

The complaint

Mr D complains that Santander UK Plc (Santander) closed his account and applied a fraud marker.

What happened

What Mr D says

Mr D says that in 2015 he worked part-time as a car hire broker. He put third parties in touch with hire companies, completed the necessary administration and charged a commission. Mr D says he notified Santander that he would be overdrawn for approximately 14 days until he received monies owed to his business which would cover the overdraft, but Santander closed the account and applied a Cifas marker. He also says that he offered a repayment plan of £5,000 a month not to have the default and marker but Santander said it would only remove the marker if he paid the entire outstanding balance in one payment – which he was unable to do as he had no banking facilities.

Mr D says he didn't raise a complaint with this service at the time as he was still communicating with Santander. He would now like the Cifas marker and credit file entries to be removed and compensation as the marker has had a substantial effect on his home and work life. As a result of the Cifas marker Santander applied another account Mr D held with a different bank was also closed and he was unable to open a new account.

What Santander say

Santander says Mr D opened the account on 23 February 2015. Its fraud team was alerted to Mr D's account activity on 12 March 2015 when Mr D's account became overdrawn by over £11,000 when he had no overdraft facility. Mr D told Santander he rented a vehicle that was returned damaged and so the hire company had taken pre-authorised payments. After this there were further debits from the account to hire car companies which meant it became £49,524.99 overdrawn. Santander completed a fraud investigation and decided to close Mr D's account and load a misuse of facility Cifas marker (on 2 September 2015).

Santander say it closed Mr D's account and loaded the marker because it appears Mr D opened the account purely to facilitate transactions he knew he didn't have the funds to cover – meaning he was using the account as a form of loan. Santander has been unable to recover funds through chargeback as it appears the charges are genuine and are for pre-authorised vehicle damage. There were multiple high value payments to car hire companies, some of which were processed after Santander spoke to Mr D about the first two transactions that took him overdrawn. Santander say Mr D knowingly carried out credit abuse on his account in order to gain funds to which he wasn't entitled.

At the time the account was closed and moved to collections in September 2015 the account was overdrawn by nearly £50,000 and Mr D hadn't reduced the balance at all or provided any evidence he had the funds to repay. This was in spite of consistently saying he was expecting to receive funds to repay the debt.

Our investigation so far

The investigator who considered Mr D's case didn't recommend that it be upheld. She said Santander acted reasonably and in accordance with its terms and conditions when it closed

Mr D's account and also acted reasonably in applying a fraud marker. This was because the available evidence led her to believe Mr D opened a new account with Santander and made payments knowing he didn't have the funds to cover them. He used his Santander account as a form of loan for his business. The loan hasn't been repaid and Mr D hasn't provided any evidence to this service or to Santander of his ability to repay it. The investigator also questioned the legitimacy of Mr D's business.

Mr D didn't agree with the investigator. In summary, he said:

- There is no evidence of the agreed overdraft because in spite of numerous requests Santander has only provided him with calls from 2018. Santander says it hasn't retained calls from 2015 but the law requires it to. The investigator failed to mention Santander's failure to provide this evidence.
- He tried to repay the overdraft by paying £5,000 a month but Santander refused. This breaches Financial Conduct regulations.
- In respect of the investigator's comments about his business, Mr D said that legally a personal bank account can be used by a sole trader.

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.

Was Mr D's overdraft authorised?

To decide this complaint the first thing I need to consider is whether Mr D arranged an authorised overdraft. He says that he contacted Santander prior to the first payments going through and said he was due to receive £55,000 from a private client which would cover the overdraft and Santander was fine with this. Santander says it has no record of this call. Mr D has asked for call recordings, but Santander hasn't retained them. But I've been able to consider detailed internal records that Santander has provided which document all communication with Mr D.

I've carefully considered these records and can't find any reference to a call from Mr D in which Santander authorise an overdraft on Mr D's account. I also consider that if Mr D had reached such an agreement with Santander, he'd have discussed it when Santander first contacted him to discuss the first two transactions that took him overdrawn by over £11,000. But this wasn't the case. The notes of the call on 12 March 2015 say that Mr D explained he had arranged with the car hire company for the payment to go out and was expecting a credit in to the account of £14,000 but this had been delayed until 14 March 2015.

The first time Mr D mentioned to Santander that he called in advance of the transactions was on 18 November 2016, over 18 months after Santander first communicated with him about the overdraft. At that stage Mr D said he'd alerted Santander to the fact he would be making multiple payments on his card up to the value of around £61,000 for his business. Mr D said in the 2016 call that Santander agreed to an overdraft for 14 days as he was expecting to receive a payment of approximately £79,000. The Santander adviser recorded that he/she couldn't find any evidence of an agreed overdraft.

On balance I'm not persuaded Santander agreed to an authorised overdraft because there is no evidence of it and because I consider if an overdraft had been agreed Mr D would have raised it as soon as Santander asked him questions about his balance. And whilst I note Mr D's comments about the retention of calls, I'm not persuaded Santander has a legal duty to retain calls for six years as Mr D suggests. I also can't require Santander to provide evidence it doesn't have.

Cifas marker

The marker that Santander filed with Cifas is intended to record that there's been a 'misuse of facility' – relating to obtaining an account with the deliberate intention of using it for fraudulent purposes. This specifically relates to the allegation that there was runaway spending on Mr D's account, after he was put on notice by Santander that he was utilising funds he wasn't entitled to. In order to file such a marker, Santander isn't required to prove beyond reasonable doubt that Mr D is guilty of a fraud of financial crime, but it must show that there are grounds for more than mere suspicion or concern. Cifas says:

- *"There must be reasonable grounds to believe that an identified fraud or financial crime has been committed or attempted; [and]*
- *The evidence must be clear, relevant and rigorous such that the member could confidently report the conduct of the subject to the police."*

So, I need to consider whether Santander has sufficient evidence to meet the standard of proof and load a marker for misuse of facility with Cifas. Having looked at all the information provided, I'm satisfied it has and will explain why.

Santander first discussed Mr D's unauthorised overdraft with him in March 2015 when he was around £11,000 overdrawn. After this, payments continued to leave Mr D's account until 7 July 2015, by which time Mr D was just over £70,000 overdrawn. Some refunds from a car hire company were then credited to Mr D's account in August 2015 amounting to around £20,000. So after Santander discussed the use of his account with him Mr D's overdraft continued to increase.

I've set out above why I think Mr D didn't have an authorised overdraft facility. This means that Mr D opened an account, credited it with £250 and then allowed the account to go into unauthorised overdraft by nearly £50,000. He has never provided any evidence of his ability to clear the unauthorised overdraft. And although Mr D has referred to how he will clear the debt numerous times he hasn't credited the account after the initial £250 when the account was opened. I have set out below what Mr D has told Santander about when he would repay funds.

- 12 March 2015 - Mr D said a credit of £14,000 had been delayed until 14 March 2015.
- 23 March 2015 – Mr D advised he was waiting for payment from a sponsor that would clear the arrears and he was also waiting for compensation following an accident.
- 1 April 2015 – Mr D said he was expecting a credit of around £60,000 in to the account between 9 and 16 April 2015.
- 30 April 2015 – Mr D said he was due a payment he'd not received so he would pay £1,000 from his wages and then the balance in June.
- 20 May 2015 – Mr D advised he was unable to make the payment that month but would pay £275 that week and would clear the arrears by 6 July when he received a compensation payment.
- 2 July 2015 – Mr D advised he was waiting for compensation of around £144,000.
- 8 July 2015 – Mr D advised he was still waiting for compensation of around £130,000, but it could be more.
- 18 August 2015 – Mr D advised the entire balance would be paid by the end of August as he was due £135,000 from his insurer.

So I'm not persuaded that at the time the transactions that took Mr D in to unauthorised overdraft were made he had the funds to bring his account in to credit. Santander then allowed Mr D over five months to make payment before it closed his account and loaded the Cifas marker in September 2015. During this time, and since, Mr D hasn't made any payments to clear the overdraft.

Mr D has said he was unable to credit his Santander account because when Santander closed his account, he didn't have any banking facilities to allow him to make payment. But I consider Mr D had sufficient opportunity to credit the account before Santander closed it and applied the marker. I'm also aware that Mr D says he no longer has evidence of his ability to re-pay the debt to Santander because his business is no longer active, so everything has been destroyed. For the same reason, Mr D has no evidence of the nature of his business venture. But Mr D communicated with Santander from 2015 through to bringing this complaint to our service so had the opportunity while his business was active to demonstrate that he had funds to credit the account with.

Mr D has also said he was told in the initial stages of the investigation that if he repaid the overdraft the Cifas marker would be removed. And he said he offered to repay £5,000 a month as long as the Cifas loading was removed. I can see no evidence of either of these claims. The first time I can see Mr D mentioned them was in a call with Santander on 23 August 2019, by which stage Santander had already dealt with a complaint about the Cifas loading. The adviser who spoke to Mr D on 23 August 2019 also noted there was no evidence to support these claims. Santander's records show that Mr D was advised to discuss a repayment plan with its collections department.

Overall, I'm satisfied Santander acted reasonably in applying a loading to Cifas for misuse of the account.

Account closure

Santander's terms and conditions allow it to close an account with immediate effect in certain circumstances, including when it believes the account has been used fraudulently. In light of what I have said so far about the Cifas loading, it follows that I consider Santander acted reasonably, and in accordance with the terms and conditions of Mr D's account, in closing the account.

I'm sorry to hear about how Mr D's life has been significantly impacted by the closure of his account and the Cifas loading but I consider Santander acted reasonably and so I'm not awarding any compensation to Mr D.

My final decision

For the reasons I have discussed I don't uphold this complaint.

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

Jay Hadfield
Ombudsman