

Ofcom Broadcast Bulletin

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Introduction

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives¹, Ofcom must include these standards in a code or codes. These are listed below.

The Broadcast Bulletin reports on the outcome of investigations into alleged breaches of those Ofcom codes, as well as licence conditions with which broadcasters regulated by Ofcom are required to comply. These include:

- a) Ofcom's Broadcasting Code ("the Code"), which, can be found at:
<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>.
- b) the Code on the Scheduling of Television Advertising ("COSTA") which contains rules on how much advertising and teleshopping may be scheduled in programmes, how many breaks are allowed and when they may be taken. COSTA can be found at:
<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/advert-code/>.
- c) certain sections of the BCAP Code: the UK Code of Broadcast Advertising, which relate to those areas of the BCAP Code for which Ofcom retains regulatory responsibility. These include:
 - the prohibition on 'political' advertising;
 - sponsorship and product placement on television (see Rules 9.13, 9.16 and 9.17 of the Code) and all commercial communications in radio programming (see Rules 10.6 to 10.8 of the Code);
 - 'participation TV' advertising. This includes long-form advertising predicated on premium rate telephone services – most notably chat (including 'adult' chat), 'psychic' readings and dedicated quiz TV (Call TV quiz services). Ofcom is also responsible for regulating gambling, dating and 'message board' material where these are broadcast as advertising².

The BCAP Code is at:

<http://www.bcap.org.uk/Advertising-Codes/Broadcast-HTML.aspx>

- d) other licence conditions which broadcasters must comply with, such as requirements to pay fees and submit information which enables Ofcom to carry out its statutory duties. Further information on television and radio licences can be found at: <http://licensing.ofcom.org.uk/tv-broadcast-licences/> and <http://licensing.ofcom.org.uk/radio-broadcast-licensing/>.

Other codes and requirements may also apply to broadcasters, depending on their circumstances. These include the Code on Television Access Services (which sets out how much subtitling, signing and audio description relevant licensees must provide), the Code on Electronic Programme Guides, the Code on Listed Events, and the Cross Promotion Code. Links to all these codes can be found at:
<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/>

It is Ofcom's policy to describe fully the content in television and radio programmes that is subject to broadcast investigations. Some of the language and descriptions used in Ofcom's Broadcast Bulletin may therefore cause offence.

¹ The relevant legislation is set out in detail in Annex 1 of the Code.

² BCAP and ASA continue to regulate conventional teleshopping content and spot advertising for these types of services where it is permitted. Ofcom remains responsible for statutory sanctions in all advertising cases

Standards cases

In Breach

Russian language referendum item

REN TV Baltic & Mir Baltic, November 2011, various dates and times

Introduction

REN TV Baltic and Mir Baltic are Russian language channels broadcasting to Latvia. They are licensed by Ofcom to Baltic Media Alliance Limited (“BMA” or “the Licensee”). Because the channels are operated under UK licences they are subject to Ofcom’s codes.

Latvia operates a constitutional mechanism under which a referendum on constitutional amendment may be triggered by the collection of sufficient numbers of signatures on an official petition. In 2011 a petition was raised calling for an amendment to the Latvian constitution to make Russian an official language of the Republic of Latvia, alongside Latvian (or Lettish). The petition was operated by the Latvian Electoral Commission (CVK).

A Latvian complainant alerted Ofcom to what appeared to be an advertisement – a 20 second item shown in commercial breaks on both REN TV Baltic and Mir Baltic – urging viewers to sign the petition. The complainant was concerned that the advertisement breached the UK’s prohibition on the broadcast of political advertising. The 20 second item opened with a blue screen with a graphic of raised hands at the bottom of the screen. The logo of the CVK, the Latvian Electoral Commission, appeared in the centre of the screen; the CVK’s website address was shown at the bottom of the screen. The picture changed to an image of the CVK’s website. Various web pages on the site were displayed and a cursor shown moving around to demonstrate how to navigate to certain pages. The blue screen and raised hands graphic returned and the item ended with the CVK’s logo at centre. The CVK’s website remained on screen throughout.

The item’s voiceover was in Russian. As translated it said:

“Visit www.cvk.lv, to find the nearest place to you where you can sign a petition in support of Russian as the second Official Language, and add your vote.

You think you’re saving time – but you’re losing your right to speak in your native language.

Deadline: 30 November!”

The Licensee believed the following translation to be more accurate than Ofcom’s translation:

“On CVK website www.cvk.lv find the nearest place where the signatures for Russian language as a second official language are being collected, and give your vote.

*By saving time, you will lose the right to speak your native language.
Till November 30 only”.*

There are no material differences between the two translations in the context of Ofcom's consideration of the issues before it.

Text was displayed throughout at the bottom of the picture that repeated the message that voting (signing) locations could be found at the website address given and that the deadline was 30 November.

Ofcom initially sought the Licensee's comments on the basis that the item was an advertisement. However BMA said that it had created and included the item in its schedules itself, i.e. that it was not placed by or on behalf of another party such as CVK. However, when then asked to respond to questions about the item as editorial programming BMA said that it in fact regarded it as a form of commercial message called 'self-promotion' in the governing European Directive, the Audiovisual Media Services ("AVMS") Directive¹.

Ofcom interprets the concept of 'self-promotion' in accordance with the principles set out in the AVMS Directive, namely, that it is material made and scheduled by the licensee and seeks to promote some aspect of the licensed service itself. Accordingly, a typical self-promotion will be a programme trailer, a general promotion for the channel as a whole, a promotion for a product or service related to the licensee's licensed services such as a channel's website, and so on. In addition, Ofcom's Cross-promotion Code defines self-promotions as "...promotions on a channel for that same channel and/or for programmes broadcast on that channel." Therefore, material which is solely produced and scheduled by the licensee rather than another party, but does not promote the licensee's own products, services, programmes or channels, is not self-promotional material.

The AVMS Directive defines different types of 'audiovisual commercial communication' – advertising (including some forms of self-promotion), sponsorship, teleshopping and product placement; all other material must therefore be editorial. In this case, the item did not meet the Directive's definitions for these types of 'audiovisual commercial communication'. As such, the item was programme material, i.e. editorial: no other category exists.

For that reason Ofcom considered the material to be programming rather than advertising and, accordingly, to be governed by the terms of the Code. In addition, for the reasons set out in the Decision section below, we considered that the content was dealing with a matter of major political and industrial controversy and a major matter relating to current public policy.

Ofcom considered that the item appeared to have been made or endorsed by CVK, a neutral government body, in view of the inclusion of its logo and a reference to its website, as set out above. As the item was not in fact made or endorsed by CVK and was in fact programming produced and scheduled by the Licensee, rather than being advertising placed by another party, Ofcom considered questions of misleadingness to arise in respect of both the item's appearance and its source.

Ofcom therefore considered the material raised issues warranting investigation under Rules 2.2, 5.4, 5.11, 5.12 and 9.2 of the Code which state:

Rule 2.2 "Factual programmes or items or portrayals of factual matters must not materially mislead the audience."

¹ The Audiovisual Media Services Directive (AVMS). See:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

- Rule 5.4 “Programmes ... must exclude all expressions of the views and opinions of the person providing the service on matters of political and industrial controversy and matters relating to current public policy (unless that person is speaking in a legislative forum or in a court of law). Views and opinions relating to the provision of programme services are also excluded from this requirement.”
- Rule 5.11 “In addition to the rules above, due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy by the person providing a service (...) in each programme or in clearly linked and timely programmes.”
- Rule 5.12 “In dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes. Views and facts must not be misrepresented.”

With Rules 5.11 and 5.12 a definition is given in the Code:

Meaning of “matters of major political or industrial controversy and major matters relating to current public policy”:

“These will vary according to events but are generally matters of political or industrial controversy or matters of current public policy which are of national, and often international, importance, or are of similar significance within a smaller broadcast area. “

- Rule 9.2 “Broadcasters must ensure that editorial content is distinct from advertising.”

We therefore asked BMA for its comments on how this content complied with these Code rules.

Response

As background, BMA told us that Latvia’s media market is “a constant battlefield for political forces, primarily nationalistic” and that this makes business difficult for television channels licensed by Ofcom that target Latvia.

The Licensee said that it is not affiliated to, or a supporter of, any of the political forces in any country. It said that it is always guided by a wish to follow Ofcom regulations closely and does so with goodwill.

BMA drew a distinction between the collection of signatures, which it regarded as a “neutral” subject, and the referendum that followed the petition (sufficient signatures were attracted to trigger the referendum). Further, the collection of signatures itself could not lead to the initiation of changes within the Latvian constitution, and was therefore not a matter of public policy or controversy; such changes could only be brought about by the actual referendum, which BMA said its channels “did not promote in any way”.

Therefore, the Licensee said that, since it was not aligned with the outcome of any “social matter”, it continued to observe neutrality in the period between the collection of signatures and the referendum. In fact, BMA said, it had “...observed due and utter

neutrality in all political matters subsequent to the social event announced in the item". The Licensee believed that during that period any "quasi-political statements" by any media could have had a political effect.

BMA stressed that REN TV Baltic and Mir Baltic broadcast to a wide Latvian audience, not just the country's ethnic Russian minority, although it also said that "the audience of these TV Channels is mainly Russian-speaking people". Its motivation in broadcasting the item was that the petition was "a hot social topic that deals with democratic processes and [the] development of democratic institutions" and as such would interest its audiences.

Therefore, BMA argued, none of the requirements or definitions that apply to the subject of political or controversial matters could apply to the item.

As noted above, BMA's view, ultimately, was that the item should be regarded as a self-promotion.

The Licensee said further, "CVK's functions and neutrality are a commonly known fact in Latvia, which would make it very unreasonable for anyone to associate their cause with CVK."

BMA added that within the Latvian TV market both REN TV Baltic and Mir Baltic are small, niche channels. REN TV Baltic has an audience share of 4%; Mir Baltic has a share of 6%. This would, the Licensee said, "hardly allow them to make any significant influence on social matters." Indeed, according to the Licensee the item had had "no political effect", had not caused any damage or harm or in any other way negatively affected either party involved in the item, and had been broadcast only for a short period.

BMA suggested that its "social announcement" was not considered 'political' in Latvia in legal terms, but that some "politically (and, possibly, economically) engaged third parties could seek other possibilities of pressuring our channels and hindering [their] image and reputation." BMA also pointed to strong competition in the advertising market, which it said had been through an economically difficult period, and that it had "felt competitors' pressure, which has been carried out in the past by numerous means."

In respect of Rule 2.2 (factual programmes must not mislead) the Licensee reiterated its view that the item was not editorial and therefore not subject to that rule. On misleadingness more generally, BMA said that it did not believe the item to be misleading: the content of this material was not distorting any facts, it said, and CVK was used "as a sole and utterly neutral source of reference information about referendum procedure."

The Licensee told us that it had to be attentive to local law in Latvia and in that respect had the "misfortune" to broadcast in the Russian language. Because of this BMA, "...via its counterparts in Latvia, faces blatant political pressure by the local media-supervising authority with an immense degree of political engagement...".

BMA stressed that any breach of rules had been "done unwittingly" and was brought about by the difficulties of operating in a foreign market and attempting to comply with both Latvian and UK regulation. The Licensee noted Ofcom's decision and said that it would seek to adhere to UK regulation more closely in the future.

Decision

Under the Communications Act 2003 (“the Act”), Ofcom has a statutory duty to set such standards for the content of programmes as appear to it best calculated to secure the standards objectives. One of these objectives is that generally accepted standards must be applied to broadcast content to provide adequate protection for members of the public from harmful material. This objective is reflected in Section Two of the Code, and through Rule 2.2, among others, which prohibits materially misleading portrayals of factual matters in programmes.

The special impartiality requirements set out in section 320 of the Act must also be complied with. The rules in Section Five of the Code ensure that the impartiality requirements of the Act are complied with, including that due impartiality is preserved on matters of major political or industrial controversy and major matters relating to current public policy (see above for the specific provisions).

Under the Act, Ofcom must also set standards to ensure that “the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with”. The EU AVMS Directive requires that advertising is distinguishable from other parts of the programme service. This is reflected in Rule 9.2 of the Code.

Ofcom noted BMA’s view that the Code did not apply to the item and that none of the Code rules considered applicable by Ofcom were relevant. For the reasons given elsewhere in this Finding Ofcom does not agree: all the quoted Code rules apply.

Ofcom therefore considered the item’s compliance with Rules 2.2, 5.4, 5.11, 5.12 and 9.2 of the Code.

Rule 2.2

This rule states:

“Factual programmes or items or portrayals of factual matters must not materially mislead the audience.”

Ofcom considered the item to be very clearly misleading as to the role of CVK. In combination with the item’s similarity to an advertisement – see under Rule 9.2 below – the use of CVK’s name, logo and website images in the item plainly suggested that it had been placed by CVK or placed on its behalf. Nothing in the item sought to reveal the true source and nature of the item or otherwise make clear that the item was made wholly independently of CVK. Ofcom considered therefore that the item had the potential to mislead viewers that CVK, the Latvian Electoral Commission, had endorsed the item’s message which in fact it had not. This misleadingness could therefore have had a harmful impact on a democratic process by affecting the actions of the voters in respect of the petition and the potential referendum. This was particularly significant in light of Ofcom’s consideration of the item under Rules 5.11 and 5.12 (see below). For these reasons, in Ofcom’s view the item was materially misleading.

Ofcom therefore concluded that the item breached Rule 2.2.

Rules 5.11 and 5.12

Rule 5.11 states:

“In addition to the rules above, due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy by the person providing a service (listed above) in each programme or in clearly linked and timely programmes.”

Rule 5.12 states:

“In dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes. Views and facts must not be misrepresented.”

It is not part of Ofcom’s remit to question or investigate the validity of the political views expressed in a case like the current one, but to require the broadcaster to comply with the relevant standards in the Code. The Code does not prohibit broadcasters from discussing any controversial subject or including any particular point of view in a programme. To do so would be an unacceptable restriction on a broadcaster’s freedom of expression.

However, the broadcaster’s right to freedom of expression is not absolute. In carrying out its duties, Ofcom must balance the right to freedom of expression on one hand, with the requirement in the Code to preserve “due impartiality” on matters relating to political or industrial controversy or matters relating to current public policy. Ofcom recognises that Section Five of the Code, which sets out how due impartiality must be preserved, acts to limit, to some extent, freedom of expression. This is because its application necessarily requires broadcasters to ensure that neither side of a debate relating to matters of political or industrial controversy and matters relating to current public policy is unduly favoured. Therefore, while any Ofcom licensee should have the freedom to discuss any controversial subject or include particular points of view in its programming, in doing so broadcasters must always comply with the Code.

Ofcom first considered whether the requirements of Section Five should be applied in this case, that is, whether the subject matter of the content concerned matters of major political or industrial controversy or major matters relating to current public policy. In determining the applicability of Section Five in this respect we did not accept the argument put forward by the Licensee that the process of collecting signatures to enable a referendum to be held on an important aspect of Latvia’s national constitution could reasonably be held to be a non-political or uncontroversial event.

Rather, we considered that the content in this case consisted of a direct call to action to viewers of REN TV Baltic and Mir Baltic to sign a petition to trigger a referendum concerning an amendment to the Latvian constitution to make Russian an official language of the Republic of Latvia. Ofcom was in no doubt that the wording encouraged viewers to sign the petition and therefore concluded that the item adopted a position in favour of introducing Russian as an official language in Latvia². For example, by including the statement *“By saving time, you will lose the right to speak your native language”* we considered that the Licensee was clearly

² Sufficient signatures (more than the threshold of 150,000) were obtained and a referendum on whether to recognise Russian as a second official language in Latvia took place. On 18 February 2012 the referendum was held and the proposal for the constitutional recognition of the Russian language was defeated.

broadcasting a viewpoint on a matter that Ofcom considered to be politically controversial within Latvia.

We took into account that this programming was seeking to affect constitutional change in an area which we understand to be highly sensitive and controversial in Latvia. The subject of the official recognition of Russian within Latvia was a highly sensitive and disputed issue, part of the broader political, ethnic and social question that attended the constitutional position of ethnic Russian Latvians more generally.

Given the ongoing and sensitive debate that Ofcom understood to have been taking place within Latvia over the campaign to make Russian an official language of the Republic of Latvia, we considered this matter to be of national importance in relation to Latvia. Therefore we considered the content was dealing with a matter of major political and industrial controversy and major matter relating to current public policy, as defined by the Code³. In reaching this decision, we took into account Ofcom's published Guidance⁴ to Section Five of the Code, which explains that "These additional rules [that relate to "major matters", rather than just "matters" of political or industrial controversy or that relate to current public policy] are necessary because of the nature of the subject matter concerned: it is of a significant level of importance and is likely to be of the moment". We considered that the campaign to trigger a constitutional referendum to make Russian an official language of the Republic of Latvia was clearly of a significant level of importance within Latvia, at the time this content was being broadcast.

Given the above, Rules 5.11 and 5.12 were therefore applicable.

In assessing whether due impartiality has been applied in this case, the term "due" is important. Under the Code, it means adequate or appropriate to the subject and nature of the programme. "Due impartiality" does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented. Due impartiality may be preserved in a number of ways and it is an editorial decision for the broadcaster as to how it ensures due impartiality is maintained.

As already pointed out, Ofcom recognises that Section Five of the Code acts to limit, to some extent, freedom of expression. However, when considering matters under the Code, Ofcom takes into consideration a broadcaster's right to freedom of expression, which is considered to be at its highest in relation to political matters.

Ofcom's Guidance⁵ on Section Five states that the impartiality requirements apply not only to Ofcom licensees broadcasting to audiences within the United Kingdom and elsewhere, but also to those not broadcasting to the United Kingdom at all. However when not broadcasting to the United Kingdom the impartiality that is "due" *may* [emphasis in original Ofcom guidance] be less depending on the subject matter and original country of reception. As stated above, REN TV Baltic and Mir Baltic are Russian language channels broadcasting to Latvia.

³ As mentioned above, the Code defines matters of major political and industrial controversy and major matters relating to current public policy as "...generally matters of political or industrial controversy or matters of current public policy which are of national, and often international, importance, or are of similar significance within a smaller broadcast area".

⁴ See <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section5.pdf>

⁵ Ibid.

Ofcom therefore assessed whether in accordance with Rules 5.11 and 5.12 in the content (as translated for Ofcom), “due impartiality was preserved” and “an appropriately wide range of significant views were included” and “given due weight”.

We noted that the Licensee made no representations about the internal balance of the item or balance produced across linked programmes. Further, no other evidence in that respect was available to Ofcom.

Ofcom considered the wording of the message that was broadcast was quite clearly expressing support for, and attempting to assist materially, one side of an issue of major political controversy by encouraging participation that would advance the Russian language cause in the context of the campaign to trigger a constitutional referendum to make Russian an official language of the Republic of Latvia. The content when considered in isolation gave a one-sided view on this matter of political controversy. Further, and importantly, the Licensee did not provide evidence as to how the views of, for example, organisations and individuals representing those opposed to the campaign to trigger a constitutional referendum to make Russian an official language of the Republic of Latvia, were reflected in clearly linked and timely programming. Ofcom therefore considered the content to be in breach of Rules 5.11 and 5.12 of the Code.

Rule 5.4

Rule 5.4 of the Code states:

“Programmes [...] must exclude all expressions of the views and opinions of the person providing the service on matters of political and industrial controversy and matters relating to current public policy...”.

Ofcom’s published Guidance⁶ to Rule 5.4 states: ““The person providing the service” is a concept used in connection with the legal requirements for the licensing and compliance of broadcasting services. In this rule, it refers to the licensee, the company officers and those persons with an editorial responsibility for the service or part of the service rather than, for example, the programme presenter”.

We noted that the Licensee confirmed that the content in this case was made and broadcast entirely on its own initiative. In the course of correspondence BMA told us, for example, “The...social communication was the initiative of REN TV and MIR BALTIC only; it was not inserted on behalf of any political body and it was distributed free of charge” and “There was not any organization or individual involved in the planning or preparation of the ‘announcements’”.

In our view this material was a call to action to viewers of REN TV Baltic and Mir Baltic to sign a petition to trigger a referendum concerning an amendment to the Latvian constitution to make Russian an official language of the Republic of Latvia. This issue, as explained above, was a major matter of political controversy or a matter relating to current public policy. Therefore, the Licensee broadcast its viewpoint on a (major) matter of political controversy and a (major) matter relating to current public policy.

Ofcom therefore considered that the content breached Rule 5.4 of the Code.

⁶ Ofcom Guidance on Section Five of the Code:
<http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section5.pdf> (published 16 December 2009)

Rule 9.2

Rule 9.2 states:

“Broadcasters must ensure that editorial content is distinct from advertising.”

In Ofcom’s opinion this piece of editorial content would have been understood by viewers to have been an advertisement. It was of a typical advertisement duration, appeared in commercial breaks and adopted an entirely one-sided stance on its subject matter – these are all characteristics of advertising.

Ofcom also considered that the presentation of the logo and website address of the Latvian Electoral Commission, CVK, was likely to have given viewers the impression that it had been placed by or on behalf of that organisation, as is referred to in the context of Rule 2.2 above.

For all these reasons, Ofcom concluded that Rule 9.2 had been breached.

The transmission of the item breached fundamental principles of the Code. Ofcom is concerned at BMA’s position in this case and in particular its view that the relevant Code rules did not apply.

Ofcom therefore put BMA on notice that any similar breaches in the future would be likely to attract consideration of a statutory sanction.

Breaches of Rules 2.2, 5.4, 5.11, 5.12 and 9.2

In Breach

HMS Ark Royal

Discovery, 1 August 2012, 13:00

Introduction

The Discovery channel is owned and operated by Discovery Communications Europe Limited ("the Licensee").

HMS Ark Royal is a documentary that follows the lives of the crew aboard an aircraft carrier. A complainant alerted Ofcom to the use of the word "fuck" by a Lieutenant Commander giving orders to his crew, "*Keep going – keep going left, for fuck's sake!*"

Ofcom considered the material raised issues warranting investigation under Rule 1.14 of the Code, which states:

"The most offensive language must not be broadcast before the watershed...".

Ofcom therefore requested comments from the Licensee about how the programme material complied with this rule.

Response

The Licensee confirmed it had immediately removed all versions of the programme from all its schedules when it was alerted to the offensive language by Ofcom, reviewed the entire series, and re-edited the non-compliant episode to remove the offensive language.

The Licensee also pointed to various measures to improve compliance measures in general, including introducing an additional viewing and safety check of content before it is broadcast.

Decision

Under the Communications Act 2003, Ofcom has a statutory duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, one of which is that "persons under the age of eighteen are protected". This objective is reflected in Section One of the Code.

Rule 1.14 states that the most offensive language must not be broadcast before the watershed. Ofcom research on offensive language¹ clearly notes that the word "fuck" and its derivatives are considered by audiences to be among the most offensive language. Such language is unacceptable before the watershed, whatever the audience profile of the channel.

Ofcom notes the action taken by the Licensee since it became aware of the transmission of the most offensive language in this case. However, Rule 1.14 of the Code states unequivocally that "the most offensive language must not be broadcast

¹ Audience attitudes towards offensive language on television and radio, August 2010 (<http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf>)

before the watershed...". The broadcast of the word "fuck" was clearly audible in this programme broadcast at lunchtime and was therefore a breach of Rule 1.14.

Breach of Rule 1.14

Resolved

Kiss Breakfast Show

Kiss 100, 28 June 2012, 06:30

Introduction

Kiss 100 is a radio station owned and operated by Bauer Media (“Bauer” or “the Licensee”). The service provides “contemporary and classic dance music” targeted at listeners aged under 30.

A complainant alerted Ofcom to the use of offensive language in a call with a listener in the early morning of Thursday, 28 June 2012.

On assessing the material Ofcom noted the use of the words “cunt” and “fucking” when presenters took a live call from a listener:

Melvin (presenter): *“Charlie was asking you guys, do you owe anyone any money – I’ve never seen the phone lines go so crazy.”*

Charlie (presenter): *“Melvin, right, I’ve just taken some calls, have to come back to this in a minute ‘cos we’ve got news, but the amount of money coming in is ridiculous, but we’ll go to Danny first. Danny, you there?”*

Danny: *“Yeah, I’m here.”*

Charlie: *“How much money you owed?”*

Danny: *“Er, three hundred pounds.”*

Charlie: *“And that’s by who?”*

Danny: *“One of my mates.”*

Charlie: *“Do you want to shout him out?”*

Danny: *“Yeah.....Dom you cunt, give me my fucking money back!”*

Various presenters
at once: *“Oooh, sorry about that guys”*
“Got an idiot on the line”
“What a fool!”

Ofcom considered the material raised issues warranting investigation under Rule 1.14 of the Code, which states:

“The most offensive language must not be broadcast...when children are particularly likely to be listening (in the case of radio).”

Ofcom therefore requested comments from the Licensee about how the programme material complied with this rule.

Response

The Licensee apologised for the incident and said it takes a very responsible attitude to compliance, particularly towards its younger listeners.

Bauer explained it has careful procedures in place so that all callers to the Kiss Breakfast Show who are put on air live are pre-briefed before broadcast, in this case by the co-presenter and producer. During the song before the caller is put to air there is a “dress rehearsal” of what the caller is going to say, which includes a direct reminder to each caller to remember they will be broadcast live and must not to swear or cause offence.

The Licensee said this call had been set up as usual, and there was no reason to believe that the caller would react the way he did on air. It was believed his short anecdote would lead smoothly into the news. The Licensee said that after the caller swore, the presenters immediately apologised. The co-presenter spoke to the caller afterwards, who was “hugely apologetic and embarrassed”, and said he had been “lost in the moment”.

Bauer assured Ofcom that as a result of its procedures there has not been any other incident where a listener has been put to air in this way and used an inappropriate swear word. It hoped that the immediate broadcast apology went some way to reduce any offence caused and the Licensee assured Ofcom that its vetting of callers would continue to be thorough.

Decision

Under the Communications Act 2003, Ofcom has a duty to set standards for broadcast content as appear to it best calculated to secure the standards objectives, including that “persons under the age of eighteen are protected”. These objectives are reflected in Section One of the Code.

Rule 1.14 states that the most offensive language must not be broadcast on radio when children are particularly likely to be listening. Ofcom research on offensive language¹ clearly notes that the words “cunt” and “fucking” are considered by audiences to be amongst the most offensive language.

The Code states that the phrase “when children are particularly likely to be listening” particularly refers to “the school run and breakfast time, but might include other times”. Ofcom’s guidance on offensive language in radio² states that:

“For the purpose of determining when children are particularly likely to be listening, Ofcom will take account of all relevant information available to it. However, based on Ofcom’s analysis of audience listening data, and previous Ofcom decisions, radio broadcasters should have particular regard to broadcasting content at the following times:

- between 06:00 and 09:00 and 15:00 and 19:00 Monday to Friday during term-time”.

¹ Audience attitudes towards offensive language on television and radio, August 2010 (<http://stakeholders.ofcom.org.uk/binaries/research/tv-research/offensive-lang.pdf>)

² See footnote 1 above

Since these examples of the most offensive language were broadcast at around 06:30 during the week during term time, Ofcom considers they were transmitted at a time when children were particularly likely to be listening.

The broadcast of the most offensive language at this time was therefore in breach of Rule 1.14 of the Code.

Ofcom however took into account that: the station has compliance procedures in place to pre-brief callers before they are broadcast live, these procedures were applied in this case, the presenters reasonably believed that the caller would not react in the way he did, the presenters cut the caller off immediately and also broadcast an apology straightaway.

In view of the circumstances, Ofcom therefore considers the matter resolved.

Resolved

Broadcast Licence Condition cases

In Breach

Community Radio Licensees

Non-payment of licence fees

Ofcom is partly funded by the licence fees it charges television and radio licensees. Ofcom is under a statutory obligation to ensure that the aggregate amount of fees that are required to be paid by licensees is sufficient to meet the cost of Ofcom's functions relating to the regulation of broadcasting. The principles which Ofcom applies when determining what fees should be paid by licensees are set out in the Statement of Charging Principles¹. The detailed fees and charges which are payable by broadcasting licenses are set out in Ofcom's Tariff Tables². The payment of a fee is a licence requirement³. Failure by a licensee to pay its licence fee when required represents a serious and fundamental breach of a broadcast licence.

In Breach

The following licensees have failed to pay their annual licence fees in full, in accordance with the original deadline, despite repeated requests to do so. These licensees have therefore each been found in breach of their licence. As a consequence of this serious and continuing licence breach, Ofcom is putting the licensees on notice that the contravention is being considered for the imposition of a statutory sanction, which could include licence revocation.

Licensee	Licence Number	Service Name
OnFM Ltd	CR074	OnFM
Radio Elwy Point FM Ltd	CR157	Point FM

¹ http://stakeholders.ofcom.org.uk/binaries/consultations/socp/statement/charging_principles.pdf

² http://stakeholders.ofcom.org.uk/binaries/research/Tariff_Tables_2001112.pdf

³ For example, Broadcasting Act licence Schedule Part 2, Condition 3

Fairness and Privacy cases

Not Upheld

Complaint by Mrs Nicola Adolphe on her own behalf and on behalf of her children (both minors) and on behalf of Mrs Pamela Holt and her son (a minor)

Tonight, ITV1, 12 April 2012

Summary: Ofcom has not upheld this complaint of unjust or unfair treatment made by Mrs Nicola Adolphe.

This programme looked at the steep rise in contagious childhood diseases (measles, mumps, whooping cough and rubella) which are considered by the World Health Organisation to be preventable by vaccination. It said that health officials consider that the increase in outbreaks of these diseases is due to parents choosing not to have their children vaccinated.

The programme included sections of an interview with Mrs Nicola Adolphe and her sister, Mrs Pamela Holt, in which they were shown explaining why they had chosen not to have their children vaccinated.

Ofcom found that:

- The programme makers obtained informed consent from Mrs Adolphe and Mrs Holt for their (and their children's participation) in the programme and provided them with an accurate description of the nature of the programme and their contribution to it, which did not materially change from the making of to the broadcast of the programme.
- Mrs Adolphe, Mrs Holt and their children were not treated unfairly in the programme as broadcast in that the programme makers took reasonable care in presenting the material facts in relation to Mrs Adolphe's and Mrs Holt's reasons for not having their children vaccinated and the programme did not present the children in a way that resulted in unfairness to them.

Introduction

On 12 April 2012, ITV1 broadcast an edition of its current affairs programme *Tonight*. The programme looked at the steep rise in contagious childhood diseases (measles, mumps, whooping cough and rubella) which the World Health Organisation ("the WHO") considers to be preventable by vaccination. It said that health officials, including the UK's Health Protection Agency ("the HPA"), consider that the increase in outbreaks of these diseases is due to parents choosing not to have their children vaccinated.

The first section of the programme referred to a current outbreak of measles on Merseyside and included interviews with the parents of two toddlers in the area who had been diagnosed with the disease.

The programme also included an interview with Mrs Nicola Adolphe and her sister, Mrs Pamela Holt, who were shown with their respective children. This section of the programme was introduced with the following commentary:

“These children are the picture of health but they could catch a contagious disease like measles, mumps or whooping cough at any point because they haven’t been immunised at all. Mums Nicky and Pam were put off by the autism scare and as a result don’t believe that any vaccinations are safe.”

Mrs Adolphe was shown saying: *“If I give a vaccine and something went wrong, I might never be able to get that back. Sometimes it’s irreversible damage that’s done and for me that’s not a risk I’d like to take.”*

The reporter explained that Mrs Adolphe and her sister accepted that their children would in all likelihood catch measles and other diseases but believed that as result of their lifestyle the children would have sufficiently strong immune system to recover fully from these diseases. Mrs Adolphe said: *“I believe that things like breast feeding, good food, good diet, exercise, sunshine, fresh air and hygiene are much more vital to health”.*

The report then indicated that 59 per cent of mothers who responded to a survey conducted on behalf of the programme with users of the Netmums website¹ said that *“not immunising your children is irresponsible”*. This was followed by Dr Mary Ramsey of the HPA saying:

“If for whatever reason your children aren’t vaccinated you’re not only putting your children at risk, but in addition to that your children could potentially expose other individuals who are friends, other members of the family, and, I think, any parent would feel dreadful if your child exposed another child who then suffered some serious complications from vaccine-preventable disease”.

The programme included an interview with the parents of a five week old girl who had died as a result of contracting whooping cough. At the end of this section of the programme the reporter explained that the little girl was too young to have been vaccinated before saying:

“The whooping cough that killed her is a highly contagious air-borne disease. Her parents believe the drop in immunisation rates is the reason why their little girl came into contact with it and became infected.”

The child’s mother then said: *“I just can’t believe that parents don’t want to vaccinate their children against something that is a killer”*. This comment was accompanied by footage of the mother and father visiting their child’s grave.

Following the broadcast of the programme, Mrs Adolphe complained to Ofcom that she, her sister and their children were treated unjustly or unfairly in the programme as broadcast.

Summary of the complaint and broadcaster’s response

The details of Mrs Adolphe’s complaint are set out below, followed by the response to particular points provided by ITV.

In summary, Mrs Adolphe complained that she, Mrs Holt (Mrs Adolphe’s sister) and their children were treated unjustly or unfairly in the programme as broadcast in that:

¹ A UK-wide parenting website.

- a) Mrs Adolphe and Mrs Holt did not give informed consent for their and their children's participation in the programme because Mrs Adolphe and Mrs Holt were misinformed about the nature of the programme and the research upon which it was based.

Mrs Adolphe said that the programme was "very pro-vaccine" but did not include a proper discussion of the real data on this issue.

In response, but before responding to Mrs Adolphe's specific heads of complaint, ITV first made some general points relevant to the programme complained about. It said that mainstream medical opinion was that vaccines were safe and effective and that children should be vaccinated against childhood diseases.

The broadcaster said that the programme was not intended to examine the science related to the safety of the recommended childhood vaccinations. Rather, it looked at: the reasons the medical profession maintained children should receive these vaccinations; why some children are not receiving them; and, what the effects of that are on public health (notably a significant increase in these vaccine-preventable diseases).

ITV said the programme did not reopen the question of whether there was a link between the MMR vaccine² and autism (or that the recommended childhood vaccines were unsafe for other reasons) because medical research has found this not to be the case. Rather the programme sought to explore whether, despite all the evidence to the contrary, concerns remained amongst parents and if so whether that was one reason why vaccination rates were still lower than they were formerly.

In response to the specific elements to the complaint, ITV said that Mrs Adolphe had contacted the programme in response to an invitation posted on a website (a copy of which was provided to Ofcom).

ITV said that Mrs Adolphe told an assistant producer that she had chosen not to vaccinate her children and did not regret it. She explained that she was a breastfeeding counsellor and that until recently she had worked with "children with specific needs". She said she had always felt uncomfortable about her husband having vaccinations when he was in the army; that it was he who started researching vaccinations; and, that she began to read some of the articles he had unearthed and she realised her attitude to vaccinations had been right all along.

Mrs Adolphe was told about the nature of the programme at this stage, and specifically about the contribution to the programme by the parents of a baby girl who died from vaccine-preventable whooping cough when she was too young to have been vaccinated and who therefore felt that it was irresponsible for parents not to have their children vaccinated. The broadcaster also said that Mrs Adolphe had confirmed within her complaint to Ofcom that she was told that the

² A vaccine to protect children from measles, mumps and rubella. In the UK, the MMR vaccine was the subject of controversy after publication in the medical journal, The Lancet, of a 1998 paper by Andrew Wakefield reporting a study of twelve children who had bowel symptoms along with autism or other disorders, including cases where onset was believed by the parents to be soon after administration of MMR vaccine. In 2010, Mr Wakefield's research was found by the General Medical Council to have been "dishonest", and The Lancet fully retracted the original paper. Several subsequent peer-reviewed studies have failed to show any association between the vaccine and autism.

programme would look at the fact that these diseases are on the increase because of lower vaccination rates.

ITV said that the producer of the programme did a “pre-interview” on the telephone with Mrs Adolphe running through the type of questions she would be asking in interview. It supplied Ofcom with a list of questions and answers from this pre-interview taken from the producer’s note book.

The broadcaster said that during this pre-interview Mrs Adolphe expressed concern at publicly airing what she considered to be her controversial views. In response the producer agreed it would be a brave step; said she could not guarantee there would be no backlash and reiterated that it was Mrs Adolphe’s decision. Mrs Adolphe decided to go ahead with the interview but, because she was aware her views were controversial, stipulated that she did not want to be filmed at home because the family lived in a vicarage and she did not want to upset members of the parish.

ITV said that when the filming plans were being made Mrs Adolphe said that her sister, Mrs Holt, who took the same view on the subject, would also like to take part in the programme and that the filmed interview largely followed the form that had been rehearsed in the pre-interview.

The broadcaster also said that at the time the interview was filmed, neither Mrs Adolphe nor Mrs Holt expressed any concerns about the questions asked or the way the interview was conducted. ITV acknowledged that Mrs Adolphe again expressed concerns that she would be “hated” for her decision not to vaccinate her children but argued that this indicated that she was well aware that her views did not follow the mainstream and that some may feel they were irresponsible.

b) Mrs Adolphe and Mrs Holt and their children were unfairly portrayed. In particular Mrs Adolphe said that:

- Her position and that of Mrs Holt was misrepresented, notably because the programme omitted to show Mrs Adolphe’s explanation that she did not have her children vaccinated because, due to her family history, she falls into the category of people who should not do so.
- Mrs Adolphe and Mrs Holt’s children were marginalised, ridiculed and used for scare-mongering purposes and the programme indicated that they were responsible for the entire nation’s outbreak of contagious childhood diseases. In particular Mrs Holt complained that the programme made it seem as if her children not being vaccinated meant that people in Merseyside were suffering, but that they lived in Dorset where there were no outbreaks.

In response, to the first element of this head of complaint, ITV said that at no point did the complainants suggest to the programme makers that their children fell into any kind of defined category which meant they should not receive vaccinations. Rather, the complainants said that they believed that the vaccines were not only unsafe but also unnecessary; and, they felt that should one of their children contract one of these diseases then – with breast feeding, good food and diet, sunshine, fresh air and hygiene (which they considered to be much more vital to health) – their children’s immune systems should be strong enough to overcome it.

ITV acknowledged that the complainants told the programme makers that their brother suffered from severe autism and that their sister died at a young age of leukaemia but said that they did not indicate that either of these conditions were linked to vaccination. The broadcaster said that Mrs Adolphe and Mrs Holt spoke of their brother's condition in the context of having first-hand knowledge of how difficult it can be to live with severe autism. It argued that the omission from the programme of the information about the complainants' brother's condition did not result in any unfairness to them because they did not give it as a reason for their opposition to vaccines.

ITV added that NHS guidance says that it may not be appropriate to vaccinate children who are currently unwell with a temperature, those who may have immunity issues (such as those with HIV/AIDS or who have cancer or have undergone certain cancer treatments), those who are on high doses of steroids and those who have had anaphylactic reactions to previous vaccinations³. ITV said the complainants did not indicate that any of these circumstances applied to their children and noted that the same NHS guide specifically states that a familial history of autism is not recognised as a reason not to vaccinate.

ITV denied that the complainants' children were "marginalised, ridiculed and used for scare-mongering purposes" in the programme or that it indicated, expressly or by implication, that they (i.e. the children) "were responsible for the entire nation's outbreak of dangerous diseases".

The broadcaster said that the programme reported that the Netmums survey undertaken for the programme indicated that – despite the evidence to the contrary – eight out of ten of respondents worry that MMR could trigger autism and that 45 per cent did not consider vaccines to be completely safe. ITV said that the complainants clearly fell into this not inconsiderable category. It added that the programme included a virologist, Mr Chris Smith, who expressed empathy for similar views. He said that even though it is his job to tell people that they should give their children the MMR vaccination:

"when I had to take my own children to have an MMR I have to admit I felt should I be doing this? And of course I should...but because of the seed of doubt that was planted historically by the scandals that went on, people now worry..."

ITV said that the complainants chose not to vaccinate their children at least in part because of the fear they might be damaged by the vaccinations, and the reasons that they gave for their choice were fairly and accurately reflected in the programme. It argued that the complainants' children were not singled out to be blamed for the entire nation's outbreak of childhood diseases, but the complainants were aware that the programme would report that lower levels of vaccination rates were being held responsible generally for the increase in what are considered by most experts to be vaccine-preventable illnesses. It added that the outbreak of measles on Merseyside, to which Mrs Holt specifically referred in the complaint, was reported in the programme as being due to low vaccination rates in parts of that city itself, not due to the complainants' children who live in Dorset.

With regard to Mrs Adolphe's position that the programme should have focussed more on her view of the scientific studies she has read on the safety and

³ <http://www.nhs.uk/planners/vaccinations/pages/mythsandtruths.aspx>

effectiveness of vaccinations, ITV reiterated that the programme was not about the underlying medical science of vaccines, and it was never suggested to the complainants that it was.

Representations on Ofcom's preliminary view

Ofcom prepared a preliminary view in this case that Mrs Adolphe's complaint should not be upheld. Both Mrs Adolphe and ITV commented on that preliminary view. The main points made by Mrs Adolphe relevant to the complaint as entertained and additional to those already raised in the original complaint and therefore considered by Ofcom, and ITV's responses to those points were, in summary, as follows.

- a) Mrs Adolphe acknowledged that she gave consent to her participation in the programme but indicated that once she had seen the transcript of the programme (which was sent to her on the same day that it was broadcast) she would have withdrawn her consent had the transcript not been sent to her at a point when it was too late for her to do so. She said that the inclusion of the voice-over commentary (of which she was unaware before she saw the transcript) stating that *"Mum's Nicky and Pam were put off by the autism scare and as a result don't believe that any vaccinations are safe"* significantly changed the meaning and intention of the interview she and her sister gave to the programme. In particular, she said that it suggested that fear of autism rather than an holistic approach to the health of their families had encouraged Mrs Adolphe and her sister not to have their children vaccinated.

Mrs Adolphe also said that she was led into participating in the programme by repeatedly being told by the programme makers that a survey of members of the parenting website Netmums had found that eight out of ten mothers are worried about their child's vaccinations but that this was only referred to once in the programme. She added that she had not been aware that the programme would be a "pro-vaccine piece" that supported mainstream medical views and that she considered that the initial website invitation to contribute to the programme indicated that it would be an open discussion on parents' views which suggested a more natural alternative to vaccines.

In summary and in response to Ofcom's preliminary view and Mrs Adolphe's comments on this aspect of it, ITV said the complainants were provided with an accurate description of the programme and their contribution to it which did not change in a material way, such that it would affect their original consent. Mrs Adolphe was sent a transcript of the interview to be contained in the programme when the edit was completed which was shortly before transmission. ITV said that this was done as a matter of courtesy not because there was an obligation on programme makers to do so, and that the transcript was not provided for the purposes of gaining final approval from Mrs Adolphe and she was given no reason to believe that it was.

ITV said that the programme's voiceover neither constituted a material change to the nature of the programme or of the complainants' contribution to it nor caused them any unfairness. ITV added that it was evident from her contribution to the programme (and her recent response to the preliminary view) that Mrs Adolphe believes that vaccines, including MMR, are unsafe and can cause, amongst other things, autism. Her views in this respect were accurately reflected in the programme.

ITV added that the statement that a survey showed that eight out of ten mothers were worried about vaccinations was reflected in the programme, and that the fact that so many parents have these concerns was discussed at some length. The broadcaster reiterated its view that the complainants were given sufficient information about the nature and purpose of the programme to enable them to provide informed consent, and about the plan to include in the programme the parents of a very young child who had died as a result of whooping cough, and who held the view that the failure to vaccinate children is irresponsible.

- b) Mrs Adolphe indicated that her position and that of her sister (as parents who had chosen not to have their children vaccinated) was unfairly portrayed in that the programme included the claim that lower vaccination rates in some areas, notably Merseyside, were leading to an increase in childhood diseases when, in her view, there were no data to support this claim. Mrs Adolphe added that she had discussed this matter, including the fact that she had undertaken some of her own desk research into it, with the programme makers.

In summary and in response to Ofcom's preliminary view and Mrs Adolphe's comments on this aspect of it, ITV repeated that the programme had reported the overwhelmingly mainstream medical view on vaccinations and the necessity for them on the grounds of public health and had made it clear that the complainants did not readily accept the mainstream view. It was because of these views that the complainants' interview was included in the programme as an example of the large group of parents who were worried about the safety of vaccinations and who chose not to vaccinate their children as a result.

ITV said the fact that Mrs Adolphe had, since the publication of Dr Wakefield's paper (see footnote 2 above), undertaken some lay research of her own into the subject which she feels has confirmed her concerns, was not relevant to the issues under discussion in this programme.

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 and unwarranted infringement of privacy in, or in connection with the obtaining of material included 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 its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and transcript and both parties' written submissions. Ofcom also took careful account of the representations made by both Mrs Adolphe and ITV in response to Ofcom's preliminary view on this complaint. However, we concluded that the further points raised did not merit a re-consideration of the outcome of this complaint.

When considering complaints of 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”). Ofcom had regard to this Rule when reaching its decision on the individual heads of complaint detailed below.

- a) Ofcom first considered Mrs Adolphe’s complaint that she and Mrs Holt did not give informed consent for their and their children’s participation in the programme because she and her sister were misinformed about the nature of the programme and the research upon which it was based.

In considering this part of the complaint, Ofcom had regard to Practice 7.3 of its Code which states that in order for potential contributors to a programme to be able to make an informed decision about whether to take part, they should be given sufficient information about: the programme’s nature and purpose; their likely contribution; the areas of questioning and, wherever possible, the nature of other likely contributions; and, any changes to the programme that might affect their decision to contribute.

It is important to note that, in Ofcom’s view, whether informed consent has been given is a continuing issue that needs to be considered from the commencement of a contributor’s participation and continues until their involvement is concluded. Therefore in assessing whether a contributor has given informed consent for their participation, Ofcom will not only look at the available information provided to the contributor prior to the recording of the contribution, but where possible the contribution itself.

Ofcom noted that Mrs Adolphe contacted the programme in response to an invitation posted on an internet forum on ‘natural parenting’ which read:

“I am an Assistant Producer on ITV’s weekly current affairs series *Tonight*. We are currently making a programme due for broadcast in April on vaccination and immunisation in children. We are interested in speaking with a family that have taken the decision not to vaccinate their child/children because they believe in a more holistic approach to health. We are keen to speak with a family that lives in the London area. Is this something that you think that you could help me with? I would be more than happy to speak with you on the phone about it in more detail to explain further”.

Having contacted the programme makers Mrs Adolphe was told about the nature of the programme and notably that it would look at the sharp increase in incidents of childhood disease such as measles, mumps, rubella and whooping cough, which the programme considered was due to lower vaccination rates. In addition, Mrs Adolphe was specifically told that the parents of a baby girl who died from whooping cough when she was too young to have been vaccinated (and who therefore felt that it was irresponsible for parents not to have their children vaccinated) would also be contributing to the programme.

Ofcom noted that Mrs Adolphe participated in a telephone ‘pre-interview’ in which the programme makers went over the type of questions she would be asked at the filmed interview. From the producer’s notes it appears that during this ‘pre-interview’ Mrs Holt detailed a number of reasons for her views against vaccination which included her opinion that rather than risking her children’s health she felt she was “protecting them from irreversible damage [because] I can’t guarantee vaccines are safe”. Mrs Adolphe also explained that she did not believe that her brother’s autism was linked to vaccination. After this ‘pre-interview’, Mrs Adolphe told the programme makers that her sister, Mrs Holt, would also like to take part in the programme. Ofcom considers that it is fair and reasonable to infer that Mrs

Adolphe passed on a summary of the information she had been told by ITV to her sister, Mrs Holt (who according to what Mrs Adolphe told ITV “took the same view on the subject”) before Mrs Holt offered to take part in the programme.

Ofcom noted from the broadcaster’s response to the complaint that it appeared that neither Mrs Adolphe nor Mrs Holt expressed any concerns about the questions they were asked or the approach of the programme during the filmed interview in which they and their children (who were filmed playing in background as their mother’s outlined their views on vaccination) subsequently participated.

Turning to the broadcast, Ofcom noted that the programme made it clear that mainstream medical opinion was that contagious childhood diseases such as measles, mumps, rubella and whooping cough were increasing as result of low levels of vaccination. The programme included interviews with parents whose children had contracted some of these diseases including those of one child who had died of whooping cough. The programme also referred to the autism scare after the publication in 1998 of Andrew Wakefield’s, now discredited, claim that there was a link between the MMR vaccine and autism. It discussed the results of a survey of parents regarding vaccination, noting that eight out of ten respondents indicated that *“despite the evidence they still worry that MMR could trigger autism”*, and included the opinion of a virologist who said that notwithstanding his job he understood and had experienced the concerns that parents felt about having their children vaccinated. The section of the programme featuring Mrs Adolphe, Mrs Holt and their children indicated that the children had not been vaccinated and included Mrs Adolphe and Mrs Holt explaining their position on this issue.

In light of these observations, Ofcom considered that the description of the programme given to Mrs Adolphe (and through her to Mrs Holt) via the initial invitation, the conversation between Mrs Adolphe and the programme makers, the pre-interview and the filmed interview itself accurately reflected the programme as broadcast.

In response to the preliminary view Mrs Adolphe said that she participated in the programme because she was repeatedly told that a survey on the Netmums website had found that eight out of ten mothers were worried about their child’s vaccinations but that this finding was only referred to once in the programme; that she had not been aware that the programme would be “pro-vaccine”; and that having seen a transcript of the programme she would have withdrawn her consent had the transcript not been sent to her when it was too late for her to do so.

Ofcom does not consider that the fact that the finding that eight out of ten parents responding to a survey indicated that *“despite the evidence they still worry that MMR could trigger autism”* was referred to only once in the programme serves to undermine its position that the description of the programme given to Mrs Adolphe (and through her to Mrs Holt) accurately reflected the programme as broadcast. In addition, given the inclusion of this statement, as well as another finding that *“45% [of respondents] told us they don’t consider vaccines to be completely safe”* and the testimony of a virologist who sympathised with parents’ concerns about vaccination (see the decision at head b) below for details), Ofcom considers that the programme made it clear to viewers that many parents were still very worried about having their children vaccinated. Therefore, in Ofcom’s view, the fact that Mrs Adolphe was told about this finding during the making of

the programme would have served to have assisted her in providing informed consent for her contribution to the programme rather than the reverse.

In her response to the preliminary view Mrs Adolphe also said that in her opinion some voice-over commentary (stating that *“Mums Nicky and Pam were put off by the autism scare and as a result don’t believe that any vaccinations are safe”*, which she first became aware of when she received the transcript) significantly changed the meaning of the interview she and her sister gave to the programme - in that it suggested that fear of autism rather than an holistic approach to the health of their families had promoted their decision not to have their children vaccinated.

Ofcom observed that Mrs Adolphe was provided with a transcript as courtesy. On the information available to Ofcom, however, it did not appear that Mrs Adolphe was given any guarantee by the programme makers that she would be able either to make any changes to the programme or to withdraw her consent to her participation having had sight of this transcript. We also noted the information given to Mrs Adolphe and her sister about the planned programme and the information which Mrs Adolphe and her sister gave to the programme makers about their reasons for not having their children vaccinated (notably Mrs Adolphe’s repeated references to what she believed to be the risk of *“irreversible damage”* as a result of vaccination – see the decision at head b) below for details). As a result Ofcom concluded that the inclusion of the voice-over commentary referred to above in the programme as broadcast did not constitute a significant change to the programme which might reasonably have affected the complainants’ original consent to participate, and which might cause material unfairness to them.

Taking all the above factors into account, Ofcom considered that Mrs Adolphe and Mrs Holt were given sufficient information about the nature and purpose of the programme to provide informed consent for their participation and that this did not change during the making of the programme or in the programme as broadcast. Ofcom also concluded that Mrs Adolphe and Mrs Holt were aware of the kind of contribution they and (by virtue of their inclusion in the filming) their children would make, and in particular that Mrs Adolphe had understood that the position she and her sister held might be considered as controversial or even irresponsible by some viewers, prior to taking part in the programme. Therefore, Ofcom concluded that that it was reasonable for the programme makers and the broadcaster to have believed that the consent provided by the complainants was “informed consent” and that, in the absence of any material changes to the programme or their contribution, that consent remained valid.

Ofcom therefore found that there was no unfairness to Mrs Adolphe, Mrs Holt or their children in this respect.

- b) Ofcom next considered Mrs Adolphe’s complaint that she, Mrs Holt and their children were unfairly portrayed.

In considering this part of the complaint, Ofcom had regard to Practice 7.9 of the Code which states that before broadcasting a factual programme broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation.

Ofcom noted that at the beginning of the section of the programme featuring the complainants with their children in a playground the reporter said:

“These children are the picture of health but they could catch a contagious disease like measles, mumps or whooping cough at any point because they haven’t been immunised at all. Mums Nicky and Pam were put off by the autism scare and as a result don’t believe that any vaccinations are safe.”

Mrs Adolphe was shown saying: *“If I give a vaccine and something went wrong, I might never be able to get that back. Sometimes it’s irreversible damage that’s done, and for me that’s not a risk I’d like to take.”*

The reporter then said: *“But doctors say that by not having the vaccines these Mums are risking not only their own children’s lives – but also those they come into contact with”.*

This was followed by a contribution from Mrs Holt in which she said while she did not think she was being selfish, *“we are all a little selfish when it comes to our kids...[and] I can only trust in what I know and what I think is best for my child and hope that people out there will understand that”.*

The reporter explained that Mrs Adolphe and her sister accepted that their children would in all likelihood catch measles and other diseases but believed that as result of their lifestyle the children would have sufficiently strong immune system to recover fully from these diseases.

Mrs Adolphe said:

“If they catch disease naturally they will hopefully recover fully. They won’t have any risk of vaccine damage, they should have a strong immune system that will fight off everything.

I believe that things like breast feeding, good food, good diet, exercise, sunshine, fresh air and hygiene are much more vital to health”.

Mrs Adolphe complained that her position and that of her sister was misrepresented because the programme omitted to show her (i.e. Mrs Adolphe’s) explanation that she did not have her children vaccinated because, due to her family history, she falls into the category of people who should not do so.

The programme did not indicate that Mrs Adolphe chose not to have her children vaccinated because, due to her family history, she falls into the category of people who should not do so. Rather it indicated that she did not have her children vaccinated because, as a result of the autism scare, she did not believe that vaccinations are safe.

From ITV’s response to this complaint it appears that during her pre-interview with one of the programme makers Mrs Adolphe said that her brother’s autism was not linked to vaccination and that she felt that in not having her children vaccinated she was protecting them from irreversible damage because she could not guarantee vaccines are safe. In addition, Mrs Adolphe repeated her position about the risk of *“irreversible damage”* to her children from vaccination in her on-camera interview and that this comment was in turn included in the broadcast.

Ofcom noted ITV's position that at no stage during the programme makers' communications with Mrs Adolphe and Mrs Holt (including the pre-interview and the filmed interview) did either complainant indicate that their children fell into a category which meant that they should not be vaccinated. We also took account of the current NHS guidance (supplied to Ofcom by ITV) which states that "it is a myth that you have to avoid or delay your child's vaccination if he or she has a personal or family history of autism and related disorders".

Ofcom then turned to Mrs Adolphe's complaint that her children and Mrs Holt's son were marginalised, ridiculed and used for scare-mongering purposes and the programme indicated that they were responsible for the entire nations' outbreak of contagious childhood diseases. In particular, Mrs Holt complained that the programme made it seem as if her children not being vaccinated meant that people in Merseyside were suffering, but that they lived in Dorset where there were no outbreaks.

The programme clearly indicated that Mrs Adolphe and Mrs Holt's children were not vaccinated and that various medical authorities (including the WHO and the HPA) believed that lower vaccination rates in general have led to an increase in measles, mumps, rubella and whooping cough. It also stated that the complainants' children *"could catch or carry a contagious disease like measles, mumps, or whooping cough... because they haven't been immunised at all"* (a point which the complainants do not contest) and that the advice of doctors indicated that *"by not having the vaccines these Mums are risking not only their own children's lives – but also those they come into contact with"*.

However, the programme did not either say or imply that the complainants' children specifically were responsible for any particular incident or outbreak of these diseases (including the outbreak of measles in Merseyside which featured at the beginning of the programme). Nor, in Ofcom's view, did the programme marginalise the children or ridicule them. Rather, as noted above, it not only indicated that Mrs Adolphe and Mrs Holt had chosen not to have their children vaccinated because they were worried about the damage they believed vaccination could do to them. It also made it clear that many other parents had the same fears about vaccination (evidenced by the eight out of ten respondents to the Netmums survey who said that they worried that the MMR vaccine could trigger autism and the 45 per cent who did not consider vaccines to be completely safe).

In light of all of these points, Ofcom concluded that the broadcaster had taken reasonable care to satisfy itself that the programme did not present, disregard or omit material facts with regard to the complainants' reasons for not having their children vaccinated in a way that resulted in unfairness to them. We also concluded that the manner in which the complainants' children were presented was unlikely to have materially and adversely affected viewers' understanding of them in a way that was unfair to them. In particular, Ofcom considered that viewers would have been able to draw their own conclusions regarding Mrs Adolphe's and Mrs Holt's decisions not to have their children vaccinated, taking into account the views of mainstream medical authorities, other parents – including those who clearly shared Mrs Adolphe's and Mrs Holt's fears, and the complainants themselves.

Ofcom therefore found that there was no unfairness to Mrs Adolphe, Mrs Holt and their children in the way they were portrayed.

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

Not Upheld

Complaint by Mr Tamika Paul Mkandawire

Britain's Gay Footballers, BBC 3, 30 January 2012

Summary: Ofcom has not upheld this complaint of unjust or unfair treatment and unwarranted infringement of privacy made by Mr Mkandawire.

BBC 3 broadcast the programme *Britain's Gay Footballers* which was presented by Ms Amal Fashanu, the niece of the late Mr Justin Fashanu. The programme explored the reasons why there had been no openly gay professional footballers since Mr Justin Fashanu came out publicly as gay in 1990, and featured interviews with professional footballers and some celebrities. Mr Mkandawire, a professional football player for Millwall Football Club ("Millwall FC"), was filmed and broadcast being asked if he would give his views on the subject and he responded by saying he would think about it. Following the broadcast of the programme, Mr Mkandawire complained that he was treated unjustly and unfairly in the programme in that he did not give his consent to be included in the programme as broadcast and was portrayed as homophobic and unwilling to talk about the subject of homophobia. Mr Mkandawire also complained that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme and in the programme as broadcast.

Ofcom found as follows:

- Mr Mkandawire's consent for the broadcast of the programme in order to avoid any unfair treatment to him was not required in the circumstances.
- The programme did not portray Mr Mkandawire as homophobic. It reflected his honest reaction to being asked to contribute to the programme and this was not unfair to him.
- Mr Mkandawire did have a legitimate expectation of privacy in relation to being filmed in training, but this was limited because he had given implied consent to being filmed. Given this conclusion, it was not necessary for Ofcom to consider whether any intrusion into Mr Mkandawire's privacy in connection with the obtaining of material included in the programme was warranted.
- Mr Mkandawire did have a legitimate expectation of privacy that the interview clip with him would not be shown in the programme as broadcast, but this was outweighed by the public interest in showing some of the difficulties the presenter had faced in getting players to talk about the subject.

Introduction

On 30 January 2012, BBC 3 broadcast the programme *Britain's Gay Footballers*. The programme was presented by Ms Amal Fashanu, the daughter of the footballer Mr John Fashanu and niece of the late Mr Justin Fashanu, an openly gay professional footballer who committed suicide in 1998.

Ms Fashanu introduced the programme by stating:

“There are 5,000 professional footballers in Britain. But, incredibly, not a single one of them has come out publicly as gay. In fact, there has only ever been one openly gay footballer in the whole history of the British game; his name was Justin Fashanu and he was a true pioneer”.

Ms Fashanu stated that her aim was to “*uncover why no gay footballer in Britain has come forward publicly*” since Mr Justin Fashanu. The programme featured various interviews with former and current professional footballers such as Mr John Fashanu and Mr Joe Barton, publicist Mr Max Clifford and the comedian Mr Matt Lucas.

During the programme, Ms Amal Fashanu was shown experiencing difficulty in persuading current football players to speak to her about why there are no openly gay footballers in the UK, although the programme did feature some interview footage with players at a training session of Millwall FC. Millwall FC was described in the programme as “*one of the toughest training clubs around*”. Ms Fashanu explained that she was trying to get a “*group discussion going, but a lot of the players were not keen to talk at all*”.

The complainant, Mr Tamika Paul Mkandawire, a professional football player for Millwall FC, was shown being approached by Ms Fashanu at a Millwall FC training session. Ms Fashanu was shown first describing the purpose of the programme which was to try to explain why there had been no openly gay football players apart from Mr Justin Fashanu and what reactions there would be to an openly gay player, before speaking to one of the football players. The programme then showed Mr Mkandawire. Ms Fashanu asked him, “*I just wanted to let you know if you wanted to do it [i.e. an interview]*”. In response, Mr Mkandawire was seen smiling with another player and said “*I’ll think about it*”, to which Ms Fashanu replied: “*But please think about it*”.

Ms Fashanu was shown speaking with another player about the fact that she had approached five or six other players, but that they were all reluctant to talk to her. She said, however, that “*thankfully more senior members of the squad were open to talking*” to her and the programme featured contributions from these players.

Summary of the Complaint and the broadcaster’s response

Unjust or unfair treatment

Mr Mkandawire complained that he was treated unjustly or unfairly in the programme as broadcast in that:

- a) Mr Mkandawire said that he did not give his consent to be included in the programme and that he had not signed a release form agreeing to participate in the programme. Mr Mkandawire also complained that the programme portrayed him as homophobic, uncooperative and unwilling to discuss the subject of homophobia. Mr Mkandawire stated that, at the time when he was approached, he had said that he would think about giving an interview and had asked Ms Fashanu to find him later, because it was an inconvenient time. However, the programme was edited and his suggestion that she should find him later was not included in the broadcast programme, which gave the impression that Mr Mkandawire was unwilling to talk and homophobic. Mr Mkandawire said that the programme makers used the environment, inappropriate timing and relaxed interaction between himself and a team mate to portray him in a negative way.

In response, the BBC said that the unedited footage did not show Mr Mkandawire asking the presenter to find him later. The BBC said that Mr Mkandawire had said that he would think about the request to be interviewed and this was stated in the programme. The BBC said that they accepted that viewers may have formed the impression that he was reluctant to address on camera the issue of homosexuality. However, the BBC stated that Mr Mkandawire's reaction was a fair reflection of the circumstances and that there were no grounds for suggesting that Mr Mkandawire was homophobic.

Unwarranted infringement of privacy

Mr Mkandawire complained that his privacy was unwarrantably infringed in connection with the obtaining of material included in the programme in that:

- b) Mr Mkandawire said that he was approached and filmed at his place of work and asked if he would consider being involved in the programme. He said he would consider it, but did not give his consent to be filmed.

By way of background to his complaint, Mr Mkandawire said that the programme had affected his professional reputation and his charity work.

In response, the BBC said that the programme makers had initially approached a Millwall FC player, Mr Darren Purse, to speak to him about why there were no openly gay football players. Mr Purse told them that he would need to seek permission from Millwall FC's press office to confirm permission to be filmed at the training grounds, which was subsequently given. The programme makers then asked if they could interview and film other players at the club. Mr Purse said that he would put this request to Millwall FC's press office and would confirm with the programme makers on the day of filming. The programme makers filmed Mr Purse at the training grounds before training commenced. Mr Purse confirmed at the time that Millwall FC had agreed to a group discussion, however only Mr Robinson, the captain of Millwall FC, had expressed an interest in participating in the filming. As a result, Mr Purse said that he would make further enquiries with the other players. The programme makers also decided to ask the players to participate in a group discussion after training.

The BBC said that the programme makers had initially asked some players who were next to the gym if they would be willing to participate in a filmed group discussion. However, these initial requests, which were made off-camera, were declined. The programme makers also met Millwall FC's press officer who was fully aware of the filming and who confirmed that it was "fine" for the programme makers to ask the players if they wanted to participate in the filming. The press officer also confirmed that the programme makers could film players in the gym and could approach and talk to them. The BBC added that they were not in a position to say what communication may or may not have taken place between the press officer and the football players. However, before entering the gym to film both the programme makers and Ms Fashanu had asked the players if they could film them and film her interacting with them. The programme makers explained to the players that the filming was for a BBC documentary about the lack of openly gay players in professional football. The BBC said that none of the players present raised any objection to being filmed.

The BBC said that, initially, the programme makers had begun filming the players in training to ensure that they were comfortable being filmed and that one of the players filmed was Mr Mkandawire. The BBC said that the camera was in

conspicuous view and was visible to all the players and that Mr Mkandawire did not raise any objection to being filmed. Ms Fashanu was also filmed approaching Mr Mkandawire while she was explaining the purpose of the filming and she asked him if he would be willing to take part in a group discussion about the issue. The BBC said that Ms Fashanu had explained clearly the reason for the two of them being filmed. Mr Mkandawire responded to her by laughing with another player and said that he would think about doing it after training. The BBC said that the camera was close to Mr Mkandawire at this point and he did not raise any objection to being filmed.

Mr Mkandawire also complained that his privacy was unwarrantably infringed in the programme as broadcast in that:

- c) Footage of Mr Mkandawire was broadcast in the programme without his consent.

Mr Mkandawire said that his assistant had contacted the programme makers to inform them that they had no right to use the footage. He said that the programme makers admitted to his assistant in that conversation that they did not have a signed release form.

The BBC did not give a specific response on this part of the complaint. However, the BBC stated in its statement in response to the complaint overall that any legitimate expectation of privacy that Mr Mkandawire may have had was outweighed by the public interest in exploring attitudes to homosexuality and the open discussion of homosexuality in the world of professional football.

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 and unwarranted infringement of privacy in, or in connection with, the obtaining of material included in the programme.

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 its decision, Ofcom carefully considered all the relevant material provided by both parties. This included a recording of the programme as broadcast and transcript, both parties' written submissions and the unedited footage which also featured Mr Mkandawire.

When considering complaints of 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"). Ofcom had regard to this rule when reaching its decision on the individual heads of complaint detailed below.

Unjust or unfair treatment

- a) Ofcom first considered the complaint that Mr Mkandawire was treated unjustly and unfairly in the programme as broadcast in that he did not provide his consent to be included in the programme and that he did not sign a release form. It also

considered Mr Mkandawire's complaint that he was portrayed as homophobic, uncooperative and unwilling to discuss the subject of homophobia and that the programme makers used the environment, inappropriate timing and relaxed interaction between himself and a team mate to portray him in a negative way.

In considering this head of complaint, Ofcom had regard to Practices 7.3, 7.6 and 7.9 of the Code. Practice 7.3 of the Code states that where a person is invited to make a contribution to a programme, they should normally, at an appropriate stage: be told the nature and purpose of the programme; be told what kind of contribution they are expected to make; be informed about the areas of questioning and, wherever possible, the nature of other likely contributions; be made aware of any significant changes to the programme; be told the nature of their contractual rights and obligations and be given clear information, if offered an opportunity to preview the programme, about whether they will be able to effect any changes to it. Practice 7.6 states that when a programme is edited, contributions should be represented fairly. Practice 7.9 states that before broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation.

Ofcom noted the following exchange broadcast in the programme:

Ms Fashanu: *"In the meantime, one of my many calls to footballers and clubs finally paid off. I was given an opportunity at last to ask some current professionals about the lack of openly gay players. I was invited down to training at championship club Millwall. Since it's famously one of the toughest clubs around, I was still a bit unsure about how the lads would react to my questions. I tried to get a group discussion going but a lot of the players were not keen to talk at all".*

Ofcom observed that the above commentary was accompanied by footage of Ms Fashanu in Millwall FC's gym, talking to some of the football players. As she approached Mr Mkandawire, Ofcom noted the following exchange:

Ms Fashanu: *"Justin Fashanu was my Uncle.*

Mr Mkandawire: *OK.*

Ms Fashanu: *And basically we are just talking about homophobia in football...we are just kind of saying, you know what you guys think if one of your team mates came out gay what would you think... you know what would you say...Yeah I just wanted to let you know if you want to do it.*

Mr Mkandawire: *I'll think about it.*

Ms Fashanu: *Yeah? But please think about it".*

Ofcom observed that Mr Mkandawire was filmed while the presenter, Ms Fashanu, explained the purpose of the programme and what type of contribution the programme makers were looking for. The unedited footage (as summarised and discussed further below) also stated which other members of Millwall FC would be making a contribution to the programme. In Ofcom's opinion the

information provided to Mr Mkandawire was sufficient in the circumstances for him to be able to make an informed decision on whether he wanted to give a fuller contribution. On the basis of the information he was provided with about the programme, Mr Mkandawire responded by saying that he *"would think about it"*. Ofcom acknowledged Mr Mkandawire's point that he had not given his specific consent to be included in the programme as broadcast. Therefore, Ofcom went on to assess whether the inclusion of the footage in the programme as broadcast led to any unfairness to Mr Mkandawire.

Ofcom noted that immediately following her exchange with Mr Mkandawire (as set out above), Ms Fashanu was shown talking with another player and explaining the difficulty she was having in getting the players to talk to her. Ofcom also took into account that prior to arriving at the training ground, Ms Fashanu was finding it difficult to get football players to talk about the lack of openly gay players in football in the programme. Ofcom concluded that the response of Mr Mkandawire combined with Ms Fashanu's remarks might have given the impression that Mr Mkandawire was reluctant to talk on camera. However, in Ofcom's view, this was a fair representation of Mr Mkandawire's reaction. In this respect, Ofcom also took account of the statements of the camera man, Ms Fashanu and the producer, all of whom had remarked that they had come away with the impression that although Mr Mkandawire was polite in his response, he was not serious about talking to them any further. This impression was further strengthened in Ofcom's view when Mr Mkandawire did not follow up with the programme makers after training to offer to give an interview on camera.

Ofcom took the view that there was nothing in the brief response of Mr Mkandawire, which was broadcast, nor in the overall representation of this response within the programme, that could reasonably be taken to signal that Mr Mkandawire was homophobic. More specifically, although some of the interviews and commentaries in the programme could have left viewers with the impression that football players are (historically) known to display homophobic behaviour, the specific part of the programme in which Mr Mkandawire featured focussed on footballers not being keen to talk about homophobia and closed with the positive comment by the presenter that *"if there was a gay player who wanted to be open, he could finally maybe come out and feel supported by his teammates."*

Ofcom considered that Mr Mkandawire's response that he would *"think about"* giving his opinion on gay football players indicated to viewers that Mr Mkandawire was considering giving an interview, but was non-committal in his response at that time. As this was Mr Mkandawire's genuine reaction to being asked whether he would consider giving his views on the programme, Ofcom's view was that there was nothing unfair in including this in the programme.

Ofcom next assessed the part of Mr Mkandawire's complaint which stated that the programme had not broadcast his suggestion (that he said he made to the presenter) to *"find him later"*. Ofcom considered whether the programme as broadcast fairly reflected Mr Mkandawire's position, went on to review the unedited footage and noted the following:

Ms Fashanu: *"Justin Fashanu was my Uncle..."*

Mr Mkandawire: *OK.*

Ms Fashanu *...and basically we are just talking about homophobia in football. We are just kind of saying, you know, what you guys*

would think if one of your team mates came out gay, you know what would you say. Yeah so, I just wanted to let you know if you want to do it.

Mr Mkandawire: *[inaudible]*

Team Mate: *You got your player now.*

Mr Mkandawire: *I'll think about it.*

Ms Fashanu: *Yeah? But please think about it. It's nothing big; two, three questions max, after training whenever. Darren's doing it as well...*

Mr Mkandawire: *Is Rob doing it as well?*

Ms Fashanu: *Yeah Rob too".*

[End of the footage]

Ofcom noted that there was no significant difference between the broadcast footage and the unedited footage. Ofcom was not able to determine what exactly was said in some parts of the footage, nor what was said in the part of the conversation not featured in the footage. However, as stated above, the impression which the programme makers had was that Mr Mkandawire was reluctant, for whatever reason, to speak further on the topic. This followed from the general attitude of Mr Mkandawire when speaking with Ms Fashanu and from the fact that he did not follow up with the programme makers after the end of his training. Ofcom therefore considered that what was broadcast captured and was an accurate reflection of Mr Mkandawire's genuine reaction. There was nothing unfair in the programme makers' portrayal of Mr Mkandawire, which was in Ofcom's view, an accurate reflection of the interaction the programme makers had with him during filming.

For the reasons discussed above, Ofcom did not consider that there was any unfair portrayal of Mr Mkandawire or any unfair editing of his response and therefore, to avoid unfair treatment as required by Rule 7.1, it was not necessary in these circumstances to obtain Mr Mkandawire's consent for the broadcast of the programme.

Ofcom therefore found that Mr Mkandawire was not treated unjustly or unfairly in the programme as broadcast.

Unwarranted infringement of privacy

In Ofcom's view, the individual's right to privacy has to be balanced against the competing rights of the broadcasters to freedom of expression. Neither right as such has precedence over the other and where there is a conflict between the two, it is necessary to intensely focus on the comparative importance of the specific rights. Any justification for interfering with or restricting each right must be taken into account and any interference or restriction must be proportionate.

This is reflected in how Ofcom applies Rule 8.1 of the Code which states that any infringement of privacy in programmes, or in connection with obtaining material included in programmes, must be warranted.

- b) Ofcom considered Mr Mkandawire's complaint that his privacy was unwarrantably infringed in the obtaining of material included in the programme, in that he was filmed at his place of work and was asked if he would consider being involved in the programme. He said he would consider it but did not give his consent to be involved in the programme.

In considering this complaint, Ofcom took into consideration Practice 8.5 of the Code which states that any infringement of privacy in the making of a programme should be with the person's and/or organisation's consent.

In order to establish whether or not Mr Mkandawire's privacy was unwarrantably infringed in the obtaining of material included in the programme, Ofcom first considered whether Mr Mkandawire had a legitimate expectation of privacy in the particular circumstances. The filming took place on the training ground of Millwall FC, which is a private club, with restricted access to the public. Ofcom also took into account the broadcaster's submission that the programme makers had obtained consent from Millwall FC to film on the premises, including the gym, but that when it came to the football players themselves, the club had told the programme makers they would need to ask the players if they wanted to participate in the filming. Ofcom noted that the programme makers had obtained verbal permission from some of the football players before filming them, however it was not clear whether or not this included Mr Mkandawire.

Taking all these factors into account, Ofcom took the view that on balance Mr Mkandawire had a legitimate expectation of privacy that he would not be filmed at his workplace, particularly when taking into consideration that the gym was located in a private club and that he did not seem to be aware that filming was going to take place before he was actually filmed. However, because Mr Mkandawire was not filmed doing or saying anything of a particularly sensitive or private nature, and had been approached to ask if he would give his view on a topical matter, rather than to speak about anything of a personal nature, Ofcom considered that any expectation of privacy Mr Mkandawire had was limited.

Having found that Mr Mkandawire had a limited expectation of privacy in these circumstances, Ofcom went on to consider whether Mr Mkandawire consented to being filmed.

The unedited footage of Mr Mkandawire was in two sequences. First, when filming the complainant exercising in the gym Ofcom noted that the camera appeared to be close to Mr Mkandawire. From this footage, it appeared that Mr Mkandawire was aware of the camera and that he did not raise any objections to being filmed or signal to the programme makers in any way that he was uncomfortable being filmed. In relation to the footage in which Mr Mkandawire and another player were approached by Ms Fashanu, Ofcom observed that Mr Mkandawire appeared to interact with the programme makers in a relaxed manner. We also took into account that: Millwall FC had given permission to the broadcaster to film at the training ground; Mr Mkandawire's limited expectation of privacy; Mr Mkandawire was in the middle of a training session, as submitted in Mr Mkandawire's complaint; he was informed (as set out in head a) above) that the programme makers were making a documentary about attitudes towards openly gay footballers and what sort of contribution they were seeking from him; he was filmed openly, and not filmed doing or saying anything of a particularly sensitive or private nature; and, he had been filmed in the gym earlier on and had not raised any objection. In these circumstances, Ofcom considered that it was

reasonable to conclude that Mr Mkandawire had given implied consent to being filmed.

Given this conclusion, it was not necessary for Ofcom to consider whether any intrusion into Mr Mkandawire's privacy in connection with the obtaining of material included in the programme was warranted.

Ofcom found therefore that there was no unwarranted infringement of privacy in the obtaining of material included in the programme.

- c) Ofcom next considered the complaint that Mr Mkandawire's privacy was unwarrantably infringed in the programme as broadcast in that footage of him was broadcast without his consent.

In considering this part of the complaint, Ofcom had regard to Practice 8.6 which states that if the broadcast of a programme would infringe the privacy of a person or organisation consent should be obtained before the relevant material is broadcast, unless the infringement of privacy is warranted.

Ofcom first assessed the extent to which Mr Mkandawire had a legitimate expectation of privacy that footage of him would not be broadcast in the programme. As noted in head b) above, Ofcom again took into consideration the circumstances in which he was filmed. In particular, Ofcom noted that although Mr Mkandawire was aware that he had been filmed for the programme, he had at no point given his consent for subsequent broadcast of the footage. Further, the programme makers had not told him that they would be including his contribution in the broadcast of the programme but had approached him to ask whether he would consider talking about the subject of homophobia in football. As Mr Mkandawire did not give a further, fuller contribution to the programme, he would not have then expected to be shown in the programme. Ofcom therefore considered that Mr Mkandawire had a legitimate expectation of privacy in relation to the broadcasting of the footage included in the programme without his consent. However, when taking into account that he was aware that he was being filmed and did not appear to raise an objection to it (as set out in head b) above), any expectation of privacy Mr Mkandawire had was, in Ofcom's view, limited.

Having found that Mr Mkandawire had a limited expectation of privacy that footage of him would not be broadcast to a wider audience without his consent, Ofcom went on to consider the broadcaster's right to freedom of expression and the audience's right to receive information and ideas without unnecessary interference.

Ofcom noted the public interest in the programme being able to explore the reasons why there were no openly gay footballers in the UK and what the attitudes were on the subject among current players. We also took account of the broadcaster's and audience's right to freedom of expression: the importance of broadcasters to be able to make programmes about controversial and sensitive topics like homophobia in UK soccer without unnecessary interference. With reference to Mr Mkandawire's specific contribution, Ofcom observed that this: was filmed openly, and Mr Mkandawire was not shown doing or saying anything of a particularly sensitive or private nature; and, was very brief and accurately reflected his genuine reaction at the time to being filmed (as detailed in head a) above). Ofcom also considered that Mr Mkandawire's reaction illustrated the difficulties Ms Fashanu experienced in getting players to talk openly about the

subject on camera and was therefore relevant to the editorial subject matter of the programme.

Ofcom therefore concluded that the broadcaster's right to freedom of expression and the audience's right to receive information outweighed Mr Mkandawire's right to privacy as regards broadcasting Mr Mkandawire's reaction to being asked for an interview without securing his prior consent in the circumstances of this case. Any intrusion into Mr Mkandawire's privacy was proportionate and justifiable. The public interest in showing the difficulty in getting football players to speak about the subject of openly gay players in football (by including Mr Mkandawire's reaction without securing his prior consent) warranted any intrusion into Mr Mkandawire's privacy in the broadcast of this material in the circumstances of this case. Ofcom considered that Mr Mkandawire's privacy was not unwarrantably infringed in the programme as broadcast.

Ofcom found therefore that there was no unwarranted infringement of privacy in the broadcast of the programme.

Accordingly, Ofcom has not upheld the complaint of unjust and unfair treatment and of unwarranted infringement of privacy in the obtaining of material included in the programme and in the programme as broadcast.

Other Programmes Not in Breach

Up to 3 September 2012

Programme	Broadcaster	Transmission Date	Categories
Graham Fisher	The 'Bridge (Stourbridge)	31/07/2012	Drugs, smoking, solvents or alcohol

Complaints Assessed, not Investigated

Between 21 August and 3 September 2012

This is a list of complaints that, after careful assessment, Ofcom has decided not to pursue because they did not raise issues warranting investigation.

Programme	Broadcaster	Transmission Date	Categories	Number of complaints
118 118's sponsorship of ITV Movies	ITV2	29/08/2012	Generally accepted standards	1
4OD (promotion)	Channel 4	30/08/2012	Generally accepted standards	1
4thought.tv	Channel 4	23/08/2012	Nudity	9
5 Live Sport	BBC Radio 5 Live	28/08/2012	Generally accepted standards	1
A Touch of Cloth	Sky1	26/08/2012	Animal welfare	1
A Touch of Cloth	Sky1	26/08/2012	Generally accepted standards	1
Accused	BBC 1	28/08/2012	Materially misleading	1
Along Came a Spider	Film 4	19/08/2012	Offensive language	1
Aqeedah-e-Khatm-e-Nubuwwat	Takbeer TV	16/06/2012	Religious/Beliefs discrimination/offence	1
Basement Jerxx	Somer Valley FM	04/07/2012	Crime	1
Basement Jerxx	Somer Valley FM	11/07/2012	Scheduling	1
BBC News	BBC	n/a	Outside of remit / other	1
BBC News	BBC Radio 4	24/08/2012	Outside of remit / other	1
BBC News at Six	BBC 1	24/08/2012	Due impartiality/bias	1
BBC Programming	BBC Channels	n/a	Outside of remit / other	1
Best of British (trailer)	4seven	17/08/2012	Sexual orientation discrimination/offence	1
Big Fat Gypsy Weddings	More4	31/08/2012	Animal welfare	1
Born Bankrupt (trailer)	Sky News	18/08/2012	Under 18s in programmes	1
Born Bankrupt (trailer)	Sky News	20/08/2012	Under 18s in programmes	1
Box Office (trailer)	Film 4	14/08/2012	Nudity	1
Bury FM (Ramadan)	Bury FM (Ramadan)	11/08/2012	Generally accepted standards	1
Casualty	BBC 1	25/08/2012	Generally accepted standards	1
Celebrity Juice (trailer)	ITV2	21/08/2012	Religious/Beliefs discrimination/offence	2
Celebrity Juice (trailer)	ITV2	22/08/2012	Religious/Beliefs discrimination/offence	1
Celebrity Juice (trailer)	ITV2	n/a	Religious/Beliefs discrimination/offence	1
Continuity announcement	FX HD	02/09/2012	Generally accepted standards	1
Coronation Street	ITV1	20/08/2012	Offensive language	1
Dave Kelly	Radio City 96.7FM	22/08/2012	Generally accepted standards	1

Deal or No Deal	Channel 4	21/08/2012	Generally accepted standards	1
Defectors	Challenge	25/08/2012	Materially misleading	1
Downton Abbey	ITV3	27/08/2012	Generally accepted standards	1
Drivetime	Talksport	21/08/2012	Generally accepted standards	1
EastEnders	BBC 1	23/08/2012	Generally accepted standards	1
EastEnders	BBC 1	31/08/2012	Age discrimination/offence	1
Embarrassing Bodies	Channel 4	21/08/2012	Scheduling	3
Emmerdale	ITV1	08/08/2012	Offensive language	1
Emmerdale	ITV1	n/a	Product placement	1
Emmerdale / Coronation Street	ITV1	n/a	Scheduling	1
Escape to the Country	BBC 1	23/08/2012	Generally accepted standards	1
Escape to the Country	BBC 1	24/08/2012	Outside of remit / other	1
Fearne Cotton	BBC Radio 1	21/08/2012	Race discrimination/offence	1
Film4 (trailer)	Channel 4	30/08/2012	Scheduling	3
Fool Britannia (trailer)	ITV1	27/08/2012	Harm	1
Foxy Bingo's sponsorship of The Jeremy Kyle Show	ITV1	n/a	Scheduling	1
Frontline Police	Channel 5	27/08/2012	Materially misleading	1
General content	TVX/ RED HOT TV	20/08/2012	Outside of remit / other	1
Geoff Lloyd's Hometown Show	Absolute Radio	21/08/2012	Generally accepted standards	3
Giff Gaff's sponsorship of The Big Bang Theory	E4	n/a	Sponsorship credits	1
Golf scores	BBC	17/08/2012	Outside of remit / other	1
Good Cop	BBC 1	30/08/2012	Generally accepted standards	1
Good Cop	BBC 1	30/08/2012	Violence and dangerous behaviour	6
Harry Hill	Channel 4	25/08/2012	Scheduling	1
Have I Got News for You	BBC 1	15/08/2012	Religious/Beliefs discrimination/offence	1
Hell's Kitchen USA	ITV2	21/08/2012	Offensive language	1
Holby City	BBC 1	28/08/2012	Race discrimination/offence	1
Hollyoaks	Channel 4	17/08/2012	Scheduling	1
Ian Brady: Endgames of a Psychopath	Channel 4	20/08/2012	Religious/Beliefs discrimination/offence	1
IBC Tamil	IBC Tamil	25/05/2012	Crime (incite/encourage)	1
Idris Elba's How Clubbing Changed the World	Channel 4	24/08/2012	Drugs, smoking, solvents or alcohol	1
ITV News	ITV1	26/07/2012	Generally accepted standards	1
ITV News at Ten and Weather	ITV1	20/08/2012	Due impartiality/bias	1
ITV News at Ten and Weather	ITV1	22/08/2012	Outside of remit / other	1

James Whale	LBC 97.3FM	17/08/2012	Race discrimination/offence	1
Jimmy Carr in Concert	Comedy Central	16/08/2012	Generally accepted standards	1
Jimmy's Forest	More4	27/08/2012	Animal welfare	1
Keith Lemon Show	ITV	30/08/2012	Religious/Beliefs discrimination/offence	1
Lee Evans	Channel 4	19/08/2012	Flashing images/risk to viewers who have PSE	1
Life With Boys	Nickelodeon	29/07/2012	Gender discrimination/offence	1
Little Stars	Noor TV	20/08/2012	Materially misleading	1
London - The Modern Babylon	BBC 2	11/08/2012	Materially misleading	1
Match of the Day	BBC 1	18/08/2012	Product placement	1
Miranda	BBC 1	24/08/2012	Offensive language	1
Mount Pleasant (trailer)	Sky News	21/08/2012	Sexual material	1
My Holiday Hostage Hell	Pick TV	20/08/2012	Generally accepted standards	1
News	CNN	15/08/2012	Violence and dangerous behaviour	1
News programming	Various	n/a	Outside of remit / other	1
Newsnight	BBC 2	20/08/2012	Generally accepted standards	4
Newsround	CBBC	25/08/2012	Outside of remit / other	1
Nick Conrad	BBC Radio Norfolk	20/08/2012	Generally accepted standards	1
Nick Ferrari	LBC 97.3FM	09/08/2012	Race discrimination/offence	1
Olympics 2012	BBC 1 Northern Ireland	27/07/2012	Television Access Services	1
Paddy McGuinness Live (trailer)	Comedy Central	15/08/2012	Outside of remit / other	1
Phones 4 U's sponsorship of Films on 4	Channel 4	18/08/2012	Generally accepted standards	1
Phones 4 U's sponsorship of Films on 4	E4	22/08/2012	Generally accepted standards	1
Phones 4 U's sponsorship of Films on 4	Film 4	13/08/2012	Generally accepted standards	1
PM	BBC Radio 4	22/08/2012	Sexual material	1
Pointless	BBC 1	27/08/2012	Disability discrimination/offence	1
Programming	Viva	28/08/2012	Offensive language	1
Psychic Today	Big Deal	24/08/2012	Participation TV - Misleadingness	1
Psychic Today	Psychic Today	23/08/2012	Materially misleading	1
Regional News and Weather	BBC 1	22/08/2012	Harm	1
Regional News and Weather	BBC 1	31/08/2012	Materially misleading	1
Robbie Dee	CFM Radio	28/08/2012	Offensive language	1
Rugby League	BBC 1	25/08/2012	Generally accepted standards	1
Secret Dealers	ITV1	29/08/2012	Competitions	1

Sexcetera	Pick TV	30/08/2012	Gender discrimination/offence	1
Shameless (trailer)	Channel 4	30/08/2012	Scheduling	1
Silent Witness	BBC 1	19/08/2012	Religious/Beliefs discrimination/offence	1
Silent Witness	BBC 1	19/08/2012	Generally accepted standards	3
Silent Witness	BBC 1	20/08/2012	Religious/Beliefs discrimination/offence	1
Special Programme	Sangat TV	01/07/2012	Religious/Beliefs discrimination/offence	1
Splatalot	BBC 1	24/08/2012	Outside of remit / other	1
Station ident	Gold	n/a	Materially misleading	1
Steve Allen	LBC 97.3 FM	23/08/2012	Race discrimination/offence	1
Sunrise	Sky News	26/08/2012	Crime	1
Superscrimprers: Waste Not, Want Not	Channel 4	25/07/2012	Materially misleading	1
The Boyle Variety Performance	Channel 4	27/08/2012	Generally accepted standards	4
The Boyle Variety Performance	Channel 4	27/08/2012	Offensive language	1
The Breakfast Show with Andy Bush	Absolute Radio	20/08/2012	Offensive language	1
The Chase	ITV1	26/08/2012	Generally accepted standards	1
The Jonathan Ross Show	ITV1	25/08/2012	Animal welfare	15
The Only Way is Essex	ITV2	22/08/2012	Religious/Beliefs discrimination/offence	1
The Premier League's Most Amazing Moments	BBC 3	18/08/2012	Sexual material	1
The Riots: In Their Own Words	BBC 2	13/08/2012	Outside of remit / other	1
The Simpsons	Channel 4	23/08/2012	Offensive language	2
The Simpsons	Channel 4	27/08/2012	Offensive language	1
The Spiral Staircase	BBC 2	31/08/2012	Generally accepted standards	1
The X Factor	ITV1	18/08/2012	Materially misleading	6
The X Factor	ITV1	18/08/2012	Offensive language	1
The X Factor	ITV1	18/08/2012	Scheduling	2
The X Factor	ITV1	25/08/2012	Advertising scheduling	1
The X Factor	ITV1	25/08/2012	Advertising/editorial distinction	1
The X Factor	ITV1	25/08/2012	Disability discrimination/offence	1
The X Factor	ITV1	25/08/2012	Materially misleading	2
The X Factor	ITV1	25/08/2012	Generally accepted standards	1
The Xfm Breakfast Show with Danny Wallace	XFM London	15/08/2012	Generally accepted standards	1
This Morning	ITV1	28/08/2012	Nudity	1
Totally Bonkers Guinness World Records	ITV2	24/08/2012	Animal welfare	1
Trollied (trailer)	Sky1	18/08/2012	Offensive language	1

Various	Radio Hartlepool	n/a	Harm	1
Various	Various	n/a	Outside of remit / other	2
Various programmes	R4 Extra	n/a	Scheduling	1
Waterloo Road	BBC 1	23/08/2012	Offensive language	1
Waterloo Road	BBC 1	30/08/2012	Race discrimination/offence	1
Whatever Happened to Harry Hill?	Channel 4	25/08/2012	Scheduling	1
Wonga.com's sponsorship of Channel 5 drama	Channel 5	29/08/2012	Generally accepted standards	1
Wonga.com's sponsorship of Channel 5 drama	Choice FM	n/a	Commercial communications on radio	1
World of Sport	Men and Movies	n/a	Advertising minutage	1
Xtra Factor	ITV2	25/08/2012	Harm	1
Zane Lowe	BBC Radio 1	22/08/2012	Drugs, smoking, solvents or alcohol	1

Investigations List

If Ofcom considers that a broadcast may have breached its codes, it will start an investigation.

Here is an alphabetical list of new investigations launched between 6 and 19 September 2012.

Programme	Broadcaster	Transmission Date
Advertising minutage	5*	11 August 2012
Advertising minutage	Dave	19 June 2012
Advertising minutage	Gold	31 August 2012
Advertising minutage	Sahara One	n/a
Advertising scheduling	E!	22 July 2012
Advertising scheduling	Sahara One	n/a
American Dad	FX	11 August 2012
Celebrity Big Brother	Channel 5	07 September 2012
ChatGirlTV2	GirlGirl	22 August 2012
Indian Idol and Saas Bina Sasural	Television Asia	n/a
Sponsorship by Himilaya Carpets	STAR India Gold	n/a
Sponsorship by NAF of Greenwich: The Interviews	Horse & Country TV	n/a
Sponsorship credit by Rated People.com	Channel 5	n/a
Sponsorship of FreshHits	BritAsia	n/a
Sponsorship of Penalty (Bunteto)	Viasat 6 (Hungary)	n/a
Sponsorship of Truth Triumphs Alone	STAR plus	n/a
The Morning Line	Channel 4	15 September 2012
The Sketchbook Killer	Crime and Investigation Network	09 July 2012
The X Factor	ITV1	01 September 2012
The X Factor	ITV1	09 September 2012

Undercover Boss	Channel 4	23 July 2012
Yasser Habib	Fadak TV	24 May 2012

It is important to note that an investigation by Ofcom does not necessarily mean the broadcaster has done anything wrong. Not all investigations result in breaches of the Codes being recorded.

For more information about how Ofcom assesses complaints and conducts investigations go to:

<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/standards/>.

For fairness and privacy complaints go to:

<http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/fairness/>.