

Complaint

Mr K has complained that Bank of Scotland plc (trading as “Halifax”) irresponsibly provided him with an overdraft which it continued applying charges on even when he was in financial difficulty.

Background

Halifax initially provided Mr K with an overdraft, which had a credit limit of £200, in October 2017. Halifax agreed to increase the credit limit on the facility in incremental amounts (the lowest increase was by £50 and the highest increase was by £300) until after five limit increases that month, it reached a total amount of £2,450.00 in April 2018.

One of our investigators looked at Mr K’s complaint and thought that Halifax firstly hadn’t acted fairly when agreeing to any of the overdraft limit increases in April 2018. She also thought that by April 2019 Halifax should have realised that Mr K’s overdraft had become demonstrably unsustainable for him; and it should have stopped providing him with an overdraft facility from that point onwards.

So it was her recommendation that Mr K’s complaint should be partially upheld and that Halifax needed to refund the interest, fees and charges it added to Mr K’s overdraft balances over £1,550.00 from April 2018 to April 2019 and all of the interest, fees and charges it added to the overdraft from April 2019 onwards.

Halifax disagreed with the investigator’s assessment and asked for an ombudsman’s review.

My provisional decision of 4 October 2024

I issued a provisional decision – on 4 October 2024- setting out why I was intending to partially uphold Mr K’s complaint.

In summary, I was intending to partially uphold Mr K’s complaint because while I was satisfied that proportionate checks would not have prevented Halifax from initially providing Mr K with the overdraft or increasing the credit limit, I thought it ought to have realised that the facility had become unsustainable for Mr K by April 2019.

Mr K’s response to my provisional decision

Mr K confirmed receipt of my provisional decision but provided nothing further for me to consider ahead of my final decision.

Halifax’s response to my provisional decision

Halifax responded to my provisional decision saying:

- Mr K was making regular payments to a savings account and this was not the typical behaviour of someone trapped in their overdraft.

- Mr K received his pay weekly or fortnightly and this affected how his account was managed. He was using the product as intended and his non-essential spending prevented him from improving his situation.
- it is possible that Mr K didn't have £2,450.00 available to clear the facility and the adverse information from removing the facility could have caused him harm.
- it started to write to Mr K about his overdraft from September 2020 onwards – as part of its monitoring of his usage - and after writing to him ten times the way Mr K used his overdraft didn't change and neither did Mr K reach out to say that he was experiencing difficulty.
- it confirmed Mr K's account balances and provided copies of the statements for his other accounts.

I thank the parties for their responses to my provisional decision.

My findings

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

Having carefully considered everything, including the responses to my provisional decision, I'm still partially uphold Mr K's complaint. I'll explain why in a little more detail.

Halifax's decision to provide Mr K with an overdraft and increase his credit limit

We've set out our general approach to complaints about unaffordable/irresponsible lending - including the key rules, guidance and good industry practice - on our website. And I've referred to this when deciding Mr K's complaint.

Halifax needed to make sure that it didn't lend irresponsibly. In practice, what this means is Halifax needed to carry out proportionate checks to be able to understand whether Mr K would be able to repay what he was being lent before providing any credit to him.

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.

Halifax has said that it obtained some information on Mr K's income and his expenditure before deciding to lend to him. It says that it cross-referenced this against information it obtained on the funds going into Mr K's bank account and his existing credit commitments which it obtained from credit reference agencies.

On the other hand Mr K says that this overdraft caused him hardship and Halifax shouldn't have lent to him to begin with.

I've carefully thought about what both parties have said.

Mr K's overdraft was an open-ended (running account) agreement (in other words, while Halifax was required to periodically review the facility, there was no fixed end date) where

there was an expectation that he'd repay what he borrowed plus the interest due within a reasonable period of time.

CONC didn't (at the time of the lending decisions) and still doesn't set out a definition of a reasonable period of time. So I think it's important to note that a reasonable period of time will always be dependent on the circumstances of the individual case.

Furthermore, for the credit limit increases there was only a need to carry out such assessments there was only a requirement where the lender was significantly increasing the credit limit.

I've therefore kept this in mind when evaluating whether it was fair and reasonable for Halifax to provide Mr K with an overdraft in October 2017 and then increase the limit in the way it did up to April 2018. It's fair to say that an overdraft limits of £200 to £2,450.00 would not have required particularly large monthly credits in order to clear the full amount that could be owed within a reasonable period of time.

Furthermore, I've seen that for most of this period Mr K was earning more than the amount of the highest overdraft limit he was provided with. I've noted what the investigator has said about the fact that Mr K had returned direct debits in March 2018. However, this was clearly because of discretionary card payments and not because he was struggling to manage his bills or his priority debts. Indeed, most of the spend on Mr K's account was discretionary.

I'm not saying that the fact that Mr K's spending was mainly discretionary means that Halifax didn't have any obligations at all when lending to Mr K. However, I do think that in this instance, at the time of the respective lending decisions, Halifax didn't have reason to believe that providing Mr K with an overdraft and then increasing his limit would create a problem debt for him.

Equally, at this stage, I think that Halifax had reason to conclude given when Mr K's committed non-discretionary income was deducted from his salary, he would have sufficient funds left over to clear his overdraft balance within a reasonable period of time. And it wouldn't have known that Mr K may have gone on to choose not to do so.

As this is the case, I'm satisfied that the checks carried out before Mr K was granted his overdraft and subsequent credit limit increases were reasonable and proportionate. And as these checks showed that Mr K would be able to sustainably repay an overdraft with limits varying between £200 and £2,450.00 within a reasonable period of time, I'm not upholding Mr K's complaint about the lending decisions taken to provide him with an overdraft facility, or to subsequent increase the credit limit.

The position from April 2019 onwards

In addition to carrying out an assessment of affordability before providing Mr K with an overdraft and any limit increases, Halifax was also required to continue reviewing Mr K account usage to see whether any limit remained sustainable for him going forwards.

Halifax will be familiar with all the rules, regulations and industry codes of practice we consider when looking at whether a bank treated a customer fairly and reasonably when applying overdraft charges. So I don't consider it necessary to set all of this out in this decision.

The available information indicates that Mr K's overdraft was reviewed, or at the very least it was scheduled to be reviewed, in April 2019. In my view, by this point, it was evident that

there was a real risk Mr K's overdraft usage could cause him to experience significant adverse consequences.

A look at his account statements show that Mr K never had a credit balance on his account after his overdraft limit was increased for the final time in April 2018. Think that this ought to have been concerning and that Mr K was clearly hardcore borrowing. Furthermore, it appears as though the funds that Mr K received into his account, each month, were lower in period leading up to the review period.

I've seen what Halifax has said about Mr K being self-employed and that it might have been the case that he may have taken time off work. I don't discount the possibility of this being the case in the period leading up to the review. However, I do think that Halifax should have found out whether this was the case. I don't think that it was fair and reasonable to assume this was the case.

In any event, I think that Halifax ought to have had some concerns that irrespective of how it had been accumulated Mr K, had nonetheless accrued a debt that had clearly become problematic for him to clear. And if it was the case that he had taken some time off from working in the leadup, he might well have had been getting to a situation where he was relying on a product which was designed and meant to be for short-term, over a much more extended period.

I note that in its response to my provisional decision Halifax has referred to Mr K's account activity after the period I've said that it should already have taken corrective action on the facility. In particular Mr K was transferring funds to his savings account. I accept that Mr K was transferring funds to his savings account. But it's fair to say that he never had a balance which could have cleared the overdraft in one fell swoop.

Furthermore, it's also fair to say that a significant proportion of the funds found their way back to Mr K's current account and that still didn't see him have a credit balance either. So I don't think that Mr K's savings account balances, which were, in any event, after the period I think that Halifax should have taken action, changes things or means that it was fair and reasonable for Halifax to continue allowing Mr K to use the overdraft in the way that he was.

In reaching my conclusions I've considered what Halifax has said about the letters it sent to Mr K about his overdraft usage. In particular, I've noted what it has said about having sent Mr K ten letters in three years from September 2020. Nonetheless, I still see its argument here as being that it acted fairly and reasonably towards Mr K because it sent him these letters, as it had identified that his overdraft usage may have been problematic.

But because Mr K didn't respond to these communications and notifications it was fair and reasonable to continue allowing him to use the facility in the same way, notwithstanding there was no change in the transactions that were being made, or the way that the overdraft was being used.

In my view, this ignores the fact that there comes a point where a lender cannot continue simply relying on a borrower not wanting to discuss the situation. After all there are many reasons why a consumer might not want to get into discussions about their finances even though they're in a situation where they're struggling, or they may even go further and say they can and will make payment when the reality is they can't.

While Mr K didn't contact Halifax, I don't think it was reasonable for Halifax to conclude that his problematic overdraft usage would correct itself. Indeed, Halifax's response to my provisional decision said that Mr K was still overdraft and the balance it has reported even suggests that he may have been over his agreed limit at the time of the response. In my

view, this further reinforces the view that simply writing to Mr K and hoping that things would change clearly wasn't and isn't enough.

In my provisional decision, I said that I also found Halifax's reliance on CONC 5D.3.2.R (6) to be contradictory and a little confusing. I said this because Halifax was on the one hand arguing that Mr K's spending was discretionary and nothing to do with him being in financial difficulty, yet on the other it was referring to a provision which in effect required a firm not to suspend, reduce or remove an overdraft where doing so would cause a customer to experience financial difficulty.

It was unclear to me how it could be the case that Mr K's overdraft usage wasn't indicative of someone who was in financial difficulty, yet removing a facility which wasn't being used to make priority payments and other committed expenditure (which is in effect Halifax's argument) would have caused him to experience financial difficulty. Halifax has since said that removing the overdraft would have led to adverse credit reference information being recorded against Mr K and this could have resulted in financial difficulty.

I accept that Halifax would have had to report that it had taken corrective action in relation to the overdraft if this was a course of action it had pursued. Nonetheless I don't think this means that it was fair and reasonable not to take action and instead continue charging Mr K. Indeed, if I take adverse credit reporting to be the main difficulty that the regulator was referring to in CONC 5D.3.2.R (6), this would effectively mean that a lender should never remove an overdraft as it would always report the fact that it had done so to credit reference agencies.

Furthermore, Halifax would have had to notify Mr K that it would be taking corrective action before it in fact did so. And if Mr K wasn't experiencing difficulty as Halifax is arguing, he would have been able to respond to any formal notifications and taken steps to reduce and or clear the overdraft. If Mr K couldn't, this would have a further indication that he wasn't in a position to repay what he owed. So I'm not persuaded by Halifax's argument that if it had taken action this may have been in breach of CONC 5D.3.2.R (6).

Overall and having considered Halifax's further points in response to my provisional decision, I remain satisfied that as Halifax didn't react to Mr K's account usage in April 2019 and take steps to impose corrective action in relation to any funds that were being borrowed, it failed to act fairly and reasonably towards him. And I'm therefore upholding this part of Mr K's complaint.

As Halifax failed to act fairly and reasonably towards Mr K from April 2019 and continued allowing him to use the overdraft in the same way, I think that he ended up paying additional interest, fees and charges as a result. So I'm satisfied that Mr K lost out because of what Halifax did wrong and that it should put things right.

In reaching my conclusions, I've also considered whether the lending relationship between Halifax and Mr K might have been unfair to Mr K under section 140A of the Consumer Credit Act 1974.

However, I'm satisfied that what I'm directing Halifax to do results in fair compensation for Mr K given the overall circumstances of his complaint. For the reasons I've explained, I'm also satisfied that, based on what I've seen, no additional award is appropriate in this case.

Fair compensation – what Halifax needs to do to put things right for Mr K

Having thought about everything, I think that it would be fair and reasonable in all the circumstances of Mr K's complaint for Halifax to put things right by:

- Reworking Mr K's current overdraft balance so that all interest, fees and charges applied to it from April 2019 onwards are removed.

AND

- If an outstanding balance remains on the overdraft once these adjustments have been made Halifax should contact Mr K to arrange a suitable repayment plan, Mr K is encouraged to get in contact with and cooperate with Halifax to reach a suitable agreement for this. If it considers it appropriate to record negative information on Mr K's credit file, it should reflect what would have been recorded had it started the process of taking corrective action on the overdraft in April 2019. Halifax can also reduce Mr K's overdraft limit by the amount of any refund if it considers it appropriate to do so, as long as doing so wouldn't leave him over any new limit.

OR

- If the effect of removing all interest, fees and charges results in there no longer being an outstanding balance, then any extra should be treated as overpayments and returned to Mr K along with 8% simple interest† on the overpayments from the date they were made (if they were) until the date of settlement. If no outstanding balance remains after all adjustments have been made, then Halifax should remove any adverse information from Mr K's credit file. Halifax can also reduce Mr K's overdraft limit by the amount of refund if it considers it appropriate to do so.

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

My final decision

For the reasons I've explained above and in my provisional decision of 4 October 2024, I'm upholding Mr K's complaint. Bank of Scotland plc should put things right in the way I've directed to do so above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 25 November 2024.

Jeshen Narayanan
Ombudsman