

Complaint

Mr H has complained about the overdraft charges Bank of Scotland plc (“Halifax”) applied to his account.

Mr H is being represented, by the (“representative”), in his complaint.

The representative has said the charges applied to Mr H’s account were unfair as there was a failure to take account of his patterns of reliance on debt and hardcore borrowing. In the representative’s view, there was no proper consideration of the longer-term impact of the borrowing on him.

Background

Mr H applied for an overdraft with a limit of £750 on his current account in June 2016. The limit has remained at this amount in the entire period of time Mr H had it.

In January 2024, Mr H complained saying that he was allowed to continue using the overdraft in a way that was unsustainable and which caused him continued financial difficulty.

Halifax did not uphold Mr H’s complaint. It did not think that it had done anything wrong or treated Mr H unfairly in the period he had his overdraft. Mr H was dissatisfied at Halifax’s response and referred his complaint to our service. When Mr H’s complaint was referred to our service, Halifax told us that we couldn’t consider parts of it as it was made too late.

One of our investigators reviewed what Mr H and Halifax had told us. He reached the conclusion that we could look at the entire period Mr H had his overdraft for but he wasn’t persuaded that Halifax had acted unfairly by allowing Mr H to use his overdraft in a way that was unsustainable or otherwise harmful. So the investigator didn’t recommend that Mr H’s complaint be upheld.

The representative, on Mr H’s behalf, disagreed with the investigator and asked for an ombudsman’s 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.

Basis for my consideration of this complaint

There are time limits for referring a complaint to the Financial Ombudsman Service. Halifax has argued that part of Mr H’s complaint was made too late because he complained more than six years after some of the charges on the overdraft were applied, as well as more than three years after he ought reasonably to have been aware of his cause to make this complaint.

Our investigator explained Mr H's complaint was one alleging that the relationship between him and Halifax was unfair to him as described in s140A of the Consumer Credit Act 1974 ("CCA"). He also explained why this complaint about an allegedly unfair lending relationship had been made in time.

Having carefully considered everything, I've decided not to uphold Mr H's complaint. Given the reasons for this, I'm satisfied that whether Mr H's complaint about some of the specific charges applied was made in time or not has no impact on that outcome.

I'm also in agreement with the investigator that Mr H's complaint should be considered more broadly than just the individual charges or lending decisions. I consider this to be the case as Mr H has not only complained about the circumstances behind the application of the individual charges, but also the fact Halifax's failure to act during the periods he alleges it ought to have seen he was experiencing difficulty caused ongoing hardship.

I'm therefore satisfied that Mr H's complaint is a complaint alleging that the lending relationship between himself and Halifax was unfair to him. I acknowledge the possibility that Halifax may still disagree that we are able to look at the whole of Mr H's complaint, but given the outcome I have reached, I do not consider it necessary to make any further comment or reach any findings on these matters.

In deciding what is fair and reasonable in all the circumstances of Mr H's case, I am required to take relevant law into account. As, for the reasons I've explained above, I'm satisfied that Mr H's complaint can be reasonably interpreted as being about that his lending relationship with Halifax was unfair to him, relevant law in this case includes s140A, s140B and s140C of the CCA.

S140A says that a court may make an order under s140B if it determines that the relationship between the creditor (Halifax) and the debtor (Mr H), arising out of a credit agreement is unfair to the debtor because of one or more of the following, having regard to all matters it thinks relevant:

- any of the terms of the agreement;
- the way in which the creditor has exercised or enforced any of his rights under the agreement;
- any other thing done or not done by or on behalf of the creditor.

Case law shows that a court assesses whether a relationship is unfair at the date of the hearing, or if the credit relationship ended before then, at the date it ended. That assessment has to be performed having regard to the whole history of the relationship. S140B sets out the types of orders a court can make where a credit relationship is found to be unfair – these are wide powers, including reducing the amount owed or requiring a refund, or to do or not do any particular thing.

Given Mr H's complaint, I therefore need to think about whether Halifax's allowing Mr H to use his overdraft in the way that it did, resulted in the lending relationship between Mr H and Halifax being unfair to Mr H, such that it ought to have acted to put right the unfairness – and if so whether it did enough to remove any such unfairness.

Mr H's relationship with Halifax is therefore likely to be unfair if Halifax allowed Mr H to continue using his overdraft in circumstances where it ought reasonably to have realised that the facility had become unsustainable or otherwise harmful for him. And if this was the case, Halifax didn't then remove the unfairness this created somehow.

Did Halifax unfairly allow Mr H to continue using his overdraft in a way that was unsustainable or otherwise harmful for him?

Before I go any further, as this essentially boils down to a complaint that Mr H was unfairly charged as a result of being allowed to continue using his overdraft, I want to be clear in saying that I haven't considered whether the various amounts Halifax charged were fair and reasonable, or proportionate in comparison to the costs of the service provided. Ultimately, how much a bank charges for its services is a commercial decision. And it isn't something for me to get involved with.

That said, while I'm not looking at Halifax's charging structure per se, it won't have acted fairly and reasonably towards Mr H if it applied this interest, fees and charges to Mr H's account in circumstances where it was aware, or it ought fairly and reasonably to have been aware Mr H was experiencing financial difficulty. So I've considered whether there was an instance, or there were instances, where Halifax didn't treat Mr H fairly and reasonably.

In other words, I've considered whether there were periods where Halifax continued charging Mr H even though it ought to have instead stepped in and taken corrective measures on the overdraft as it knew, or it ought to have realised, that he was in financial difficulty.

Having looked through Mr H's account statements throughout the period concerned, I can't see that Halifax ought reasonably to have realised that Mr H was experiencing financial difficulty to the extent that it would have been fair and reasonable for it to have unilaterally taken corrective measures in relation to Mr H's overdraft. I'll explain why I think this is the case in a little more detail.

I accept that Mr H used his overdraft regularly. The representative's arguments appear to suggest that this in itself means that Mr H was experiencing financial difficulty and therefore the complaint should be upheld. But I think that it is far too simplistic to say that it automatically follows that a customer was in financial difficulty simply because they were using a financial product that they were entitled to use.

I accept that the rules, guidance and industry codes of practice all suggest that prolonged and repeated overdraft usage can sometimes be an indication of financial difficulty. However, this is not the same as saying that prolonged and repeated overdraft usage by a customer will always mean that they are, as a matter of fact, in financial difficulty.

So I think it's important to look at overall circumstances of a customer's overdraft usage as part of considering their overall financial position. And, in this case, I've considered Mr H's incomings and outgoings as well as any overdrawn balances and thought about whether it was possible for him to have stopped using his overdraft, based on this.

I think that if Mr H was locked into paying charges in circumstances where there was no reasonable prospect of him exiting his overdraft then his facility would have been unsustainable for him. So I've carefully considered whether this was the case.

The first thing for me to say is that Mr H's overdraft limit was low in comparison to his monthly income. Therefore, there was limited scope for this overdraft in itself to have caused Mr H financial difficulty. I'm also satisfied that Mr H's case isn't one where the borrower was in and overdraft with no hope of being able to exit it. On the contrary, Mr H's income being higher than his limit means that Mr H always exited the overdraft each month.

Although I do accept that there were plenty of times where Mr H met the criteria of someone who displayed a pattern of repeat use of their overdraft. For the avoidance of doubt, I accept

that there is a section of CONC (CONC 5D) which relates to this. However, even if Halifax didn't meet all of the requirements set out in CONC 5D, I wish to make it clear that I don't think that simply sending letters will mean that a lender met all of its obligations, I'd still need to consider whether Mr H lost out as a result of any potential failing.

I've also therefore considered whether Mr H's use of his overdraft (and Halifax continuing to allow him to use it) was causing him to incur high cumulative charges that were harmful to him. Having considered matters, I'm satisfied that this isn't the case in this instance. I'll now proceed to explain why.

To start with, while I'm not seeking to make retrospective value judgements over Mr H expenditure, there are significant amounts of non-committed, non-contractual and discretionary transactions going from Mr H's account. Indeed, while I am concerned at the fact that Mr H was making payments to a debt collection agency, there is a significant amount of discretionary and non-committed expenditure going out of the account too.

Equally, I can't see that he was borrowing from unsustainable sources in order to meet his overdraft charges or that his borrowing was increasing exponentially. Mr H did have a limited number of other credit commitments but this does not mean that he was reliant on credit to meet his essential expenditure. And it isn't immediately obvious to me that Mr H was borrowing from unsustainable sources – such as payday type lenders either.

I accept neither of these things in themselves (or when taken together) mean that Mr H wasn't experiencing difficulty. But I don't agree that Mr H was reliant on credit. He was quite comfortably able to make any essential commitments without using his overdraft – particularly given the low limit on the facility. However, he was choosing to use his overdraft to make discretionary transactions and in periods where he had increased funds his discretionary expenditure increased.

Given the repeat usage letters Mr H is likely to have been sent by Halifax, I think that he ought to have realised that how much he was paying for this. So I simply don't agree that Mr H was using his overdraft purely for essential spending, or because he had a reliance on credit to get by, as the representative says. Equally, as Mr H's overdraft limit was low and as a result the charges were also low, I can't reasonably say that they were a cause of him continuing to use the facility either.

As the representative has also referred to CONC 5D, I also wish to make it clear that it isn't simply the case that a customer should never be allowed to make discretionary payments from an overdraft. Indeed, its argument appears to be suggesting that a corrective action should be taken against a customer every time they meet the criteria for being sent a letter, irrespective of the circumstances. However, the rules and guidance aren't as blunt a tool as this. The position is far more nuanced.

The representative's interpretation runs contrary to the purpose of the rules and guidance which is to ensure that customers are protected from high cumulative charges where they are likely to cause harm. The rules and guidance aren't to prevent the use of overdraft in all circumstances where a repeat use letter has been sent in the way that the representative's argument suggests.

Even more importantly the representative's argument is at odds with the concept of proportionality – a firm should take action proportionate to the circumstances. This concept of proportionality runs right through CONC 5 as a whole. Given the amount of funds that Mr H was in receipt of, I'm not persuaded that Halifax ought reasonably to have realised that Mr H's overdraft usage was causing him harm.

Overall and having considered everything, I don't think that it was unreasonable for Halifax to have proceeded adding the charges that it did. This is particularly bearing in mind that any issues Mr H may have been having wasn't as a result of this overdraft. I think that Halifax taking action in the way that it would have done, had it acted in way that the representative is suggesting it should have, would have been disproportionate.

I say this because I don't think that it would have been proportionate for Halifax to demand that Mr H immediately repay his overdraft, in circumstances where he was entering into a significant credit balance each month and there was a realistic prospect of Mr H clearing what he owed in a reasonable period of time.

Indeed, I think that if Halifax had suggested that it would take corrective action, Mr H would have argued that it would be unfair, bearing in mind the consequences of such action, in circumstances where he was using the overdraft in line with the terms and conditions and it appears as though he could afford to use it in the way he was. I'm firmly of the view that taking corrective action in this case is likely to have led to far greater adverse consequences for Mr H, given his overall position.

Therefore, I don't find that the relationship between Mr H and Halifax was unfair to Mr H. I've not been persuaded that Halifax created unfairness in its relationship with Mr H by allowing him to use his overdraft in the way that he did. Based on what I've seen, I don't find Halifax treated Mr H unfairly in any other way either.

So overall and having considered everything, while I can understand Mr H's sentiments and appreciate why he is unhappy, I'm nonetheless not upholding this complaint. I appreciate this will be very disappointing for Mr H. But I hope he'll understand the reasons for my decision and that he'll at least feel his concerns have been listened to.

My final decision

For the reasons I've explained, I'm not upholding Mr H's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 6 May 2025.

Jeshen Narayanan
Ombudsman