

complaint

Mr and Mrs B complain about overdraft fees on their joint account with National Westminster Bank Plc.

background

Mrs B had a sole current account with NatWest. This later became a joint account when Mr B was added to the account. They have since split up, but as this complaint relates to a period when they were both account holders, they are both involved in bringing this complaint.

The account became a packaged bank account in 2011. In an earlier complaint in June 2018, Mrs B complained that the packaged bank account had been mis-sold. The bank reviewed its records, and as a result it recognised that she had been in financial difficulties in 2011. So it upheld that complaint and refunded the packaged bank account fees that had been charged between 2011 and 2018 (with interest on the refunds).

After that complaint was closed, Mrs B asked the bank to re-open it so that she could complain about more fees, including overdraft fees. That is the complaint I am dealing with here. NatWest upheld part of this complaint, apologised, and refunded another £250 in fees and interest which had been charged as a result of the packaged bank account fees already refunded. But the bank did not agree to refund overdraft fees that had not been so charged. It said these had been properly charged, in line with the account's terms and conditions. It also said that, as a result of a ruling by the Supreme Court in 2009, the charges could not be challenged for unfairness under relevant regulations or the common law.

Mrs B brought this complaint to our Service. She said she couldn't afford the fees, and that she had been experiencing serious hardship since 2011. NatWest told us that neither Mrs B nor Mr B had told the bank about their financial difficulties until June 2018. It maintained that the fees had been correctly charged, and that they could not be challenged on the basis that they were unfair. Our investigator agreed, and so she did not uphold this complaint. Mrs B asked for an ombudsman to review this case.

I wrote a provisional decision which read as follows.

my provisional findings

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

I agree that the overdraft fees were charged in accordance with the account terms and conditions, and that the effect of the Supreme Court ruling NatWest referred to is that overdraft charges cannot be challenged for unfairness, either in court or in a complaint with the Financial Ombudsman Service.

However, when Mrs B complained about the charges, she said that she had been experiencing serious hardship for years, and that as a result she could not afford the charges.

I have read Mrs B's original letter to NatWest, dated 8 June 2018, in which she first complained about the account. It goes into considerable detail about her financial difficulties.

It is too long for me to quote it here, but in summary she said the account was constantly overdrawn and over the overdraft limit, direct debits and cheques were frequently returned unpaid, she depended on benefits, and life was a constant struggle to pay essential bills and to afford basic necessities. She complained that the bank had never contacted her about these issues or to discuss the overdraft. She said she had suffered from mental health issues (although she did not specify what these were), which had made it harder to deal with the stress caused by her financial situation. She said she had often asked NatWest for a loan, but had been declined each time.

Since Mrs B's follow-up complaint was treated as a re-opening or continuation of her initial complaint (both final response letters have the same complaint reference), I wouldn't expect her to have to repeat all of that information when she pursued her complaint again in September 2018. She referred to financial hardship again in her complaint form when she brought her complaint to our Service. So I find that the scope of this complaint is not just her allegation that the overdraft fees were unfair, but that she was complaining about the overdraft fees in the broader context of the bank not doing enough to help her with her financial difficulties, to which the overdraft fees were contributing.

As I've said, I can't assess the fairness of the overdraft fees themselves (or any other kind of fees charged on the account, such as returned item fees). But I can consider whether NatWest did enough in connection with Mr and Mrs B's financial difficulties. Since that issue has not really been addressed so far, I have written a provisional decision.

The relevant guidelines about customers in financial difficulty were the *Lending Code* until July 2016, and since then the *Standards of Lending Practice*. Both of these say that when a lender (which includes a bank which provides an overdraft facility) becomes aware that its customers are in financial difficulties, it should proactively contact them to discuss the situation. It should treat them sympathetically and positively, and suggest a way forward to help them get out of debt. This might involve waiving or freezing fees and interest, although not necessarily: lenders have discretion to try different ways to help.

When a customer is in financial difficulties, there is an onus on the customer to tell the lender. There is no record of Mr and Mrs B doing that until June 2018. But the *Lending Code* said that lenders should also identify such customers, and then pro-actively contact them to discuss the matter, and provide customers with clear information setting out the support available to them. And the *Standards of Lending Practice*, which replaced the *Code*, says:

"Firms should have triggers and processes in place to identify customers who may be in financial difficulty and should act promptly and efficiently to address the situation with the customer."

The *Lending Code* included (at paragraph 180 of both the 2011 and 2014 editions) a list of events which might suggest to a lender that its customer is in financial difficulties. The first item on the list is "Items repeatedly being returned unpaid due to lack of available funds." Another one is repeatedly exceeding an overdraft limit. This list is not exhaustive.

There is another list in paragraph 183 (both versions), of more signs that a customer may be in financial difficulties. The first of these is "regular unarranged overdrafts." Another one is "hardcore borrowing or increasing dependence on unauthorised overdrafts developing."

With this in mind, I reviewed Mr and Mrs B's account statements for the period from November 2012 to February 2019. The account was almost permanently overdrawn, and

usually by a four-figure sum. In the whole of that period – more than six years – the account was only in credit for 26 clear days. She exceeded her overdraft limit 60 times.

It's not clear to me when Mrs B first told NatWest that she was struggling. But given the history of her account, I think that NatWest ought to have picked up on this anyway, and then acted accordingly. I am reinforced in that opinion by the fact that NatWest would have done affordability checks when it rejected her loan applications. (Also, NatWest told our investigator that Mrs B had stated that she was in full time employment, but there was no sign of a salary or wages being paid into her account, and I would expect that to have been noticed when it assessed her loan applications.)

NatWest provides a service called overdraft control, which stops most (but not all) payments which would take an account into an unarranged overdraft. This also avoids fees being charged for returned payments. However, I don't think that was enough. From the time that NatWest ought to have realised that Mrs B was in financial difficulty, I think it should have done more.

I accept NatWest's argument that Mrs B probably needed more assistance than it could give her on its own, and that a bank certainly can't be expected to fulfil the role of a debt advice charity, or an accountant. The *Code* and the *Standards* recognise this, and that is why they mention referring a customer to a third party for further support as one of the things a lender should do. But I don't think that gets NatWest off the hook completely. There are some actions it is reasonable to expect a bank to do. These include reducing the overdraft limit each month, to try to help the customer get their spending under control, for example. Or freezing interest and charges temporarily, to give the customer some breathing space. Or even defaulting the account, which would have the effect of stopping further charges permanently (although Mrs B might not have wanted that to happen). None of these options (or further alternatives) appear to have been considered.

It's too late to go back and do that now, but to resolve this complaint it might be fair to order NatWest to refund the charges back to the account. I will consider what NatWest has to say about that before I issue my final decision – and what both parties have to say about where I should draw the line from where the refunds should begin. It might not necessarily be as early as 2012. (And it cannot be earlier than June 2012, or six years before Mrs B complained, because the time limit for bringing a complaint is six years from the event being complained about.)

I would normally award interest on refunds. But since (as I've said already) the onus is on the customer to tell the lender when she is struggling, and there is no record of this happening before June 2018, I am currently minded not to award interest on refunds of charges incurred before then. I will consider what the parties say about that.

So my provisional decision is that, for now, I currently intend to uphold this complaint. Subject to any further representations I receive from the parties by the date given below, I intend to order National Westminster Bank Plc to refund all of the overdraft fees, overdraft interest, and returned item fees back to the account, and to pay simple interest on those refunds at eight per cent a year from 9 June 2018 to the date of my final decision.

responses to my provisional decision

Mrs B accepted my provisional decision in principle, but she said that Mr B had told her that he had frequently contacted the bank about his financial difficulties in 2011, when they had been on benefits. I asked NatWest about this, but they have no record of it.

NatWest emphasised that Mr and Mrs B had failed to report their difficulties earlier, despite having had ample opportunity to do so. NatWest said its systems do continually review accounts to identify customers who exceed their credit limits or breach their terms and conditions, but this had not flagged Mrs B's account for attention. Mrs B had paid deposits into her account every month (and if she had failed to do that, then NatWest's systems would have picked this up). It had sent Mrs B letters to make her aware of the cost of her overdraft, and inviting her to get in touch to discuss her options. It had begun reducing Mrs B's overdraft limit in 2019.

Nevertheless, NatWest still agreed to refund the overdraft fees and interest since June 2012, on the basis that the account had probably not been suitable for her needs.

my findings

There is no evidence that Mr B did contact the bank about financial difficulties in 2011, so I will presume that he did not.

Since (apart from that issue) both parties have accepted my provisional decision, there is no reason for me to depart from it.

my final decision

So my decision is that I uphold this complaint. I order National Westminster Bank Plc to refund all of the overdraft fees, overdraft interest, and returned item fees incurred since 9 June 2012 back to the account, and to pay simple interest on those refunds at eight per cent a year from 9 June 2018 to the date of my final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs B to accept or reject my decision before 24 October 2020. Mrs B may reply on Mr B's behalf.

Richard Wood
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