

Ofcom Broadcast Bulletin

**Issue number 94
8 October 2007**

Contents

<u>Introduction</u>	3
Standards cases	
<u>Notice of Sanction</u>	
GMTV Ltd	5
<i>Viewer competitions, GMTV, August 2003 to February 2007</i>	
<u>In Breach</u>	
Drivetime with Rick Vaughan Show	6
<i>BRMB (Birmingham), 16 - 22 May 2007, various times</i>	
Win a Car a Day in May	8
<i>Real Radio - Scotland (Central Scotland), 29 May 2007, 15:12</i>	
Quiz Night Live	10
<i>FTN, 29 October 2006, 22:00</i>	
Cash Call “Total Amount of Money” puzzle	12
<i>The Hits, 28 February 2007, 02:30</i>	
Call Me a Cabbie	14
<i>Sky Three, 16 August 2007, 07:30</i>	
101 Sexiest Celebrity Bodies	15
<i>ITV2, 31 July 2007, 20:00</i>	
Ek Ajnabee	16
<i>Zee TV Cinema, 27 May 2007, 12:00</i>	
The Breakfast Show	17
<i>Power FM (South Hampshire), 17 April 2007, 07:40</i>	
<u>Resolved</u>	
Cash, Car and the Caribbean	19
<i>Metro Radio, 12 January 2007, 16:20 and TFM 96.6FM, 17 January 2007, 08:50</i>	
Fairness & Privacy cases	
<u>Upheld in Part</u>	
Complaint by Carter Ruck Solicitors on behalf of Mrs Monica Calvert	21
<i>Old Dogs New Tricks, BBC1, 31 August 2006</i>	

Fairness & Privacy cases continued

Not Upheld

Complaint by Ms Lisa Rodrigues on behalf of Sussex Partnership NHS Trust	31
<i>Dispatches: Britain's Mental Health Scandal, Channel 4, 9 October 2006</i>	
Complaint by Mr Robert Winsor	41
<i>Newsnight, BBC2, 25 January 2007</i>	
<u>Other programmes not in breach/outside remit</u>	45

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).

Standards cases

Notice of Sanction

GMTV Ltd

Viewer competitions, GMTV, August 2003 to February 2007

On 26 September 2007, Ofcom published its decision to impose a statutory sanction on GMTV Ltd. for breaches of Rule 2.11 (competitions should be conducted fairly) of the Ofcom Broadcasting Code, which came into effect on 25 July 2005; and Rule 8.2(b) (Use of Premium Rate Telephone Services in Programmes) of the ITC (Independent Television Commission) Code 2002, which was in force until 24 July 2005.

Ofcom has found that these rules were breached due to the following conduct:

Competition finalists were regularly selected before lines closed (“**early selection**”) over a period of nearly four years.

A method of selecting finalists was used that resulted in those viewers who called to enter between 08:30 and 09:00 having significantly less chance of being selected as a finalist than those who entered before 08:30 (“**the 15/5 method**”).

In addition, on some occasions the final five competition finalists were selected up to three minutes before lines closed (“**final five**”).

For the reasons set out in the adjudication, Ofcom imposed a financial penalty of £2,000,000 on GMTV and directed it to broadcast a statement of its findings in a form determined by Ofcom on three specified occasions.

The full adjudication is available at:

http://www.ofcom.org.uk/tv/obb/ocsc_adjud/gmtv.pdf

In Breach

Drivetime with Rick Vaughan Show

BRMB (Birmingham), 16 - 22 May 2007, various times

Introduction

The drivetime show is broadcast from 14:00 - 18:00. Ofcom received a complaint that a competition prize was inaccurately described and therefore listeners were misled when encouraged to participate in a competition. The presenter described the competition as an opportunity to accompany him to Athens and watch the Champions League Final.

The complainant's wife entered the competition and was later contacted to say that she had 'won' but that there was some bad news – it was not Athens in Greece, but a restaurant called Athens in Birmingham. The complainant subsequently contacted the station directly to complain. The complainant appreciated that the station had offered to refund the cost of the text (25p at the standard rate), but he nevertheless thought that they had exercised poor judgement in running a competition which was based upon a deception.

Ofcom asked the broadcaster to comment on the item in the context of Rule 2.11. This Rule requires that: "Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known".

Response

GCap Radio, which owns BRMB, said that the station wanted to ensure that the competition was fun and engaging for its listeners and, to a large extent, they believed that this had been achieved. They maintained that there was no attempt by the radio station to mislead contemptuously or deceive its listeners or engage in any practice that could be deemed less than exemplary. They further added that the radio industry is a highly competitive market where there is a need for radio stations to show genuine creativity so as to attract listeners.

The prize was described as a chance for 100 people to win "*tickets to go to Athens and watch the Champions League final*". At various points throughout the promotion of the competition, however, GCap Radio said sufficient clues were given to listeners that the prize was not a trip to Athens in Greece. For example at one point it was even clearly stated that the prize was for "*Athens in Brum*" not "*Athens in Greece*"; an interview with the owner of the restaurant 'Athens' gave sufficient clues to listeners; and the fact that the radio station advised people to arrive at BRMB for 3pm on the day of the match (taking into account the time difference and flight time to Greece from the UK), should have alerted participants to the fact that something was amiss.

GCap confirmed that 95 winners had enjoyed the day's festivities. Three individuals did complain that the true nature of the prize was not accurate and they were offered a refund for the full cost of their texts. GCap believed that the prize was described in good faith and while it regretted any misgivings the complainant may have as regards the given description of the prize, it wished to stress that at no time did it intend contemptuously to deceive its listeners. Nonetheless, they appreciate that for future

competitions, it would be beneficial to give listeners more information about the prize on offer to avoid any risk of confusion.

Decision

We listened to the various audio links that covered the promotion of the competition between 16 and 22 May 2007. Prospective participants were asked to text their names to the special SMS text number for their chance to win, if randomly selected. The presenter repeatedly gave the impression that the prize was an opportunity *“to be there with me right across to Athens”*; and *“this is our biggest prize so far”*.

The first unambiguous clue to the fact that the venue was in Athens in Birmingham, not Athens in Greece, was not given to listeners until the 22 May. This was seven days after a number of listeners had already been encouraged to enter a competition in which the true nature of the prize had not clearly been made known. The prize was, in fact, an evening in Athens (a Greek restaurant within Birmingham) with free food and drink for 50 winners (including one guest of each winner, making a total of 100 people); and the chance to watch the ‘Champions League Final’ on a big screen television. The interview with the restaurant manager was on 21 May and was so cryptic that listeners were still unclear about the actual venue.

While Ofcom appreciates that the intention was to promote the competition in an engaging and entertaining way, we nevertheless concluded that it had been executed in a manner designed to obscure the true nature of the prize. The broadcaster itself acknowledges that it would have been beneficial to give listeners more information about the prize to avoid confusion. Rule 2.11, and the accompanying guidance, underline that it is essential that prizes should be described accurately and rules be clear and appropriately made known. Ofcom therefore considered that the manner in which this competition was conducted was a serious breach of the Code. Since this breach is however the first recorded by Ofcom against the licensee, we will not on this occasion take any further regulatory action.

Breach of Rule 2.11

Win a Car a Day in May

Real Radio - Scotland (Central Scotland), 29 May 2007, 15:12

Introduction

A competition prize of a car was placed at a location in Scotland. Listeners were invited to establish where it was, from aired clues, and to text the station with the car's location and registration number by premium rate short message service (SMS), charged at 25p. The first correct text received by Real Radio won the car. For each competition clues were given to listeners throughout the day until the car had been won, which was guaranteed to occur before 17:00. Entrants were periodically taken to air without knowing whether they had won the competition, until Real Radio received the winning text, after which the winner was aired and revealed to listeners.

A listener claimed that the name of a winner had appeared on Real Radio's website before she had been put to air.

Ofcom was therefore concerned that after the winner was decided Real Radio may have still been taking calls from listeners who were attempting to enter the competition. We therefore sought Real Radio's comments regarding Rule 2.11 (competitions must be conducted fairly).

Response

Real Radio said that the winner was contacted just before its 15:00 news broadcast, when her personal details were sought. While being recorded for broadcast she was then verified as the winner by a Real Radio representative present at the location of the prize. Once confirmed, her name was sent to Real Radio's interactive department, at 15:07, to be placed on the broadcaster's website. However, the broadcaster added that, as the first possible slot for airing the winner was 15:12, it was "plausible though perhaps not desirable" that the winner's details were placed on its website before being broadcast.

Real Radio said that, through oversight, the text service had remained open after it had verified the winner until the day's competition had ended (some 5 minutes). Although it had not appealed for entries during that period, the broadcaster acknowledged that it was possible listeners could have entered with no chance of winning, which had been unintended though potentially unfair. Real Radio added that it had not intended to mislead listeners and would "learn from this with regards to any future text answer activity." To this end, it welcomed "further and clearer guidelines on the subject of fair time line closures..." Real Radio also confirmed that no other correct answers were received in this instance.

Decision

It is common for listeners to enter radio competitions in direct response to an aired appeal. In this case, no prompt was broadcast after the winning text had been received by the radio station. However, for a competition to be conducted fairly, broadcasters must ensure that the audience is told immediately when the competition has come to an end. Further for the sake of transparency, broadcasters should inform the audience that if they enter the competition after it is closed, they may be charged.

Ofcom acknowledges that, in this case, the unfair conduct was unintentional and the adverse effects on listeners (in particular financial harm) were most likely to have been minimal, given that only 5 minutes elapsed between Real Radio having confirmed and broadcast the winner. However, broadcasters should take particular care when using premium rate services (PRS) in competitions to ensure that the competition procedures and mechanics enable the broadcaster to inform the audience about the competition's closure transparently and therefore fairly. In this case, the broadcaster's decision to record the winning entry and delay its broadcast without ensuring that lines were closed was unfair to listeners who entered in the interim and therefore breached Rule 2.11 of the Code.

Ofcom expects all broadcasters to exercise particular caution in all aspects of the use of PRS in their programmes. In the absence of this, Ofcom will view breaches of Rule 2.11 very seriously and will consider further regulatory action.

Breach of Rule 2.11

Quiz Night Live

FTN, 29 October 2006, 22:00

Introduction

Quiz Night Live, a Call TV quiz show, ran a competition in which the following sum was screened:

“EIGHT TIMES TEN MINUS THIRTY PLUS SIXTEEN”.

Viewers were invited to “*add all the numbers*” and to call a premium rate telephone number for a chance to enter.

A viewer questioned the validity of the answer, 2,549, which was given at the end of the competition, as no caller who reached the studio had identified it. We asked FTN for full details of the methodology applied in this case to arrive at the answer it had broadcast.

Rule 2.11 of the Code requires that: “Competitions should be conducted fairly...”

The broadcaster provided Ofcom with the methodology. However, there appeared to be an error. At one point in the calculation of the answer, the number 60 had been used instead of 16.

We therefore asked Virgin Media TV, which now owns and operates FTN (*Quiz Night Live* was broadcast on FTN when the channel was owned and operated by Flextech Television), to detail the validation and verification procedure that had been implemented in approving the competition for broadcast and how the competition complied with the Code.

Response

Virgin Media TV acknowledged that the calculation of the answer had erroneously included the number 60, rather than the correct number, 16. This made the correct answer, 2,505 (not 2,549, as broadcast), which was not identified by any caller who successfully reached the studio.

The broadcaster said that the competition was devised by the production company’s series producer and then checked by two other members of the production team, before being held by an independent adjudicator. It added that, “regrettably, none of these people noticed the error...”

Decision

A basic principle in the fair conduct of running a competition is to ensure that viewers are told the correct answer when a competition has ended.

If the correct answer is not known to those running the competition, a participant who is put through to the studio runs the risk of providing it without being awarded the prize. In this case, no caller who successfully reached the studio identified the correct answer. However, it is possible that some entrants may have had the correct answer, but did not get through to the programme.

The broadcast of an incorrect answer has the potential to cause future financial detriment to some viewers. Regular viewers who are keen to solve the puzzles posed in Call TV quiz service competitions are clearly misled if they are given incorrect answers and similar competitions are run subsequently.

In this case, it appears that there was no financial detriment to callers. However, the competition was in breach of Rule 2.11 of the Code.

Ofcom recognises this is the first time that a programme broadcast on FTN has been found in breach of Rule 2.11. However, a breach of this nature has the potential to cause viewers financial detriment and Ofcom is likely to consider any recurrence as a serious compliance failure.

Breach of Rule 2.11

Cash Call “Total Amount of Money” puzzle

The Hits, 28 February 2007, 02:30

Introduction

Cash Call is a block of TV quiz programmes transmitted overnight on the channels The Box, Kiss, Smash Hits, Magic, Q, Kerrang and The Hits. These channels are all owned by Emap. Viewers entered the quizzes by calling premium rate service numbers.

One viewer complained to Ofcom that a quiz entitled “What is the total amount of the money in the puzzle?” was confusing. The complainant said that the coins and notes on screen came to a value of £55.58, but that the answer given to viewers was £47.42. Ofcom contacted the broadcaster asking it to clarify the answer.

Response

Emap said that the competition required viewers to calculate the total value of valid currency on the screen. However, also on screen was a certain amount of “dummy” currency (which had been altered and therefore rendered void). The total value required to solve the puzzle was therefore only the sum total of the “valid” currency, which was £47.42 and which was the answer eventually accepted on-air. The broadcaster enclosed with its response a ‘screen-grab’ (i.e. picture) of the money on screen and a recording of the quiz as it was transmitted.

When Ofcom viewed the recording, it noted the “dummy” currency and observed that the correct answer to the puzzle was indeed £47.42. However, it also noted that areas of the screen were sometimes covered by on-screen text so that there were times when it was not possible to distinguish which coins and notes on the screen were valid. Ofcom therefore wrote to Emap asking it to comment further, with particular with regard to Rule 2.11 of the Broadcasting Code which states that “Competitions should be conducted fairly...”

Emap responded that it could explain how this incident occurred but could not justify it. It said that the full screen graphic (which at times obscured some of the money on screen) was used to cover the presenters’ shift changes. It admitted that some of the coins were obscured when the full screen graphic was used. Emap appreciated that this contravened Rule 2.11 of the Code. It believed however this was as the result of an unfortunate oversight rather than a deliberate attempt to mislead viewers.

Emap informed Ofcom that on 19 April 2007, Emap TV terminated its contract with Telemedia, the production company that produced and operated *Cash Call* programming on Emap’s channels.

Decision

Ofcom noted the broadcaster’s full response and admission that it had breached Rule 2.11 of the Code. The competition could not be conducted fairly if viewers were unable, at times, to see some of the coins on the screen for significant periods when the competition was being broadcast.

Ofcom notes that Emap no longer employs the production company concerned, and its statement that it remains committed to delivering fully compliant quiz

programming. Emap TV, as the licensee, however is at all times responsible for ensuring compliance with the Code. It is of paramount importance that broadcasters are fully conversant as necessary with the activities of companies they contract with to provide, or contribute to, all types of programming in order to ensure compliance with the Code.

Breach of Rule 2.11

Call Me a Cabbie

Sky Three, 16 August 2007, 07:30

Introduction

Call Me a Cabbie is a factual entertainment reality series which was repeated in morning timeslots on Sky Three. Ofcom received two complaints that the episode broadcast on 16 August 2007 contained several swear words including the words 'fuck' and 'fucking' at a time when this channel, available on the Freeview platform, was accessible for children to view.

Ofcom asked Sky to comment on these complaints under Rule 1.14 (the most offensive language must not be broadcast before the watershed or when children are particularly likely to be listening) of the Code.

Response

Sky responded that the series as originally broadcast contained language that was inappropriate for broadcast at times when children were likely to be watching. A version with offensive language edited out was therefore created for the repeats of this series on Sky Three in the morning. However, as a result of human error the wrong version of the programme was broadcast on this occasion. Sky has confirmed to us that this was the only occasion in the series where the incorrect version was played.

Decision

Rule 1.14 states that "the most offensive language should not be broadcast before the watershed or when children are likely to be listening". Although this series did not attract a significant child audience, it was broadcast at 07:30 and on a service readily available to a large majority of households and therefore available for children to view. Our research indicates that 'fuck' (or 'fucking') is one of the most offensive swear words¹. This programme contained four instances of these words as well as 'bollocks', 'shit' and 'tossler'. Furthermore, all of this language was included in the subtitling provided for this programme.

Broadcasters are under a clear duty to ensure that robust procedures are in place to ensure full compliance with the Code, as was underlined in a Note to Broadcasters published in Bulletin 89. We welcome Sky's assurances that it has reminded staff of the importance of due diligence in assigning the correct versions of programmes to respective timeslots in their schedules. However, this programme contained several instances of bad language, including the most offensive type, and was broadcast before the watershed. This programme was therefore in breach of Rule 1.14 of the Code.

Breach of Rule 1.14

¹ "Offensive Language and Sexual Imagery in Broadcasting: a Contextual Investigation" is available at <http://www.ofcom.org.uk/research/radio/reports/bcr/language.pdf>

101 Sexiest Celebrity Bodies

ITV2, 31 July 2007, 20:00

Introduction

101 Sexiest Celebrity Bodies is a three-part chart show comparing the attractiveness of celebrities.

A viewer complained that the last ten minutes of the programme contained at least four instances of the word 'fucking' in an interview with the actor Colin Farrell. On viewing the whole programme, Ofcom also noted a use of the word 'fuck' earlier in the broadcast in an interview about the actress Lucy Liu.

Ofcom asked ITV for comments in relation to Rule 1.14 (most offensive language must not be broadcast before the watershed).

Response

ITV sincerely apologised for the inclusion of this offensive language pre-watershed. This was entirely unintentional and was the result of human error.

The broadcaster explained that this error was not a repetition of the scheduling problem which led to ITV4 being held in breach of Rule 1.14 in July 2007 (Bulletin 89). This and two previous occasions in 2006, when offensive language had been broadcast on ITV channels pre-watershed, were due to wrong versions (i.e. post-watershed editions) being scheduled. ITV had taken this breach of July 2007 very seriously and reviewed its levels of checking and vigilance before broadcast.

On this occasion, *101 Sexiest Celebrity Bodies* was a newly acquired series. It was delivered late to the compliance team and unfortunately the bad language had been overlooked whilst staff had concentrated on the suitability of the more sexual aspects of the series for a pre-watershed slot.

Having now reviewed the whole of the series, ITV has decided that it should only be shown post-watershed. ITV said it has taken this case extremely seriously and re-emphasised the importance of this issue to all compliance staff.

Decision

Ofcom's research has demonstrated that the words 'fuck' and 'fucking' are regarded as the most offensive language. By broadcasting this language in this programme at 20:00, ITV was in breach of Rule 1.14 of the Code.

Ofcom acknowledges ITV's apology and explanation for the error. Although the circumstances of this mistake were different to those previously mentioned in Bulletin 89, the outcome as far as the audience was concerned was that seriously offensive language had been broadcast before the watershed, resulting in a breach of the Code.

Breach of Rule 1.14

Ek Ajnabee

Zee TV Cinema, 27 May 2007, 12:00

Introduction

Zee Cinema is a subscription movie (not pay per view) channel aimed at a predominantly Hindi audience. *Ek Ajnabee* is a thriller/crime film rated '18' by the British Board of Film Classification. The plot centres on a bodyguard who goes on a quest to find his employer's daughter, who has been kidnapped by gangsters. In doing so he systematically searches for, tortures and kills those he believes to be responsible for the kidnapping.

One viewer complained. She was shocked that both she and her nephews were able to watch such a violent film during the afternoon at the weekend.

Ofcom asked Zee TV to respond with regard to Rule 1.3 of the Code (children must be protected from unsuitable material by appropriate scheduling).

Response

Zee TV said that programme was broadcast in edited form to ensure the content was editorially justified and suitable for broadcast pre-watershed. As a consequence, the channel argued that the film would not have disturbed a child viewer. The broadcaster suggested that an experienced programming team had taken care to edit the film to ensure that the Code was complied with satisfactorily, without affecting the story line. While Zee TV stated it was sorry a viewer was offended, it argued that in this case any offence could have been mitigated had the viewer exercised personal discretion and turned the film off.

Decision

This 18-rated film as broadcast contained material of a highly adult, and often violent nature – kidnapping, torture, shoot outs, suicide and drugs use. Ofcom notes Zee TV's attempts to minimise harm to children and offence through editing. Upon viewing the material, however, Ofcom found that in its opinion many of the edited scenes were still too harmful to be shown before the watershed at the time of broadcast. For example, although torture scenes may have been edited so that violent detail of the protagonist inflicting pain on his victims was minimised, these scenes were still nevertheless too extreme by their very nature, including body parts such as fingers and ears being severed, and the chief protagonist toying with the idea of suicide, by placing a gun in his mouth.

In addition, certain sequences containing unsuitable content still remained in the film as broadcast – for example, a brief scene of a criminal snorting cocaine. Ofcom considers that this film was clearly unsuitable for children and it was not appropriate to broadcast it before the watershed. It was therefore in breach of Rule 1.3.

Breach of Rule 1.3

The Breakfast Show

Power FM (South Hampshire), 17 April 2007, 07:40

Introduction

In this programme, the presenters, Rick, Donna and Bob, asked listeners to contact them with their stories of what had “...gone wrong during sex”. Over the course of the programme listeners texted and phoned in with their stories. These in turn were read out to listeners.

Contributions included such descriptions as:

“Having a ‘bit of fun’...christening all the rooms”

“My skirt got stuck...my boyfriend’s parents [could see] my bum...”

“...that ‘sex’ can be on your own, or with another person...”

“I squeezed into really tight knickers...when the moment came to get them off, I couldn’t...”

“I [was] with my ex-boyfriend...I [was] on top, having a good time...”

“...cries of passion...”

“At it – in the throes of passion”

“In the throes of passion his...pride and joy got bent in half...”

“My [future] husband and I were...at it... shall we say?”

“...that’s called ‘dogging’ these days...”

“We were in a state of undress”

“...having it away...”

“My first time...in someone else’s bed...I lunged...she had to help me detach me from the sheets...”

One listener complained that this was inappropriate content for the time of day.

We asked the broadcaster to comment on the material in the light of: Rule 1.3, which states that “Children must...be protected by appropriate scheduling from material that is unsuitable for them”.

Response

Power FM said that after the 07:00 news bulletin, Donna, one of the presenters of the show, referred to an e-mail that she had received from a member of the public who had found herself in an embarrassing situation while being “intimate with her partner”. After she read out the e-mail, the breakfast team invited callers to phone in with or text their experiences regarding any humiliating incidents they may have experienced when having sex.

Power FM said that most of the incidents read out were not in its view offensive, for example from one caller who broke her wrist after falling off a bed, to another who had been stung by a wasp. With reference to Rule 1.3, Power FM believed that the discussions had centred on the humiliating experiences in which people had found themselves, as opposed to their sexual experiences specifically. In its view, the discussion had been acceptable because it was sufficiently inexplicit, with scant reference to, or any discernible acknowledgement of, any particular sexual activity.

Power FM nonetheless accepted that the decision to broadcast these items had been an error of judgement, and that the nature of the discussion was not acceptable at

that time of the morning. It apologised unreservedly to the complainant for any offence caused. In the light of what had happened, it said it would hold a further Code training session with relevant personnel.

Decision

With regard to Rule 1.3, much of what was transmitted fell into the realm of innuendo. It is possible that such conversations could have passed some children by. However, the presenters repeatedly invited listeners to tell the programme: *“what’s gone wrong during sex?”*.

The show did not contain one off comments during general banter, but was in fact a whole section devoted to the topic. As the broadcaster acknowledges, the overall context of the discussions and the length of the item meant the content became inappropriate for broadcast at breakfast time when a number of children were likely to be in the audience. The programme was therefore not scheduled appropriately in order to protect children from unsuitable material.

Ofcom notes that Power FM has admitted its error in broadcasting this item. We also note the steps the broadcaster has taken subsequently to ensure material of this nature is not broadcast when children are particularly likely to be listening. However, it remains the case that this was an item which the presenters returned to on repeated occasions throughout the transmission of this programme, at breakfast time. We were therefore concerned that at no time during the broadcast, no member of the production team, sought to limit the material appropriately.

Breach of Rule 1.3

Resolved

Cash, Car and the Caribbean

Metro Radio, 12 January 2007, 16:20 and TFM 96.6FM, 17 January 2007, 08:50

Introduction

Cash, Car and the Caribbean was a competition run across a number of stations owned by Emap Radio including Metro Radio and TFM 96.6.

Ofcom received 3 complaints from listeners that a pre-recorded promotion for the competition on Metro Radio did not make it clear that the competition was a cross-network competition (i.e. that the competition was run on a number of Emap stations across the country), rather than just being conducted by one local station.

Ofcom also received a complaint from a listener that the competition on TFM 96.6FM also did not make it clear that the competition was a cross-network competition.

Rule 2.11 of the Code requires that: "Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known."

Response

Emap said that *Cash, Car and the Caribbean* was its first networked competition and that it was keen to ensure the way it was conducted was not only compliant with Ofcom's code rules but that it did not mislead listeners in any way. It said that presenters were told to refer to the networked status of the competition and broadcast pre-recorded trails that specifically mentioned the networked status of the competition every hour.

On Metro Radio, Emap said that there were two pre-recorded promotional items. One of these had the full details of the competition including the networking and pricing information. The other did not, as it was intended to be used as an introduction or end piece to the competition or a presenter announcement about the competition. Unfortunately the wrong promotion had been played. Emap acknowledged that this was a mistake and said in future all pre-recorded promotional material would include the necessary information.

With regards to the complaint on TFM 96.6FM, Emap said that a presenter had ad-libbed the promotion and acknowledged that this could have given the impression that the competition was not being run across its network. In light of this experience, Emap said it would provide specific guidance to presenters to "prevent them amending or ad-libbing the pre-scripted announcements to avoid any errors, omission or grounds for misunderstanding".

Decision

For competitions to be run fairly, listeners should be given sufficient information to decide whether or not to participate. When run simultaneously on various local/regional services, competitions can result in participation being spread wider (i.e. beyond the local area) than might be obvious to listeners in any one location.

Broadcasters should not give listeners the impression that a competition is run over a smaller geographical area than is actually the case.

In the case of *Cash, Car and the Caribbean* certain promotions did not fully explain that the competition was being run across a network. However, Ofcom welcomes Emap's acknowledgment of these errors and the steps Emap has taken to ensure that future competitions are appropriately described.

Ofcom therefore considers the matter resolved.

Resolved

Fairness and Privacy Cases

Upheld in Part

Complaint by Carter Ruck Solicitors on behalf of Mrs Monica Calvert

Old Dogs New Tricks, BBC1, 31 August 2006

Summary: Ofcom has upheld parts Ms Calvert's complaint of unfair treatment and unwarranted infringement of privacy in the making of the programme. Ofcom has not upheld Mrs Calvert's complaint of unwarranted infringement of privacy in the programme as broadcast.

This edition of the BBC's consumer series *Old Dogs New Tricks* looked at what it referred to as "homeworking scams". One of the businesses featured was Kallimera, run by Mrs Monica Calvert, who supplies home-based workers with kits containing materials and instructions for making and painting plaster cottages. One of the presenters, Ms Lynn Faulds Wood, sent off for a kit using a false name, Cathy Williams. She found the materials unsatisfactory and the cottages she made were rejected by Mrs Calvert's business. Mrs Calvert responded to letters from "Cathy Williams" on three occasions, each time rejecting the models and offering advice on how to improve the cottages. Ms Faulds Wood then visited Mrs Calvert's home with a camera crew and tried to discuss her business with her. Footage of Mrs Calvert's home was included in the programme and the presenters referred to her business.

Carter Ruck Solicitors ("Carter Ruck") complained that the programme was unfair to Mrs Calvert in that she was portrayed as a con artist and her business as a scam; furthermore in the absence of grounds for suspecting her of wrongdoing, it was disproportionate for the programme makers to seek to obtain her kits by deception. Carter Ruck also complained that Mrs Calvert's privacy was unwarrantably infringed in the making of the programme in that she was doorstepped without good reason and her privacy was unwarrantably infringed in the broadcast as a result of the inclusion of her name and footage of sweeping shots of her house.

The BBC responded that: Mrs Calvert was not portrayed as a con artist, her business was not portrayed as a scam, but that there was evidence to justify an investigation by the programme of her business; there was no deception involved in the programme makers contact with Mrs Calvert and the approach used was not unfair; there was no infringement of Mrs Calvert's privacy in the making of the programme and the approach made to her home was justified; and, Mrs Calvert had placed her home address in the public domain herself and the programme did not give the precise location of her home.

Ofcom considered that Mrs Calvert was portrayed as a con artist and her business as a scam. In Ofcom's view this was not justified and was therefore unfair to her. Ofcom considered that the use of deception by the programme makers in using a false name to investigate the claims in her advertisements was not disproportionate. However the use of doorstepping to seek an interview with Mrs Calvert was disproportionate and not warranted. This was an infringement of her privacy in the making of the programme. The inclusion of Mrs Calvert's name and footage of her home did not disclose any information that was not already in the public domain and was not an infringement of her privacy in the broadcast.

Introduction

On 31 August 2006, BBC1 broadcast an edition of its consumer series *Old Dogs, New Tricks*. The programme looked at what it referred to as “homeworking scams”. One of the businesses featured was Kallimera, run by Mrs Monica Calvert, who supplies home-based workers with kits containing materials and instructions for making and painting plaster cottages. One of the presenters, Ms Lynn Faulds Wood, sent off for a kit using a false name, Cathy Williams. She found the materials unsatisfactory and the cottages she made were rejected by Mrs Calvert’s business. Mrs Calvert responded to letters from “Cathy Williams” on three occasions, each time rejecting the models and offering advice on how to improve the cottages. Ms Faulds Wood then visited Mrs Calvert’s home with a camera crew and tried to discuss her business with her. Footage of Mrs Calvert’s home was included in the programme and the presenter referred to her business.

Carter Ruck Solicitors (“Carter Ruck”) complained that Mrs Calvert was treated unfairly in the programme and that her privacy was unwarrantably infringed in the making and the broadcast of the programme.

The Complaint

Mrs Calvert’s case

In summary, Carter Ruck complained that Mrs Calvert was treated unfairly in that:

- a) She was portrayed as a con artist and her small business as a scam. According to the BBC’s publicity the programme features Ms Faulds Wood and Esther Rantzen “investigating scams and dodgy businesses, and tracking down the people responsible”. Carter Ruck stated that Mrs Calvert has run a small business from her home for 14 years, selling kits containing the materials and instructions necessary to make and paint plaster cottages. She has made a modest income from the business and has run it without any complaint from customers, trading bodies or the publications in which she advertises the business. Consumers of her Homeworker Starter kit can make money out of the miniature cottages if they apply the necessary skill, which Ms Faulds Wood did not.
- b) It was disproportionate for the programme makers to seek to obtain Mrs Calvert’s cottage making kits by deception. Mrs Calvert and her business were not the subject of any complaint or investigation and, in the absence of any allegations of illegality or anti-social behaviour and without any grounds for suspecting her of wrong doing.

In summary, Carter Ruck complained that Mrs Calvert’s privacy was unwarrantably infringed in the making of the programme in that:

- c) Mrs Calvert was doorstepped without good reason. The stated purpose of the programme was to track down the individuals responsible for “scams and dodgy businesses”. There was nothing untoward or dishonest about Mrs Calvert’s business and the programme makers had no compelling evidence to suggest otherwise. The programme makers had no good reason to believe that an investigation would be frustrated if Mrs Calvert was approached openly or that she would not reply to the allegations in writing; she had responded to the letters from “Cathy Williams”, the false name used by Ms Faulds Wood. However, the

programme makers did not contact Mrs Calvert prior to doorstepping her to inform her of the investigation, put allegations to her or to invite her to attend an interview and therefore, prior to Ms Faulds Wood's arrival at her home, Mrs Calvert was unaware that she was the target of an investigation by the BBC. Her quiet enjoyment of her home was severely destroyed by the surprise arrival of Ms Faulds Wood and the camera crew. Mrs Calvert felt physically intimidated and distressed by Ms Faulds Wood's aggressive attempts to open her front door. Despite Mrs Calvert making it clear, by closing her door, that she did not wish to be interviewed, Ms Faulds Wood persisted at her door for an hour, ringing the doorbell and trying to force entry into the house when Mrs Calvert opened the door to invited guests. The programme makers did not have reasonable grounds to suspect that Mrs Calvert was guilty of crime or significant wrong doing and the door stepping was for dramatic effect only, as the programme makers could have obtained answers to their questions by putting them in writing to the complainant.

In summary, Carter Ruck complained that Mrs Calvert's privacy was unwarrantably infringed in the programme as broadcast in that:

- d) The programme named Mrs Calvert and included footage of sweeping shots of her house, together with the disclosure of its location in Lincolnshire. This served no public interest and was included for dramatic effect only.

The BBC's case

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

- a) In response to the complaint that Mrs Calvert was portrayed as a con artist and her business as a scam, the BBC said that Mrs Calvert was never portrayed as a con artist, nor was her business portrayed as a scam. The programme set out to investigate whether it was possible to make the amounts of money promised in advertisements for homeworking opportunities. The BBC said that the test for inclusion in the programme was how closely the claims in the advertisements held up when tried out by a member of the public. Mrs Calvert's advertisement in *The Sun* not only suggested that her "customers" could "earn up to £20 an hour", but also omitted to say, as the Advertising Standards Authority suggests it should, that this opportunity required an outlay of money. The BBC argued that the advertisement's claims were therefore misleading. The programme had further evidence suggesting a close look at Mrs Calvert's cottage painting scheme would be worthwhile, in the form of an interview with a representative of the Office of Fair Trading's ("OFT") "Scambusters" unit. Although this interview was not used in the programme, since there was a risk that viewers might take it as a direct comment on Mrs Calvert's business, the OFT representative described "pretty much" what happened when the programme applied to Mrs Calvert for a homeworking opportunity, and went on to refer to "wild promises of what you'll make, and really that never happens".

The BBC said that the programme took care to ensure viewers understood the differences between cottage painting and the envelope stuffing businesses featured, which were referred to as obvious scams. They were different from Mrs Calvert's business, which was not an obvious scam.

It would have been extremely simple, the BBC argued, for Mrs Calvert to demonstrate that individuals who respond to her advertisements really could "earn up to £20 an hour", as her advertisements said. All that would have been necessary would be to identify to the programme makers a single individual who

had actually been making £20 an hour from selling painted plaster cottages. The fact that she did not was, on its own, adequate grounds for suspicion. The BBC said that the fact she couldn't come up with anyone who had ever made any money from making and painting plaster cottages, even in support of the complaint, was even more suspicious. Simple arithmetic demonstrated that no such figure could be achieved using the kit supplied. The BBC stated that the programme makers responded to one of her advertisements and demonstrated that the economics of the scheme were questionable and merited investigation.

- b) In response to the complaint that the use of deception was disproportionate, the BBC said that there was no deception involved in the programme makers' contact with Mrs Calvert. She placed advertisements in national newspapers, presumably in the hope that any of those newspapers' readers might respond. The use of "dummy shoppers" is a standard way of establishing whether products and services conform to acceptable standards: they are used extensively by large retailers and Trading Standards Officers. The BBC argued that one of the risks for consumer journalists, Trading Standards Officers and the OFT was being sent a sample that was far superior to that normally supplied. The programme makers did no more than take appropriate steps to avoid that eventuality, and it was not unfair to Mrs Calvert to take this approach. When she was approached directly by Ms Faulds Wood, the BBC said that Ms Calvert replaced the supplied mould, paints and brushes, blaming her packer for sending out inferior items.

In response to the complaint of unwarranted infringement of privacy in the making of the programme, the BBC said in summary:

- c) In response to the complaint that Mrs Calvert was doorstepped without justification, the BBC said that in order for there have been an infringement of Mrs Calvert's privacy, the programme makers would have had to physically disturb or materially restrict her private and family life or revealed inherently private or particularly sensitive information about her. As the programme made clear, three attempts to send cottages back to Kallimera resulted in what the programme makers considered a perfunctory brush-off: although the first response contained an attempt at courtesy, the second simply ignored the request for a telephone call, and the third was little better. The programme makers were determined to find out just what was wrong with the cottages. The BBC said that although Mrs Calvert's material for home workers stated that home workers were given an advice line telephone number, no number was printed on the material provided. Mrs Calvert's solicitors had acknowledged that only specially favoured "customers" were given a number, so for any customer struggling to make a start on the progression to earning the promised "up to £20 an hour", the only way to deal directly with anyone in Mrs Calvert's cottage painting business was to pay it a visit. The BBC argued that the clear implication of the absence of any phone number, from the original leaflet and the terms of the rejections of the first three attempts at cottage painting, was that the last thing Mrs Calvert wanted was, as claimed in her sales leaflet, to "answer speedily and efficiently" the "queries" that were inevitable when anyone started on a new venture.

The BBC said that, after appropriate discussions with the relevant senior editorial figures, the programme makers decided to pay Mrs Calvert a visit to ask her if the latest batch of cottages met her standards. Although this did not work, the approach was entirely warranted by the Mrs Calvert's deliberate attempts to stop aspiring cottage-painters getting in touch.

The programme makers took care to minimise any disruption to Mrs Calvert's home life. They parked well away from her house and rang the doorbell. When the door was opened, it was immediately slammed in Ms Faulds Wood's face before she had even had the opportunity to say why she was there. The team was bewildered by this reaction, and Ms Faulds Wood asked further very polite questions through the letterbox making clear why she was there and asking Mrs Calvert to come and look at a cottage and explain how anyone could make the money they had been promised. The team remained outside the premises because Mrs Calvert said she would come out to talk when she had finished with customers for her fancy dress business. Had she asked them to leave they would have done - but in fact she suggested she would, in due course, come out and talk. Mrs Calvert did eventually speak to Ms Faulds Wood, offered her some further paints and answered some questions. However, it was clear she was reluctant to be interviewed, so the BBC decided not to broadcast the footage. Although the complaint referred to Mrs Calvert being "deeply distressed and scared by Ms Faulds Wood's behaviour", the rushes demonstrated that Mrs Calvert simply closed the door as soon as Ms Faulds Wood introduced herself. When she spoke to Ms Faulds Wood later, there was no trace of discomfort in her voice.

In response to the complaint of unwarranted infringement of privacy in the broadcast the BBC said in summary:

- d) In response to the complaint that her name and shots of her home were included in the programme, the BBC said that Mrs Calvert herself placed her home address, which is also her business address, in the public domain. The programme said no more than that she lived in Lincolnshire, without giving a precise location. Any shots of her house would have identified it no more closely than the precise address included in both the material distributed by Mrs Calvert's cottage painting business to customers and to the many readers of *The Sun* and the other newspapers she advertises in. The BBC's decision to refer to her location and to include shots of her house was warranted by the circumstances and information in the public domain.

Carter Ruck's comments

In response to the BBC's statement, Carter Ruck commented on two elements of the BBC's statement and said in summary:

- a) If the sole object of the programme was to investigate scams and dodgy businesses, then Mrs Calvert should not have been included, since the BBC conceded that she was not a con artist and her business was not a scam. The claims made in Mrs Calvert's advertisements had not been the subject of complaint by a member of the public and were tested by an undercover journalist, not a member of the public. Carter Ruck provided copies of testimonials from satisfied customers of Mrs Calvert.
- c) Although the rushes of Ms Faulds Wood and the film crew outside the house lasted approximately 12 minutes, they were in fact there for almost an hour. Ms Faulds Wood pushed the door with great force. Mrs Calvert had replied to every letter from "Cathy Williams" and the BBC had no reason to believe that had they written to her revealing their undercover investigations, she would not have replied.

The BBC's comments

In its final response, the BBC said in summary in response to the matters raised by Carter Ruck in response to the BBC's first statement:

- a) The programme said that the cottage painting scheme did offer some "genuine opportunities". Nevertheless, the programme makers had evidence that Mrs Calvert's newspaper advertisements were misleading. The letters provided by Carter Ruck were presented in such a form that they could not be verified. In any event, the most they showed was that in some cases, cottage makers could sell some of their cottages, mostly to family and friends, provided they did the selling themselves. None of the writers claimed to have become a regular supplier of painted cottages to Mrs Calvert.
- c) The rushes showed that Mrs Calvert's recollection that Ms Faulds Wood pushed the door with great force was flawed.

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.

Carter Ruck's complaint on behalf of Mrs Calvert was considered by Ofcom's Executive Fairness Group. Ofcom considered the complaint and the broadcaster's response, together with a recording and transcript of the programme as broadcast.

Ofcom found as follows:

- a) Carter Ruck complained on behalf of Mrs Calvert that she was portrayed as a con artist and her business as a scam.

In considering this head of 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 BBC said the programme did not portray Mrs Calvert as a con artist or her business as a scam. However, Ofcom considered that viewers would have gained the clear impression from the programme that this was the BBC's intention. The programme began by stating that it was setting out "to nail the men behind the country's biggest homeworking scams".

In Ofcom's view, viewers were likely to have understood this statement to refer to Mrs Calvert, as one of the people running a business featured in the programme.

The commentary went on to say:

“The papers are always running ads promising high earnings for jobs you can do at home. Some do offer genuine opportunities. Lynn’s putting one of them to the test”.

Although the programme’s commentary referred to some of the homeworking businesses featured in press advertisements offering “genuine opportunities”, there was nothing in the commentary to suggest that the BBC considered that Mrs Calvert’s business fell into that category.

Furthermore, Ofcom considered that the test for inclusion in the programme as set out in the BBC’s statement in response to the complaint, namely “how closely the claims in advertisements held up when tried out by a member of the public”, would not have been apparent to viewers from what was said in the programme itself.

Ofcom considered that the programme makers were entitled to put Mrs Calvert’s advertisement to the test and to investigate her claims for her homeworking scheme (see also b) below). Ofcom noted that the programme maker’s investigations suggested that Mrs Calvert’s advertisement appeared to exaggerate the earning potential of her customers. However, Ofcom also noted that the programme makers did not include in the programme any dissatisfied customer of Mrs Calvert, whereas, in relation to the other businesses featured, they were able to find and include in the programme, dissatisfied customers. Ofcom considered that, given that the stated aim of the programme was to “nail the men behind the country’s biggest homeworking scams”, the programme did not reveal any evidence of serious consumer detriment that would put Mrs Calvert into the category of “scams”. In the circumstances the portrayal of Mrs Calvert and her business in the programme was not justified.

Ofcom found that the programme was unfair to Mrs Calvert in this respect.

- b) Ofcom considered the complaint that the use of deception was unfair to Mrs Calvert.

In considering this head of complaint, Ofcom took into account Practice 7.14 of the Code, which states that programme makers should not normally obtain or seek material through misrepresentation or deception, but provides that it may be warranted to do so without consent if that is in the public interest and the material cannot reasonably be obtained by other means.

Ofcom took the view that, in the context of the preparation of a programme investigating advertisements offering homeworking opportunities, it was legitimate for the programme makers to put Mrs Calvert’s advertisements to the test. It was also reasonable for the programme makers to use deception, by using a false name when contacting Mrs Calvert at the investigation stage to obtain the kits offered in her advertisement, since it was possible that an open initial approach may have resulted in the programme makers being provided with a different kit than the one they received when using a false name. The approach used was not disproportionate in relation to the initial investigation.

Ofcom found no unfairness to Mrs Calvert in this respect.

- c) Ofcom next considered Carter Ruck’s complaint that Mrs Calvert’s privacy was unwarrantably infringed in the making of the programme in that she was approached without her consent and doorstepped.

In considering this head of complaint, Ofcom viewed untransmitted footage of the programme makers' approach to Mrs Calvert at her home. Ofcom took into account Practices 8.5, 8.9 and 8.11 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. Practice 8.11 says that doorstepping for factual programmes should not take place unless a request for an interview has been refused or it has not been possible to request an interview, or there is good reason to believe that an investigation will be frustrated if the subject is approached openly, and it is warranted to doorstep.

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, 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?

Doorstepping is the filming or recording of an interview or an attempted interview with someone without prior warning. Doorstepping is a legitimate means for programme makers to obtain interviews in certain circumstances.

However, it should not take place unless a request for an interview has been refused, or it has not been possible to request an interview, or there is good reason to believe that an investigation will be frustrated if the subject is approached openly, and it is warranted to doorstep.

In reaching a decision about whether Mrs Calvert's privacy was infringed in the making of the programme as a result of the programme makers doorstepping her, Ofcom first sought to establish whether she had a reasonable expectation of privacy. In Ofcom's view, legitimate expectations of privacy will vary according to the place and nature of the information, activity or condition in question, the extent to which it is in the public domain (if at all) and whether the individual concerned is already in the public eye.

Ofcom noted that the programme makers made no attempt to request an interview openly with Mrs Calvert and therefore they did not know whether such consent would be forthcoming. The BBC has not suggested that it was not possible for them to do approach Mrs Calvert openly. Ofcom notes that, although they did not have a telephone number for Mrs Calvert, the programme makers had her address and were able to visit her home. Further, although the programme makers were not satisfied with her response, Mrs Calvert did respond to the letters from Ms Faulds Wood, when using the name Cathy Williams, and no evidence has been provided by the BBC to suggest that an open approach to Mrs Calvert would have led to the investigation being frustrated. Ofcom therefore considered that the use of doorstepping to approach Mrs Calvert was disproportionate in the circumstances.

Ofcom considered that Mrs Calvert had a legitimate expectation of privacy at her home. Although it was her business premises as well as her residence, her home was not also, for example, a shop. The material provided to Ms Faulds Wood did not suggest that Mrs Calvert expected her customers to personally call on her. In these circumstances, Mrs Calvert had a legitimate expectation of privacy in her

home. The doorstepping of Mrs Calvert, in which the programme makers approached her at her home without any prior warning, was therefore an infringement of her privacy in the making of the programme.

Was the infringement of privacy warranted?

As set out under decision head a) above, the portrayal of Mrs Calvert as a con artist and her business as a scam was not justified and therefore the use of doorstepping was not warranted.

Ofcom therefore found that Mrs Calvert's privacy was unwarrantably infringed in the making of the programme.

- d) Ofcom considered the complaint that Mrs Calvert's privacy was unwarrantably infringed in the broadcast of the programme in that her name and footage of shots of her house were included.

In considering this head of complaint, the Group took into account Practice 8.2 of the Code, which states that information which discloses the location of a person's home or family should not be revealed without permission, unless it is warranted.

As set out under c) above, when considering complaints about the unwarranted infringement of privacy, Ofcom will, 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 Mrs Calvert's privacy was infringed in the broadcast, Ofcom first sought to establish whether she had a legitimate expectation of privacy.

Ofcom considered that individuals generally have a legitimate expectation that images of their home and identifying information about them will not be broadcast. In this case, however, that expectation was diminished by Mrs Calvert's own actions, in that she runs her business from her home and advertises her name and address in her literature. Ofcom noted that the information in the programme did not disclose any information that was not already readily available in the public domain. There was therefore no legitimate expectation of privacy and therefore no infringement of Mrs Calvert's privacy in the broadcast.

In these circumstances, the Group did not go on to consider the question of whether any infringement was warranted.

The Group therefore found that there was no infringement of Mrs Calvert's privacy during the broadcast of the programme.

Ofcom therefore found that in one respect the BBC was in breach of Rule 7.1 of the Code, which requires broadcasters to avoid unjust or unfair treatment of individuals or organisations in programmes. It also found that in one respect the BBC was in breach of Rule 8.1 of the Code, which requires that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

Accordingly the Executive Fairness Group has upheld part of the complaints of unfair treatment and the complaint of unwarranted infringement of privacy in the making of the programme. It has not upheld the complaint of unwarranted infringement or privacy in the broadcast of the programme.

Not Upheld

Complaint by Ms Lisa Rodrigues on behalf of Sussex Partnership 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.

Ms Lisa Rodrigues, Chief Executive of Sussex Partnership NHS Trust ("the Trust"), complained that the Trust was treated unfairly and that its privacy was unwarrantably infringed in the making and the broadcast 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 Eastbourne District General Hospital ("the hospital"), which is managed by the Trust. The programme included footage of staff and patients on a mental health ward at the hospital, and criticisms were made of the care provided at times at the hospital.

Ms Rodrigues, Chief Executive of the Trust (at the time of broadcast, but not at the time of the filming) complained that the programme was unfair because it reported on matters that had taken place a year earlier; the Trust was not given an appropriate and timely opportunity to respond to the issues raised in the programme; the programme and its title were misleading; surreptitious filming at the hospital was not justified in the public interest. Ms Rodrigues complained that secret filming at the hospital without permission was an infringement of the Trust's privacy in the making of the programme and that the broadcast of the secretly filmed footage was an unwarranted infringement of the Trust's privacy in the broadcast.

Channel 4 responded that there was no unfairness in the delay between filming and broadcast and that the timescale was made clear in the programme; detailed information was given to the Trust in a letter, providing it with a full and fair opportunity to respond; neither the title nor the content of the programme was misleading; surreptitious filming was justified by the public interest in the care provided to psychiatric patients. Channel 4 said that the infringement of the Trust's privacy in the making and the broadcast of the programme was justified by the public interest.

Ofcom found that the programme had made it clear that the filming at the hospital took place a year prior to the broadcast; the Trust was given an appropriate and timely opportunity to respond to the criticisms of it in the programme; the title and the programme were clearly intended to be representative of general concerns about the care given to NHS mental health patients (the Trusts referred to in the programme were not portrayed as the worst performing Trusts); in Ofcom's view reasonable care had been taken by the programme makers to ensure that material facts were not represented, disregarded or omitted in a way that was unfair to the Trust; and that surreptitious filming was justified by the public interest in the safety of patients and staff. Ofcom therefore found that whilst the Trust's privacy was infringed in the making and the broadcast of the programme, this was justified by a significant public interest in the issues raised.

Introduction

The *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 Eastbourne District General 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.

Ms Rodrigues, Chief Executive (at the time of broadcast, but not at the time of the filming) of Sussex Partnerships NHS Trust, (“the Trust”) complained that the Trust was treated unfairly in the programme and that its privacy was unwarrantably infringed in the making and the broadcast of the programme.

The Complaint

Ms Rodrigues’ case

In summary, Ms Rodrigues complained that the Trust was treated unfairly in that:

- a) The programme reported on matters that had taken place a year earlier and had since been put right. Further, the programme makers failed to accept the Trust’s offer to film the ward as it was at the time of broadcast, in order to present a balanced programme.
- b) The Trust was not given an opportunity to see the programme before broadcast and therefore was not given an opportunity to respond appropriately to the allegations in the programme.
- c) The programme and its title, *Britain’s Mental Health Scandal*, were misleading as the footage was filmed in just three hospitals in England. Channel 4 failed to take reasonable care to satisfy itself that material facts were not represented, disregarded or omitted in a way that was unfair to the Trust, in that the reporter spent just two weeks at the hospital. The Trust manages seven acute mental hospitals and has 5000 staff.
- d) The deception by the programme makers in filming surreptitiously on the ward was not justified by the public interest. The programme makers could have focused on the Trust’s failings by seeking to film in the ward openly, as the Trust invited them to do in advance of the programme being broadcast.

In summary, Ms Rodrigues complained that the Trust’s privacy was unwarrantably infringed in the making of the programme in that:

- e) Secret filming on a mental health ward, where some of the country’s most vulnerable people were being cared for, was an infringement of the hospital’s privacy. No consent was sought from the hospital and the filming was not justified. There was no more sensitive area for filming without consent than a mental health ward. The programme makers had not given the Trust any argument supporting this breach of confidentiality and so had failed to demonstrate why the filming was justified. The programme makers had also failed to demonstrate that there was prima facie evidence of a story in the public interest; that there were reasonable grounds to suspect that further evidence

could be obtained; and that the secret filming was necessary to the credibility and authenticity of the programme.

In summary, Ms Rodrigues complained that the Trust's privacy was unwarrantably infringed in the programme as broadcast in that:

- f) The broadcast of footage secretly filmed on a mental health ward, where some of the country's most vulnerable people were being cared for, was an infringement of the hospital's privacy. No consent was sought from the hospital and the broadcast was not justified. The programme makers had failed to demonstrate why the broadcast was justified.

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 received a one star rating, putting it in the bottom 30% of mental health trusts in the country in terms of reaching performance targets. Prior to the secret filming, the Trust was last inspected by the Healthcare Commission in 2004, when several causes for concern were found, including inadequate assessment and management of the risk of violence to staff; little response to incidents and risk alerts reported by staff; and a higher than average mortality rate for deaths associated with schizophrenia.

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. This was 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 that the footage was filmed a year before broadcast, Channel 4 said that it was not unfair to the Trust for the programme to report on matters that took place a year earlier. It was made clear both in the commentary and via regular on screen captions that the filming had taken place a year earlier. There was no unfairness in the delay between the gathering of secretly filmed material and transmission: the programme involved a complex investigation raising sensitive issues. It would have been irresponsible to have presented the

material to the Trust without first assessing the material and the context and gaining carefully considered expert medical and legal opinion. The programme makers advised the Trust four weeks before transmission of the findings of the investigation as they planned to feature them in the programme. A letter to the Trust dated 12 September 2006 gave a background to the investigation, set out in detail what matters of concern the secret filming and research had revealed, and asked the Trust for its response to the claims made. As regards the complaint that the programme reported on matters that had since been “put right”, other than referring to a refurbishment, the relevant ward being split in two and “other significant improvements”, the Trust had not at any stage prior to broadcast addressed the specific concerns raised in the programme makers’ first letter. Since the programme made no criticisms of the Trust in relation to the physical conditions on the ward, filming the refurbishment and changed structure of the ward would not have been editorially warranted or justified. The producer turned down the offer to film the new service, following the refurbishment and changed structure of the ward not only because it was not relevant to the allegations made in the programme (about the care given to patients on the ward), but also because, as was illustrated by the undercover investigation, hospital policy and practice could be two different things. The only way the programme makers could have honestly tested the robustness of the new service would have been by doing so covertly. The programme makers invited the Trust to specify what improvements had taken place that were relevant to the allegations in the programme, but no such details were given in the Trust’s formal response for broadcast.

- b) As regards the complaint that the Trust was not given an appropriate opportunity to respond to the allegations in the programme, Channel 4 said that the detailed outline of the issues contained in the original letter to the Trust was sufficient to allow the Trust to respond. Although requests to view material prior to broadcast are considered on a case by case basis, it was not Channel 4’s policy or practice to provide the subjects of secret filming with an advance preview of secretly filmed material. Given its refusal to do so in this case, it was open to the Trust to request from the programme makers further information to enable it to respond as it believed appropriate. The information provided to the Trust did not prevent it from responding more fully than it did. The Trust was given a full and fair opportunity to respond to the allegations in the programme.
- c) In response to the complaint that the programme and its title were misleading, Channel 4 said that it was made clear at the outset of the programme that filming took place in a “fairly typical sample of psychiatric wards nationally” and that “none of the worst performing Trusts were chosen”. The ward filmed at the hospital was fairly typical of such wards nationally. It was not unfair to feature only one of the Trust’s seven acute hospitals, as the programme did not claim to be comprehensive. What was claimed was that the reporter worked in a fairly typical selection of hospitals. The reporter worked at the hospital for 11 shifts over August and September 2005. The implication that the programme was unfair to the Trust because of the short period the reporter worked there was unfounded. The fact that she was able to gather so many examples of breaches of good practice during those 11 shifts was evidence for, rather than against, routine breaches of good practice. As regards the title of the programme, this was not misleading: the footage of four hospitals in three NHS Trust areas featured in the programme was a fairly representative selection of wards nationally.

- d) In response to the complaint about surreptitious filming, Channel 4 said that seeking the information obtained by this means was warranted, since the subject matter was in the public interest and the material could not reasonably have been obtained by other means. The majority of the material gathered from the hospital related to poor treatment of patients by staff. Staff would almost certainly not have behaved in the way they did as revealed in the footage obtained had the filming been carried out openly. The experts from whom the programme makers took advice agreed that the matters raised were in the public interest. The deception undertaken by the undercover reporter was entirely proportionate to the serious matters of public interest revealed in the programme.

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

- e) The programme raised a significant number of matters of important public interest. Clear evidence of failings within hospitals would 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, an eminent Professor of Psychiatric Nursing who advised the programme makers, was also of the view that the material gathered could not be gathered other than by secret filming and that the infringement of privacy was proportionate and justified. 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. It was crucial that the hospital was identified in order for viewers to make sense of why the case of the death of Samantha Chandler (who was found hanging from a light fitting in the ward filmed at the hospital) was relevant to the programme's investigation, in which the reporter revealed that not all the lessons from Ms Chandler's death had been learned. The legitimate public interest in the care provided to psychiatric patients outweighed any right to privacy of the hospital. Any infringement of privacy that occurred in the making of the programme was proportionate and clearly warranted by the importance of the subject, and by the necessity of obtaining clear evidence that the hospital was not providing an acceptable standard of care to patients and that good practice guidelines were being breached.

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

- f) The Trust was aware of the nature of what was secretly filmed, what the programme intended to claim and the intention to broadcast four weeks prior to transmission. The programme makers spent much time providing assurances to the Trust in relation to its concerns. Having been made aware of the material, the Trust declined the invitation to be interviewed and instead provided a statement. The Channel obtained legal advice and consulted with its experts and was confident that, had an injunction been sought, there would have been strong public interest grounds to successfully defend such an application.

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 both 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.

This case was referred to the Fairness Committee, Ofcom's most senior decision making body, for consideration. The Committee considered Ms Rodrigues' complaint and the broadcaster's response, together with a recording and transcript of the programme as broadcast.

In the circumstances of this case Ofcom found the following:

- a) Ms Rodrigues complained that the programme reported on matters that took place a year earlier and that the programme makers did not take up an offer to film the ward at the time of broadcast.

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.

The Committee noted that the commentary said "*The first hospital our reporter worked in was Eastbourne District General – in East Sussex. She worked there in August and September last year*". There were also on-screen captions during the programme showing that filming had taken place a year earlier. In these circumstances it would have been very clear to viewers that the filming was over a year old. Given the complexity and seriousness of the subject matter, in which four NHS trusts were investigated, it was not excessive or unreasonable for the making of the programme to last over a year. The date of filming was therefore fairly represented in the programme.

The Committee noted that the programme makers were invited by the Trust to film at the hospital again nearer to the date of broadcast. It also noted Channel 4's argument that as the criticisms in the programme did not relate to physical conditions on the ward, it was not relevant to film the refurbishment and changed structure of the ward. There was no obligation on the programme makers to take up the offer, since editorial control rested with them and it was for them to decide what to film and what to include in the programme, provided such decisions did not lead to unfairness.

Accordingly Ofcom found no unfairness in this respect.

- b) Ofcom considered Ms Rodrigues' complaint that the Trust was not provided with an opportunity to view the programme prior to broadcast and was not, therefore, given an appropriate and timely opportunity to respond to the criticisms of it in the programme

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

The Committee considered that it was a matter for the programme makers whether to allow the Trust to view the programme in advance and that it was not incumbent on them to do so. What the programme makers were required to do, given that the programme did contain a number of significant allegations about the hospital and the Trust, was to provide the Trust with an appropriate and timely opportunity to respond. Almost four weeks before the programme was broadcast, the programme makers set out in a lengthy and detailed letter to the Trust (dated 12 September 2006) the proposed programme, explaining the issues raised by the undercover filming. The broadcaster also invited a response. In doing so, the programme makers provided the Trust with an appropriate and timely opportunity to respond to the criticisms in the programme. The Trust declined to put forward a representative for interview but in Ofcom's view, the statement it provided for broadcast, in response to the initial letter and following further detailed correspondence between the Trust and the programme makers, was fairly reflected in the programme.

Accordingly, Ofcom found no unfairness in this respect.

- c) Ofcom went on to consider Ms Rodrigues' complaint that the programme and its title were misleading, resulting in unfairness to the Trust.

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

The Committee noted that the title of the programme referred to *Britain's Mental Health Scandal* (Ofcom's italics), when in fact all the hospitals and trusts featured were in England. However it did not consider that this reflected specifically on or caused any unfairness to the Trust itself. The Committee also considered that it was clear from the content of the programme that its title was intended to reflect the representative nature of the programme and the concerns more generally about the care given to mental health patients nationally rather than reflecting specifically on the Trust itself.

The Committee considered that the programme made it clear that the hospitals and trusts featured were intended to be representative only. In particular it made it clear that the trusts featured were not the worst performing. Moreover, it took the view that the 11 shifts carried out by the reporter at the hospital were sufficient for her to form a view as to whether the concerns expressed by the Healthcare Commission about the hospital remained valid. Reasonable care had therefore been taken to ensure that material facts were not represented, disregarded or omitted in a way that was unfair to the Trust.

Accordingly Ofcom found no unfairness in this respect.

- d) Ofcom next considered Ms Rodrigues' complaint that the surreptitious filming at the hospital was not justified by the public interest.

In considering this head of complaint, the Committee took into account Practices 7.14 of the Code. Practice 7.14 provides that programme makers should not normally obtain or seek information, audio, pictures or an agreement to contribute through misrepresentation or deception, but that it may be warranted to use material obtained by misrepresentation or deception without consent if it is in the public interest and cannot reasonably be obtained by other means.

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 an issue in the public interest to report, there are reasonable grounds to suspect that further material evidence could be obtained and it 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 Healthcare Commission in 2004, in particular the concerns raised about staff and patient safety, it was legitimate for the programme makers to carry out filming at Eastbourne District General Hospital.

Furthermore, the Committee considered that consent was unlikely to be forthcoming to film openly in the hospital. Even if such consent had been given and filming carried out openly, the programme makers would have been unlikely to witness the incidents seen by the undercover reporter, as staff were likely to have behaved differently if they knew they were being filmed. In the circumstances, the use of secret filming was necessary to the credibility and authenticity of the programme. The material could not reasonably have been obtained by other means.

Accordingly, Ofcom found no unfairness in this respect.

- e) The Committee considered Ms Rodrigues' 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, 8.9 and 8.13 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. Practice 8.13 states that surreptitious filming should only be used when it is warranted and that normally it will only be warranted if there is prima facie evidence of a story in the public interest, there are reasonable grounds to suspect that further material evidence could be obtained and that it is necessary to the credibility and authenticity of the programme.

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, 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 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 attract a degree of protection from the public eye. Whilst a hospital may 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 Code recognises places such as hospitals to be "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 are within a 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 which it is in the public interest to report and there are reasonable grounds to suspect that further material evidence could be obtained and it is necessary to the credibility and authenticity of the programme.

As set out under d) above, 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. In view of the findings of the Healthcare Commission in 2004, in particular the concerns raised about staff and patient safety, it was legitimate for the programme makers to carry out filming at the hospital.

Consent was unlikely to be forthcoming to film openly in the hospital and, even if such consent had been given and filming was carried out openly, the programme makers would have been unlikely to witness the incidents seen by the undercover reporter. In the circumstances, therefore the Committee considered that the secret filming was a proportionate means of obtaining the material and was necessary to the credibility and authenticity of the programme.

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

- f) The Committee considered Ms Rodrigues' complaint that the Trust's privacy was unwarrantably infringed in the broadcast of the programme.

In considering this head of complaint, the Committee took into account Practices 8.5 and 8.9 of the Code as set out above.

As set out under e) above, 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, 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 broadcast, the Committee first sought to establish whether the Trust had a reasonable expectation of privacy.

The Committee considered that, for the reasons set out under e) above, both the patients and the activities of a hospital receive a degree of protection from the public eye. There was therefore no automatic right to broadcast footage filmed in a hospital without permission.

In the circumstances, the Committee found that the Trust's privacy was infringed in the broadcast because appropriate consent had not been gained for the broadcast.

Was the infringement of privacy warranted?

For the reasons set out under e) above, 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 and that consent was unlikely to be forthcoming to broadcast the footage filmed in the hospital. In these circumstances, the Committee considered that the broadcast of the footage was justified by the public interest.

The Committee therefore found that the infringement of the Trust's privacy during the broadcast 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 Robert Winsor

Newsnight, BBC2, 25 January 2007

Summary: Ofcom has not upheld this complaint of unfair treatment by Mr Winsor.

This episode of *Newsnight* reported on the findings of the Culture, Media and Sport Committee which criticised the way in which many television quiz game shows were being conducted and recommended a Government investigation into the practices used and a new regulatory framework. The report included part of an interview with Mr Bob Winsor (described in the programme as a “former telephonist, *Big Game TV*”). Mr Winsor alleged that unscrupulous practices were used by Big Game TV to make more money from viewers who participated in the quizzes.

The programme’s presenter said that ITV had declined to speak to *Newsnight* but had pointed out that it had carried programming from Big Game TV for two months in 2006 and that “we [ITV] can categorically state that the practices Mr Winsor refers to do not relate to programming carried on ITV”.

Mr Winsor complained that he was treated unfairly in the programme as broadcast in that the statement from ITV read out on *Newsnight* was untrue at the time it was made. Mr Winsor said that he was not given an opportunity to respond to the implied allegation that his evidence was untrue.

Ofcom found that the statement by ITV was unlikely to have left viewers with a negative or damaging opinion of Mr Winsor. Ofcom concluded that the programme (in appropriately broadcasting ITV’s statement) did not broadcast allegations against Mr Winsor to which he would have been entitled to respond. Accordingly Ofcom has not upheld Mr Winsor’s complaint of unfair treatment.

Introduction

On 25 January 2007, the BBC broadcast an edition of *Newsnight* which included an item on television quiz shows. The programme reported on the findings of the House of Commons Culture, Media and Sport Select Committee which criticised the way in which many interactive television quiz shows were being conducted.

The report included part of an interview with Mr Robert Winsor (described in the item as a “former telephonist” for Big Game TV, a dedicated quiz channel) who alleged that unscrupulous practices were used by Big Game TV to make more money from viewers who participated in its quizzes.

The item stated that:

“...behind the scenes of some Call TV programmes, according to Mr Winsor, the whole aim is to keep as many people waiting, at 75p a minute. For the TV industry this meant easy money.”

The item went on to examine the significant profits gained by ITV from its quiz programming; stating that the industry was set to grow and that this had prompted Members of Parliament to start asking questions about this type of programming. The item also queried whether the Call TV programmes constituted “gambling” or even “fraud”.

The presenter of the programme stated that ITV had declined to speak to *Newsnight* but had pointed out that it had carried programming from Big Game TV for two months in 2006 and that:

“we [ITV] can categorically state that the practices Mr Winsor refers to do not relate to programming carried on ITV”.

The Complaint

Mr Winsor’s case

In summary, Mr Winsor complained that he was treated unfairly in the programme as broadcast in that the statement from ITV read out on *Newsnight* in which he was named was untrue at the time it was made. Mr Winsor said that he did not lie about ITV carrying such programming. Mr Winsor said that he was not given the opportunity to respond to this allegation.

The BBC’s case

In summary, the BBC responded to the complaint as follows:

The BBC stated that the item was constructed on entirely normal principles of fairness. Having featured Mr Winsor’s account of unscrupulous practices at Big Game TV, and having drawn particular attention to the contribution of quiz-generated revenue to the finances of ITV (*“According to ITV, in the first half of last year its Quiz TV operation took £27 million, and 9 million of that was pure profit.”*), the item had in effect raised the question of whether ITV had been profiting from unscrupulously-conducted quizzes. The BBC said that this was, at the very least, a suggestion of possible wrongdoing, and it was entirely in keeping with Rule 7.11 of the Code² that the programme makers offered ITV the opportunity to respond.

The BBC said the programme’s presenter made clear at the end of the report that ITV had been asked for an interview, but instead had provided a statement. The ITV statement acknowledged that ITV had carried programming from Big Game TV for two months in 2006, but said: *“We can categorically state that the practices Mr Winsor refers to do not relate to programming carried on ITV”.* The BBC noted that Mr Winsor maintained that the statement was untrue. The BBC said that truthful or not, the statement was ITV’s response to the suggestion that it might have broadcast unscrupulously-conducted quizzes supplied by Big Game TV. The BBC said that the programme makers of *Newsnight* could hardly do anything other than report it.

The BBC said that during the course of covering controversial matters, it will often be the case that contributors disagree with the responses from the subjects of critical comments or suggestions, but that this does not confer a further right of response on the contributors. If it did, then, by the same token, those criticised would have a right to respond to the contributors’ responses, and so on *ad infinitum*. The BBC said that it could see that there might be circumstances where something said by way of right of reply was so potentially damaging to a contributor that further comment was called for (though, in practice, considerations of defamation would normally inhibit the broadcast of such material). In this instance, however, the BBC said that there was no issue of damage to Mr Winsor.

² If a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.

The BBC said that it appeared from Mr Winsor's complaint that he believed the ITV statement called his truthfulness into question. In response to this the BBC said that the item gave viewers no basis for forming such an impression as Mr Winsor's contribution to the item concerned unscrupulous practices at Big Game TV, and made no mention of ITV. The BBC said the possibility of a connection with ITV was suggested by the presenter, not by Mr Winsor. ITV's statement, although it named Mr Winsor, did not contradict anything he had said, or anything the item had presented him as saying. The BBC said that although it could appreciate why Mr Winsor would object to what he believed to be an untruth on the part of ITV; there was no basis on which ITV's statement could be regarded as reflecting adversely on his own veracity.

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.

- a) Mr Winsor complained that he was treated unfairly in the programme as broadcast in that the statement from ITV read out on *Newsnight* in which he was named was untrue at the time it was made. Mr Winsor said that he did not lie about ITV carrying such programming. Mr Winsor said that he was not given the opportunity to respond to this allegation.

In considering Mr Winsor'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.

In reaching its decision Ofcom addressed itself two questions. Firstly was ITV entitled to an opportunity to respond to the programme? And secondly, did the response by ITV result in unfairness to Mr Winsor?

In relation to the first question Ofcom noted a connection was made in the programme between the unscrupulous practices of some Call TV programmes and ITV's own operations. Ofcom took the view that this association amounted to a significant allegation against ITV and as such it was entitled, in the interests of fairness, to an opportunity to respond. Ofcom noted that the programme makers of *Newsnight* appropriately sought ITV's response, and ITV provided one in the form of a statement which was included in the programme.

Ofcom next considered the statement by ITV with a view to determining whether its broadcast resulted in unfairness to the complainant. Ofcom noted from Mr Winsor's complaint that he believed the ITV statement was untrue (and as a result it was unfair to him). However, having taken

account of the programme and Mr Winsor's role in it, it is Ofcom's view, that the statement by ITV (true or not) was not capable of resulting in unfairness to the complainant in the programme as broadcast.

In reaching this decision Ofcom noted that Mr Winsor's only contribution to the programme was as follows:

Presenter: *"This, according to one of the people who works for [a call TV programme], is how these programmes make their money."*

Bob Winsor (captioned as *"former telephonist, Big Game TV"*):

"People start calling in, they know the answer, there's software in the studio that shows you how many calls are coming in a minute, and there are a lot of calls coming in. Because the call volumes are so high the producer doesn't take the call. And on this time the calls are held for, like, two and a half hours. Then the calls start to drop off because people are getting bored or they're thinking they're not going to get through. When they start to drop off, then he'll take the call."

And

Presenter: *"Behind the screens of some Call TV programmes, according to Mr Winsor, the whole aim is to keep as many people as possible waiting, at 75p a minute."*

Importantly, Ofcom noted that Mr Winsor made no claims about ITV in the programme.

Ofcom also noted that the statement at the end of the programme by ITV was reflected in the following way:

"Now, ITV declined to speak with us, but did ask us to point out that, though they carried programming from Big Game TV for two months last year, quote "We can categorically state that the practices Mr Winsor refers to do not relate to programming carried on ITV".

Taking these factors into account, Ofcom considered that viewers would have likely understood that at one time ITV had broadcast programmes from Big Game TV but that it was not associated with the unscrupulous practices described by Mr Winsor. Whether the statement was true or not, Ofcom considered that the statement by ITV was unlikely to have left viewers with a negative or damaging opinion of Mr Winsor. This is because Mr Winsor made no claims about ITV in the programme and ITV's statement simply stated that the practices Mr Winsor referred to did not relate to programming carried on ITV. In the circumstances Ofcom found that the programme (in appropriately broadcasting ITV's statement) did not broadcast allegations against Mr Winsor which he would have been entitled to respond to. In the circumstances, Ofcom found that the broadcast of ITV's statement did not result in unfairness to the complainant.

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

Other Programmes Not in Breach/Out of Remit

16 to 30 September 2007

Programme	Trans Date	Channel	Category	No of Complaints
'Fit Fugitive' competition	13/08/2007	Essex FM	Competitions	1
10 Years Younger	30/08/2007	Channel 4	Generally Accepted Standards	1
9/11: The Falling Man	06/09/2007	Channel 4	Generally Accepted Standards	1
A Place in the Sun	26/08/2007	More 4	Offensive Language	1
BBC Radio 5	14/09/2007	BBC Radio 5	Generally Accepted Standards	1
BBC Radio Bristol	13/09/2007	BBC Radio Bristol	Offensive Language	1
Beauty & the Geek	05/09/2007	Channel 4	Generally Accepted Standards	1
Beauty & the Geek	05/09/2007	Channel 4	Sex/Nudity	1
Big Brother: What the Housemates Did Next	09/09/2007	Channel 4	Offensive Language	1
Breakfast Show trailer	24/08/2007	Horizon Radio	Generally Accepted Standards	1
Casualty	09/09/2007	BBC1	Generally Accepted Standards	6
Coronation Street	05/09/2007	ITV1	Inaccuracy/Misleading	1
Coronation Street	09/09/2007	ITV1	Generally Accepted Standards	2
Coronation Street	05/09/2007	ITV1	Generally Accepted Standards	1
Coronation Street	03/09/2007	ITV1	U18's in Programmes	1
Coronation Street	05/09/2007	ITV1	Violence	5
Coronation Street	03/09/2007	ITV1	Generally Accepted Standards	1
Dirty Sanchez: The Movie	22/08/2007	TMF	Animal Welfare	1
Doc Martin (trailer)		ITV3	Violence	1
Dogfighting Undercover: Panorama Special	30/08/2007	BBC1	Animal Welfare	1
Dogfighting Undercover: Panorama Special	30/08/2007	BBC1	Generally Accepted Standards	1
Drivetime	12/09/2007	Essex FM	Generally Accepted Standards	1
Dumped	04/09/2007	Channel 4	Generally Accepted Standards	1
Eastenders	03/09/2007	BBC1	Crime (incite/encourage)	2
Eastenders	30/08/2007	BBC1	Offensive Language	1
Emmerdale	04/09/2007	ITV1	Violence	1
Emmerdale	05/09/2007	ITV	Violence	1
Emmerdale	19/09/2007	ITV1	Generally Accepted Standards	1
Eurovision Dance Contest	01/09/2007	BBC1	Generally Accepted Standards	2
Friday Night with Jonathan Ross	07/09/2007	BBC1	Generally Accepted Standards	2

Gay, Straight or Taken?	04/09/2007	Five Life	Generally Accepted Standards	1
Hell's Kitchen	03/09/2007	ITV1	Generally Accepted Standards	1
Hell's Kitchen	09/09/2007	ITV1	Generally Accepted Standards	1
Hollyoaks	10/09/2007	Channel 4	Generally Accepted Standards	2
Hollyoaks	10/09/2007	Channel 4	Sex/Nudity	2
ITV News	21/08/2007	ITV1	Generally Accepted Standards	1
ITV News	12/09/2007	ITV1	Inaccuracy/Misleading	1
Iain Lee Show	22/06/2007	LBC	Offensive Language	2
Little Devil	27/08/2007	ITV1	Animal Welfare	1
London Tonight	03/09/2007	ITV1	Due Impartiality/Bias	1
Loose Women	07/09/2007	ITV1	Sex/Nudity	1
Make Your Play	18/08/2007	ITV1	Competitions	1
Michael Caine off set	18/08/2007	TCM	Sex/Nudity	1
Mike Parry	10/08/2007	Talksport	Generally Accepted Standards	1
Northsound 1	01/08/2007	Northsound 1	Competitions	1
Outnumbered	28/08/2007	BBC1	U18's in Programmes	1
Palm FM	16/08/2007	Palm FM	Commercial References	1
Panorama	17/09/2007	BBC1	Advertising	1
Pete Mills Show	18/08/2007	KCFM 99.8	Generally Accepted Standards	1
Phil Williams	09/09/2007	Xfm	Generally Accepted Standards	1
Phoenix Nights (trailer)	10/09/2007	E4+1	Religious Offence	1
Programme trailer	08/09/2007	ITV4	Violence	1
Promotion for Premiership coverage	08/08/2007	BBC Radio 5 Live	Inaccuracy/Misleading	1
Ray Winstone Investigates: Tonight	03/09/2007	ITV1	Due Impartiality/Bias	2
Revelation TV	26/07/2007	Revelation TV	Generally Accepted Standards	1
Rhona Cameron/Wild Women	23/08/2007	Talk 107	Generally Accepted Standards	1
Running Scared	23/08/2007	Sky Movies Action	Generally Accepted Standards	1
Sarah Kennedy	14/09/2007	BBC Radio 2	Generally Accepted Standards	2
Silent Witness	04/09/2007	BBC1	Religious Offence	1
Skins	28/08/2007	Channel 4	Religious Offence	1
Sky News	09/09/2007	Sky News	Due Impartiality/Bias	1
Sportsound	03/09/2007	BBC Radio Scotland	Religious Offence	1
Sportsound	25/08/2007	BBC Radio Scotland	Generally Accepted Standards	1
Star News	12/08/2007	Star News	Animal Welfare	1
Stoned in Suburbia	24/08/2007	Sky 3	Generally Accepted Standards	2
Street Crime UK Uncut (trailer)	06/09/2007	Bravo+1	Violence	1
Streetcrime UK (trailer)	05/09/2007	Bravo 2	Crime (incite/encourage)	1

Sunrise	18/09/2007	Sky News	Due Impartiality/Bias	1
Tears of the Sun	18/07/2007	Five	Violence	1
The Alan Titchmarsh Show Live	03/09/2007	ITV1	Generally Accepted Standards	1
The Canterbury Tales (Prioress's Tale)	02/09/2007	Oneword Radio	Generally Accepted Standards	1
The Dangerous School for Boys	16/09/2007	Channel 4	Animal Welfare	1
The Dinner Party	09/09/2007	BBC1	Generally Accepted Standards	1
The Dinner Party	09/09/2007	BBC1	Sex/Nudity	1
The Dinner Party (trailer)	06/09/2007	BBC	Sex/Nudity	2
The Man Who Predicted 9/11	09/09/2007	Channel 4	Offensive Language	1
The Simpsons	05/09/2007	Channel 4	Violence	1
The X Factor	08/09/2007	ITV1	Generally Accepted Standards	2
The Xtra Factor	18/08/2007	ITV2	Violence	1
This Morning	03/09/2007	ITV1	Animal Welfare	1
Top Gear Polar Special	25/07/2007	BBC2	Sex/Nudity	1
Two Pints of Lager and a Packet of Crisps	11/08/2007	BBC3	Generally Accepted Standards	1
Ultimate Caving	24/08/2007	BBC1	Generally Accepted Standards	1
What Not to Wear	30/08/2007	BBC1	Generally Accepted Standards	1