

The complaint

Mr H complains that NewDay Ltd trading as Aqua ("NewDay") was irresponsible when it increased his credit limit and didn't treat him fairly when he complained about some of the transactions on his account.

What happened

NewDay opened a credit card account for Mr H in December 2019 with a credit limit of £450. This type of credit was an open-ended or running account facility. NewDay subsequently increased Mr H's credit limit to £650 in April 2020; £1,650 in August 2020; £2,650 in January 2021 and £3,650 in May 2021.

Mr H had reached his credit limit in August 2021 and in September the balance on the card was over £6,000. I understand the account has now been closed and NewDay says Mr H is liable to pay the outstanding balance.

Mr H said that NewDay shouldn't have increased his limit above £650 as he's on a low wage and his hours aren't guaranteed. He said that NewDay didn't treat him fairly when he complained about transactions on his account. Mr H also said that NewDay should have had regard to what he'd told it about his mental health conditions and how these impact on his ability to remember and his impulsiveness.

NewDay didn't uphold Mr H's complaint. It said that the credit limit increases were carried out correctly and in line with its lending policy - adequate checks were completed to ensure each increase was affordable, which included reviewing information provided by Mr H and information from credit reference agencies. NewDay said that it sent Mr H a letter that allowed him 40 days to 'opt out' of each increase prior to it taking place and that he didn't get in touch.

In its final response to his complaint in November 2021, NewDay said that if Mr H had struggled to understand any of the information it sent that he could have reached out to its customer service department who would have better explained it to him. NewDay didn't comment on Mr H's issue with some of the transactions on his account, but said that the account was now closed as Mr H felt the credit was unaffordable.

Mr H brought his complaint to us. Our investigator assessed the complaint and found that NewDay should have looked into Mr H's circumstances in more depth before increasing his credit limit twice in 2021, but wouldn't have found enough of concern regarding his finances to decline to lend to him. However, our investigator also found that NewDay had become aware in October 2020 of Mr H's mental health conditions and the impact these had on his ability to remember and his ability to manage his spending. They concluded that NewDay should not have offered Mr H's credit limit increases in 2021 because of this.

In order to put things right for Mr H our investigator recommended that NewDay refund any charges applied to Mr H's account since January 2021 and any interest applied to spending above the existing credit limit. They also recommended that NewDay pay Mr H £300 in recognition of the distress and inconvenience caused to him by its failure to engage with his

mental health conditions or make reasonable adjustments to support him in making informed decisions.

NewDay agreed with our investigator's conclusions and recommendations. It calculated a refund of interest as £246. Mr H agreed with our investigator's conclusions but not their recommendation of how to put things right for him. Mr H doesn't feel it's fair that he should be held liable for the account balance, given his mental health conditions, and that he didn't benefit from the money spent.

The complaint came to me, as an ombudsman, to review and resolve. I issued a provisional decision on the 15 December 2022 explaining why I thought Mr H's complaint should be upheld in part and setting out my proposals for what needed to happen to put things right for him. I allowed time for both parties to comment on what I'd said or provide any new information they wished me to consider. Mr H agreed with my provisional decision and redress proposals, and NewDay responded to say that it had no comment or further information to provide.

This is my final decision on the matter and will be legally binding should Mr H choose to accept it. I understand that Mr H is complaining about the increases to his credit limit from and including August 2020, so I haven't looked into whether or not NewDay got anything wrong when it opened the account for Mr H or when increased his initial credit limit to £650 in April 2020.

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 reconsidered everything, and having no new information or comment to consider, I've found no reason to depart from my provisional conclusions. I'll set out my reasons again for upholding Mr H's complaint in this final decision. I appreciate that this outcome will be very disappointing for NewDay and I hope the following clearly explains how I've reached my conclusions.

As mentioned in my provisional decision, when deciding how this complaint should be resolved I've had regard to the regulator's rules and guidance on responsible lending (set out in its consumer credit handbook – CONC) which lenders, such as NewDay, need to abide by. NewDay will be aware of these, and our approach to this type of lending is set out on our website, so I won't refer to the regulations in detail here but will summarise them and refer to them where appropriate.

The regulations state that before increasing the limit on Mr H's credit card, NewDay needed to check that he could afford to meet his repayments out of his usual means, within a reasonable period of time, without having to borrow further and without experiencing financial difficulty or other adverse consequences. The checks NewDay carried out needed to be proportionate to the nature of the credit - for example, a higher amount of credit might require a higher level of checking before agreeing to lend. The checks also needed to take into account Mr H's circumstances – for example, his income or the amount of debt he already had, and any signs of financial difficulty.

The overarching requirement was that NewDay needed to pay due regard to Mr H's interests and treat him fairly. CONC 2.2.2G(1) gave an example of contravening this as 'targeting customers with regulated credit agreements which are unsuitable for them by virtue of their indebtedness, poor credit history, age, health, disability or any other reason.' NewDay also needed to provide Mr H with clear, fair and not misleading information in order to help him

make informed decisions about his account.

The regulations also state that if a business knows, or ought to reasonably suspect, that someone's ability to make financial decisions might be constrained then it needs to take extra care in deciding whether or not to lend to them. A business shouldn't automatically decline credit, but it does need to carefully weigh up a person's need for credit against the potential harm it might cause them. A lender should take particular care that a person is not provided with credit which it knows, or reasonably believes, to be unsuitable to their needs, even where the credit would be affordable, given their individual circumstances and intended use of the credit.

So the questions I've considered include whether or not NewDay carried out a proportionate affordability check each time it increased Mr H's credit limit? If not, what would a proportionate check have shown? Did NewDay treat Mr H fairly and with due regard to his interests when it offered the increases? Did it provide him with clear, fair and not misleading information about his account? Did it take into consideration Mr H's mental health conditions and how these might impact on his ability to manage his account?

The credit increase in August 2020

I'll begin with Mr H's individual circumstances. Mr H shared with us and NewDay that he has difficulty remembering and can be impulsive. He explained that this can cause him problems with his finances. For example, Mr H didn't always recognise transactions on his account. When he spoke to NewDay about transactions he didn't recognise, he explained that he might have made them but he couldn't remember doing so. Mr H shared a letter with us from his local adult learning disabilities team who support him. They told us that Mr H has a diagnosis of two conditions and is in receipt of state benefits. They explained that Mr H experiences difficulties with his impulsivity or compulsive behaviours and may have felt that this credit would support him without considering the consequences of the debt accruing. Mr H told NewDay about his particular circumstances in October 2020. So it knew about these before increasing his credit limits in 2021 but not before the August 2020 increase.

Leaving aside for the moment the question of whether or not NewDay ought to have suspected before being told that Mr H's capacity for making financial decisions might be constrained in some way, NewDay needed to carry out an appropriate check on his finances to ensure that he'd be able to repay the credit within a reasonable time without difficulty when it increased Mr H's credit limit in August 2020.

NewDay said that before offering this increase it asked Mr H about his income and estimated his expenses. It checked his credit file to see what he owed elsewhere and how he was managing that. It also considered how he'd been using his account up to this point. NewDay said that it didn't find anything in this information that concerned it and so it offered Mr H an increase in his credit limit from £650 to £1,650.

Mr H told NewDay that his annual income was £20,000 when he opened the account in December 2019. NewDay could see from credit file information that Mr H owed £1,000 elsewhere and had £2,700 of debt in default, which was over three years old. I don't know if there had been any change to these circumstances by August 2020.

Mr H had been making more than the minimum payment on his card and hadn't missed any payments. However, I've noticed that although Mr H had been making more than the minimum payment each month, he had been spending as much again, more than the credit limit in several months. The account statements show that Mr H was increasingly spending his credit on online game purchases. His June statement shows almost 30 transactions amounting to over £600.

The contact notes show that Mr H enquired about eligibility for a credit increase in early April and NewDay explained how the automatic credit limit increases were decided and directed him to the relevant feature in its app. I've also noticed in the customer records that Mr H had requested and been declined for a credit limit increase in April, May, June and July 2020, sometimes several times in the month. He had been accepted for a credit limit increase to £650 in late April, and yet continued to request increases.

I think NewDay ought to have looked into Mr H's finances in more depth before increasing his credit limit in August 2020, given the above context and that it was increasing his available credit by a significant amount to £1,650 just four months after the previous increase. I think it would have been appropriate for it to have verified what Mr H had said about his income and understood his expenses. NewDay said that it used an online credit reference agency tool to sense-check what Mr H had said about his income and estimate his expenses. It hasn't provided me with this information, beyond affordability scores. Altogether, I don't think NewDay did enough in this instance.

Mr H provided us with his bank statements from the time. To be clear, I'm not suggesting this is the information NewDay ought to have relied on but I think it's reasonable for me to use this to get an idea of what NewDay might have learnt through further checks.

As Mr H and his support team told us, Mr H relies on state benefits. In August 2020, he was in receipt of weekly support for his living costs and a monthly personal independence payment. Mr H also had a weekly wage of less than £100. He explained that he was on a zero hours contract and I can see that his wages varied. Altogether, Mr H received about £1,800 a month. However, as £600 of this was to support him with the extra costs of having long-term health conditions and wasn't means tested, I don't think it would be reasonable to automatically assume that this money was available to him to repay this credit.

Mr H was spending about £400 on food in the months before this increase. His other costs include about £100 on bills and less than £100 on payments for another credit card. I don't have any information about Mr H's rent or other housing costs, so I haven't concluded that the credit would have been unaffordable for him.

I've concluded that NewDay would still have offered Mr H a credit increase at this point, even if it had more information about his finances. It seems he would have enough left over after meeting his existing commitments and living costs to be able to repay the credit without difficulty, even considering the possibility that some of his income wasn't available for debt repayment.

I have also considered whether the credit was obviously unsuitable for Mr H and whether NewDay made a fair lending decision. I don't think there were enough indications at this point that Mr H's spending patterns were causing him harm, for example he didn't appear to be overindebted or having difficulty managing his existing debt. NewDay didn't know about Mr H's health conditions at this point and I haven't seen anything which makes me think they ought reasonably to have known. Without this context, I don't think NewDay would have declined to lend to Mr H on the basis that the credit would have been unsuitable.

Altogether, I've concluded that NewDay wasn't irresponsible when it increased Mr H's credit limit on this occasion.

The credit limit increases in January and May 2021

Mr H's August 2020 account statement showed £875 of new purchases, including food and travel. His early September 2020 account statement showed £1,000 of new purchases,

including food, travel, utility and credit card bills. 37 transactions relate to purchases made via a social network application (in-app purchases) amounting to £800.

On 22 September Mr H called NewDay to query several transactions made on the 20 September relating to this app. There were at least 27 in-app transactions amounting to £860 in September showing on Mr H's statement. NewDay refunded the transactions made on the 20 September only, £260 in total.

On 16 October Mr H called NewDay and said that he believed he'd had fraudulent transactions on his account. He told NewDay that he suffered from memory and mental health problems, and that he could have made these transactions but he didn't remember. From the information I've seen, nothing further happened regarding these in-app purchases. There is nothing showing on the contact notes about the credit limit on Mr H's card in January 2021 but the account history and statements show that NewDay increased his limit by £1,000 to £2,650.

At this time, NewDay not only knew about Mr H's health conditions but had experienced how these might impact on his ability to make decisions about his finances. As mentioned, Mr H had continued to apply for credit limit increases despite having had a conversation about how eligibility for limit increases was decided; Mr H didn't know whether or not he'd carried out some of his account transactions; and NewDay could also see at this point that Mr H had a pattern of spending which involved using credit for his living costs and increasingly frequent purchases on social networking apps.

NewDay said in its final response to Mr H about his complaint that if he hadn't understood information it had provided then he could have contacted its customer care team to help him. However, this isn't the only way in which a person's ability to make informed financial decisions might be constrained. The regulations state that whether or not a person has the ability to understand, remember, and weigh up relevant information will determine whether they are able to make a responsible borrowing decision based on that information.

I think NewDay should have reasonably known at that point that Mr H was not in a position to be able to make a responsible borrowing decision about this credit limit increase because it seems his ability to understand, remember and weigh up the information were impacted by his mental health conditions. I think it ought to have seen that, irrespective of whether Mr H could afford to repay further credit, it was unsuitable for him.

Altogether, I've concluded that NewDay didn't treat Mr H fairly and with due regard to his interests when it increased his limit from £1,650 to £2,650 in January 2021.

Mr H made no new purchases on his account from November 2020 until March 2021. Mr H's April statement shows 26 in-app transactions amounting to £2,430. These related to the same social network application that Mr H had previously queried. Mr H called NewDay on 12 April 2021 to say that there were unrecognised transactions on his account. He asked to be put through to a disabilities department and it seems was transferred to customer care and then on to fraud as he was disputing transactions on his account. These transactions were refunded.

Mr H was in touch with NewDay several times in April 2021 – he didn't think all the disputed transactions had been refunded and he wasn't initially happy to pay the minimum payment shown on his statement as this had been calculated on the balance prior to the transactions being refunded. On one occasion he wanted to discuss the (fraud) declaration form, on another he asked for a second form to be sent to him because there was nowhere for him to sign on the form he'd been sent.

In mid-May Mr H was offered another credit limit increase of £1,000 to £3,650. For the same reasons as before, I've concluded that NewDay didn't treat Mr H fairly or with due regard to his interests when it offered him this increase.

What happened after this

Mr H continued spending on his card in May 2021 with almost £1,800 new purchases, including food, transport and bills, and the same in June. Mr H was charged an overlimit fee that month. In July there were almost £200 of payments made to a social network streaming application, including foreign exchange fees.

In August 2021 it seems the payments that had been refunded to Mr H's account in April were presented again on appeal from the merchant. NewDay reviewed these and found that Mr H was liable for them, and recharged them to his account taking his balance up to £6,058.

Mr H wasn't happy with this outcome and complained. NewDay reviewed the case and didn't find in Mr H's favour. In October 2021, Mr H explained that it had been dealt with as fraud by mistake and he now remembers making these purchase. The issue was that he hadn't received the goods he'd paid for, for example access to exclusive events, merchandise and in-app gifts. Mr H was told that it was too late to make this complaint as more than 120 days had passed since the purchases were made in March.

Mr H then complained that the account was unaffordable and that he hadn't been treated fairly.

Putting things right

I've found that NewDay was irresponsible when it increased the credit limit on Mr H's account beyond £1,650 in January 2021. Our investigator concluded that in order to put things right for Mr H NewDay should refund interest and charges on credit spent above the existing credit limit. This is because our usual approach to putting things right is to try and return a person to the position they were in had everything gone as it should have. When an irresponsible lending decision has been made this usually involves refunding any money a borrower has paid for the credit but leaving them to repay the money borrowed, as they've had the use of it.

In this case, however, I don't agree that this approach puts Mr H back into the position he was in before this credit was granted. Before NewDay increased Mr H's credit limit in January 2021, his balance was just over £1,200 and he'd stopped spending on the account. It's not straightforward to come to a view as to what might have happened had NewDay left the limit as it was. Mr H might have continued to clear down the balance and not made any new purchases. He might have made new purchases up to this limit again, and continued to use the card in this way. NewDay might have stepped in and taken action to limit the amount or type of transactions Mr H was making, given its obligation to monitor his account and take action where there are signs of actual or possible financial difficulties (CONC 6.7.3A-R). It might have taken a different approach to investigating particular transactions in the light of Mr H's health conditions in order to assist him with making decisions about his account and to mitigate any risks to him (CONC 2.10.12G).

What did happen is that Mr H spent almost £2,500 on in-app purchases in March 2021 and when NewDay refunded these Mr H spent the money again, and then spent the additional money he was offered through a second credit limit increase in July. The account reached a balance of over £3,600 by August, and now stands at over £6,000 as the refunded transactions were re-presented. I understand that Mr H has repaid about £2,300 in total in

2021.

In deciding on a fair and reasonable resolution, I've had regard to CONC Chapter 7 which sets out rules and guidance for businesses around debt recovery. These state that a business must suspend the pursuit of recovery of a debt from someone when it has been notified that the person might not have the mental capacity to make relevant decisions about the management of their debt or engage in the debt recovery process. Furthermore, creditors should consider writing off debts where a borrower lacked the mental capacity to make the relevant financial decision at the time that he entered the credit agreement with the creditor. The legal position in England and Wales is that a contract is voidable where the creditor knew of the incapacity or must be taken to have known of it.¹

In this case, where I've found that Mr H didn't have the capacity to make informed decisions about the credit increases in 2021, and the credit was likely to be unsuitable for him and have harmful consequences, I think the fair and reasonable thing to do here is for NewDay to write off this debt and report the account as settled on Mr H's credit file.

Our investigator recommended that NewDay pay Mr H compensation in recognition of the distress and inconvenience this matter caused him. I have considered this when making my decision. However, I have decided that it wouldn't be appropriate in this case to direct NewDay to pay Mr H an additional award as I feel writing off the balance is a fair resolution.

My final decision

As I've explained above, I am upholding Mr H's complaint in part about NewDay Ltd trading as Aqua and it now needs to put things right for him as I've set out.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 10 February 2023.

Michelle Boundy
Ombudsman

¹ CONC 7.10.1R referencing Para 7.13 of the Irresponsible Lending Guidance produced by the previous regulator, The Office of Fair Trading