



Complaint by Dalradian Gold Limited (DGL) about *Good Morning Ulster*

Type of case	Fairness and Privacy
Outcome	Not Upheld
Service	BBC Radio Ulster
Date & time	26 October 2021, 06:00
Category	Fairness
Summary	We have not upheld a complaint from DGL about unjust or unfair treatment in the programme as broadcast.

Case summary

The programme featured a discussion between the presenter and a journalist who was the presenter in a forthcoming documentary about a planning application by Dalradian Gold Limited (DGL or “the Company”) to develop a gold mine in the Sperrins, County Tyrone.

DGL complained that it had been treated unjustly and unfairly in the programme because the reporter asserted as fact that DGL was “guilty of environmental breaches”. The Company complained that the programme implied that DGL had committed a criminal offence, despite the fact that the Northern Ireland Environment Agency (“NIEA”) had “decided that it had no evidence on which to base a prosecution”, Ofcom’s decision is that material facts were not presented, disregarded, or omitted in the programme in a way that was unfair to the Company.

Programme summary

The programme featured a discussion between the presenter and a journalist who, the programme explained, would be presenting a forthcoming documentary about a planning application by Dalradian Gold Limited (DGL) to develop a gold mine in the Sperrins, County Tyrone.

The following exchange took place:

Presenter: *“Now, you think everyone would want a gold mine. But a planning application for one in the Sperrins has divided opinion in County Tyrone, and tonight, the BBC Spotlight programme examines a community seemingly at war over the issue. And we’ve reporter Lyndsey Telford with us to tell us more, morning to you.*

Reporter: *Good morning, Chris.*

Presenter: *So, tell us then about the gold mine, because a lot of people will have heard about this potential gold mine, but there is also a bit of a row surrounding it.*

Reporter: *Well yes, those familiar with the story of the gold mine will have heard of the Company Dalradian. It’s been exploring for gold in the Sperrins for more than a decade and says it’s found what it estimates to be billions of pounds worth of gold. Now, it submitted a planning application to develop the mine a few years back and that’s due to go before a public inquiry in the coming months, and that will help decide whether or not the plans go ahead. But this has proved highly controversial. There have been reports of intimidation on both sides of the divide, and even violence.*

Presenter: *Intimidation on both sides, what, what are the two sides then, what’s the divide here?*

Reporter: *Well yes, so a lot of people think this gold mine could be brilliant; so economically, they say the area could really do with the jobs boost. Speaking to locals who support the mine, this could mean the difference between their family members emigrating for work or staying at home. Now, you’re about to hear from Peter McAleer who hopes the mine will go ahead”.*

The programme included audio of a statement made by a supporter of the mine, Mr McAleer, who said:

“The mine will mean nothing to me for I’ll not work in the mine. I’m 70 years of age, but it will help my children and my grandchildren. I have a grandson in Australia now 3 years, because there was no work”.

The interview between the presenter and Ms Telford continued:

Presenter: *“So, that’s one side. But then there are the others who are against it?*

Reporter: *Yes, so a lot of the opposition is based on environmental grounds. Now, you'll know that the Sperrins is an area of outstanding natural beauty, the rivers are home to an endangered species, and I suppose gold mining around the world has a reputation of being a sort of heavy intensive industry, not one you would usually associate with the Sperrins. This is Marella Fyffe you're about to hear from. She has been campaigning against the mine.*

The programme included audio of a statement made by an opponent of the mine, Ms Fyffe:

Ms Fyffe: *The way it's been projected at the moment as, as a mine that's going to be, ah, beautiful and environmentally friendly and ethically run and so on, it's a load on nonsense. Why would we be a sacrificial community and allow that to happen in our, in this beautiful part of the Sperrins?*

The interview between the presenter and Ms Telford continued:

Presenter: *And you know you can hear that concern; she talks about the beautiful part of the Sperrins. There is this desire to protect the area and I suppose a lot of this will also be about the Company itself. What's their environmental record like?*

Reporter: *Well, that depends on who you ask. The Company told us that it has an excellent environmental record which it takes very seriously, and the mine, should it go ahead, would be environmentally friendly and even carbon neutral. But we went looking into its records and found a series of environmental breaches during its exploratory stage. Now, one of which was considered so serious by the environmental regulator, the NIEA, that it was considering a prosecution case against Dalradian. Now, Dalradian have denied any responsibility for that incident and ultimately no case was taken to the PPS1. The Company also disputed a number of other pollution reports recorded by the NIEA, but there will be more on that all tonight. There will be some further digging into the reported intimidation as well as the track record of those behind the project so that will be on at 10:35 tonight on BBC NI and on the iPlayer as well.*

Reporter: *As Lynsey said there, BBC Spotlight on tonight after the late News 10:35 on BBC1".*

The programme continued. No further reference was made to Dalradian Gold in the remainder of the programme.

¹ Public Prosecution Service Northern Ireland.

Summary of the complaint and broadcaster's response

Complaint

DGL complained that it had been treated unjustly and unfairly in the programme as broadcast because the reporter asserted as fact that DGL was “guilty of environmental breaches”, and that despite the fact that the NIEA had “decided that it had no evidence on which to base a prosecution”, the programme implied that DGL had committed a criminal offence.

DGL said that the reporter was “well aware of the falsity of her statement” and provided Ofcom with copies of pre-broadcast correspondence which it had sent to the BBC in response to the journalist’s enquiries on 22 October 2021, which set out DGL’s position that there had been no breaches of environmental regulations.

Broadcaster's response

The BBC said that the reporter’s statement that DGL had breached environmental standards was not false. It said that the programme makers had unearthed evidence of a number of breaches; separately, three discharges of zinc in 2017 and five pollution incidents involving suspended solids recorded between 2015 and 2019, one of which was classified as “medium severity” and resulted in a prosecution case being considered. The BBC said that the programme makers had found documentation in the form of letters to the Company from the NIEA on these matters; the BBC provided copies of this documentation to Ofcom.

The BBC said that the reporter had made clear to listeners that the Company denied committing environmental breaches and that she did not state that the Company was “guilty” of a criminal offence, as suggested by DGL in its complaint to Ofcom. Rather, the reporter had explained that a “serious” breach was not referred for prosecution. The BBC added that the brevity of the interview, which also covered other aspects of the programme, did not permit the reporter to go into more detail. The BBC said that contrary to DGL’s assertion in its complaint to Ofcom, the reason given by the NIEA’s senior officer for not pursuing a case against the Company was not that there was no evidence of breaches, but rather, that a case might not be successful. The BBC provided Ofcom with a copy of a report compiled by a senior officer at NIEA who investigated the alleged “serious” pollution incident referred to in the programme. The report concluded:

“In my opinion the entirety of the evidence gathered by [the water quality inspector who identified the potential breach and collected the samples] supports the case that, at the time of the investigation, polluting matter was escaping from the Dalradian Gold Limited Site”.

“The sample results were not especially high, and I think there are enough potential defences for the company that it’s unlikely we’d get a conviction”.

“On balance while I fully support the investigating officer’s decision to collect statutory samples and carry out a full investigation, I do not believe the case is sufficiently strong to provide a strong likelihood of a significant penalty. In my view while some of the defences advanced by the company have weaknesses, all of these defences taken in the

round are likely to be enough to convince a court to dismiss the case or impose a nominal penalty”.

The BBC said that the reporter’s reference to “*environmental breaches*” was not intended to imply that DGL had committed a criminal offence and the BBC added that it did not believe this is how her words would have been understood by listeners.

The BBC referred to a guide on enforcement sanctions and policy² issued by the Environment Agency (England and Wales) (“the Agency”) which stated that “not all breaches are an offence”. The BBC said that although the Agency is not the regulator of environmental standards in Northern Ireland, the legal basis for enforcement is “by and large common to the UK”. The BBC said it had made further enquiries with the Agency’s sponsoring body, the Department for Environment, Food and Rural Affairs (DEFRA). The BBC sent an email to DEFRA on 15 August 2022, seeking “guidance” on the use of the term “environmental breach”, used in the Environment Agency Enforcement and Sanctions Policy, in relation to pollution incidents involving water courses. A senior communications officer on behalf of DEFRA provided a response to the BBC by email on 19 August 2022. The BBC provided a copy of this correspondence to Ofcom in connection with DGL’s complaint, which included the following information concerning DEFRA’s view on this issue:

- non-compliance with a permit would be considered an environmental breach;
- the term ‘environmental breach’ covers both high level and low level incidents;
- a low level incident is an occurrence or event when there is non-compliance with a permit but a low level of harm or culpability is involved; and
- not all breaches are considered offences because breaches of a permit can happen accidentally or by the intervening action of a third party, or there may be a statutory defence which means that a breach is not an offence.

The BBC said that this information confirmed its understanding that the terms “breach” and “offence” are not coterminous, therefore supporting its assertion that the reporter’s comments did not imply that DGL had committed a criminal offence. The BBC said that, in any case, the reporter made it clear in her answer that DGL was not prosecuted under the law. The BBC added that by referring to DGL’s statement that it denied having committed an environmental breach and disputed other pollution reports, the reporter ensured that DGL’s position was fairly presented in the interview.

Ofcom’s Preliminary View

Ofcom prepared a Preliminary View that the complaint should not be upheld. Both parties were given the opportunity to make representations on the Preliminary View, but neither party chose to do so.

² <https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/environment-agency-enforcement-and-sanctions-policy>.

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 unjust or unfair treatment in programmes in such services.

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

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

When considering complaints of unjust or unfair treatment, Ofcom has regard to whether the broadcaster's actions ensured that the programme as broadcast avoided unjust or unfair treatment of individuals and organisations, as set out in Rule 7.1 of Ofcom's Broadcasting Code ("the Code"). In addition to this rule, Section Seven (Fairness) of the Code contains "practices to be followed" by broadcasters when dealing with individuals or organisations participating in, or otherwise directly affected by, programmes, or in the making of programmes. Following these practices will not necessarily avoid a breach of Rule 7.1 and failure to follow these practices will only constitute a breach where it results in unfairness to an individual or organisation in the programme. In considering this complaint, Ofcom had regard to the following Code Practices:

Practice 7.9 states:

"Before broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation..."

Ofcom takes account of the broadcaster's right to freedom of expression and the audience's right to receive information and ideas. However, in presenting material in programmes, reasonable care must be taken by broadcasters not to do so in a manner that causes unfairness to people or organisations. Whether a broadcaster has taken reasonable care to present material facts in a way that is not unfair to an individual or organisation will depend on all the particular facts and circumstances of the case including, for example, the seriousness of any allegations and the context in which they were presented in the programme.

Ofcom considered DGL's complaint that the Company was treated unjustly or unfairly in the programme as broadcast because the reporter had asserted, wrongly, that DGL was "guilty of environmental breaches". We had regard to DGL's position that the programme had implied that DGL had committed a criminal offence, despite the fact that the NIEA had "decided that it had no evidence on which to base a prosecution".

Before considering the substance of the complaint, we took into account that the relevant segment of the programme was a short promotional piece for a forthcoming documentary (which was due to be broadcast later that day). The BBC said that the brevity of the interview did not permit the

journalist to go into detail about all aspects of the forthcoming documentary. In Ofcom's view, listeners would have been likely to appreciate that the reporter's remarks during the programme were brief, and therefore she was providing a short summary of a more detailed investigation that would be explored further in the later documentary.

In that context, we considered the content of the programme. As set out in the "Programme summary" above, the reporter had explained to listeners that DGL's proposal to extract gold from a site in the Sperrins had proven "*highly controversial*", with opposition to the plans largely based on "*environmental grounds*". When questioned by the presenter about the Company's "*environmental record*", the reporter had responded:

"Well, that depends on who you ask. The Company told us that it has an excellent environmental record which it takes very seriously, and the mine, should it go ahead, would be environmentally friendly and even carbon neutral. We went looking into its records and found a series of environmental breaches during its exploratory stage. Now, one of which was considered so serious by the environmental regulator, the NIEA, that it was considering a prosecution case against Dalradian. Now, Dalradian have denied any responsibility for that incident and ultimately no case was taken to the PPS".

We took into account the BBC's position that it was not inaccurate for the reporter to claim that her investigation had "*found a series of environmental breaches during its exploratory stage*". The BBC said that, in fact, the reporter had uncovered of a "number of breaches": three discharges of zinc in 2017 and separately, five pollution incidents involving suspended solids recorded between 2015 and 2019, one of which occurred in 2016 and was classified as "medium severity". The BBC said that this incident resulted in a prosecution case being considered by the NIEA.

We recognised that the Company denied that its activities had resulted in breaches of environmental regulations, a position which it had emphasised to the programme makers prior to broadcast. In this pre-broadcast correspondence, the Company had explained that it had never breached the zinc threshold set out in its discharge Consent (Consent No 068/12/2), because its own independently verified sampling did not indicate a breach. Nevertheless, Ofcom understood from documents supplied by the BBC that the NIEA had issued an Enforcement Notice against the Company on 30 March 2017, which stated that DGL, "have been found to be in breach of environmental legislation", and further set out that three samples of effluent taken by the NIEA at an exploration tunnel at DGL's site in 2017, presented results that "constitute[d] a breach of condition 1 of [DGL's] Consent". Ofcom also understood from documents supplied by the BBC that a separate alleged pollution incident in 2016 had led to a report being compiled by a senior officer at NIEA. As referenced above, the officer had stated: "In my opinion the entirety of the evidence gathered by [the water quality inspector who identified the potential breach and collected the samples] supports the case that, at the time of the investigation, polluting matter was escaping from the Dalradian Gold Limited Site".

Ofcom's role is not to make findings of fact as to whether or not the Company's activities had resulted in a "*series of environmental breaches during its exploratory stage*", and we acknowledge that DGL disputed these "breaches" based on its own measurements. However, taking into account the material provided to us by the BBC in this case, we considered that there was a sufficient basis for the presenter's comments, and that DGL's view on this point was fairly presented in the programme.

Regarding the Company's further complaint that despite the fact that the NIEA had "decided that it had no evidence on which to base a prosecution" in relation to this incident, the programme unfairly implied that DGL had committed a criminal offence, we recognised that, in relation to the 2016 incident, the senior investigating officer at the NIEA had concluded that "The sample results were not especially high, and I think there are enough potential defences for the Company that it's unlikely we'd get a conviction". In our view, DGL's assertion in its complaints to Ofcom that the NIEA had "decided that it had no evidence on which to base a prosecution" was not an accurate representation of the NIEA's position, which we considered was that it had concluded that there was insufficient evidence to secure a conviction.

In its submissions, the BBC said that the reporter's reference to "*environmental breaches*" was not intended to imply that DGL had committed a criminal offence because, in this particular context, "offence" and "breach" are not coterminous. In assessing the extent to which the programme had resulted in unfairness, we recognised that at no point did the programme state that the Company had committed a criminal offence. Rather, the reporter made clear that the Company "*denied any responsibly*" for the 2016 incident that had led NIEA to "[consider] *a prosecution case against Dalradian*".

We considered that, on balance, the programme fairly summarised the Company's position regarding the extent to which it was responsible for the alleged "*serious*" pollution incident referred to in the programme. The programme also made clear that the "*NIEA decided not to prosecute*". Where the programme made clear that the regulator's final decision was that the Company would not be subject to prosecution, we did not agree that a viewer could have reasonably concluded that the programme implied that DGL had committed a criminal offence in relation to the 2016 "medium severity" incident. We also took into account that the reporter explained that the Company "*also disputed a number of other pollution reports recorded by the NIEA*" and included a further statement, setting out the Company's position:

"The Company told us that it has an excellent environmental record which it takes very seriously, and the mine, should it go ahead, would be environmentally friendly and even carbon neutral".

Given the above, on balance, we considered that the broadcaster had taken reasonable care to satisfy itself that material facts had not been presented, disregarded or omitted in a way that was unfair to DGL. Therefore, our decision is that there was no unfairness to DGL in this regard.

Ofcom has not upheld this complaint of unjust or unfair treatment in the programme as broadcast.