

Complaint

Mr C has complained about a credit card and subsequent credit limit increases NewDay Ltd (trading as “Aqua”) provided to him.

He says the limit on his credit card was automatically raised multiple times without request at times when his life was difficult.

Background

Mr C’s credit card

Aqua provided Mr C with a credit card with an initial limit of £900 in April 2015.

Mr C’s credit limit was increased to £1,500.00 in August 2015; £2,100.00 in January 2016; £3,550.00 in May 2016; and finally £4,650.00 in February 2017.

Aqua’s response to the complaint

Upon learning that Mr C’s complaint had been referred to our service, Aqua accepted it shouldn’t have offered the fourth credit limit increase to Mr C. And it agreed to refund all interest, fees and charges Mr C paid on balances above £3,550.00 as a result. As this is in line with what we’d tell a lender to do in the event we were to uphold a complaint, we’ve not looked into the February 2017 increase.

Our investigator’s investigation and assessment

One of our investigators then reviewed what Mr C and Aqua had told us. And she thought Aqua hadn’t done anything wrong or treated Mr C unfairly in relation to providing the credit card or increasing the credit limit in August 2015 and January 2016.

Unfortunately, the investigator did not at the time realise that Aqua agreeing to refund all interest on balances over £3,550.00, meant that its position was that it had only agreed that it had done something wrong in February 2017 and had only made an offer in relation this limit increase.

Aqua did not consider that it had done anything wrong in May 2016 and as a result did not offer any sort of refund in relation to the limit increase which took place at this point. Nonetheless as our investigator considered that Aqua had offered on the May 2016 limit increase, she did not look into whether or not Aqua acted fairly and reasonably at this point and instead told Mr C that what Aqua had already agreed to do to put things right for him was fair and reasonable in the circumstances of his complaint.

Mr C’s response to our investigator

Mr C specifically disagreed in relation to the investigator’s findings on Aqua’s lending decisions prior to May 2016. He was happy in relation to accept the offer in relation to the

lending decisions that had been communicated to him – included the erroneously communicated offer in relation to the May 2016 increase.

Mr C asked for an ombudsman to look at his complaint and in particular he believed that his complaint about the earlier lending decisions - i.e. what happened prior to May 2016 - should also be upheld.

My provisional decision of 20 November 2023

I issued a provisional decision on 20 November 2023.

In my provisional decision, I clarified that Aqua had only ever offered to uphold the complaint about the credit limit increase to £4,650.00 in February 2017. I'll go into details behind the reasons for my clarification in the May 2016 section of this final decision.

I also set out why I thought that Aqua had not acted unfairly when offering Mr C a credit limit increase to £3,550.00 in May 2016. Having also considered the circumstances at the time of the earlier increases, I explained why this left me intending to conclude that what Aqua had actually already agreed to do to put things right for Mr C was fair and reasonable in the circumstances of his complaint.

In summary, I thought that Aqua's offer was fair and reasonable because I wasn't persuaded that the decisions to initially provide Mr C with his credit card in April 2015; or increase the limit on the account in August 2015, January 2016 and May 2016 were unfair or unreasonable.

It was therefore my intention not to require Aqua to pay Mr C any further compensation.

Responses to my provisional decision

Aqua did not respond to my provisional decision or provide anything further to me to consider.

Mr C disagreed with my provisional decision stating:

- He had a binding offer from Aqua in relation to the third and fourth limit increases. Aqua should have attempted to correct the offer if it didn't agree with how the investigator communicated it when she issued her assessment.
- I had created a situation where I was asking him to forget that a written agreement had been mediated and I should have contacted him before issuing a provisional decision which was affected by any misunderstanding of Aqua's offer.
- Aqua upheld the fourth increase on the basis on a change in employment. He left his previous employment in January 2016. So if Aqua had checked his employment it would have found this out prior to the third limit increase in May 2016.
- I accepted that Aqua no longer had records of the credit checks that it carried out in April 2015. But given the account was still unpaid the records should have been retained notwithstanding the fact that only eight years had passed.

My findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I want to start by saying that in my provisional decision I used an incorrect initial on a couple of occasions when referring to Mr C. I wish to confirm that these are typing errors.

Nonetheless, Mr C is absolutely correct in saying that is not the level of service that he should be receiving from our service. I agree that this is the case, I apologise for the typing errors in my provisional decision and I think that it is important for me to acknowledge this right at the start of this final decision.

I now turn to the substance of Mr C's complaint.

We've explained how we handle complaints about unaffordable and irresponsible lending on our website. And I've used this approach to help me decide Mr C's complaint.

Having carefully considered everything, I remained satisfied that what Aqua has offered to do to put things right for Mr C is fair and reasonable in the circumstances of his case. I'll explain why I think that is the case.

As I explained in my provisional decision, Aqua needed to make sure it didn't lend irresponsibly. In practice, what this means is Aqua needed to carry out proportionate checks to be able to understand whether Mr C could afford to repay any credit it provided.

Our website sets out what we typically think about when deciding whether a lender's checks were proportionate. Generally, we think it's reasonable for a lender's checks to be less thorough – in terms of how much information it gathers and what it does to verify it – in the early stages of a lending relationship.

But we might think it needed to do more if, for example, a borrower's income was low or the amount lent was high. And the longer the lending relationship goes on, the greater the risk of it becoming unsustainable and the borrower experiencing financial difficulty. So we'd expect a lender to be able to show that it didn't continue to lend to a customer irresponsibly.

I explained, in my provisional decision, that there had been some suggestion that Mr C might not have been complaining about the decision to provide him with the credit card in the first place. Mr C has since made some further points in relation to this matter.

So for the sake of clarity, completeness, and the avoidance of doubt I've looked at the decision to provide Mr C with his credit card in August 2015 as well as the decision to increase his credit limit to £1,500.00 in August 2015; and then £2,100.00 in January 2016 (and for reasons I'll go on to explain in that section of this decision, the decision to provide Mr C with an increased credit limit of £3,550.00 in May 2016).

Aqua's checks

Aqua says it initially agreed to Mr C's application after it obtained information on his income and carried out a credit search. And the information obtained indicated that Mr C would be able to make the low monthly repayments due for this credit card. Due to Mr C's account being relatively well managed he was then offered credit limit increases to £1,500.00 and then £2,100.00.

On the other hand Mr C says that he shouldn't have been lent to and the credit was provided at a time when his life was difficult.

I've considered what the parties have said.

Aqua's decision to provide Mr C with a credit card with a limit of £900

What's important to note is that Mr C was provided with a revolving credit facility rather than a loan. And this means that to start with Aqua was required to understand whether a credit

limit of £900 could be repaid within a reasonable period of time, rather than all in one go. A credit limit of £900 required relatively small monthly payments in order to clear the full amount owed within a reasonable period of time.

Aqua hasn't been able to provide the results of any credit checks that it carried out when it agreed to provide Mr C with his credit card in April 2015. But given just how long ago this application was, I don't think that is too surprising. Mr C considers this to be suspicious given the account has not been fully repaid and he suggests that this may not suit the narrative it has put forward.

I've thought about what Mr C has said. I accept that Mr C's account hasn't been settled. But Mr C's account is a revolving credit facility and it isn't unusual for credit facilities to run for a number of years with balances on them. And there isn't anything in the regulations that states a respondent firm needs to hold credit check information indefinitely. I say this while particularly mindful that Aqua won't have known whether Mr C would make a complaint in the future at the time it was requested from its credit reference partner.

Typically most data is held for around six years. Indeed, I think Mr C would likely be told a credit reference agency no longer held this information if he were to have requested it himself. Given the information is from more than eight years ago, I don't think that it unreasonable for Aqua to no longer hold it. And I do not consider it reasonable to draw adverse inferences against this information not being held in this circumstance. I say this particularly as I haven't been provided with any other clear documentary evidence to show what a credit check is likely to have looked like either.

In any event, as I explained in my provisional decision, having been given and considered some information on Mr C's income at the time, I'm satisfied that a declaration of income is likely to have been sufficient for Aqua to have determine that a credit of £900 was affordable for Mr C. The information provided suggests that Mr C was in work at the time and that he received sufficient funds to be able to repay £900 within a reasonable period of time.

As this is the case, I'm currently satisfied that the checks carried out before Mr C was initially provided with his credit card were reasonable and proportionate.

The first and second credit limits

For the first credit limit increase, it appears as though Aqua mainly relied on Mr C's account having been managed well in the four months or so since it had been opened. I'm not necessarily persuaded that Mr C's account had been managed particularly well or that this in itself was an indication that Mr C should be lent up to a further £600.

This is especially as it appears as though Mr C made £640 of cash withdrawals in May 2015 and June 2015. However, I can also see that Mr C made a large repayment in May 2015.

Aqua has also been able to provide credit search data which shows that Mr C had 11 active credit accounts and outstanding balances of around £8,000.00 at the time he was offered the credit limit increase to £1,500.00.

Between the first and second limit increases, Mr C appears to have made only a single cash withdrawal for £100. And he made a payment of around two thirds of the increased credit limit in October 2015. So I can see why Aqua might have thought that an extra £600 on a revolving credit basis might have been affordable given Mr C had made a lump sum payment significantly in excess of this.

I'm also mindful that although there wasn't anything in the way of any additional significant adverse information on the credit search Aqua carried out. Indeed, at this stage while Mr C did have more active accounts his balances had reduced to around £2,500.00.

While I accept that there were some indications that Mr C's account management might have suggested the credit limits were affordable, given the amount of the likely increased monthly payments, I do think that there is a reasonable argument for saying that it would have been proportionate for Aqua to find out a bit more about Mr C's regular living costs before offering the credit limit increases.

As Aqua didn't obtain this information, I've considered the information Mr C has provided with a view to deciding what it might have found out about Mr C's regular living costs had it asked him about this. To be clear this isn't the same as asking Mr C for his bank statements, as given the amounts involved here I don't think that asking for this information would have been proportionate in the circumstances.

Having carefully thought about matters, I don't think that Aqua would have made different decisions, when offering the first and second limit increases, even if it had asked Mr C for more information. I say this because the information Mr C has provided about his finances at the time appears to show that when his committed regular living expenses and existing credit commitments were deducted from the funds going into his account, he did have the funds, at the time at least, to sustainably make the repayments due.

In reaching this conclusion, I've thought about what Mr C has said about having received bonuses. But as these were funds he received I think that these would have been taken into account. I also think that it is reasonable to take these funds into account too. Furthermore, while Mr C has said that he was receiving credits for a friend to help him get back on his feet, I can't see how Aqua would have found out about this.

Mr C has also said that a look at his bank statements show that he didn't have much in the way of funds left in his account at the end of the month. And he's also referred to the cash withdrawals and late payments as evidence of him not having the funds to repay any additional credit.

However, Mr C is including all of his spending in his analysis of what was left in his account at the end of the month. And Aqua only needed to find out about his main regular living expenses, given the credit searches would have shown Mr C's credit commitments. I wouldn't have expected Aqua to have conducted the forensic line by line analysis of Mr C's bank statements that Mr C has carried out.

Furthermore, while I do acknowledge that the cash withdrawals that Mr C has referred to, as I've explained earlier on in this decision, it's also fair to say that this was balanced out by the relatively large payments Mr C made on more than one occasion. And bearing all of this in mind, I don't think that the late payments or cash withdrawals in themselves meant that Aqua shouldn't have lent to Mr C.

And, in these circumstances, it's difficult for me to conclude that Aqua would have found out that Mr C didn't have insufficient funds to make the repayments for the increased credit limits of £1,500.00 and £2,100.00. This is even if it had tried to find out more about his circumstances at this time.

It's possible that Mr C's position might have been worse than what it looks like, or that it worsened after the credit limit increases took place. But it wouldn't be fair and reasonable for me to use hindsight here, or say that Aqua should have known this was the case. This is especially as the available information indicates proportionate checks (rather than a forensic

analysis of Mr C's bank statements) would more likely than not have shown that Mr C could repay what he could owe at the time the lending decision was made. I also say this in the full knowledge that he cleared his balance in full in April 2016.

So overall while I can understand Mr C's sentiments, I remain satisfied that Aqua didn't treat Mr C unfairly or unreasonably when providing him with his credit card or subsequently increasing his credit limit to £1,500.00 in August 2015 and £2,100.00 in January 2016.

The position in relation to the third (May 2016) limit increase

I explained in my provisional decision that it appeared as though the investigator had omitted the credit limit increase to £3,550.00 in May 2016, in her assessment. I explained that the investigator considered that the complaint about the credit limit increase was being upheld by Aqua as it was agreeing to refund all interest from £3,550.00 onwards. However, Aqua confirmed that it had not and had never agreed that the complaint about the third limit increase should be upheld.

To be clear, this miscommunication was noted after the case had been passed to me for a final decision. I accept that the language Aqua used could have been better and that it could have referred to the limit increases by number – for example the first limit increase, the second limit increase etc. But nonetheless Aqua always stated that it would refund any interest from £3,550.00 onwards. This means that it wasn't accepting having done anything wrong up to the point it increased Mr C's limit over £3,550.00 – i.e. the fourth limit increase to £4,650.00 in February 2017.

Mr C says that my provisional decision overlooked the fact that he accepted a binding offer in relation to the limit increase to £3,550.00 in May 2016. I accept and appreciate that Mr C is disappointed at the news he has received. But I am afraid that I do not agree with him on this matter. I'll explain why I think that this is the case.

Aqua never offered to uphold the complaint about the May 2016 limit increase. It accepted that we could consider a complaint about this – in the same way it accepted that we could consider a complaint about its initial decision to provide Mr C with a credit card and the limit increases in August 2015 and January 2015 – but it never accepted that it did anything wrong in relation to this limit increase or agreed to make an offer.

So Aqua did not make an offer in relation to the May 2016 increase. Our investigator's misunderstanding of Aqua's position (and that is what happened rather than Aqua making and then retracting an offer here) and incorrect suggestion that it had made an offer did not create a binding offer in circumstances where one had never existed in the first place. Given Aqua had not indicated it was prepared to make an offer in relation to the May 2016 increase, our investigator was never authorised or entitled to communicate such an offer on Aqua's behalf.

Once the jurisdiction position had been determined, our investigator was merely entitled to investigate and give her thoughts on whether Aqua acted fairly and reasonably when offering Mr C a limit increase in May 2016. She did not do that in this instance as she incorrectly interpreted Aqua's position.

Mr C says that Aqua should have objected about the proposed settlement before the case reached decision. I agree that Aqua pointing out the investigator's error might have resulted in the matter being noticed sooner. But that doesn't change the position in relation to the investigator's scope and authority or mean that her assessment created a binding offer, where one never existed, in the way that Mr C suggests.

Indeed Aqua didn't confirm its agreement to the adjudicator's assessment on the merits of Mr C's dispute. In any event, I'm afraid that Mr C's interpretation of having accepted a binding offer isn't how the law of contract - and in particular offer and acceptance - operates. Amongst other things, at the very least, it is clear that there is no meeting of the minds between the parties to this dispute and it's clear that any communication of an offer was made by a third-party not authorised to make such an offer on the basis of a mistake.

Having reviewed the file, I could see that there was a clear question in relation to whether Aqua was accepting that it shouldn't have increased Mr C's credit limit in May 2016 and making an offer to settle the complaint in relation to this limit increase. And because this may well have affected the enforceability of any direction that I would have made in my final decision, at my instigation, the investigator asked Aqua to confirm that it was in fact making an offer in relation to the May 2016 limit increase.

As I've explained, Aqua confirmed that it had not made an offer to refund any interest added to Mr C's account as a result of the May 2016 limit increase. The investigator subsequently asked Aqua whether it wished to make such an offer in light of what she'd communicated to Mr C - in other words whether it wished to accept the position in relation to her merits assessment. Aqua confirmed that it did not as it did not consider that it did anything wrong in May 2016 and wanted the complaint about this limit increase considered. That is why I looked at this limit increase in my provisional decision.

Mr C says this matter should have been resolved prior to my provisional decision and that he should have notified that there were some alleged errors which were going to affect matters. Once again while I appreciate why Mr C is disappointed at how events have turned out, the whole point of me issuing a provisional decision on his case, rather than proceeding directly to a final decision, was precisely because what I had discovered had the potential to change matters. Issuing a provisional decision gave both parties the opportunity to comment on all matters including my thoughts on whether Aqua acted fairly and reasonably in May 2016 - not just the position in relation to the offer - ahead of a final decision. Issuing a provisional decision in these circumstances is entirely in line with our process for resolving disputes.

I've explained that it is regrettable that it took until the case had reached an ombudsman for the errors to have been noticed. Nonetheless as they were identified at that stage and most crucially as I had the information required to assess the matter, that is why I issued a provisional decision to allow *both* parties the chance to formally comment ahead of a provisional decision. Furthermore, Mr C has been able to make submissions as to why he disagrees with the position on the May 2016 increase prior to my final decision.

So, while I appreciate Mr C's sentiments, I'm satisfied that he has not lost out as a result of my decision to consider whether Aqua acted fairly and reasonably towards him in May 2016, rather than attempt to ratify an offer that Aqua is adamant (and the available evidence appears to support) it never made and will therefore not have been binding. As this is the case and while I accept that Mr C is disappointed because he believes he's lost out on an offer - even though Aqua never actually made that offer - I'm satisfied that what remains to be considered is Mr C's further points in relation to the May 2016 limit increase. I now turn to that matter.

Was the third limit increase in May 2016 provided unfairly?

I've reconsidered whether it is fair and reasonable for me to uphold a complaint that the May 2016 limit increase was provided unfairly as Aqua ought to have realised it was unaffordable for Mr C.

Having carefully considered all of the information provided, I'm satisfied that Mr C only owed some £330 at the end of the month the limit increase was offered. And at the end of the previous month Mr C owed £20 which was in effect the interest remaining from purchases which Mr C's previous payments had cleared the balance on.

Furthermore, Mr C's non-mortgage balances with one of the credit reference providers decreased to just under £115,000.00. And with another credit reference agency, although the lines of credit it was saying were available to Mr C, in any event, remained the same, the amount that Mr C owed had reduced.

As this is the case, it's very difficult for me to reach the conclusion that Aqua acted irresponsibly in deciding to increase the amount of credit available to Mr C. Mr C's finances seemed to be getting better and he'd cleared the amount he owed.

Mr C says that things are not always as they seem. Mr C had been made redundant from his job a few months earlier and was going through a difficult time. In Mr C's view, if it had done the correct checks it would have seen that he wasn't in employment and he's provided the evidence to support that he wasn't working at the time.

I've considered what Mr C has said and I'm sorry that he's gone through a difficult time. Before I get on to what Aqua did or did not do in May 2016, as Mr C has referred to what our investigator said about its offer in relation to the February 2017 limit increase, I think it's worth me confirming why it agreed that it shouldn't have offered this increase.

Aqua agrees that it shouldn't have offered this increase because (for the sake of clarity I will quote Aqua's words exactly) *"the extended credit was utilised quickly and the customer became delinquent immediately after. The notes on the account from this time show that we were advised that the change in circumstances was unemployment"*. I realise that Mr C may (as a result of our investigator's communications) be under the impression that Aqua was aware of Mr C's change in employment circumstances at the time of the February 2017 limit increase – although this is not clear.

Having said this the information makes it clear that Aqua upheld the complaint about the last increase because the additional funds provided as a result of the limit increase were quickly used. And Aqua subsequently became aware of the change in Mr C's employment circumstances when it received an income and expenditure assessment from a debt management company, which Mr C authorised in May 2017. So I don't think that Aqua necessarily accepts that it ought to have been aware that Mr C was not in employment when it increased his credit limit in February 2017. It merely accepts that it was told about this fairly soon afterwards.

In any event, the question for me to consider here, is whether Aqua ought to have been aware that Mr C wasn't in employment at the time it offered him the credit limit increase in May 2016. From what I've seen it appears as though Aqua proceeded on the basis that Mr C was employed with the same employer (that he was when he made his initial credit card application) when it increased his credit limit in May 2016. This in itself, is not a wholly unreasonable starting point. And whether it is reasonable for Aqua to have proceeded with the limit increase offer on this basis is determined by a number of different factors.

I accept and the evidence provided does show that Mr C was no longer employed at this time. And it is possible that if Aqua had asked Mr C whether his circumstances had changed Mr C might have told Aqua that he was no longer employed. Although I have to weigh this against the fact that Mr C has described the limit increases as being perfectly timed, yet still unwarranted and he did use the funds. So I have to accept that there is also a possibility

Mr C might not have said that his circumstances had changed, if Aqua had asked him whether his circumstances had changed and he considered the extra credit affordable.

In any event, I have to consider whether Aqua even needed to have asked Mr C this. Aqua only needed to do this if it was proportionate in the circumstances. And I need to consider this matter in the context of the May 2016 increase having been provided when it appeared Mr C's finances seemed to be getting better and he'd cleared the amount he owed on this credit card, rather than it being the case that his finances were worsening in the way that the credit check information gathered in February 2017 suggested that they were at that time.

Furthermore, a customer's previous repayment history is one of the factors that a lender is permitted to take into account when deciding whether to provide credit. In this case, Mr C was not proving himself to be a minimum payer in the lead up to May 2016, he had actually pretty much cleared his balance. In these circumstances, while I accept Mr C's argument that things might not always be as they seem, in this instance Aqua didn't have reason to question Mr C's employment at this stage. Therefore, I think that further extensive checks into Mr C's employment at this time would not have been proportionate in the circumstances.

Mr C's repayment record on his Aqua account leading up to the increase together with the reduction in his indebtedness elsewhere, did not indicate that his employment status had changed. And given the level of improvement in Mr C's finances indicated in the credit reference agency checks, I don't think that Aqua's failure to carry out further checks into Mr C's employment at this stage meant that its checks weren't reasonable and proportionate. In my view, Mr C's repayment record and the other checks carried out with credit reference agencies did not indicate that he might be unemployed or that he might not be able to afford the extra credit that was going to be offered.

So, in these circumstances, while I am very much sympathetic to what Mr C has told us and I am very sorry to hear that he has gone through a difficult time, I'm satisfied that bearing in mind the particular circumstances here Aqua's decision not to carry out checks into Mr C's employment wasn't unreasonable. And given what the rest of the information gathered showed, I remain satisfied that Aqua was entitled to offer Mr C the credit limit increase to £3,550.00 in May 2016.

As this is the case, I also remain satisfied that what Aqua has already offered to do to put things right for Mr C is fair and reasonable in all of the circumstances and I'm not requiring it to do anything further. I appreciate that my decision will be very disappointing for Mr C – particularly in light of what has gone on through the course of the investigation. But I hope he'll understand the reasons for my decision and that he'll at least feel his concerns have been listened to.

Fair compensation – what Aqua needs to do to put things right for Mr C

Having carefully considered everything, I'm satisfied that it would be fair and reasonable, in all the circumstances of Mr C's complaint, for Aqua to put things right in the following way (which it has already agreed to do):

- rework Mr C's account to ensure that from May 2016 interest is only charged on the first £3,550.00 outstanding - to reflect the fact that the **fourth** credit limit increase should not have been provided. All late payment and over limit fees should also be removed;
- if an outstanding balance remains on Mr C's account once all adjustments have been made Aqua should contact Mr C to arrange a suitable repayment plan for this. If it considers it appropriate to record negative information on Mr C's credit file, it should

backdate this to when it shouldn't have provided the additional credit in question in the first place;

- if the effect of all adjustments results in there no longer being an outstanding balance, then any extra should be treated as overpayments and returned to Mr C along with 8% simple interest† on the overpayments from the date they were made until the date of settlement. If no outstanding balance remains on Mr C account after all adjustments have been made, then Aqua should remove any adverse information it (not any third party) has recorded from Mr C's credit file.

† HM Revenue & Customs requires Aqua to take off tax from this interest. Aqua must give Mr C a certificate showing how much tax it has taken off if she asks for one.

I understand that Aqua sold an outstanding balance on Mr C's account to a third-party debt purchaser. So it will need to either buy the account back from the third-party and make the necessary adjustments, pay an amount to the third party (equivalent to that needs to be made on Mr C's account) in order for it to make the necessary adjustments, or pay Mr C an amount (equivalent to the interest, fees and charges which need to be refunded) to ensure that it fully complies with this direction.

To be clear I cannot make a direction against a third-party in any final decision I am likely to reach. Therefore, I am not requiring the County Court Judgment be removed as it a third-party that obtained this. If Mr C wants that removed, he has to contact the court or the third party in relation to this matter.

My final decision

For the reasons I've explained above and in my provisional decision of 20 November 2023, I'm partially upholding Mr C's complaint. NewDay Ltd (trading as Aqua) should put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 17 January 2024.

Jeshen Narayanan
Ombudsman