

## **complaint**

Mr C has complained that NewDay Ltd (trading as “Aqua”card) irresponsibly provided him with two credit cards in 2014 and 2018.

## **background**

I attach my provisional decision of 29 July 2019, which forms part of this final decision. In my provisional decision, I set out why I was intending to uphold Mr C’s complaint and invited both parties to make any final comments ahead of my final decision.

Following this, Aqua confirmed having received my decision. But it didn’t provide anything for me to think about or ask for any additional time to do so.

Mr C also confirmed receiving my provisional decision. He said that he accepted my provisional decision and he didn’t have anything further for me to think about.

## **my findings**

I have reconsidered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

I set out in some detail why I intended to uphold Mr C’s complaint in my provisional decision. And, in the absence of anything further from either party, I see no reason to change my conclusions.

So having carefully considered everything, I’m upholding Mr C’s complaint.

## **fair compensation – what Aqua needs to do to put things right for Mr C.**

Having carefully considered matters, I think that it would be fair and reasonable in all the circumstances of Mr C’s complaint for Aqua to put things right in the following way:

- refund all interest, fees and charges incurred as a result of the credit limit on the first credit card being increased from £250 to £750. Aqua sold the outstanding balance on this account to a third party debt purchaser. So it either needs to buy the account back from the third party and make the necessary adjustments, pay an amount to the third party in order for it to make the necessary adjustments, or pay Mr C an amount equivalent to the reduction needed on the outstanding balance.
- write off the outstanding balance on the second account provided in May 2018.

## **my final decision**

For the reasons set out above and in my provisional decision of 29 July 2019, I’m upholding Mr C’s complaint. NewDay Ltd should put things right in the way set out above.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr C to accept or reject my decision before 14 September 2019.

Jeshen Narayanan  
**ombudsman**

## COPY OF PROVISIONAL DECISION

### complaint

Mr C has complained that NewDay Ltd (trading as "Aqua"card) irresponsibly provided him with two credit cards in 2014 and 2018.

### background

Aqua provided Mr C with a credit card in April 2014. He was given an initial credit limit of £250. The credit limit was increased from £250 to £750 four months later in August 2014. Mr C ended up defaulting on the account and it was sold to a third-party debt purchaser in January 2017.

Mr C was then provided with a second Aqua card in May 2018. The initial credit limit provided on this card was £900. As I understand it, Aqua was in the process of defaulting this account when Mr C complained that Aqua irresponsibly lent to him.

In its final response, Aqua told Mr C that it didn't think it did anything wrong in relation to Mr C's first account. But it accepted that as it defaulted Mr C's first account and sold the outstanding balance to a third party debt purchaser, it shouldn't have provided Mr C with a second card. It said it would remove all the interest and charges applied to the account and also credit the account with a further £70 in order to put things right for Mr C. Mr C remained dissatisfied at Aqua's offer and referred his complaint to us.

One of our adjudicators looked into Mr C's complaint. She thought that Aqua should also remove any adverse information recorded on Mr C's credit file – as a result of the second account – as well as adjusting the balance in the way it said it would in its final response. She didn't say that Aqua had to do anything in relation to the first card. Aqua accepted our adjudicator's view but Mr C didn't. As the parties weren't able to agree on a resolution, the complaint was passed to an ombudsman for review.

### my provisional findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. We've set out our approach to unaffordable/irresponsible lending complaints on our website and I've considered this while provisionally deciding Mr C's complaint.

Having carefully considered everything provided, I think that there are three overarching questions that I need to consider in order to provisionally decide what's fair and reasonable in all the circumstances of Mr C's complaint. These questions are:

- Did Aqua carry out reasonable and proportionate checks to satisfy itself that Mr C would be able to repay what he borrowed in a sustainable way at the time of each lending decision (in other words - when initially providing the card and then increasing the credit limit to £750) on the first card?
  - If not, what would reasonable and proportionate checks more likely than not have shown?
- Is what Aqua has offered to do to put things right for Mr C as a result of irresponsibly providing a second card fair and reasonable in all the circumstances of the case?
- Did Aqua act unfairly or unreasonably towards Mr C in some other way?

I'll consider each of these questions in turn.

Did Aqua carry out reasonable and proportionate checks to satisfy itself that Mr C would be able to repay what he borrowed in a sustainable way at the time of each lending decision on the first card?

Aqua gave Mr C his first Credit Card (as well as his second one) when it was regulated by the Financial Conduct Authority ("FCA"). And the relevant regulatory rules in place at the time were set out in the Consumer Credit Sourcebook ("CONC") section of the FCA Handbook of rules and guidance.

Section 5.2.1(2) of CONC set out what a lender needed to do before agreeing to give a consumer borrowing of this type. And it says a firm had to consider *"the potential for the commitments under the regulated credit agreement to adversely impact the customer's financial situation"* as well as *"the ability of the customer to make repayments as they fall due over the life of the regulated credit agreement, or for such an agreement which is an open-end agreement (like Mr C's credit card), to make payments within a reasonable period."*

CONC 5.2 also includes some guidance on the sorts of things a lender needs to bear in mind when considering its obligations under CONC 5.2.1. Section 5.2.4(2) says *"a firm should consider what is appropriate in any particular circumstances dependent on, for example, the type and amount of credit being sought and the potential risks to the customer. The risk of credit not being sustainable directly relates to the amount of credit granted and the total charge for credit relative to the customer's financial situation."*

And CONC 5.3 contains further guidance on what a lender should bear in mind when thinking about affordability. CONC 5.3.1(1) says *"In making the creditworthiness assessment or the assessment required by CONC 5.2.2R (1), a firm should take into account more than assessing the customer's ability to repay the credit."*

CONC 5.3.1(2) then says *"The creditworthiness assessment and the assessment required by CONC 5.2.2R (1) should include the firm taking reasonable steps to assess the customer's ability to meet repayments under a regulated credit agreement in a sustainable manner without the customer incurring financial difficulties or experiencing significant adverse consequences."*

In practice all of this meant that a lender had to take proportionate steps to ensure a consumer would've been able to repay what they were borrowing in a sustainable manner without it adversely impacting on their financial situation. Put simply the lender had to gather enough information so that it could make an informed decision on the lending.

Although the guidance didn't set out compulsory checks it did list a number of things a lender could take into account before agreeing to lend. The key thing was that it required a lender's checks to be proportionate. And any checks had to take into account a number of different things, such as how much was being lent, the financial means of the borrower and when what was being borrowed was due to be repaid.

I've kept all of this in mind when thinking about whether Aqua did what it needed to before agreeing to Mr C's credit card and each time it increased his credit limit.

*why I don't think that it was unfair for Aqua to have provided Mr C with a credit card with an initial limit of £250*

Aqua says that it asked Mr C to confirm his annual income as well as the income for his household. It also says that it carried out a credit check which indicated that he wasn't in arrears on any accounts and defaults. It says that based on the information it had it was reasonable for it to have provided Mr C with an initial credit limit of £250.

Having carefully thought about everything provided, I do think Aqua's checks before providing the initial credit limit of £250 were reasonable and proportionate taking all the circumstances into account.

Mr C was given a credit facility where there was an expectation that he'd repay what he borrowed plus the interest due within a reasonable period of time. CONC doesn't set out what a reasonable

period of time is. 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.

That said, I think that Mr C's self-declared income together with there not being anything too concerning on his credit file leads me to think that it was reasonable and proportionate for Aqua to conclude Mr C would be able to repay £250 within a reasonable period of time. So I don't think that Aqua did anything wrong when it initially provided Mr C with a credit card that had a £250 limit.

*why I think it was unfair for Aqua to increase the credit limit on Mr C's card in August 2014*

Aqua increased Mr C's credit limit to £750 in August 2014. In my view, this was a significant increase and Aqua needed to ensure Mr C could sustainably repay a balance of £750 within a reasonable period of time. Aqua's correspondence appears to suggest that its decision to increase the credit limit on Mr C's account was based on his account management. I have significant concerns with both the approach in principle and the result produced in this case.

Firstly, it is not clear to me why a borrower who is able to successfully manage a given credit limit can then automatically be deemed, without further checks, to be able to successfully manage a higher limit. It seems to me that this logic would likely lead to continually increasing limits, unless or until problems arise.

In any event, even if I were to leave my concerns about this approach to one side, I don't think that Aqua could reasonably have believed that Mr C was managing his account well when his credit limit was £250.

I say this because Aqua would have seen that Mr C had incurred over limit fees, on more than one occasion, when the limit on his account was £250. In my view, this suggested that Mr C may have been struggling financially and, at the very least, it was a clear indication that he wasn't managing his account well. Aqua will also be aware that it was required to monitor Mr C's repayment record and offering assistance where it appeared that he might have been experiencing financial difficulty.

I don't think that trebling Mr C's credit limit (therefore offering more credit at an APR of 44.9%) when he was already struggling to keep within his existing limit was offering assistance. In my view, Aqua was adding to any potential financial difficulty rather than offering assistance.

I've seen what Aqua has said about it sending Mr C a letter offering him the opportunity to opt out of the limit increase. But I don't see how this makes a difference as to whether it was fair to offer the increase in the first place. It seems to me that Aqua is trying to outsource its responsibility to assess whether Mr C was able to sustainably make the payments to an increased credit limit onto Mr C. And I don't find this argument persuasive.

So having carefully thought about everything, I'm intending to say it was unfair for Aqua to increase Mr C's credit limit in August 2014. As Mr C would have paid additional interest and charges as a result of Aqua unfairly increasing his credit limit, I think that he lost out as a result of what Aqua did wrong. This means that I'm intending to tell Aqua to put things right on the first card.

*Is what Aqua has offered to do to put things right for Mr C as a result of unfairly providing an unaffordable second card fair and reasonable in all the circumstances of the case?*

Aqua has already accepted that it shouldn't have provided Mr C with a second card in May 2018. It said that Mr C's application for a second card should have been declined because he'd defaulted on the first one. So I don't need to look at Aqua's lending decision all I need to consider is whether what it has offered to do to put things right is fair and reasonable in all the circumstances of this case.

I've carefully considered everything provided. In most cases, where credit has been provided when it shouldn't have been, it would be fair and reasonable for the lender to refund any interest and charges paid by the borrower (if they were) plus interest. But the borrower would be expected to repay any remaining amount of the funds they were given.

So ordinarily I'd expect Mr C to pay back the funds he was lent – when he used his card – but not the interest. Indeed this is what I'm intending to tell Aqua to do in relation to the extra £500 it lent Mr C on the first card when it increased the credit limit to £750 in August 2014.

That said, I'm mindful of the particular circumstances of this case and Aqua's decision to provide Mr C with a second credit card in May 2018. Aqua gave Mr C a credit card with a credit limit of £900 in May 2018. It did this just over a year after an account with a lower credit limit of £750 defaulted. So Aqua advanced an increased amount of credit when it ought to have been aware that Mr C proved unable to repay a lower amount.

In my view, Aqua advanced credit in circumstances where it ought reasonably to have realised that there was a significant risk it wouldn't get what it was advancing back without this causing Mr C financial difficulty. As Aqua's decision to advance credit in these circumstances was so egregious and paying this balance back is likely to cause Mr C distress and financial difficulty going forward, I'm intending to say that Aqua needs to do more to put things right here. And I'm intending to say that Aqua should write off the outstanding balance on the credit card.

I turn now to Mr C's credit file. Our adjudicator asked Aqua to remove all adverse entries relating to the second card from Mr C's credit file. But I don't think that doing this would be the fair and reasonable thing to do here given my reasons for upholding the complaint. To explain, the basis for Mr C's complaint was and is that he shouldn't be lent to because of the adverse information Aqua ought to have been aware of. I've accepted that this is the case and that's why I've upheld Mr C's complaint.

In these circumstances, it seems to me that amending Mr C's credit file to remove adverse information thus increasing the chances of him being able to access further funds would be counterproductive and arguably not in his best interests, or those of any potential lender.

So having carefully thought about everything, as I'm intending to ask Aqua to write off the outstanding balance on the second card, I'm not intending to say it should amend Mr C's credit file. This means that I'm intending to tell Aqua that it can and should record that it has written off an outstanding balance on the second credit card.

*Did Aqua act unfairly or unreasonably towards Mr C in some other way?*

I've carefully thought about everything provided. Having done so, I've not seen anything here that leads me to conclude Aqua acted unfairly or unreasonably towards Mr C in some other way.

So I find that Aqua didn't act unfairly or unreasonably towards Mr C in some other way.

**conclusions**

Overall and having carefully thought about the three overarching questions, set out on page two of this decision, unless what I receive in response to this provisional decision changes my mind, I'm intending to issue a final decision which finds that:

- Aqua *did* complete reasonable and proportionate checks before initially providing Mr C with a credit card that had a £250 credit limit in April 2014
- Aqua *didn't* complete reasonable and proportionate checks on Mr C to satisfy itself that he would be able to repay the balance on his credit card when it increased the limit to £750 in August 2014;

- reasonable and proportionate checks *would* more likely than not have shown that Mr C would be unable to sustainably make the payments required once for this credit limit increase;
- what Aqua has already agreed to do to put things right for Mr C in relation to the second credit card *isn't* fair and reasonable in all the circumstances of this case;
- Aqua *didn't* also act unfairly or unreasonably towards Mr C in some other way.

The above findings leave me intending to conclude that Aqua has done something wrong in this case and that it should put things right in the way I've set out below.

**fair compensation – what I'm intending to tell Aqua to do to put things right for Mr C.**

Having carefully considered everything, I think it would be fair and reasonable in all the circumstances of Mr C's complaint for Aqua to put things right in the following way:

- refund all interest, fees and charges incurred as a result of the credit limit on the first credit card being increased from £250 to £750. Aqua sold the outstanding balance on this account to a third party debt purchaser. So it either needs to buy the account back from the third party and make the necessary adjustments, pay an amount to the third party in order for it to make the necessary adjustments, or pay Mr C an amount equivalent to the reduction needed on the outstanding balance.
- write off the outstanding balance on the second account provided in May 2018.

**my provisional decision**

For the reasons explained, I'm intending to partially uphold Mr C's complaint and say that NewDay Ltd (trading as Aquacard) should put things right in the way I've set out above.

So unless the comments and evidence I get by 12 August 2019 changes my mind, that's what I'll tell Aqua to do in my final decision.

Jeshen Narayanan  
**ombudsman**