

Complaint

Mr and Mrs H have complained about the overdraft charges Bank of Scotland Plc (trading as "Halifax") applied to their current account.

Mr and Mrs H are being represented, by the ("representative"), in their complaint.

The representative has said the charges applied to Mr and Mrs H's account were unfair as there was a failure to take account of their 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 them.

Background

Mr and Mrs H have had a current account with Halifax for a number of years. They've had an arranged overdraft on it since at least 2002. The limit on it has been increased and decreased on it a number of times. At its highest, Mr and Mrs H limit was £5,050.00 and at its lowest it was £2,000.00. At the time of Mr and Mrs H's complaint in August 2024, the limit on the overdraft was £3,000.00.

Mr and Mrs H complained saying that they were allowed to continue using the overdraft in a way that was unsustainable and which caused them continued financial difficulty.

Halifax did not uphold Mr and Mrs H's complaint. It did not think that it had done anything wrong or treated Mr and Mrs H unfairly in the period they used their overdraft. Mr and Mrs H was dissatisfied at Halifax's response and referred their complaint to our service.

When Mr and Mrs H's complaint was referred to our service, Halifax told us that we couldn't consider part of it as it was made too late. One of our investigators subsequently reviewed what Mr and Mrs H and Halifax had told us. He reached the conclusion that we could look at the entire period Mr and Mrs H had their overdraft for, but he was not of the opinion that Mr and Mrs H had lost out as a result of the way that Halifax had allowed them to use their overdraft. So the investigator didn't uphold Mr and Mrs H's complaint.

The representative, on Mr and Mrs 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 and Mrs H's complaint was made too late because they complained more than six years after some of the charges on the overdraft were applied, as

well as more than three years after they ought reasonably to have been aware of their cause to make this complaint.

Our investigator explained why Mr and Mrs H's complaint was one alleging that the relationship between them and Halifax was unfair to them as described in s140A of the Consumer Credit Act 1974 ("CCA"). She 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 and Mrs H's complaint. Given the reasons for this, I'm satisfied that whether Mr and Mrs 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 and Mrs 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 and Mrs H have 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 they allege it ought to have seen they were experiencing difficulty caused ongoing hardship.

I'm therefore satisfied that Mr and Mrs H's complaint is a complaint that the lending relationship between themselves and Halifax was unfair to them. I acknowledge that Halifax may still disagree that we are able to look at all of Mr and Mrs 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 and Mrs 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 and Mrs H's complaint can be reasonably interpreted as being about that their lending relationship with Halifax was unfair to them, 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 and Mrs 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 their 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 and Mrs H's complaint, I therefore need to think about whether Halifax's actions in allowing Mr and Mrs H to use their overdraft in the way that it did, resulted in the lending relationship between Mr and Mrs H and Halifax being unfair to Mr and Mrs 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 and Mrs H's relationship with Halifax is therefore likely to be unfair if Halifax allowed Mr and Mrs H to continue using their overdraft in circumstances where it ought reasonably to have realised that the facility had become unsustainable or otherwise harmful for them. And if this was the case, Halifax didn't then somehow remove the unfairness this created.

Did Halifax unfairly allow Mr and Mrs H to continue using their overdraft in a way that was unsustainable or otherwise harmful for them?

Before I go any further, as this essentially boils down to a complaint that Mr and Mrs H were unfairly charged as a result of being allowed to continue using their 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 and Mrs H if it applied this interest, fees and charges to Mr and Mrs H's account in circumstances where it was aware, or it ought fairly and reasonably to have been aware Mr and Mrs H were experiencing financial difficulty. So I've considered whether there was an instance, or there were instances, where Halifax didn't treat Mr and Mrs H fairly and reasonably.

In other words, I've considered whether there were periods where Halifax continued charging Mr and Mrs 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 they were in financial difficulty.

Having looked through the account statements I've been provided with, I can't see that Halifax ought reasonably to have realised that Mr and Mrs H were 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 the overdraft facility. I'll explain why I think this is the case in a little more detail.

The representative's arguments appear to suggest that the mere fact Mr and Mrs H were able to use their overdraft for the period that they did means that they were experiencing financial difficulty and therefore the complaint should be upheld. I'd also add that it has insisted this shouldn't have been allowed to happen because of CONC 5D. 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 and Mrs H's incomings and outgoings as well as any overdrawn balances and thought about whether it was possible for them to have stopped using their overdraft, based on this. I think that if Mr and Mrs H were locked into paying charges in circumstances where there was no reasonable prospect of them exiting their overdraft then their facility would have been unsustainable for them. So I've carefully considered whether this was the case.

The first thing for me to say is that Mr and Mrs H's account was in receipt of credits that were sufficient to clear the overdraft within a reasonable period of time. For example, as far back

as August 2013, Mr and Mrs H received close to £100,000.00 into their account. I appreciate that Mr and Mrs H have said that these funds were from a house sale. But it is difficult for me to accept that this meant that they had to use their overdraft and couldn't have removed it at this stage.

Furthermore, the account is regularly credited with funds that run into thousands and could have been used to clear the overdraft right up to the point that Mr and Mrs H made their complaint. I accept the possibility that Mr and Mrs H may have used these funds for other things, it was their choice to do this.

I accept that there were periods where Mr and Mrs H used their overdraft more often. For the avoidance of doubt, I accept that there is a section of CONC (CONC 5D) which relates to this. I've therefore considered whether Mr and Mrs H's use of their overdraft (and Halifax continuing to allow them to use it) was causing them to incur high cumulative charges, which they had absolutely no way of avoiding and which were harmful to them. And having considered matters, I'm satisfied that this isn't the case.

To explain, while I'm not seeking to make retrospective value judgements over Mr and Mrs H expenditure, there are significant amounts of non-committed, non-contractual and discretionary transactions going from Mr and Mrs H's account. Given the overdraft charges also appear on the statements, I think that Mr and Mrs H ought to have realised that how much they were paying for using their account in the way that they were.

So I simply don't agree that Mr and Mrs H was using their overdraft purely for essential spending, or because they had a reliance on credit to get by, as Mr and Ms H and the representative say. As I've already explained, the total amount of the credits Mr and Mrs H received into their account were enough to clear the balance, without the further discretionary spending. It would also have been the case if Mr and Mrs H left the credit they received in this account rather than transferred them out to others.

It's also fair to say that these credits suggested they could have cleared their overdraft within a reasonable period of time had they wished to do so. More importantly, I can't see that they were borrowing from unsustainable sources in order to meet the overdraft charges or that their borrowing was increasing exponentially.

I say all of this while mindful that I've seen no indication that any of the potential signs of financial difficulty contained in the regulator's guidance on financial difficulty (set out in CONC 1.3) – such as Mr and Mrs H failing to meet consecutive payments to credit, or Mr and Mrs H failing to meet their commitments out of their disposable income – were present in Mr and Mrs H's circumstances. I can't see that Mr and Mrs H were regularly borrowing from unsustainable sources either.

Given the representative's reference 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 and Mrs H's account was in receipt of, I'm not persuaded that Halifax ought reasonably to have realised that Mr and Mrs H's overdraft usage was causing them 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 the consequences of Halifax taking corrective 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 and Mrs H immediately repay their overdraft, in circumstances where there was a realistic prospect of Mr and Mrs H clearing what they owed in a reasonable period of time. I also think that Mr and Mrs H would more likely than not have considered that Halifax imposing a unilateral solution in these circumstances to be disproportionate given such action would have been reported to credit reference agencies and the effect that this would have had on their ability to borrow.

I've also seen what the representative has said regarding CONC 5D.3.2R (3). However, CONC 5D.3.2 R (1) makes it clear that CONC 5D.3.2R only applies to customers who have a pattern of repeat use *AND* there are signs of the customer being in actual or potential difficulty.

In the first instance, it's worth noting that there isn't any suggestion that Mr and Mrs H contacted Halifax to explain that they were experiencing difficulty, or that they needed help in repaying their overdraft, prior to this complaint. Furthermore, given I've not seen anything in Mr and Mrs H's statements, indicating that there were any of the signs highlighted in CONC 1.3, I'm satisfied that this isn't a case where there were signs of Mr and Mrs H potentially, or actually being in financial difficulty.

As this is the case, I'm satisfied that the applicable section of CONC 5D, to Mr and Mrs H's circumstances, is CONC 5D.3.1, rather than CONC 5D.3.2. CONC 5D.3.1 permits a firm to employ more subtle techniques such as sending a customer a further letter. As this is the case, I don't think that Halifax was under an obligation to call Mr and Mrs H in the way that the representative has suggested.

For the reasons I've explained, in this case, I'm satisfied that Halifax had no reason to believe that Mr and Mrs H were experiencing difficulty. And in circumstances, where there appears to be no dispute that Mr and Mrs H did not expressly reach out to Halifax and ask it for help to repay their balance, I think that telling them what they were paying to use their overdraft in the way they were was reasonable.

Therefore, I'm not persuaded that the relationship between Mr and Mrs H and Halifax was unfair to Mr and Mrs H. I've not been persuaded that Halifax created unfairness in its relationship with Mr and Mrs H by allowing them to use their overdraft in the way that they did and based on what I've seen, I don't think that Halifax treated Mr and Mrs H unfairly in any other way either.

In reaching my conclusions, I've seen that Mr and Mrs H have said that they have been told they have to pay further tax and that Mr H has become unemployed since this complaint was made. I'm sorry that Mr and Mrs H now find themselves in a difficult position. However, I can only uphold a complaint where a respondent firm failed to act fairly and reasonably and I don't think that this was the case here. Although should a balance remain on the overdraft –

the most recent statements I've seen showed a credit balance on the account – I would remind Halifax of its obligation to exercise forbearance and due consideration should it be the case that Mr and Mrs H are experiencing difficulty.

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

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs H to accept or reject my decision before 3 November 2025.

Jeshen Narayanan
Ombudsman