complaint

Mr H complains that NewDay Ltd, trading as Aqua, kept increasing his credit limit without checking he could afford the payments. And that they wrongly sold his account to a debt collection agency before helping him.

background

I recently issued my provisional conclusions setting out the events leading up to this complaint, and how I thought best to resolve it. I've attached my earlier provisional decisions, which form part of this final decision.

I invited both parties to let me have any further comments they wished to make in response to my second provisional conclusions.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

response to my second provisional findings

Mr H said that he'd preferred that his whole debt was cancelled but accepted my second provisional findings. NewDay also accepted my second provisional findings.

NewDay lent to Mr H through a sequence of increases in his credit card limit. After a certain time, the checks it conducted about his creditworthiness were in breach of the requirements laid out in CONC.

I would reiterate that I consider the individual circumstances at play in Mr H's case make this an appropriate way to resolve his complaint, though that does not set a precedent for other cases appearing to share similar features.

my final decision

For the reasons I've explained here, and in more detail in my provisional decisions, I uphold this complaint. In full and final settlement, I require NewDay Limited to:

> 1) liaise with the owners of the account to ensure Mr H's debt is reconstructed, removing interest, charges and capital to leave his debt standing at £800, with no further interest to be applied
>
> 2) if that is not possible, take back ownership of the account to effect the reconstruction in 1)

I encourage Mr H to co-operate with the owners of his account and agree with them a suitable repayment arrangement for the remaining balance, based on his current circumstances. Mr H could also place a Notice of Correction on his credit file held by credit reference agencies. In this notice he can explain the circumstances in which his debt arose.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before **4 April 2020**.

Adrian Bird
ombudsman

Copy of my second provisional decision

complaint

Mr H complains that NewDay Ltd, trading as Aqua, kept increasing his credit limit without checking he could afford the payments. And that they wrongly sold his account to a debt collection agency before helping him.

background

I recently issued my provisional conclusions setting out the events leading up to this complaint, and how I thought best to resolve it. I've attached a copy of my first provisional decision, which forms part of this second provisional decision.

I invited both parties to let me have any further comments they wished to make in response to my first provisional conclusions.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

response to my provisional findings

Mr H provided no response to my provisional findings.

NewDay said that they considered the credit limit increase from £600 to £800 to be responsible lending. They said that before that increase, Mr H had not in fact missed a payment in one particular month but paid it late. Although they charged a fee of £12 for this late payment, it was paid one day after it was due. I understand they are making a distinction between Mr H missing a payment and not paying at all, and not missing it but paying late within the same calendar month it was due. I understand the distinction they're making is that in their assessment of Mr H's payment history they consider his late payment as less significant to them than a payment not paid at all. And as such they didn't think they'd not taken into account a sign that Mr H was experiencing, or had experienced financial difficulty.

At the time NewDay increased the credit limit to £800, the Financial Conduct Authority (FCA), under CONC rule 5.2.3, said "*The extent and scope of the creditworthiness assessment or the assessment required by CONC 5.2.2R (1), in a given case, should be dependent upon and proportionate to factors which may include one or more of the following:*

(1) the type of credit;
(2) the amount of the credit;
(3) the cost of the credit;
(4) the financial position of the customer at the time of seeking the credit;
(5) the customer's credit history, including any indications that the customer is experiencing or has experienced financial difficulties…"

I can understand that the payment referred to was late by one day, and that on this occasion would not necessarily on its own indicate to NewDay that Mr H was experiencing or had experienced financial difficulties.

They said that Mr H's use of cash advances was simply a use of that feature of his account. And that he had withdrawn £200 in cash from a total spent of around £600 before the limit was increased to £800.

I don't think it follows that, just because the ability to take cash advances is a feature of an account, a lender doesn't need to have regard for the number and size of such advances. After all, such activity has for many years been identified by the Office of Fair Trading (OFT) and the FCA as a potential indicator of possible financial difficulty. However, in the absence of other signs that Mr H's circumstances warranted closer examination before lending increased, I think this use of four cash advances totalling £200 in around six months would not necessarily indicate to NewDay that they needed to know more about his circumstances to ensure they could lend to him responsibly.

NewDay also said that the monthly payment Mr H would have to pay on a balance owed of £800 would be £8.28 more than the payment due on a balance of £600. They said Mr H had demonstrated with his previous payments that he could afford to pay a sum at least equivalent to the proposed new payment amount. And they referred to the CONC guidelines around the proportionality of a lender's creditworthiness checks.

I've considered NewDay's view that in Mr H's case he had shown, before the increase in limit to £800, he could afford the minimum payment due on a debt of £800. And I've considered the regulation prevailing at the time, under CONC 5.2A.27, which said "…*the firm must assume that the customer draws down the entire available balance up to the increased credit limit at the earliest opportunity and repays by equal instalments over a reasonable period*."

In Mr H's case, I've thought about whether NewDay's assessment of his creditworthiness considered whether by paying his minimum payments – that they'd seen as affordable to him – also showed that the debt could be repaid in a reasonable period. Had Mr H paid the minimum payment required each month, the £800 debt would have taken several years to repay. So, whilst NewDay say they assumed Mr H would draw down the entire available balance up to the increased credit limit, they appear only to have considered the monthly affordability of the new level of borrowing and not the reasonable time period over which the debt must be repaid.

NewDay has highlighted that the increase in Mr H's limit from £600 to £800 was only £200. While that may not appear significant in those terms, put in a different light it equated to a credit limit increase of 33%.

In light of this, I've considered the regulation prevailing at the time, under CONC 5.2A.4, which said "*A firm must undertake a reasonable assessment of the creditworthiness of a customer before…significantly increasing a credit limit for running-account credit under a regulated credit agreement*." I've considered the significance of the monetary amount of the limit increase, but also the increase expressed as a percentage. Whilst it could be considered to be significant in some customer's circumstances, I think, in Mr H's circumstances at the time, the increase of £200 doesn't represent a large increase. But in percentage terms, it could be viewed as a significant one.

And I've noted CONC rule 5.3.1 (9), prevailing at the time, said "*For a regulated credit agreement for running-account credit the firm should set the credit limit based on the creditworthiness assessment…taking into account the matters in CONC 5.2.3 G, and, in* *particular, the information it has on the customer's current disposable income taking into account any reasonably foreseeable future changes*."

When NewDay increased Mr H's credit limit from £600 to £800 they'd seen how he'd maintained his account during the seven months he'd had it. They've said that his use of cash withdrawals for £200 in total was not an indication to them that Mr H was experiencing or had experienced financial difficulties. And they said he'd paid at least the minimum monthly amount due on time with the exception of one which was paid a day late. This too, they said, was not an indication that Mr H's circumstances warranted additional scrutiny.

I think NewDay's assessment that Mr H's disposable income was sufficient for him to afford the credit limit increase from £600 to £800 appears to be based on his payment performance on his account in the seven months he'd had it, along with a credit report that they felt didn't show them any signs that they should examine Mr H's circumstances any closer. Based on Mr H's payment performance and account use, I think that NewDay didn't act unreasonably in deciding to increase the credit limit some seven months after they originally lent to him. And that their decision to lend at that time was not irresponsible or in conflict with their CONC responsibilities mentioned earlier. But I do not think the same could be said for the increase in 2016 and those after that point. And each of those increases could be viewed as both significant in monetary terms *and* in percentage terms.

With the information available to NewDay when they increased Mr H's credit limit to £1,600, to meet the CONC requirements referred to above, they should have checked Mr H's circumstances and his creditworthiness more than they did. Had they done so, they would have found that he'd been off work with illness for prolonged periods of time, affecting his income. These absences had resulted in Mr H using payday borrowing, and other borrowing, to meet his expenditure commitments. And he says he'd also been maintaining his NewDay payments by not paying other commitments he had.

The credit that NewDay made available to him from late 2016, when they increased his credit limit to £1,600, and the additional credit made available to him in all subsequent credit limit increases, was credit that they should not have made available to him. They didn't know what Mr H's circumstances were, though if they'd made suitable enquiries, this information would have been available to them. So had NewDay made a proper creditworthiness assessment at this time, they should have known the impact Mr H's circumstances would likely have had on his ability to afford further increases.

Mr H's circumstances, particularly his medical diagnosis, mean that his capacity to work and earn an income have been reduced. This means the debt he currently has with NewDay is likely to take many years to repay. It's likely too that Mr H may be caused distress throughout this long period as he manages this debt.

In ordering NewDay to reduce a significant proportion of Mr H's outstanding balance, I have considered the combined circumstances of Mr H's ability to repay the debt he has with NewDay, and the irresponsible lending decisions NewDay made in granting him the credit above £800. That Mr H has used the money NewDay made available to him doesn't mean it is any more affordable for him to repay it, even if it waives interest on that borrowing.

Ultimately, NewDay must recognise that, on this occasion, its decision to make credit available to Mr H without adequate assessment of his creditworthiness means that it won't be able to recover all the money it lent. I have decided that some of the debt that Mr H still owes should be removed by the reconstruction of his account. This will give Mr H an opportunity to repay his debt in a reasonable time, depending on his ability to do so.

The evidence I have shows Mr H owes around £3,432 on his account. From the time NewDay increased Mr H's credit limit above £800, Mr H has repaid around a further £2,196. For the reasons I've given, I think Mr H's debt should be reconstructed so that he owes £800- the amount he owed when NewDay's decisions to lend to him became irresponsible. This means that NewDay should reduce Mr H's debt by approximately £2,632. He has already repaid around £2,196 of that figure.

I consider the individual circumstances at play in Mr H's case make this an appropriate way to resolve his complaint, though that does not set a precedent for other cases appearing to share similar features.

my provisional decision

For the reasons I've explained here and, in more detail in my first provisional decision, it is likely that I will uphold this complaint. In full and final settlement, I require NewDay Limited to:

> 1) liaise with the owners of the account to ensure Mr H's debt is reconstructed, removing interest, charges and capital to leave his debt standing at £800, with no further interest to be applied
>
> 2) if that is not possible, take back ownership of the account to effect the reconstruction in 1)

I encourage Mr H to co-operate with the owners of his account and agree with them a suitable repayment arrangement for the remaining balance, based on his current circumstances. Mr H could also place a Notice of Correction on his credit file held by credit reference agencies. In this notice he can explain the circumstances in which his debt arose.

copy of my first provisional decision

complaint

Mr H complains that NewDay Ltd, trading as Aqua, kept increasing his credit limit without checking he could afford the payments. And that they wrongly sold his account to a debt collection agency before helping him.

background

Mr H opened a credit card account with NewDay in 2014. He was given a credit limit of £300. Two months later his limit was increased to £600, and five months after that it was increased to £800. In September 2016, NewDay increased Mr H's credit limit to £1,600. After that, they increased his limit twice more, finally being set at £3,600.

On each occasion, NewDay sent a letter to Mr H giving him notice that 40 days later, the proposed limit increase would happen, unless he contacted them telling them not to. He didn't ask them not to increase his limit on any occasion.

Mr H contacted NewDay in 2018 to discuss his financial difficulties. They looked at his income and outgoings. And he could only afford a much lower amount each month than required on the contract. They stopped interest and charges on his account and Mr H paid the lower amount each month until they sold his account to another company.

Mr H complained to NewDay that they had entrapped him into debt without knowing his financial circumstances, and wrongly sold his debt on to a debt collection company before helping him.

In NewDay's final response letter they said they'd done all the necessary checks each time they increased his limit. And that each time, he'd had the choice to say no to the increase.

They did not uphold his complaint.

Mr H didn't agree and complained to us.

An investigator looked at the evidence and said that the credit limit increases done from September 2016 were not responsible lending. She said NewDay had enough information available in September 2016 to cause them to check Mr H's financial circumstances more closely. And that by checking, they would not have increased his credit limit. She thought that NewDay should take back ownership of the account from the owning company and reconstruct Mr H's account to the time it had an £800 limit.

Mr H didn't agree with the investigator's view as he said he was entrapped into the whole debt. And NewDay disagreed they had lent irresponsibly, so the matter has been passed to me for a final decision.

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.

NewDay were required to lend responsibly. Before agreeing to do so, they should've assessed the affordability of the credit to ensure that Mr H could afford to repay what he was borrowing.

It's up to NewDay which checks they carry out. But they must be proportionate to things such as the amount borrowed, the cost of repayment and Mr H's borrowing history. While there isn't a required set list of checks, the relevant regulations - set out in section 5 of the Consumer Credit Sourcebook (CONC) - indicate that a creditworthiness assessment should consider the ability of a customer to afford and sustain payments - with particular regard to the information it has on the customer's current disposable income. I've borne that in mind when looking at what NewDay considered when it offered Mr H the credit limit increases.

credit limit increases

I am mindful that the first credit limit of £300 was described by NewDay at the time as "within affordability". But their decision also recognised that Mr H had a "low income" and he had "high indebtedness". They also said the £300 limit was "appropriate to his circumstances". Within two months of opening his account, NewDay offered an increased credit limit, doubling it to £600. They used credit reference agency information and their own experience of Mr H's payment history on his new account to decide how appropriate the increase was.

As the amount of credit they'd given to Mr H was still relatively low, I can see why the increase was considered to be responsible by NewDay. And why they felt the checks they did were proportionate. I agree with that decision.

But just five months later, in 2015, they increased the credit limit again. Since the last increase, Mr H had missed one payment, incurring a £12 charge, and he had withdrawn cash, incurring a fee each time. NewDay did the same checks they'd previously done for an increase in limit. And they considered it a responsible decision as Mr H's payment record with them was acceptable to them. And they said he didn't have any other borrowing in arrears, and no court judgments. But he'd already missed a payment and withdrawn cash. I believe that should have caused NewDay to have checked Mr H's disposable income- to meet the CONC requirement to do so. But I haven't seen any evidence they did. So it is this increase, and those that followed, that I find don't meet NewDay's obligations to lend responsibly.

Compounding the situation, 20 months later, NewDay increased his credit limit again. They wrote to him, as they had on each previous credit limit increase, asking him to contact them if he didn't want the increase. Again, Mr H didn't contact them. But the CONC regulations don't make it Mr H's responsibility to check he can afford the new borrowing. And the regulations also don't make it Mr H's responsibility to choose not to have the increased credit limit by opting out. It's NewDay's responsibility, under the regulations, to check Mr H could afford and sustain payments. From early 2016, NewDay were using extra information from a credit reference agency to help them make their decision to lend. They were receiving more details than for the previous limit increases about Mr H's borrowing from other lenders. I've seen that when they increased Mr H's limit to £1,600 in September 2016, doubling it from £800, they knew he'd had many payday loans and his total borrowing on credit cards was several thousand pounds. This was a sharp rise from the level of under £1,000 when they'd increased his limit from £600 to £800. And the payday loan information was new to NewDay.

NewDay's own account records showed them that Mr H had withdrawn cash on his card. On one day he'd withdrawn very small sums, each with a £3 fee. Although this was over eighteen months prior to increasing the limit to £1600, if NewDay had considered that, along with the much higher level of credit card indebtedness, and the high level of payday loan borrowing in the recent past, they could have taken a different view on whether it was responsible to lend to Mr H again, and checked his disposable income. They had not checked it since they opened his account in 2014. This increase in limit was the second NewDay did where I think they should have checked Mr H's ability to pay- a regulatory requirement in CONC.

The UK Cards Association's best practice guidance said of "*Unsolicited Credit Limit Increases- Risk Indicators…potential examples include evidence of;*

- *paying the minimum payment over an extended period…*
- *a significant increase in overall outstanding balances over time…*
- *making use of cash advances…*"

Mr H's total indebtedness was much higher than it was when NewDay previously increased his limit. And he had been making payments of the minimum amount due, or a sum similar but just above that sum, for many months. And he had used cash advances. All these factors indicate that NewDay should again have checked Mr H's disposable income.

Mr H has said he made some payments from money he'd borrowed from payday lenders. And he'd also had long periods of illness absence from work. And if NewDay had carried out proportionate checks as a result of the new credit reference agency information available to them, and the way Mr H was running his account with them, they would have discovered a fuller picture of Mr H's circumstances. And that he wasn't in a position to take on more credit, so they wouldn't have lent to him.

In light of this, I find that NewDay failed to act responsibly when it increased Mr H's credit limit in (and after) 2015.

So I believe that NewDay need to do something to put things right. This will include reversing interest and charges added to the account from the time the lending was irresponsible.

I recognise Mr H has spent on his account, and has shown that whenever NewDay made credit available to him he used it. But the debt should be reduced by an appropriate amount to reflect the irresponsible lending that happened. The debt Mr H owed at the time the limit was first increased irresponsibly was around £600. And Mr H has had the benefit of the spending that he did on the account after that time. But he has made repayments against a lot of this spending. Because of this, I think the debt Mr H should now have to repay is £600.

NewDay's decision to sell Mr H's account to another company

When Mr H contacted NewDay in May 2018, the result of the income and expenditure check NewDay did with him was that he could afford a much lower payment than NewDay required. When a consumer is in financial hardship, a lender should consider those circumstances fairly. NewDay recognised Mr H's hardship- he had been out of work since early that year- and agreed to stop interest and charges, and for him to pay a much-reduced payment each month. This was positive and sympathetic to his circumstances and NewDay acted fairly and responsibly in this respect.

His unemployment, his medical circumstances and his level of debt suggest his financial difficulties would be long-term. As NewDay had a much fuller picture of Mr H's circumstances as a result of him contacting them, they were entitled to sell his debt on to a company better able to deal with his circumstances that were, in all likelihood, going to last a long period of time. I don't consider NewDay acted unfairly in doing this.

my provisional decision

My provisional decision is that I uphold Mr H's complaint. To settle it, NewDay Ltd should take the steps outlined above, which for clarity are:

> 1) liaise with the owners of the account to reconstruct Mr H's account, removing interest, charges and capital to leave his debt standing at £600, with no further interest to be applied;
>
> 2) if that is not possible, take back ownership of the account to effect the reconstruction in 1)

I encourage Mr H to co-operate with the owners of his account and agree with them a suitable repayment arrangement for the remaining balance, based on his current circumstances. Mr H could also place a Notice of Correction on his credit file held by credit reference agencies. In this notice he can explain the circumstances in which his debt arose.