

Complaint

Miss C has complained about the overdraft charges HSBC UK Bank Plc (trading as “First Direct”) applied to her current account. She’s effectively said the charges applied to her account were unfair as they were applied when she was in financial difficulty.

Background

Miss C originally applied for an overdraft in March 2013. Miss C’s application was accepted and she was provided that has since remained on the account. In December 2024, Miss C complained saying that First Direct applied overdraft charges to her account during period where she was unable to afford the charges. Therefore, they were applied while she was experiencing financial difficulty

First Direct didn’t uphold Miss C’s complaint. It did not think that it had done anything wrong or treated Miss C unfairly. Miss C remained dissatisfied after First Direct’s response and referred her complaint to our service. When Miss C’s complaint was referred to our service, First Direct told us that we couldn’t consider part of it as it was made too late.

One of our investigators reviewed what Miss C and First Direct had told us. He reached the conclusion that we could look at the entire period Miss C had her overdraft for. However, he wasn’t persuaded that First Direct had acted unfairly by allowing Miss C to use her overdraft in a way that was unsustainable or otherwise harmful. So the investigator didn’t think that Miss C’s complaint should be upheld.

Miss C 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. First Direct has argued that Miss C’s complaint was made too late because she complained more than six years after some of the charges on the overdraft were applied, as well as more than three years after she ought reasonably to have been aware of her cause to make this complaint.

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

Having considered matters, I’m satisfied that it is reasonable to interpret Miss C’s complaint as being one alleging that the lending relationship between Miss C and First Direct was unfair to Miss C as described in s140A of the Consumer Credit Act 1974 (“CCA”). I consider this to be the case as Miss C has not only complained about the circumstances behind the

application of the individual charges, but also the fact First Direct's failure to act during the periods she alleges it ought to have seen she was experiencing difficulty caused ongoing hardship.

I'm therefore satisfied that Miss C's can therefore reasonably be interpreted as a complaint that the lending relationship between herself and First Direct was unfair to her. I acknowledge the possibility that First Direct may still disagree that we are able to look at the whole of Miss C'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 Miss C's case, I am required to take relevant law into account. As, for the reasons I've explained above, I'm satisfied that Miss C's complaint can be reasonably interpreted as being about that her lending relationship with First Direct was unfair to her, 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 (First Direct) and the debtor (Miss C), 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 Miss C's complaint, I therefore need to think about whether First Direct's allowing Miss C to use her overdraft in the way that it did, resulted in the lending relationship between Miss C and First Direct being unfair to Miss C, such that it ought to have acted to put right the unfairness – and if so whether it did enough to remove any such unfairness.

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

Did First Direct unfairly allow Miss C to continue using her arranged overdraft in a way that was unsustainable or otherwise harmful for her?

Before I go any further, as this essentially boils down to a complaint that Miss C was unfairly charged as a result of being allowed to continue using her overdraft, I want to be clear in saying that I haven't considered whether the various amounts First Direct 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 First Direct's charging structure per se, it won't have acted fairly and reasonably towards Miss C if it applied this interest, fees and charges to Miss C's

account in circumstances where it was aware, or it ought fairly and reasonably to have been aware that there was a clear reason it would have been unfair to do so. I've therefore considered whether such a reason existed which would have resulted in First Direct charging Miss C unfairly.

Having looked through the account statements First Direct has provided from 2018 onwards, it's clear that Miss C has been using her overdraft. I'm therefore satisfied that there can be no dispute that Miss C was using her overdraft over the period of time she's had it. Miss C's arguments appear to suggest that this in itself means that her complaint should be upheld.

However, Miss C's overdraft was arranged under an open-ended agreement credit agreement. This means that Miss C had an agreement to use her overdraft and as a result she was entitled to use it without having to reapply to do so. Therefore, Miss C using her overdraft in the period that she had it doesn't automatically mean that her complaint should be upheld.

That said, I do 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, it isn't always the case that prolonged and repeated overdraft usage by a customer will always mean that they are, as a matter of fact, in financial difficulty. Indeed, if that were automatically the case, there would be an outright prohibition on revolving credit accounts being open ended, rather than there being a requirement for a lender to review how the facility is being used.

It's also worth saying that one such instance where a lender would be expected to act is where it was clear that the customer was experiencing financial difficulty. Nonetheless, it would need to be objectively clear to the lender, rather than a matter open to interpretation, that the overdraft charges were clearly making things worse and they were harmful as a result.

I've therefore considered whether First Direct acted fairly and reasonably towards Miss C, in this light. In other words, I've considered whether there were periods where First Direct continued charging Miss C 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 she was in financial difficulty.

Having looked through Miss C's account statements throughout the period I have them for, I can't see that First Direct ought reasonably to have realised that Miss C 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 Miss C's overdraft.

I'll explain why I think this is the case in a little more detail.

To begin with, I can't see Miss C notified First Direct that she was struggling and that these charges were causing her difficulty. If she had First Direct would have known that the charges were causing harm and I would have expected it to act. Nonetheless, even though I can't see that Miss C directly told First Direct that she couldn't afford to pay these charges, I've considered whether her account activity ought to have alerted it to this being the case.

In considering this matter, I'm mindful that in order to help with determining whether it is objectively the case that a customer was experiencing financial hardship, the regulator has set out guidance on what it considers to be potential indicators of financial difficulty. The '*Guidance on financial difficulties*' states that things such as a customer failing to meet consecutive payments to credit, being unable to meet their commitments out of their disposable income, having adverse credit or other insolvency information recorded against them, or being in a debt arrangement should be considered as potential signs of a customer

being in financial difficulty.

However, having looked at Miss C's account transactions, I've seen no indication that any of the potential signs of financial difficulty contained in the guidance, were obviously present in her circumstances during the entire period I've looked at. I also can't see anything in Miss C's account transactions which suggest that First Direct should have known that she was borrowing from payday or other high-cost lenders, which although not contained in the regulator's guidance, is generally accepted to be an indication that a borrower could be struggling too.

I've also looked at Miss C's incomings and outgoings as well as her overdrawn balances and determined whether it was possible for her to have stopped using her overdraft, based on this. I think that if Miss C was locked into paying charges in circumstances where there was no reasonable prospect of her exiting her overdraft then her facility would have been unsustainable for her, even where the indicators of financial difficulties I've set out above weren't clearly present in her circumstances, when looking at the account transactions.

In reviewing this matter, I've noted that throughout the period of time I have statements for, Miss C's account was in receipt of credits that were sufficient to clear the overdraft within a reasonable period of time. Indeed, I'm satisfied that Miss C's case isn't one where a borrower was marooned in their overdrawn with no reasonable prospect of exiting it. The fact that Miss C was receiving regular credits into her account is another reason why her overdraft doesn't appear to have been obviously unsustainable for her.

Furthermore, while I'm not seeking to make retrospective value judgements over Miss C expenditure, there are significant amounts of non-committed, non-contractual and discretionary transactions going from Miss C's account.

I accept that Miss C may well have had other credit commitments at this time. But this in itself does not mean that she was reliant on credit to meet her essential expenditure. And it isn't immediately obvious to me that Miss C was borrowing from unsustainable sources – such as payday type lenders – in order to pay for the charges, or meet other committed expenditure either.

Of course, I accept neither of these things in themselves (or when taken together) mean that Miss C wasn't experiencing difficulty. But I don't think that Miss C's account conduct and overdraft usage obviously show that she was. And bearing in mind I'm satisfied that it is more likely than not that Miss C did not directly tell First Direct that she was experiencing financial difficulty, that's what I'd need to be persuaded of in order to uphold her complaint.

Looking from the outside, it looks like Miss C had the funds to be able to reduce the amount that she used her overdraft. Therefore, I don't think that Miss C was obviously locked into using her overdraft and paying the charges for doing so. In my view, there was a reasonable prospect of Miss C exiting her overdraft. And First Direct was reasonably entitled to believe that Miss C was choosing to use her overdraft in the way that she was, rather than a case that her financial circumstances meant that she had no choice other than to do so.

In reaching my conclusions, I've noted that Miss C has said she had unarranged charges prior to 2018 and that she's provided text messages to show this. I accept that the text messages Miss C has provided show that she did incur unarranged overdraft charges. In the first instance, it's worth me saying that prior to 2020 overlimit fees (which the charges Miss C is referring to are a type of) weren't considered to be charges for credit. They were effectively a fee for providing a service which banks were able to charge as and when they occurred.

The text messages Miss C has provided show that she incurred a number of these fees and there is no dispute about this. However, as I don't have copies of the statements from that time I don't know the types of transactions that triggered Miss C going over her agreed overdraft limit.

Nonetheless, it's clear that Miss C was attempting to make payments from her account when she didn't have the funds to do so. The alternative to allowing these payments was returning the payments which would also have returned payment or unpaid item fees. Furthermore, given Miss C continued to attempt making these payments when having insufficient funds in her account, it's difficult for me to accept that she wouldn't have in any event presented these same payments if she didn't have an overdraft in the first place.

Given arranged overdraft fees were considerably cheaper than unarranged overdraft fees, it seems to me that Miss C would have incurred even more fees, had First Direct taken action to remove her arranged overdraft. As this is the case, while I acknowledge that Miss C has provided evidence of incurring unarranged overdraft charges prior to 2018, I don't think that this in itself means that First Direct acted unfairly in continuing to provide her with an arranged overdraft from then onwards.

Bearing all of this in mind, I've not been persuaded that First Direct created unfairness in its relationship with Miss C by allowing her to use her overdraft in the way that she. Based on what I've seen, I don't find First Direct treated Miss C unfairly in any other way either.

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

My final decision

For the reasons I've explained, I'm not upholding Miss C's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss C to accept or reject my decision before 6 October 2025.

Jeshen Narayanan
Ombudsman