

## Paul Ellery in the Morning

<b>Type of case</b>	Broadcast Standards
<b>Outcome</b>	In Breach
<b>Service</b>	Sunshine Radio
<b>Date &amp; time</b>	16 September 2019, 07:45
<b>Category</b>	Generally accepted standards
<b>Summary</b>	This programme featured potentially offensive statements about gender identity which were not justified by the context. In breach of Rule 2.3 of the Broadcasting Code.

### Introduction

Sunshine Radio is a local radio station serving Hereford and Monmouthshire with music, speech, local news and information. The licence for the service is held by Sunshine FM Limited (“Sunshine FM” or “the Licensee”).

*Paul Ellery in the Morning* is a daily light-entertainment programme that includes discussions of news of the day.

Ofcom received a complaint that a presenter talked in a mocking manner about singer Sam Smith coming out as non-binary<sup>1</sup>.

After playing a Sam Smith track during the programme, the presenter Paul Ellery said:

*“I can’t get over this that he [Sam Smith] says he doesn’t identify with being male or female, so in future we have to call him ‘they’. And I heard somebody on – I think it was on BBC News Channel over the weekend –*

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<sup>1</sup> Stonewall defines the use of the term ‘trans’ as “An umbrella term to describe people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth. Trans people may describe themselves using one or more of a wide variety of terms, including (but not limited to) transgender, transsexual, gender-queer (GQ), gender-fluid, non-binary, gender-variant, crossdresser, genderless, agender, nongender, third gender, two-spirit, bi-gender, trans man, trans woman, trans masculine, trans feminine and neutrois”.

*saying, 'the easiest way to find out, Sam, if you're male or female or they, is to take your clothes off – there we go you're definitely a boy!'*".

We considered that the material raised potential issues under Rule 2.3 of the Code, which states:

"In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context...Such material may include, but is not limited to, offensive language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language (for example on the grounds of age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation, and marriage and civil partnership). Appropriate information should also be broadcast where it would assist in avoiding or minimising offence".

We therefore sought comments from the Licensee about how the programme complied with this rule.

Ofcom also requested information from the Licensee about the content on BBC News referred to in the programme. The Licensee could not find it.

## **Response**

Sunshine FM described the programme as a live, unscripted "one man show" and stated that there was no production team or "backroom staff" involved in its broadcast.

The Licensee said that the comment about Sam Smith's gender was part of a "throw away short link" and was not intended to offend listeners. However, it added that after reviewing the programme, the presenter's view was that his comment was "misjudged" and had the potential to have caused offence.

Sunshine FM said that the presenter would not have deliberately sought to offend the LGBT community. It added that Paul Ellery had undertaken compliance and legal training, in addition to him attending daily meetings to review content.

In response to Ofcom's Preliminary View, which was to record a breach of Rule 2.3, the Licensee said that the presenter had resigned from Sunshine Radio. Ofcom also provided the presenter with the opportunity to make representations in this case but he did not provide any.

## **Decision**

Reflecting our duties under the Communications Act 2003, Section Two of the Code provides protection for members of the public from harmful and/or offensive material.

Ofcom takes into account the audience's and the broadcaster's right to freedom of expression set out in Article 10 of the European Convention on Human Rights when considering whether a broadcaster has provided listeners with adequate protection from offensive material in a programme.

Ofcom has also had due regard in the exercise of its functions to the need to eliminate unlawful discrimination, to advance equality of opportunity and to foster good relations between those who share a relevant protected characteristic – such as gender reassignment – and those who do not.

Rule 2.3 requires that in applying generally accepted standards, broadcasters must ensure that potentially offensive material is justified by the context. Context includes, but is not limited to, the editorial content of the programme, the service on which the material was broadcast, the time the material was broadcast and the extent to which the nature of the content can be brought to the attention of the potential audience (for example by giving information).

Ofcom first considered whether the broadcast contained material which could be considered offensive.

During the programme the presenter:

- repeated a remark he said he had heard from another source conflating Sam Smith’s gender and their sex at birth. In our view, it would have been clear to listeners from the presenter’s tone and the manner in which he was discussing this subject (“*I can’t get over this...*”) that he endorsed the discriminatory and dismissive remarks to which he was referring; and,
- referred to Sam Smith using the masculine pronouns “*he*” and “*him*” and said that they were “*definitely a boy*” despite the fact that it had been widely reported – and the story that the presenter was discussing referred to the fact – that Sam Smith was identifying as non-binary and had requested that people use the pronoun “*they*” when referring to them.

We considered that these comments had the potential to cause offence as they sought to ridicule Sam Smith’s non-binary status. In addition, by referring to Sam Smith using the incorrect pronoun, the presenter appeared to ignore and undermine Sam Smith’s publicly stated gender identity.

As set out above, potentially offensive comments and material can be broadcast, but the Code requires them to be justified by the context in which they are presented to the audience. Ofcom therefore went on to consider whether this content was justified by the context.

*Paul Ellery in the Morning* is a daily light-entertainment programme which includes discussion of news of the day. Ofcom acknowledged that listeners would therefore be likely to expect a range of personal views across a variety of subjects, some of which may be contentious or attract strong opinions from the presenter. We recognise the importance of broadcasters, in line with the right to freedom of expression, being able to discuss issues surrounding gender identity, including those relating to people who identify as non-binary. However, when discussing sensitive issues, particularly those linked to people with protected characteristics, it is important sufficient context is provided so as to comply with Rule 2.3.

In this case, the comments made by the presenter about Sam Smith were brief, which may have limited the potential for offence to some extent. However, they did not form part of a serious or considered discussion about issues related to gender identity and, at no point were his comments challenged, scrutinised or otherwise contextualised. Furthermore, the tone of the presenter’s

comments was mocking, dismissive and flippant towards Sam Smith's announcement that they were identifying as non-binary.

Noting that we only received one complaint from listeners about the presenter's comments, we considered that the above factors established the potential for the comments in question to cause offence.

Given the strength of the presenter's views on gender reassignment which had the potential to cause offence to listeners, and in particular, to members of the trans community, we considered that these comments were likely to have exceeded listeners' expectations of content on this local radio station. We therefore considered that there was insufficient context to justify the potentially offensive references to Sam Smith's gender.

We acknowledged the Licensee's position that the comments were not intended to offend listeners, and the presenter's acknowledgement that they were "misjudged". However, regardless of the intent, in our view the comments had the potential to cause offence for the reasons set out above.

Ofcom was concerned by Sunshine FM's submission that other than the presenter, no other members of a production team or "backroom staff" were involved in the broadcast of the programme. We acknowledged the steps the Licensee has taken to improve compliance prior to the presenter's resignation, including the presenter undertaking compliance training and attending daily meetings to review content. However, given all of the above, our Decision was that the content exceeded generally accepted standards, in breach of Rule 2.3 of the Code.

### **Breach of Rule 2.3**