

## **The complaint**

Mr V is unhappy he's been charged an early termination charge and for excess mileage when he terminated his hire agreement with Volkswagen Financial Services (UK) Limited trading as Volkswagen Finance.

## **What happened**

In April 2016, Mr V was supplied with a new car through a hire agreement with Volkswagen. He paid an advance rental of £133.82 and the agreement was for 36 months; with monthly payments of £133.82. If the agreement ran its full term, Mr V was due to pay a total of £4,817.52 in rental payments.

The agreement stated a maximum total allowable mileage of 30,000 miles (10,000 miles a year). It also stated that Mr V would be charged 3.6 pence (excluding VAT) a mile for every mile that exceeded this amount.

In December 2018, Mr V asked Volkswagen if he could end the agreement early. They agreed and charged an early termination charge of £294.41 and an excess mileage fee of £633.14.

Mr V complained to Volkswagen about the lack of contact he had from the agent who collected the car. But Volkswagen didn't uphold this complaint and said the agent had tried to contact him by phone, but Mr V hadn't let them know he'd changed his number.

Mr V wasn't happy with Volkswagen's response, and he brought his complaint to us for investigation. In bringing the complaint to us, he also said he was unhappy with the amount he'd been charged to terminate the agreement.

Our investigator didn't think the collection agent had done anything wrong as they were provided with the most up to date contact details Volkswagen had on file. And he didn't think Volkswagen had acted unfairly by not providing the collections agent with information they themselves didn't have.

However, the investigator explained why he thought Volkswagen were able to charge an early termination charge and a charge for pro-rated excess mileage on termination. He also explained, and provided calculations for, why he thought the charge for terminating the agreement wasn't fair and reasonable, as Volkswagen received more than they would've if the agreement had run its full term.

Given all of this, he thought Volkswagen should reduce the outstanding balance by £424.25.

Mr V accepted the investigator's view, but Volkswagen didn't respond. As such, this matter has been passed to me to make a final decision.

## **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.

Having done so, I've reached the same overall conclusions as the investigator, and for broadly the same reasons. If I haven't commented on any specific point, it's because I don't believe it's affected what I think is the right outcome.

In considering this complaint, I've had regard to the relevant law and regulations; any regulator's rules, guidance and standards, codes of practice, and what I consider was good industry practice at the time. Mr V was supplied with a car under a hire agreement. This is a regulated consumer credit agreement which means we can look into complaints about it.

However, before I address Mr V's complaints, I think it would be useful to address the charges themselves. And, in doing so, I've considered the following:

#### Consumer Credit Act 1974 (CCA)

Section 101 of the CCA refers to a consumer's right to terminate a hire agreement by giving notice. It states:

*"Right to terminate hire agreement:*

*(1) The hirer under a regulated consumer hire agreement is entitled to terminate the agreement by giving notice to any person entitled or authorised to receive the sums payable under the agreement.*

*(2) Termination of an agreement under subsection (1) does not affect any liability under the agreement which has accrued before the termination ...*

*(7) This section does not apply to—*

*(a) any agreement which provides for the making by the hirer of payments which in total (and without breach of the agreement) exceed £1,500 in any year..."*

Section 132 of the CCA enables the court to grant relief to a hirer where the owner has recovered possession of the goods otherwise than by action. It states:

*"Financial relief for hirer:*

*(1) Where the owner under a regulated consumer hire agreement recovers possession of goods to which the agreement relates otherwise than by action, the hirer may apply to the court for an order that—*

*(a) the whole or part of any sum paid by the hirer to the owner in respect of the goods shall be repaid, and*

*(b) the obligation to pay the whole or part of any sum owed by the hirer to the owner in respect of the goods shall cease, and if it appears to the court just to do so, having regard to the extent of the enjoyment of the goods by the hirer, the court shall grant the application in full or in part.*

*(2) Where in proceedings relating to a regulated consumer hire agreement the court makes an order for the delivery to the owner of goods to which the agreement relates the court may include in the order the like provision as may be made in an order under subsection (1)."*

#### Consumer Rights Act 2015 (CRA)

The CRA sets out a schedule of non-exhaustive examples which might be considered to be unfair. The effect of this section is that terms used in contracts and notices will only be binding upon the consumer if they are fair. It defines 'unfair' terms as those which put the consumer at a disadvantage, by limiting the consumer's rights or disproportionately increasing their obligations as compared to the trader's rights and obligations.

*“Part 2: Unfair Terms..... What are the general rules about fairness of contract terms and notices?”*

*62. (1) An unfair term of a consumer contract is not binding on the consumer ....*

*(4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.”*

The CRA provides guidance on the expected clarity of wording within a contract, and the potential impact that any ambiguity within the contract would have:

*“68: Requirement for transparency*

*(1) A trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent ...*

*(4) A term is unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.*

*69: Contract terms that may have different meanings*

*(1) If a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail.”*

The CRA then goes on to list examples of terms that might be considered unfair:

*“Schedule 2: Consumer contract terms which may be regarded as unfair.*

*Part 1 list of terms ...*

*(4) A term which has the object or effect of permitting the trader to retain sums paid by the consumer where the consumer decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the trader where the trader is the party cancelling the contract.*

*(5) A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied.*

*(6) A term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation.”*

### The Financial Conduct Authority (FCA)

The FCA Principles for Businesses (PRIN) also apply and are of relevance to this complaint. PRIN 6 says *“A firm must pay due regard to the interests of its customers and treat them fairly.”*

### The Hire Agreement

The hire agreement sets out Mr V's contractual obligations. Regarding early termination, the agreement states:

*“8.1 When the Hiring Period ends or we terminate the hiring (or accept your repudiation of this Agreement) you must return the Vehicle to us immediately at such address as we may reasonably require at your own expense together with everything supplied with the vehicle (including the servicing book) and the registration document and any MOT certificates. If you do not return the Vehicle we may repossess it and recover from you any expenses we incur.*

*8.2 If we terminate the hiring or accept your repudiation of this Agreement you must pay us:*

- All unpaid rentals and any unpaid maintenance charges and other payments due (which shall include interest where applicable) plus*
- As compensation or agreed damages on our acceptance of your repudiation or as a debt on our termination the total amount of rentals payable during the Hiring Period (excluding VAT) less the amount of rentals paid or which have become due (excluding VAT) less also an amount (if any) equal to a rebate of rentals calculated at the rate of 4% per annum on the rentals (excluding VAT) which have not become due; plus*
- All our expenses of recovering or trying to recover the Vehicle repairing or storing it and tracing you (plus VAT) plus*
- An administration charge of up to £100 (including VAT) where this is reasonably required to meet our processing costs.*

*8.3 If we terminate the hiring or accept your repudiation of this Agreement we will deduct from any sum you owe us (to reflect early settlement) an amount calculated by us to give credit for any difference in value of the vehicle resulting from its return to us earlier than anticipated at the outset of this Agreement.*

*8.4 If we terminate the hiring of this Agreement, or accept your repudiation of this Agreement, any refunded road fund license relating to the Vehicle will belong to us and we can collect the refund."*

Regarding excess mileage the agreement states:

*"10.1 You must make sure that the Vehicle does not cover more than:*

*10.1.1 the Maximum Annual Mileage in each succeeding period of 12 months starting from the making of this agreement and/or*

*10.1.2 the Maximum Total Mileage*

*10.2 When we ask, you must pay us the Excess Mileage Charge ... (plus VAT) for each mile covered by the Vehicle in excess of the Maximum Annual Mileage or the Maximum Total Mileage.*

*10.3 If you have paid Excess Mileage Charges in relation to the Maximum Annual Mileage we will deduct this amount from any Excess Mileage Charge we ask you pay in relation to the Maximum Total Mileage.*

*10.4 If the mileometer stops working you must have it repaired. You must tell us the date when it stopped working, the recorded mileage at that date and the date when it was repaired. We will calculate an average mileage for the period during which the mileometer was not working based upon the recorded mileage.*

*10.5 If this Agreement terminates early, we will reduce the Maximum Total Mileage in the proportion which the actual period of hire originally agreed. Any Excess Mileage Charge will be calculated using the reduced Maximum Total Mileage.*

*10.6 Where the Vehicle is a used vehicle, we will take into account the given milometer reading at the start of this Agreement, in assessing any Excess Mileage Charges payable.*

*10.7 We will add to the milage of the Vehicle the mileage covered by any substitute or replacement vehicle while in your possession and control.”*

The first point I need to consider is whether these charges are legally enforceable on early termination. Unlike a hire purchase agreement, the hire agreement Mr V entered into doesn't have the same rights in legislation to terminate an agreement early. And, while section 101 of the CCA gives consumers the right to terminate a hire agreement, this doesn't apply to agreements where the hirer is required to make payments exceeding £1,500 a year. Which Mr V was. So, I'm satisfied that section 101 of the CCA doesn't apply.

So, as the charges, on the face of it, aren't unenforceable, I've also considered if what Mr V is being asked to pay is fair and reasonable in the circumstances.

Based on what I've seen, I'm satisfied that both parties agreed to terminate the hire agreement early. And, as a result, Volkswagen charged both an early termination charge and a charge for exceeding the total allowable mileage (calculated based on a pro-rated allowable mileage for the length the agreement was in force).

Clause 8 of the hire agreement only provides for an early termination charge based on the provisions set out in that clause. However, this clause doesn't include the circumstances applicable here – where early termination was mutually agreed between the parties. So, it's not clear whether clause 8 actually applies. And the way Volkswagen have calculated the early termination charge doesn't appear to bear any relation to the charges set out in either 8.2 or 8.3 – Mr V appears to have been charged 55% of all future rental payments. Volkswagen have explained this calculation was based on the expected value from the agreement, and the value of the car upon termination.

What's more, the agreement doesn't appear to clearly or fairly set out a way of calculating Mr V's liability when the agreement is terminated early by mutual consent. While the CCA doesn't give Mr V the right to terminate the agreement early, 8.2 seems to do so. But this is worded in such a way, by reference to repudiating the contract which Volkswagen can accept or not, that its meaning isn't clear to the average consumer.

In addition, 8.3 indicates that the value of the car, when it's returned early, is accounted for. But this isn't explicitly set out, nor are there any references to any objective criteria for calculating values, such as publicly available reference tools. And, while clause 10 allows for an excess mileage charge to be applied, the hire agreement isn't clear as to what basis fair compensation will be calculated when both an early termination and an excess mileage charge are applied.

Given the above; and given that early termination of an agreement is a relatively common occurrence, I consider that the drafting of the agreement falls short of the requirement for plain, intelligible language, as laid out in the CRA.

Taking everything into consideration, I think it's fair to presume that Volkswagen are charging both the early termination charge and excess mileage charge to compensate themselves for both Mr V not paying all the originally agreed contractual payments and for any devaluation of the car caused by the expected mileage (the total allowable mileage specified in the hire agreement) being exceeded. But the fact that the car potentially has a different (higher) value on early termination, as opposed to the value at the end of the hire agreement, also needs to be considered.

As I've said, the hire agreement doesn't provide a transparent and fair way of calculating this compensation, and so ensuring that Volkswagen aren't overcompensated to the extent that it

wouldn't be fair and proportionate to their actual loss. So, I'm satisfied that PRIN 6 should be applied to these circumstances. Which would also involve the need for Volkswagen to be both clear and transparent about what they're charging; and not charging more than it's fair and reasonable to do so.

In his view on Mr V's complaint, the investigator looked at the difference between the position Volkswagen would be in upon early termination compared to the position they'd be in had the agreement run its full term (and the car having done no more than the total allowable mileage). In doing so, the investigator also considered the value of the car at both stages, with valuations taken using publicly available reference tools - the motor trade guides. Using these guides is in line with standard practice for the Financial Ombudsman Service, so I don't think the investigator acted unfairly when doing so. What's more, neither party has provided any evidence to show that these valuations were incorrect.

As such, I see no reason why the investigator's calculations shouldn't be relied upon.

When Mr V returned the car, there was around four months left on the agreement, and had the agreement continued to its natural end, Mr V would've paid an additional £535.28. As it was, he paid an early termination charge of £294.41, and a pro-rated excess mileage charge of £663.14.

So, had the agreement run its full term, Volkswagen would've received £453.30 in payments from Mr V, and the car would've been valued at £4,890 (assuming the total allowable mileage hadn't been exceeded – if it had, then any reduction in this value due to mileage would be offset by any excess mileage charge). So, Volkswagen would be receiving goods and payments to the value of £5,343.30.

However, as the agreement was terminated early, Mr V paid a total of £927.55 in charges, and the car was valued at £4,840 – just £50 less than Volkswagen would've likely achieved had the agreement run its full term, and the mileage allowance not been exceeded. So, Volkswagen received goods and payments to the value of £5,767.55. As such, charging what they did on early termination, Volkswagen received £424.25 more than they otherwise would've done if the agreement had run its full course.

I've not seen anything to show me that Mr V was made aware that Volkswagen were benefitting from terminating the agreement early, rather than letting it run its full course, and I don't think it's likely he would've been otherwise aware of this. And, if he had been aware, I don't think it's likely he would've terminated the agreement early, especially given the short period left on the term.

Having considered section 132 of the CCA, and the significant amount by which Volkswagen benefitted from the agreement ending how it did, I think it's likely that a court would consider it reasonable to grant Mr V some relief – while there appears to be a contractual basis for an excess mileage charge, when combined with the early termination fee it's resulted in a situation where Volkswagen have been overcompensated.

So, and whether or not a court would grant Mr V any relief under the CCA, I'm satisfied that Volkswagen didn't comply with PRIN 6 by requiring Mr V to pay a disproportionate charge. As such, I'm satisfied that Volkswagen need to take action to remedy the situation.

#### Collection of the car

Mr V is unhappy that the car wasn't collected quickly after he'd instructed Volkswagen that he wanted to terminate the agreement. And this has resulted in an extra days hire charge.

I've seen that the collection agent struggled to make contact with Mr V as Volkswagen didn't have his up to date phone number.

While I appreciate Mr V's comments about the collection agent not having to phone him, I think it was his responsibility to ensure that Volkswagen had his up to date details. As such, I don't think Volkswagen did anything wrong by providing the collection agent with the most up to date information they were aware of. And I won't be asking them to remove the extra days hire charge.

### **Putting things right**

As detailed above, I'm satisfied that Volkswagen benefitted by £424.25 by allowing Mr V to terminate the agreement when he did, when compared to what they would've received had the agreement run its remaining few months. And, for the reasons given, this wasn't fair or reasonable in the circumstances.

It's my understanding that Mr V still owes Volkswagen a total of £767.06, made up of the extra days hire charge and the unpaid excess mileage charge. So, Volkswagen should reduce this amount by £424.25, and issue an updated invoice to Mr V for the new (reduced) amount. Furthermore, if Mr V's financial circumstances are such that he's unable to make the outstanding payment in one go, I'd remind Volkswagen of their obligations to treat these circumstances with forbearance and due consideration when agreeing a payment plan.

### **My final decision**

For the reasons explained, I uphold Mr V's complaint. Volkswagen Financial Services (UK) Limited trading as Volkswagen Finance should follow my directions above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr V to accept or reject my decision before 17 February 2023.

Andrew Burford  
**Ombudsman**