme, that sensitive subjects would arise or events occur that the show and radio station would regret and that the reference to anal sex was unprompted and unexpected. However, the Licensee believed the presenter dealt with it in the best way he could so as not to exploit the situation.
- 14 If broadcasters are to tackle challenging issues such as this, at times when children are likely to be in the audience, then much greater care must be taken when moderating such content. In this case, Ofcom did not consider that the language, which became quite explicit, and the overtly sexual tone of the discussion was suitable for younger listeners. The RAJAR figures indicated that a significant number of children (RAJAR define children as between 4-14) were listening to the programme at this time (between 117,000 and 43,000 – this item occurred at the half hour and these RAJAR figures represent listeners at either side of that time) – and that it would have been expected that they would be listening (given the RAJAR figures for this time and for this service).
- 15 Taking all these factors into account Ofcom considered that the broadcast breached Section 1.2 (b) (Protection of Younger Listeners) of the ex-Radio Authority Programme Code.

28 April 2005 – Discussion on Daisy Chaining

- 16 On 28 April 2005, at 0820, the breakfast programme discussed ‘Daisy Chaining’ (a reference meaning young teenagers engaging in group sex). A mother who was listening with her daughters complained that this was treated in a flippant and irresponsible manner. For instance, the presenters discussed when they lost their virginity and one of them said he was “gagging for it” at the age of 14. A listener called in to say that “it [daisy chaining] sounded like quite a good idea...”. He was then asked by the presenter whether it made him “want to be 14 again”, to which the caller exclaimed “does it!”. Another presenter remarked that it was an “improvement from spin the bottle”. Ofcom was concerned that the item may have appeared to have condoned under-age and group sex and treated the subject in an irresponsible way.
- 17 A representative of the Licensee explained that he had spoken to the complainant following the broadcast and, while sympathising with her position, he had told her that the subject was not raised to titillate or exploit. The broadcaster argued that the presenter had pointed out the dangers of unwanted pregnancies and sexually transmitted diseases. The discussion had been sparked by a news story that many listeners may have been thinking about that morning. The discussion was not sensationalist.
- 18 Following subsequent correspondence with Ofcom, an Emap Radio representative accepted that this item breached the ex-Radio Authority Programme Code and that “this was another example of the presenters failing to keep what should have been a thought provoking and informative item, albeit one presented in an irreverent style, within acceptable boundaries”. However, the broadcaster was “surprised that Ofcom consider the item appeared to condone under age sex. The presenters were discussing a report that claimed under age sex is on the increase. One of the presenters questioned the validity of the claims; Bam Bam specifically stated that

teenage sex was 'fraught' and twice mentioned problems caused by sexually transmitted diseases and pregnancy. Two of the team confessed to losing their virginity before the age of consent but Bam Bam concluded the discussion by stating that the two who did not indulge in under age sex were good boys/girls. We do not therefore accept that the conversation condoned under age sex".

- 19 It is Ofcom's view that under-age sex is not necessarily a topic that is unsuitable for breakfast time. However, whether or not such an issue is appropriate depends on the context in which it is discussed and the manner in which it is treated. Ofcom accepts that the item started by quoting the newspaper article at some length which referred to STDs and that the presenter also mentioned AIDS, pregnancy and sexual diseases. However, Ofcom was seriously concerned that the clear implication of some of the presenter's (and the caller's) comments was that being 14 would mean being able to engage in daisy chaining which was something that would be desirable. This impression that under-age sex was, at the very least, acceptable was reinforced by the presenter's comments that when he was 14, he was "gagging for it". There was some signalling, within the programming, that the conversation was going too far. However further discussion led to the two members of the Kiss on air team revealing that they had had sex at 14 and 15 and one revealed that he had had "all the other stuff"... "not all the way" at 10. Ofcom accepts that the mere fact that members of the on air team said they had sex before the age of consent does not necessarily, in itself, condone under age sex. However this was stated in the context of a conversation that made it clear that the presenter was desperate to have sex at 14 but did not until he was 19. Ofcom recognises that, as the broadcaster pointed out, it ended with the phrase "good boy" and "good girl" for the two who had had sex at 17 and 19 and that the other members of the team were described as "dodgy". However, one of those who had sex before 16 retorted that he felt "privileged." In summary, despite some comments at the start and end of the item, the general tenor, in Ofcom's view, was one of admiration for under age sex.
- 20 Overall, given that sex under the age of sixteen is unlawful, the executive were concerned by the approach taken by the breakfast programme. The RAJAR figures indicate that a significant number of children were listening (117,000) to the programme at this time and that it would have been expected that they would be listening (given the RAJAR figures for this time and for this service).
- 21 Taking all these factors into account Ofcom considered therefore that the broadcast breached Section 1.2 (b) (Protection of Younger Listeners) of the ex-Radio Authority Programme Code.

13 June 2005 – Inappropriate Language in a pre-recorded 'wind-up' call

- 22 On 13 June 2005 at 0745, the show broadcast a 'wind-up' call with a member of the public. Streetboy called the man (having obtained his telephone number from the back window of his car) and pretended that his car had 'cut' him up on the road. Streetboy said to the man, in what was an aggressive call, "you were driving like a proper wanker – you cut me up". The man said he was not actually driving his car, but his brother-in-law was and apologised and offered to get him to call Streetboy back. Streetboy also told the man that he should "tell him [the driver] that he is just a prick from me". A complainant who was listening with their step-daughter complained about the station's use of "foul language" at a time when children could be listening.
- 23 A representative of the Licensee acknowledged that this broadcast contained: "... inappropriate use of language for this time of day". The broadcaster stated that it

strives to “strike a balance between using the sort of language that is commonplace and relevant to our audience but stops short of causing offence. Sometimes attempting to strike this balance may mean we get it wrong.....”.

- 24 Ofcom noted that the Licensee accepted that the use of words such as ‘wanker’ and ‘prick’ in this context was an “inappropriate use of language for this time of day”.. The language was used by the presenter and the conversation was pre-recorded. An editorial decision was therefore taken to include the language. The RAJAR figures indicate that a significant number of children were listening (121,000) and that it would have been expected that they would be listening (given the RAJAR figures for this time and for this service).
- 25 Taking all these factors into account Ofcom considered that the broadcast breached Sections 1.2 (b) (Protection of Younger Listeners) of the ex-Radio Authority Programme Code.

21 June 2005 – Inappropriate Language in discussion about Tom Cruise at a film premiere

- 26 Two listeners complained that offensive language was broadcast on 21 June 2005 at 0842 and was used by the presenter during a discussion about the programme makers who squirted water Tom Cruise at a film premiere. One of the listeners was in the car with their two children. Such language as “crap”, “shite”, “shit”, “arsed”, “what cocks are writing that”, “cacked” and “vagina” were used on a number occasions.
- 27 A representative of the Licensee defended the item but said that there were “a few words in there I agree are less than ideal for broadcast at this time under my standards being set for Kiss 100, although they did not dwell on them. I have spoken to our breakfast producer today, and will have a conversation with the breakfast presenters tomorrow when they finish their show, indicating this is not the level I wish to take the station to.”
- 28 Ofcom accepts that it could be argued that the language if taken separately and in isolation was not itself problematic. However, its combination and cumulative effect within a single discussion was inappropriate for the time of broadcast. The RAJAR figures indicated that a significant number of children were listening (43,000) and that it would have been expected that they would be listening (given the RAJAR figures for this time and for this service).
- 29 Taking all these factors into account Ofcom’s executive considered that the broadcast breached Section 1.2 (b) (Protection of Younger Listeners) of the ex-RA Code.

19 September 2005 – The use of inappropriate language

- 30 In an item broadcast on 19 September 2005, at 0825, the presenters asked for suggestions which involved substituting the word ‘muff’ (‘muff’ refers to the female genital area) for love – for instance “Can you feel the muff tonight?”, “Muff stinks”, “I’ll take you down where muff lives”, “How deep is your muff”. A number of titles were repeated over and over again. A listener who was listening with their 12 and 14 year old children complained that this was offensive and inappropriately scheduled.

- 31 A representative of Emap Radio explained that the 'muff' item had been intended as a double entendre (the presenters had previously referred to the microphone wind shield as a 'muff') but it went beyond the pun it was intended to be.
- 32 He further added that, in view of the complaints about the breakfast show under consideration by Ofcom, he and the Programme Director had held a meeting with the breakfast presenters. They specifically discussed matters of harm and offence, the protection of children as well as the fairness and privacy rules and the impact these have on items such as 'wind-up' calls. They were therefore confident that the breakfast team were not only well aware of the Code rules but were keen to comply with them. They regretted this had happened and trusted the most recent action would prevent future reoccurrence.
- 33 In Ofcom's view, the continual play on and use of the word "muff" at this time, when children were likely to be listening was inappropriate. This was compounded by continued and repeated use of the word. The RAJAR figures indicated that a significant number of children were listening (31,000) and that it would have been expected that they would be listening (given the RAJAR figures for this time and for this service).
- 34 Taking all these factors into account Ofcom considered that the broadcast breached Section One: Protecting the Under-Eighteens, Rules 1.3 (appropriate scheduling) and 1.5 (when children are particularly likely to be listening) of the Code.

21 September 2005 – Inappropriate sexual discussion

- 35 A listener complained about an item broadcast at 0745, on 21 September 2005, when her daughter often listened to the show. The discussion focussed on whether women were "up for it" (sex) and "sexiest and ready for a bunk up" when they got out of the shower. The discussion that followed was, in the complainant's view, offensive and unsuitable at a time when children were likely to be listening. The presenter spoke to various women who called in and made reference to being aroused, "you're giving me the horn and where am I to put it". One caller said, "all girls like to be clean ready for the action". The presenter also asked whether callers made "creative use of the shower". The presenter also said to another presenter that "you can say girls dial me up, come down to Kiss, and get in the shower and then I'll shag yer".
- 36 The Licensee stated that it believed that, handled properly, the shower discussion may have been a legitimate topic of conversation even at breakfast time, but that it did go too far.
- 37 The language used and the discussion that took place were unsuitable for children and at a time when children were particularly likely to be listening. The conversation about whether women were sexually aroused after a shower was prolonged and, in Ofcom's view, calls with some of the callers were salacious and totally inappropriate for the time of broadcast. The programme was, at times, uncomfortably similar in tone to an adult sex line. The RAJAR figures indicated that a significant number of children were listening (27,000) and that it would have been expected that they would be listening (given the RAJAR figures for this time and for this service).
- 38 Taking all these factors into account Ofcom considered that the broadcast breached Section One: Protecting the Under-Eighteens, Rules 1.3 (appropriate scheduling), 1.5 (when children are particularly likely to be listening) and 1.17 (discussion of sexual behaviour) of the Code.

15 November 2005 – Ineffective bleeping of the word “fuck” in a ‘wind-up’ call

- 39 A complainant, who was listening with his daughter, complained that during a ‘wind-up’ call, he heard a man who was being asked to pay a parking ticket, tell the presenter to “fuck off” several times. While there were bleeps in the item they were incorrectly placed. This item was broadcast at 0730.
- 40 This item was a pre-recorded ‘wind-up’ where a member of the public was rung up and asked to pay a bogus outstanding parking ticket fine. In the initial telephone conversation, there were at least ten occasions where the word “fuck” and its derivative were clearly audible, because of ineffective bleeping. The presenter, Streetboy, then went to see the member of the public in person where again there was at least one audible use of the word “fuck” and other inadequate bleeping. On both occasions the items were pre-recorded.
- 41 The Licensee explained that it had held a disciplinary hearing with the programme producer, who was subsequently dismissed. The broadcaster accepted that the failure to ensure that the language was adequately masked was unacceptable.
- 42 The use of the word “fuck” in this item was repeated and the bleeps were in certain instances either totally ineffective or not used at all. This was surprising given that the item was pre-recorded. The f-word and its derivatives are, according to research undertaken by Ofcom (as well as previous regulators), regarded by the majority of the public as some of the most offensive language. The RAJAR figures indicated that a significant number of children were listening (144,000 to 158,000 – these are the figures for the half hour to 0730 and the half hour after 0730) and that it would have been expected that they would be listening (given the RAJAR figures for this time and for this service).
- 43 Taking all these factors into account Ofcom considered that the broadcast breached Section One: Protecting the Under-Eighteens, Rules 1.3 (appropriate scheduling) 1.5 (when children are particularly likely to be listening) and 1.14 (most offensive language) of the Code.

Follow up correspondence

- 44 During Ofcom’s investigation, Emap Radio which own the Licensee addressed the overall compliance issues that the above cases raised. They told Ofcom that:
- The two presenters of the Bam Bam breakfast show were given warnings; this eventually led to the termination of Bam Bam’s contract.
 - There had been a change in the senior management team at Kiss 100. This included the dismissal of the breakfast show’s producer and the Programme Director moving elsewhere, to be replaced by a much more experienced Programme Director.
 - All complaints would now be dealt with by Emap Radio’s Head of Regulatory and Public Affairs and not at station level – thereby retaining a watching brief to spot trends.
 - Substantial changes had been made to ensure that presenters were conversant with compliance issues.

- A “Kiss Presentation Manual” (“the Manual”), which contained specific guidance about style, language and content, was produced. All on air staff/producers and programme directors were required to attend a presentation about the Ofcom Broadcasting Code and the Manual. These staff were required to read the Code and to sign a statement that they had done so and had understood it.
- Any potential breaches of the Code or its Manual would be brought to the immediate attention of the presenters and producers and the material would be modified or removed from air

45 Emap Radio also wished to point out that the Bam Bam breakfast show was the flagship programme for Kiss 100 which targets young Londoners. The show’s aim was to reflect the lifestyle and concerns of that demographic. Until earlier in 2005, they did this without attracting substantive complaints and Emap Radio very much regretted that listeners had been driven to complain about some of the content of the show.

Consideration of a sanction

46 It was noted that since 15 November 2005 Ofcom had not recorded any further breaches by the Licensee of the Broadcasting Code in respect of the Kiss 100 service. It also took into account, by way of mitigation, the changes in management at the station and the other actions that had been taken in response to the complaints as mitigating factors. Ofcom’s executive welcomed these steps to ensure compliance in the future. However, in the executive’s view the number and level of standards breaches was serious and suggested that for a period the compliance of this show was not under sufficient control by the Licensee. In addition, the fairness and privacy case of Mr R of 5 July 2005 was in itself a very serious breach and showed a worrying lack of understanding of the care and compliance needed with ‘wind-up’ calls. Ofcom’s executive therefore concluded that the breaches/contraventions of the Codes/Guidance, in the period from April 2005 to November 2005 inclusive, were extremely serious and were repeated, and in accordance with the published guidelines, recommended that the case be referred to Ofcom’s Content Sanctions Committee.

Sanction Decision

47 The Content Sanctions Committee (“the Committee”) met on Monday 5 June 2006 to consider the matter. Kiss FM Radio Limited (“the Licensee”) was invited to attend and appeared before the Committee (represented by its managing director and by representatives of Emap Radio Limited (“Emap Radio”), the Licensee’s parent company). In considering whether to impose a statutory sanction, and if so at what level, the Committee considered the Licensee’s written representations as well as the oral representations made by Emap Radio on the Licensee’s behalf.

48 Emap Radio admitted that, in light of the Kiss 100 complaints, they “got it wrong”. Their procedures were not “up to spec” at the time, and some of the content on the breakfast show in the past had not been acceptable. Emap Radio also admitted that they could not defend some of the material that had been broadcast and they stated that they had not made “any attempt to do so”. However, Emap Radio also believed that they had used the process as a learning curve, and that all their on-air and production staff were now fully conversant with all aspects of the Ofcom Broadcasting Code and that their compliance procedures were “second to none”. They suggested that there was some evidence for this in that there had been no complaints about Kiss 100 since November 2005.

- 49 Emap Radio stated that as a result of a previous fine (£125,000) against another radio station within the Emap Radio Group (Key 103 FM Manchester), they had introduced a centralised group-wide system of complaints in March 2005, which they thought at the time would probably be sufficient. Under this system, all Ofcom complaints were sent to Emap Radio's Head of Regulatory and Public Affairs, who then passed them to the relevant local stations to handle the replies; the local stations would copy him in on their replies. When the Kiss 100 complaints began to mount up, it became clear that that system was not working, and was not sufficient. So, from October 2005, stricter controls were introduced, under which Emap Radio's Head of Regulatory and Public Affairs undertook all the replies, with relevant information about the complaints being provided to him by the local station concerned.
- 50 From January 2006, the system was refined again, and Emap Radio's Head of Regulatory and Public Affairs now used a "traffic light system" to code incoming complaints as to whether or not they were likely to be contentious or serious; this enabled him to alert the local management to those complaints of a more serious nature and, in appropriate cases, to alert Emap Radio's Board of any potentially serious cases. Emap Radio stated that, if the warning light system had been in place at the time, they would have spotted the increase in complaints by early May 2005, by which time there were two complaints under review; Emap Radio added that they would never get to that stage again.
- 51 Emap Radio confirmed that, ultimately, compliance responsibility for Kiss 100 rested with the Group Managing Director of Emap Radio Limited and with Emap's Radio Board; responsibility for its day to day operation was passed to appropriate people, and cascaded up to Emap Radio's Head of Regulatory and Public Affairs and the Managing Director of Radio Programming for Emap Radio. The individuals concerned were responsible to the board of Emap Radio for delivering against the policies which had been set.
- 52 It was explained to the Committee that, in October 2004, Emap Radio began preparations for consolidation with Scottish Radio Holdings. This resulted in a doubling of Emap Radio's headcount. Two main radio divisions were created; one, called National Brands, oversaw Kiss 100. Each division was given a large amount of autonomy in line with Emap Radio's policy of backing and empowering the local teams. At that time, it was decided to appoint separate managing directors for Kiss 100 and another of the radio stations. However, the Kiss 100 role was not filled until August 2005, so interim measures were put in place in October 2004.
- 53 The then new management had adopted a new policy towards presenters, a more trusting and conciliatory approach than the previous policy. Under the previous policy, fines of up to a week's salary at a time were imposed for deviations from what the Licensee deemed to be its non-negotiable rules.
- 54 However, during consultations with the new Programme Director, Emap Radio and the new Managing Director of the Licensee no longer had confidence that there would not be a further breach of Ofcom's Broadcasting Code by Bam Bam, the breakfast show presenter, and it was decided that the breakfast show would have to be terminated and this had resulted in significant costs to the Licensee. Emap Radio said that while they made no attempt to justify the output, which was subject to Ofcom's investigation, they wished the Committee to take into account that through termination of a number of contracts, they had incurred very significant costs and also lost a highly successful breakfast show.

- 55 Emap Radio also wanted to emphasise that, from its launch, Bam Bam Breakfast show had received immediate critical and popular success. It had gained four Sonys over its period of broadcast and many other awards. It also became the number one breakfast show for its target 15-24 year olds in London, a position it held until Emap Radio decided to terminate the show in April. It had been one of Emap Radio's most valuable radio assets.
- 56 So far as the Mr R case, specifically, was concerned, Emap Radio agreed that this was a "horrible intrusion into someone's privacy and degrading someone in public...it was also extremely bad for the radio station". Emap Radio described the decision to broadcast the item as "inexplicable" because even the presenter acknowledged after the item that it had gone too far. It was not known why no one at the station spotted it, and why the station then went on to receive another fairness and privacy complaint about failing to obtain consent for broadcast, only three weeks later. It was thought that the more conciliatory approach adopted towards presenters (described above) had brought about the change in process which allowed a case such as Mr R to occur.
- 57 In relation to the second upheld fairness and privacy complaint (relating to a broadcast on 29 July 2005 – see Broadcast Bulletin 54 on 20 February 2006), Emap Radio commented that at that point although complaints had been received, none had been upheld by Ofcom. There was also a feeling that when people were asked to do a fairly edgy programme, the station was bound to receive complaints and the programme teams needed to be backed up unless something has actually been found to have gone wrong. However, Emap Radio did accept that a more experienced managing director than was in place at the time should have made his own decision about the seriousness of the complaints the programme was receiving - not just wait for a complaint to be upheld, before taking it seriously. It was acknowledged that if they had found out fairly quickly that they were not on the right side of the line, it might have seen a different situation. Emap Radio also sought to distinguish the fairness and privacy case arising from the broadcast on 29 July 2005 from the case of Mr R on the grounds that the 29 July case arose from an incorrect interpretation of the relevant rules.
- 58 In summary, Emap Radio said that they could not give Ofcom a cast-iron guarantee that this Licensee would not get complaints in the future, because of the very nature of live broadcasting. However, they thought that they could guarantee that they would not be having to sit in front of the Committee again, trying to defend a cumulative number of complaints or any individual cases that were as serious as Mr R's case.
- 59 Having heard the representations made on behalf of the Licensee, the Committee decided that the upheld fairness and privacy complaint made by Mr R against the Licensee in relation to the broadcast by Kiss 100 on 5 July 2005 was so serious as to warrant a statutory sanction in its own right and that, for the reasons given below, the subsequent breach (the upheld fairness and privacy complaint relating to broadcast on 29 July) should be taken into account in determining the level of sanction, since it concerned similar compliance failures. Both cases involved secret recording where no consent from the participants was gained prior to broadcast. Both involved 'wind-ups' of members of the public which resulted in unfairness to the participants and unwarranted infringements of privacy both in the making and broadcast of the programme.
- 60 The Committee therefore considered the standards breaches and fairness and privacy contraventions separately in determining the appropriate sanctions.

Fairness and Privacy Case

- 61 In Ofcom's view the case of Mr R was the most serious case of unwarranted infringement of privacy it had heard. In the Committee's view, the broadcast was devoid of any justification of public interest and could have had a serious effect on the individual concerned, whose deep distress was evident.
- 62 The decision by the Licensee to transmit this material was not one which had required a fine judgement on its part. Unlike other cases of potential infringement of privacy, it was not a case where the Licensee had to make a difficult editorial judgement balancing such factors as freedom of expression, the public interest and privacy of the individual concerned. Furthermore, what was of particular concern to Ofcom, in this case, was the possible secondary consequences of such a 'wind-up' call, where an individual was left for a number of days unaware that he was the victim of a hoax on a very personal and important issue (i.e. his employment and how his current employer viewed him).
- 63 The Committee found it hard to understand how and why this material came to be broadcast and why those responsible for the compliance in the station had not listened to it prior to broadcast. It was also noted that it was a month before the then Programme Director of Kiss 100 had listened to it. In the Committee's view, to have conducted the hoax telephone call with Mr R was a serious offence in its own right, to then broadcast it was incomprehensible, but to broadcast it without consent was inexcusable, and to broadcast it without anyone with responsibility for the station's output listening, was an abject failure of both compliance procedures and management.
- 64 The Committee noted Emap Radio's comments that the 29 July 2005 fairness and privacy case might not have arisen had there already been an adjudication about Mr R (which was transmitted on 5 July 2005). However, it could not understand why anyone hearing the Mr R broadcast would have considered it necessary to await an adjudication before realising that it fell on the wrong side of the line, particularly since there was some recognition by the presenter himself that it had gone beyond acceptable bounds.
- 65 The Committee considered that the 'wind-up' itself, the decision to broadcast and the lack of any proper process, all demonstrated the most serious failures in the Licensee's compliance procedures.
- 66 The Committee reiterated the need for very clear oversight of presenters by management. It is essential that if a broadcaster wants to become involved with programming that may infringe people's privacy, then it must have a full and proper understanding of the nature of privacy and how the Broadcasting Code works in this area. The fact that these cases were pre-recorded made the failure even worse. In the view of the Committee, they had been caused not only by production failures, but also serious failures in management oversight.

Standards breaches

- 67 The Committee recognises that Kiss 100 is intended to be what the Licensee describes as "an edgy station aiming at an edgy audience" with presenters who are "jagged edged". Ofcom does not and would not wish to discourage challenging and provocative material. However, such programming carries with it certain responsibilities. The Licensee must ensure that appropriate compliance procedures are in place to produce such programmes, and that they are appropriately scheduled.

Furthermore, material which is likely to cause offence should be justified by the context. There was a clear failure by the Licensee to put in place the necessary management structure to oversee its “talent”.

- 68 The Committee noted that the standards breaches, on 27 and 28 April 2005, 13 and 21 June 2005, 19 and 21 September 2005 and 15 November 2005, had occurred over a period of only six months, all at a time of day when children were likely to be listening (breakfast radio). Section 319(2)(a) of the Communications Act 2003 specifically requires Ofcom to set standards which are best calculated to secure “that persons under the age of eighteen are protected”.
- 69 By May 2005, Emap Radio should have been aware that there were two outstanding complaints (those relating to the breaches on 27 and 28 April 2005) and should have taken appropriate action. However, it appears that no effective action was taken for several months. The Committee noted that new complaints-handling procedures were introduced in March 2005; this was prior to the series of complaints subject to this adjudication and, in the Committee’s view it must soon have been apparent that these procedures were ineffective. Whilst the Kiss 100 Presentation Manual was issued on 13 July 2005, as part of the measures taken by Emap Radio to ensure appropriate awareness by station staff, a further four complaints (about half the total number) were received after that. The Committee noted that no complaints had been received since November 2005, following further new procedures being put in place by Emap Radio in October 2005. The Committee concluded therefore that more effective action could have been taken by Emap Radio and earlier.
- 70 In the Committee’s view, not only was the cumulative number of the breaches serious, but there were also repeated breaches concerning the same breakfast show. The Committee commented that one specific and unnecessary issue which led to one of the complaints, namely, the failure to bleep properly on a pre-recorded broadcast, simply compounded the matter. In the Committee’s view, the number of breaches between April 2005 and November 2005 suggested that, for a period, the compliance of the show was evidently not under proper control.

Sanctions

- 71 Emap Radio were aware that the Committee was being asked to consider a fine. They advised the Committee that a substantial fine would do nothing to harden their already present resolve not to allow a repetition of these events. They did not think that there was anything more that they possibly could do and they “never want to see this kind of thing happen again”. They stated that the commercial radio sector had had a difficult financial year and any substantial fine, on top of losses they had already incurred for terminated contracts, would only mean that providing compelling programming would be harder.
- 72 The Committee took into account the various actions taken by Emap Radio and the very real efforts they had made in response to the series of complaints. Nevertheless, in the Committee’s view the compliance procedures in place at the time of the breaches were evidently wholly inadequate and there were some totally inexcusable broadcasts, which showed an almost wilful disregard by the Licensee, for not only Ofcom’s Codes but also the station’s own audience. In view of the seriousness and number of standards breaches, concerning the same breakfast show during the period, the Committee decided that a financial penalty was appropriate. For the reasons outlined above, the Committee concluded that the Licensee should be fined £100,000 in respect of the standards breaches.

- 73 In view of the very serious nature of the upheld fairness and privacy case in respect of Mr R, the Committee decided that a financial penalty was appropriate. The seriousness with which this case is viewed is demonstrated by the fact that this is the first time Ofcom has imposed a fine on a Licensee for an upheld fairness and privacy complaint and the largest ever imposed for such an offence. For the reasons outlined above (and taking into account the upheld fairness and privacy complaint on 29 July 2005), the Committee concluded that the Licensee should be fined £75,000 in respect of the upheld fairness and privacy complaint in respect of Mr R.
- 74 The aggregate fine is therefore £175,000 (all fines are payable to HMG and once received by Ofcom are forwarded to the Treasury).

Content Sanctions Committee

Philip Graf
Tim Suter
Kath Worrall

20 June 2006

Annex 1

Ofcom Code Extracts

Section 1.2(b) of the (ex-Radio Authority) Programme Code:

“Proper regard for taste and decency are clearly areas where the position of younger listeners needs to be considered”

(broadcasts on 27 and 28 April 2005, 13 and 21 June 2005)

Section 3.4.1 of the (ex-Radio Authority) Programme Code:

“the ‘wind-up’ call is a technique that, if it is to be used, requires care. The [Radio Authority] expects that permission to broadcast ‘wind-up’ calls will be sought in a proper manner. No ‘wind-up’ scenarios should distress or upset callers or offend against good taste or decency, either when recorded or when broadcast”

(broadcast on 5 July 2005)

Rule 1.3 of Ofcom’s Broadcasting Code

“Children [defined as ‘people under the age of fifteen years’] must be protected by appropriate scheduling from material that is unsuitable for them”

(broadcasts on 19 and 21 September 2005 and 15 November 2005)

Rule 1.5 of Ofcom’s broadcasting Code

“Radio broadcasters must have particular regard to times when children are particularly likely to be listening”.

(19 and 21 September 2005, and 15 November 2005).

Rule 1.14 of Ofcom’s Broadcasting Code

“The most offensive language must not be broadcast before the watershed or when children are particularly likely to be listening”

(15 November 2005).

Rule 1.17 of Ofcom’s Broadcasting Code

“.... Any discussion on, or portrayal of, sexual behaviour must be editorially justified if included before the watershed, or when children are particularly likely to be listening, and must be appropriately limited and inexplicit”

(21 September 2005).

Rule 7.1 of Ofcom’s Broadcasting Code

“Broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes”

(29 July 2005).

Rule 8.1 of Ofcom's Broadcasting Code

"Any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted"

(29 July 2005).

Annex 2

Adjudication

Mr R

Bam Bam Breakfast Show, Kiss 100 FM, 5 July 2005

Summary: Ofcom has upheld a complaint about this edition of the ‘Bam Bam Breakfast Show’ on Kiss 100, which broadcast the content of a telephone conversation between one of the programme-makers and a member of the public, Mr R.

Mr R had inadvertently left a message on the programme-maker’s answer-phone believing it to be the mobile phone of a member of his employer’s Human Resources department. Mr R had called the number hoping to discuss redeployment following redundancy. The programme-maker called Mr R back pretending to be a member of the company’s Human Resources department. The conversation was secretly recorded and later broadcast without Mr R’s consent. Mr R complained that he was treated unfairly and that his privacy was unwarrantably infringed in both he making and broadcast of the programme.

Ofcom considered that Mr R was likely to have been readily identifiable from the programme to a number of listeners. His voice was clearly audible; the programme referred to him repeatedly by his forename and details relating to his employment history were broadcast.

It was evident from the recording that Mr R became distressed during the conversation as the programme-maker was increasingly critical of him and his abilities. Further, Ofcom took the view that the broadcast of this conversation had the potential to cause considerable distress and embarrassment to Mr R. This was likely to have been exacerbated by Mr R’s personal circumstances, of which the programme-makers were aware.

In all the circumstances, Ofcom took the view that the programme-maker’s treatment of Mr R was unacceptable. They showed a serious disregard for the consequences of their actions and their behaviour was inconsistent with the necessary care that broadcasters would reasonably be expected to take to avoid potential unfairness and unwarranted infringement of privacy.

This resulted in unfairness to Mr R and unwarrantably infringed his privacy in both the making and broadcast of the programme.

Introduction

This programme broadcast the content of a telephone conversation between a member of the Breakfast Show team ‘Streetboy’ and a member of the public, Mr R. Mr R had called the mobile phone number of a member of his employer’s (“the company”) Human Resources department. The call had been diverted to Streetboy’s mobile telephone. Mr R had called the number hoping to discuss redeployment following redundancy from the company and inadvertently left a message on Streetboy’s answer-phone. Streetboy called Mr R pretending to be a member of the company’s Human Resources department. The conversation was recorded and later broadcast without Mr R’s knowledge or permission.

During the conversation Mr R explained to Streetboy that he was enquiring about the status of his application for a particular post. Streetboy told Mr R that he did not have the necessary qualifications for the role and suggested that he was not suitable for any role within the company. Streetboy went on to tell Mr R that he was wasting their time and should not bother calling again. He asked Mr R to 'sell himself' over the phone and, after Mr R had detailed his work experience, went on to say that he did not like "show-offs". Finally, Streetboy told Mr R to "go and flip burgers or something" and also to go back into training.

Following the conclusion of the conversation the programme's principal presenter, Bam Bam, told Streetboy that he was "dealing with this guy's whole future and career."

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

The Complaint

Mr R's Case

In summary, Mr R complained that he was treated unfairly in the programme and that his privacy was unwarrantably infringed in both the making and broadcast of the programme in that the conversation was recorded and broadcast without his knowledge or consent. He was identifiable to employees of the company and was subjected to "unpleasant comments" during the conversation.

Kiss 100 FM's Case

In summary, Kiss 100 accepted that the material was broadcast without consent of all parties. They stated that a member of staff at the company had mistakenly diverted their calls to Streetboy's mobile phone. Streetboy received a number of messages over a period of time, and called one back. This did not excuse the fact that it was put to air without permission or that the content was in poor taste. However, the item did not mention the company's name, which might have limited listeners' ability to identify Mr R. Kiss 100 confirmed that all staff had been reminded of the importance of obtaining permission from callers prior to calls being aired.

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.

In this case Ofcom found as follows:

Programme-makers should not normally obtain or seek information through misrepresentation or deception, except where the disclosure is reasonably believed to serve an overriding public interest. When deception is used for the purposes of entertainment, particularly if the deception involves the secret recording of a telephone conversation for inclusion in an entertainment programme, care should be taken to prevent any potential unfairness and unwarranted infringement of privacy. People who are the subject of a

recorded deception should normally be asked to give their consent before the material is broadcast. However, this may not be necessary if the person is not identifiable.

In this case, Ofcom noted that the broadcaster accepted that the conversation was secretly recorded and broadcast without the consent of Mr R and that they conceded that the content of the programme was in poor taste.

Ofcom considered that Mr R was likely to have been readily identifiable from the programme to a number of listeners. His voice was clearly audible; the programme referred to him repeatedly by his forename and specific details relating to his employment history were broadcast.

It was evident from the recording that Mr R became distressed during the conversation as the programme-maker was increasingly critical of him and his abilities. The programme-maker's unfounded, disparaging comments regarding Mr R's suitability for a new role (some of which are referred to above under "Introduction") went beyond poor taste, as Kiss 100 had suggested, and were in Ofcom's view, unfair. Further, Ofcom took the view that the broadcast of this conversation had the potential to cause considerable distress and embarrassment to Mr R. This was likely to have been exacerbated by Mr R's personal circumstances, of which the programme-makers were aware.

The use of deception in obtaining the material; the broadcast of the material, including potentially sensitive information concerning Mr R's circumstances, without consent and the manner and tone of the programme-makers dealings with him resulted in unfairness to Mr R and infringed his privacy in both the making and broadcast of the programme. In Ofcom's view there was no justification for doing so and the infringement of his privacy was unwarranted.

In all the circumstances, Ofcom took the view that the programme-maker's treatment of Mr R was totally unacceptable. They showed a serious disregard for the consequences of their actions and their behaviour was inconsistent with the necessary care that broadcasters would reasonably be expected to take to avoid potential unfairness and unwarranted infringement of privacy.

The complaint was upheld.

The Executive Fairness Group

20 June 2006