

Complaint

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

Background

Mr S has also complained about Halifax’s actions when providing him with personal loans. However, we’ve notified Mr S that we’re looking at his personal loan complaint separately. So this decision is only looking at whether Halifax acted fairly and reasonably towards Mr S in relation to his overdrafts.

Halifax provided Mr S with overdrafts on two separate current accounts.

Account A

The overdraft on account A was initially provided with a limit of £700 in January 2019. The limit was increased to £900 later in January 2019, £1,000.00 in February 2019, £1,250.00 in March 2019, £1,400 later in March 2019, £1,500.00 in October 2021 and £2,010.00 in September 2019.

In October 2019, the limit was then reduced to £1000.00 before it was increased to £1,500.00 in January 2020 and then £1,750.00 in March 2020.

Account B

The overdraft on account B was initially provided with a limit of £250 in October 2019, before it was increased to £750 in February 2020.

In March 2024, Mr S complained that he shouldn’t have been given either of these overdrafts. Halifax considered Mr S’ complaint and didn’t uphold it. As far as it was concerned, Mr S applied for his overdrafts and limit increases online and without the presence of its advisors so it treated the applications on the basis that Mr S knew how much he wanted to borrow and what he could afford to repay.

Mr S was dissatisfied at Halifax’s response and referred his complaint to our service. One of our investigators subsequently looked at Mr S’ complaint and thought that Halifax hadn’t acted unfairly or unreasonably either when agreeing to the overdrafts, the limit increases or in the way that it allowed Mr S to use the facilities. So she didn’t think that Mr S’ complaint should be upheld.

Mr S disagreed with the investigator’s assessment and asked for an ombudsman’s decision.

My provisional decision of 21 November 2024

I issued a provisional decision – on 21 November 2024 - setting out why I was intending to partially uphold Mr S’ complaint.

In summary, I was intending to partially uphold Mr S' complaint as while I was satisfied it was fair for Halifax to provide the overdrafts and increase the limit, Halifax didn't react to Mr S' account usage in October 2021 and take steps to impose corrective action in relation to any funds that were being borrowed. In my view, Halifax allowing Mr S to use his overdrafts in the same way after this point, despite him proving himself to clear what he owed within a reasonable period of time, resulted in it failing to act fairly and reasonably towards Mr S.

Mr S' response to my provisional decision

Mr S responded to ask whether any consideration was given to the fact that his account with another entity within Halifax's parent group, had an overdrawn which had been withdrawn and then restored.

Halifax's response to my provisional decision

Halifax responded to say that it agreed to my provisional decision and to settle Mr S' complaint in line with my proposed direction. It nonetheless also provided some further information on what it was it knew about Mr S' circumstances when it agreed to lend.

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 thank the parties for their responses to my provisional decision.

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

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 S'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 S 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.

In my provisional decision, I said that Halifax had initially argued that as Mr S made his applications for overdrafts and limit increases online, it assumed that he had considered how much he wanted to borrow and how much he could repay at the time of each application. It also referred to its checks meeting industry standards as well as the Lending Code.

My observations regarding Halifax's arguments and why I don't think that it carried out reasonable and proportionate checks

Before I get into the specifics of Mr S' complaint I have a couple of general observations to make about Halifax's submissions.

In the first instance, I'm not aware of and neither has Halifax highlighted, any provisions which indicate that a lower standard in relation to assessing affordability applies when an applicant makes an online application for credit, let alone that a firm can and should simply assume that credit is affordable in these circumstances.

I'm also unsure why Halifax has chosen to refer solely to the Lending Code and industry standards in relation to its actions, when the regulator has set out its rules and guidance, which firms are required to follow when carrying out affordability assessments, in the Consumer Credit Sourcebook ("CONC").

In any event, I think that it's important for me to set out that my role here isn't to determine whether Halifax's systems and processes meet industry standards (as it says) or the regulator's rules and guidance.

My role here is to determine whether Halifax acted fairly and reasonably in its dealing with Mr S when providing him with these overdrafts and allowing him to continue using them.

Nonetheless, I am concerned that Halifax has said that it made no attempt to cross check or verify Mr S' declaration of income and that there was absolutely no requirement for it to do so.

I say this this because CONC 5.2A.16G (3) states:

"For the purpose of considering the customer's income under CONC 5.2A.15R, it is not generally sufficient to rely solely on a statement of current income made by the customer without independent evidence (for example, in the form of information supplied by a credit reference agency or documentation of a third party supplied by the third party or by the customer)".

That said, CONC 5.2A.15R (1)(a) allows for CONC 5.2A.16G (3) not to apply when:

"the firm can demonstrate that it is obvious in the circumstances of the particular case that the customer is able to make repayments in accordance with CONC 5.2A.12R, so as to make the actions described in (2) to (4) disproportionate;".

Halifax's arguments prior to my provisional decision suggested that it relied solely on a statement of income from Mr S. This is despite the fact that there doesn't appear to be anything in what it has presented which suggests it was obvious in the particular circumstances of the case that Mr S was able to repay what he could owe after all of the limit increases.

However, its response to my provisional decision it has since said that it would have cross-checked Mr S' declaration of his income against information that it obtained on the amount of funds Mr S received into his main bank account each month. As this is the case, I'm now prepared to accept that it did not simply rely on a statement of Mr S' current income.

Nonetheless as I've not seen the full results of what it was that was considered at the time the overdrafts and limit increases were provided, I'm not satisfied that reasonable and proportionate checks were carried out at the respective times.

Was it fair and reasonable to provide Mr S with the overdrafts and limit increases in the first place?

Mr S' overdrafts are open-ended (running account) agreements (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 requirement to carry out such assessments 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 S with overdrafts in January 2019 and October 2019 and then increase the limits in the way it did up to March 2020. It's fair to say that total overdraft limits of £700 (when Mr S was initially granted an overdraft on Account A) up to a combined £2,500.00 (across the two accounts when the final limit increase on Account A was applied in March 2020) would not have required overly large monthly credits in order to clear the full amount that could be owed within a reasonable period of time.

I've also seen that for most of this period Mr S' accounts were receiving credits which suggested that he was in a position to clear what he could owe within a reasonable period of time. Therefore, at this stage, I'm satisfied that Halifax didn't have reason to believe that providing Mr S with overdrafts and then increasing his limit in the way that it did from January 2019 to March 2020 was creating a problem debt for him.

Mr S has referred to his management of the overdraft he had with another legal entity within Halifax's parent group. I think Halifax is likely to have been aware of the headline balance on the account. However, Mr S is referring to a separate account with a different legal entity with a completely separate banking licence.

I've also seen nothing at all to indicate that Halifax had information at a level granular enough for it to have known about the full circumstances behind the overdraft facility being withdrawn and then reinstated, in the way that Mr S says it was, at the time of these applications.

Furthermore, Mr S would have been aware of this and the fact that he was making further overdraft applications with Halifax. Mr S doesn't appear to have declared any of this to Halifax at the time of his applications either. Given the maximum amount that Mr S could owe on these overdrafts, I wouldn't have expected Halifax to have carried out a detailed review of all of Mr S existing current accounts either.

In any event, I also think it is worth noting that by the time of the limit increases, Halifax was entitled to place more weight on the conduct of Mr S' Halifax accounts, rather than what was happening elsewhere. Given the credits going in and Mr S' expenditure, I also think that, during this time, it was reasonable for Halifax to conclude when Mr S' committed non-discretionary income was deducted from his salary, he would have sufficient funds left over to clear his overdraft balances within a reasonable period of time. And it wouldn't have known that Mr S may have gone on to choose not to do so.

Although, I do think that Halifax ought to have kept a watching brief on how things unfolded as it appears the reason that Mr S' account was in credit was because he took out a loan of £19,000.00 from Halifax in March 2020.

Overall, although I'm not satisfied that the checks carried out before Mr S was granted his overdrafts and subsequent credit limit increases were reasonable and proportionate, nonetheless had such checks been carried out between January 2019 and March 2020 they would have shown that Mr S was in a position to pay his overdrafts and limit increases within a reasonable period of time.

So I'm still not upholding Mr S' complaint about the lending decisions taken to provide him with overdraft facilities, or to subsequent increase the credit limit on them.

The position from October 2021 onwards

In addition to carrying out an assessment of affordability before providing Mr S with an overdraft and any limit increases, Halifax was also required to continue reviewing Mr S 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.

When issuing my provisional decision, I thought that the available information indicated that Mr S' overdrafts were reviewed, or at the very least they were scheduled to be reviewed each year. In its response to my provisional decision, Halifax has subsequently said that while Mr S' statements had review dates, his accounts weren't reviewed at these dates. It apologised for any confusion and said that it hasn't undertaken annual reviews for nearly ten years. It also said that its systems constantly review a customer's account on an ongoing basis.

I don't whether Halifax did review Account B in October 2021 in the way that the copy statements say. Nonetheless, Mr S' statements did state that Halifax would review Account B at this time. And as Halifax in any event says it constantly reviewed a customer's account, I remain satisfied that it Halifax ought to have realised that there was a real risk Mr S' overdraft usage could cause him to experience significant adverse consequences, by October 2021 at the very latest.

A look at his account statements show that Mr S barely had credit balances on his accounts after his limits were increased for the final time in March 2020. I think that this ought to have been concerning and that Mr S was clearly hardcore borrowing. Furthermore, I've referred to Mr S having large credits going into Account A in the period leading up to final limit increases, but the credits were lower in period leading up to October 2021.

Therefore, I think that Halifax ought to have had some concerns that irrespective of how it had been accumulated Mr S, had nonetheless accrued a debt that had clearly become problematic for him to clear. I say this particularly given some of the transactions that were being made on Account B.

I've considered what Halifax has said (and what our investigator appears to have repeated) about the letters it sent to Mr S about his overdraft usage. I see its argument here as being that it acted fairly and reasonably towards Mr S because it sent him these letters, as it had identified that his overdraft usage may have been problematic.

But because Mr S 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 S 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 continued sending letters and charging even when Mr S was starting to have returned payments on Account B. And as it didn't take any action in those circumstances, I'm actually wondering what it would have taken for Halifax to have realised that Mr S wasn't displaying an ability to repay what he owed within a reasonable period of time.

I'm aware that my conclusions in this section of my decision are based on when I think that Halifax ought to have reviewed Account B and what it would have learnt had this been done. And I accept that Halifax wasn't due to review Account A until January 2022. But given what it would have learnt about Mr S by the time of the January 2021 review, what had happened since and what it would have learnt during the course of the October 2021 review of Account B, I don't think Halifax needed to wait until January 2022 to know that the overdraft on Account A had become unsustainable.

Therefore, I remain satisfied that as Halifax didn't react to Mr S' account usage in October 2021 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 S' complaint.

Halifax failing to act fairly and reasonably towards Mr S from October 2021 onwards, leads me to conclude that he ended up paying additional interest, fees and charges as a result. So I'm satisfied that Mr S lost out because of what Halifax did wrong and that it now needs to put things right.

In reaching my conclusions, I've also considered whether the lending relationship between Halifax and Mr S might have been unfair to Mr S 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 S given the overall circumstances of his complaint. For the reasons I've explained, I'm also satisfied that no additional award is appropriate in this case.

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

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

- Reworking Mr S' current overdraft balances so that all interest, fees and charges applied to them from October 2021 onwards are removed.

AND

- If an outstanding balance, or outstanding balances remain on the overdrafts once these adjustments have been made Halifax should contact Mr S to arrange a suitable repayment plan. Mr S 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 S' credit file, it should reflect what would have been recorded had it started the process of taking corrective action on the overdrafts in October 2021. Halifax can also reduce or remove Mr S' overdraft limits 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 limits.

OR

- If the effect of removing all interest, fees and charges results in there no longer being an outstanding balance or outstanding balances, then any extra should be treated as overpayments and returned to Mr S 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 balances remain after all adjustments have been made, then Halifax should remove any adverse information from Mr S' credit file. Halifax can also reduce, or remove, Mr S' overdraft limits 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 S 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 21 November 2024, I'm partially upholding Mr S' complaint. Bank of Scotland plc should put things right in the way I've directed it to do so above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 10 January 2025.

Jeshen Narayanan
Ombudsman