

The complaint

Mr H complains that NewDay Ltd trading as Aqua (Aqua) lent to him irresponsibly.

What happened

Mr H opened his Aqua card account in 2012. Aqua increased his credit limits as follows:

Date	Old Limit	New Limit
June 2012	-	£500
November 2012	£500	£750
April 2013	£750	£1250
May 2014	£1250	£2200
October 2014	£2200	£3300
March 2015	£3300	£4300
August 2015	£4300	£5050
January 2016	£5050	£5800

In June 2020, Mr H's account was closed – so purchases couldn't be made. Between June 2019 and November 2020, several payment plans were agreed:

Date	Payment Plan
June 2019	£90 per month for 12 months, letter sent. Zero interest.
January 2020	3-month payment holiday, letter sent
March 2020	£1 per month for 12 months, letter sent. Zero interest.
September 2020	£55 per month, 2 months review. Zero interest.
November 2020	Payment holiday to February 2021

In February 2020, Mr H paid £300 into the account. Mr H's credit file was marked with late payment information.

In September 2019, Mr H complained that Aqua didn't do proper checks when they offered to increase his credit limits. He only paid the minimum amount each month. He had financial problems and was struggling to pay his debts. He didn't get any notice that his account was to be closed – if Aqua were once happy to lend him more money, why did they suspend his account? Aqua then agreed to reduce or suspend repayments. He then paid in £300 as part of this agreement and the account was stopped – so he couldn't use the £300 to spend. Aqua agreed payment plans but put late payment information on his credit file. Mr H also complained that he's been issued with a marbles card by New Day – and this was irresponsible.

In March 2020, Aqua said Mr H passed their risk criteria at each increase. The increases in November 2012 and April 2013 were requested by Mr H. The increases between May 2014 and January 2016 were all offered proactively by Aqua – he could've opted out of them, but Mr H accepted the offers each time. They knew he was making minimum repayments but that didn't mean they wouldn't lend him more money. In January 2014, his annual income was £26,650, with other income of £7,000 and unsecured debt of £13,400. At that time, there were no arrears or payday loans showing on Mr H's credit file. Due to some confusion about information that Mr H was given on a call, they refunded interest of £223.37 in January 2020. But they said that his Aqua account was closed and was open to repayments only. On the marbles card, Aqua agreed that this shouldn't have been given to Mr H and they refunded all interest and fees on the card and cancelled the outstanding debit balance.

Mr H brought his complaint to this service. Our investigator looked at what had happened. She said the original issue of the card wouldn't be looked at as it was more than six years before Mr H complained. Aqua had shown their risk data to us - which included external and internal information. There were no arrears or indicators of financial difficulty. They'd said that making minimum repayments wouldn't mean that Mr H was struggling. They said their risk analysis showed that they were right to increase Mr H's credit limits. She looked at Mr H's bank statements. These showed that in the three months before each increase, there were loans from high cost credit firms, plus other credit card debts. There were payments to gambling firms. Mr H's overdraft was around £3,000. She looked at the payment plans put in place between 2019 and 2020. These were appropriate – and Aqua had stopped charging interest during this time. They were justified in advising credit reference agencies about the plans. She could see that the payment of £300 was part of

the agreement to put a payment plan in place – and therefore it couldn't be refunded. But – because of what the bank statements showed - she concluded that Aqua should've completed more checks to ensure Mr H could afford to borrow more money – he was in financial difficulty. Aqua should refund all interest and charges from May 2014 – that is, the first proactive increase offered by Aqua. She didn't look at the marbles card as Mr H had told us that he was satisfied with the outcome on that.

Aqua disagreed. They said their risk assessment – based on their own data - showed that Mr H could afford the increased debt. They weren't required to look at bank statements. So, they asked that an ombudsman review Mr H's complaint.

I then reached a first provisional decision where I said:

As our investigator as said – this service can only look at things that happened within six years of Mr H's complaint. Mr H complained to Aqua in September 2019. So, I won't look at the issue of the card in 2012, or the limit increases before September 2013.

The key issue here is – did Aqua lend to Mr H responsibly? Our investigator showed that Mr H had significant debts with high cost lenders – because he was making payments from his bank account to them and also appeared to be paying money to gambling firms. She got this information from Mr H's bank statements. Aqua say – they didn't see Mr H's bank statements, nor did they need to ask for them – as Mr H passed all their credit assessment tests at each increase in the credit limits. They say they were therefore correct to lend more money to Mr H. Because they saw no signs of difficulties – they didn't need to make other inquiries about his circumstances (such as asking for his bank statements).

I take a different view of our investigator. I've looked at Aqua's credit assessments and at Mr H's Aqua statements between 2014 and 2020. I don't think they show that Aqua could've seen that Mr H was in difficulty – and therefore I can see why they didn't ask for more information from him.

Looking at Aqua's credit assessments. They show that Mr H paid on time – there were no late payment fees. There were no arrears. There were only two occasions when he went over his limit. I can see that he borrowed up to his limit consistently – but I don't see that as necessarily a bad thing. There were few cash withdrawals made with the card – although these did increase from 2015 onwards.

Looking at Mr H's Aqua statements – these show normal retail spending throughout. In April 2015 and August 2015, I could see a small number of low value gambling transactions – a total of 16 in those two months – and each for around £5 to £10 each time. So – these weren't very significant. He did only make the minimum payments each month – but of itself, that wouldn't mean there were problems.

So, on balance, I can see why Aqua was OK with its lending to Mr H – given what the Aqua information showed.

Looking at the increases in credit limits, I can see that Mr H was given the option of declining the offers from Aqua – but he accepted them each time. And when Mr H did advise Aqua payment plans, at reduced rates of interest, or zero interest. So, they were trying to help. I can see that that he paid in £300 to the account in February 2020. This was part of the payment holiday agreement and it seems that Aqua acted OK here. Where a payment plan is agreed, Aqua must report this to credit reference agencies – they must do this.

So – on balance, I don't think I can say that Aqua acted irresponsibly in this case. So, while I know this will be disappointing to Mr H, I won't be asking them to do anymore here. I understand that Mr H is now on another payment holiday with should continue to deal with them positively about his debt with them.

Responses to my first provisional decision:

Aqua didn't respond to my provisional decision. That's not surprising because it found in their favour.

But Mr H did. And he didn't agree with what I'd said. Again, that's not surprising. But it was clear to me that Mr H felt very strongly about what had happened and raised a number of specific points around whether the lending was affordable or responsible. He didn't think I'd properly explained how I'd come to a very different conclusion to that of the investigator. In summary, he thought Aqua should have done more to make sure that he could afford to borrow the money at the time. So, I've gone back and looked at all the information on this case again. And I can see why Mr H feels Aqua as they should have done. I find what he now says very persuasive.

I issued a second provisional decision where I said:

Like all lenders, Aqua was bound by the guidelines (set down by the Financial Conduct Authority) at the time. Those guidelines said Aqua should carry out reasonable and proportionate checks to make sure that Mr H could afford to repay the additional borrowing. Neither reasonable or proportionate are defined – as such. But – having considered the matter again – I'm now minded to agree with Mr H that the checks carried out by Aqua weren't enough to meet what these terms might reasonably be intended to mean.

Aqua has given us details of the data that it had available to it at the time of each increase. What data Aqua chooses to use is a matter for it. But it does have to accept that only getting limited information may expose it to not meeting the required 'threshold'. So – to be clear – I'm not telling Aqua how it should have run its business – I'm simply saying that I think the application of its normal processes had led to an unfair outcome for Mr H. That doesn't mean the same would be true of any or all other cases this service might look at. I'm only considering the particular circumstances of Mr H's case.

I think it's helpful to look in particular at the first three increases we're able to deal with – those from May 2014 to March 2015. There were increases of around 80% (from £1,250 - £2,200), 50% (from £2,200 - £3,300) and 30% (from £3,300 - £4,300) in the space of less than 12 months. That's an increase of over three times the level of credit. And – the increases from £4,300 to £5,800 between March 2015 and January 2016 amounted to an increase of 33% in 10 months. So, I think reasonable and proportionate checks would have included some further direct interaction with Mr H to make sure this significant increase was affordable. That would probably have included getting some evidence of his situation and/or ability to repay the increased debt.

It's only much later – March 2016 – that Aqua seem to have become aware of Mr H's real indebtedness and, in particular, a history/large number of payday loans. And from that point onwards, it didn't increase his credit limit. So, it seems quite likely that had Aqua carried out more detailed checks at the times of the earlier increases, I'm not sure they would have continued to lend to Mr H. For example, they could've asked Mr H more about his circumstances and asked for an income and expenditure analysis. This would have likely shown his other debts and the other payments he was making.

I haven't seen any evidence to show Aqua had anything other than the limited data. And that limited data doesn't seem to me to enable it to say it carried out reasonable and proportionate checks when giving a more than three-fold increase in credit. I accept Mr H made the minimum payments each month. But I can also see that for most of the period in question, Mr H borrowed up to the limit in a 'hard core' way. And then - almost as soon as an increased credit limit was given, Mr H spent up to it and the borrowing simply stayed at or just below the new limit. So – it became 'hard core' (or long-term) debt. That should also have alerted Aqua to make further enquiries of Mr H.

Having now reconsidered all of the evidence and what Mr H has said in response to my provisional decision, I'm minded to uphold his complaint. So, I'll be asking Aqua to:

- Refund all interest and charges from the increase in the limit in May 2014 to the date of any final decision. To the extent that Mr H has paid the interest and charges through minimum monthly payments, 8% per annum simple should be applied to the amounts paid and paid to Mr H.
- If there's a debt remaining, then Aqua and Mr H should agree a mutually agreeable payment plan.
- Remove any adverse entries on Mr H's credit file. These would not have been needed if Aqua hadn't lent the money to Mr H in the first place.

I'm only likely to depart from my revised view if Aqua is now able to demonstrate clearly how its approach to checking Mr H could afford to borrow the increased sums met the FCA's guidelines at the times concerned. In doing so, it'd need to persuade me that the increases to above could reasonably be said to be affordable without any further checks carried out.

Mr H didn't make any comments. But Aqua did. They said (in summary):

- There's no definition of what is 'reasonable and proportionate' and therefore – how can I say that Aqua failed to undertake such checks to this standard?
- They adhered to lending guidelines as set down by the FCA at the time.
- To look at percentage increases in the limits isn't fair.
- There wasn't any adverse data showing in Mr H's records at the time – arrears or affordability data. He managed his Aqua account well.
- High utilisation of a credit limit doesn't necessarily mean a limit shouldn't be increased – Mr H's debt wasn't 'hard-core'.
- Mr H could've declined the increases in limits, but he didn't. And he didn't have to use the increased limit if he didn't want to – he must take some responsibility for his debt.
- It's only fair to refund interest and fees over £1250 – the limit in May 2014. They disagreed that Mr H should be awarded 8% simple on his payments – as he was paying for goods. And Mr H is already on a Covid19 payment arrangement.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and

reasonable in the circumstances of this complaint.

I've considered what Aqua have said in response to the second provisional decision, but I'm not going to substantially change my mind.

Aqua are correct in saying that 'reasonable' and 'proportionate' are defined – but the dispute resolution scheme requires me to determine a complaint by reference to what in my opinion is fair and reasonable in the circumstances of the case. I don't say that Aqua haven't followed their processes, or that they're wrong – but in Mr H's case, they haven't led to a fair outcome for Mr H.

I do consider that the percentage increases are relevant – but even if they're not, the actual increases in limits were significant in any case – from £1,250 to £5,800 in under two years. And the level of those increases should've meant that Aqua carried out more checks.

Aqua say that borrowing more and not repaying the capital balance isn't 'hard core' debt. I disagree. Aqua increased Mr H's limits and hence his debts by almost five times in 20 months – with no sign of Mr H being able to make reductions in his debt with them. I think that's hard-core borrowing. And where that's seen, lenders should interpret that as a sign of potential problems.

I accept Aqua's comments about the amount of interest refund that should be made, and the calculation of any additional award of 8% simple – I will amend this in my final decision.

It's good to learn that Mr H is on a payment plan due to the Covid19 pandemic. But this is time limited and I believe is due to be reviewed by Aqua soon. The payment plan that I'd like to see should be an arrangement that Mr H can maintain in the longer term.

Putting things right

Having considered everything that both Aqua and (previously) Mr H have said, I think a fair outcome is:

- We've agreed that Aqua's lending up to £1,250 in May 2014 was OK. Aqua can charge Mr H interest on the original amount borrowed as that is not something covered by my decision. So – they should refund all interest and charges on balances over £1,250 with effect from May 2014 to the date of this decision.
- Where the adjustment made results in a credit balance – this is money Mr H should've had and had been without – Aqua should pay interest at 8% per annum simple on this. I suspect a credit balance won't occur in this case – given that Mr H had the benefit of several zero interest periods.
- Aqua and Mr H should agree a mutually acceptable and sustainable repayment plan for the remaining debt.
- Aqua should remove any adverse credit entries from Mr H's credit file. These wouldn't have occurred if Aqua hadn't lent the money.

(continued)

My final decision

I uphold this complaint.

NewDay Ltd trading as Aqua must:

- Refund all interest and charges on balances over £1,250 with effect from May 2014 to the date of this decision.
- Where the adjustment made results in a credit balance - pay interest at 8% per annum simple on this.
- Agree with Mr H a mutually acceptable and sustainable repayment plan for the remaining debt.
- Remove any adverse credit entries from Mr H's credit file. These wouldn't have occurred if Aqua hadn't lent the money.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 8 June 2021.

Martin Lord
Ombudsman