

complaint

Mr M is unhappy with how Bank of Scotland plc (Halifax) treated him when in financial difficulty. He also thinks Halifax shouldn't have allowed him to increase the overdraft on his account as he was already struggling with other credit and couldn't afford to repay the borrowing.

background

Mr M held a current account with Halifax. The account defaulted in April 2016 and Halifax has been seeking to collect the debt since.

The account began without an overdraft facility in July 2011. An overdraft facility of £500 was introduced in September 2011 and there were then 10 increases (requested by Mr M) to the limit between September 2011 and July 2012, as follows:

Month	Overdraft limit
July 2011	None
30 September 2011	£500
30 September 2011	£1,000
30 September 2011	£2,000
12 October 2011	£2,500
13 October 2011	£3,000
14 October 2011	£3,100
16 October 2011	£3,150
26 June 2012	£3,500
28 June 2012	£4,000
4 July 2012	£4,500
8 July 2012	£5,000

Mr M made a total of 56 applications for an increased overdraft between September 2011 and June 2014, of which 45 were declined (these not being listed above). So the last increase to the overdraft limit was in July 2012.

During the period July 2011 to July 2012, there were quite significant amounts of money going into and out of the account. The larger deposits appear to come from Mr M's self-employed earning. The larger transfers in and out are quite erratic – there is no obvious pattern to them.

But generally, the outgoings were exceeding what was coming into the account and the account was going further into the overdraft. For example, at the beginning of September 2011, the account was £19 overdrawn. At the beginning of October 2011, it was £1,549 overdrawn and November 2011 £3,149 overdrawn. At the beginning of August 2012, the account was £4,678 overdrawn.

From August 2012, the account was predominantly overdrawn – often close to and sometimes exceeding, the £5,000 limit. As a result, Mr M incurred a number of authorised and unauthorised overdraft fees/charges. In May 2014, Halifax contacted Mr M as the account was in arrears. Mr M said he would be clearing the arrears within a short period of time.

Mr M then contacted Halifax in February 2015 to let it know he wasn't working and this was putting pressure on his finances. In March 2015, Halifax said it would put a hold on all fees and charges and it provided an account management facility free of charge for six months. Halifax says it was unsuccessful trying to contact Mr M on a number of occasions between March 2015 and January 2016, when it says it wrote to Mr M to say the account would be closed and defaulted, unless it was brought back in order within 60 days.

In February 2016 Mr M told Halifax that he'd sought advice from a debt management charity and that he'd been advised to ask Halifax what it could do to help him in his situation. Halifax agreed to give Mr M 30 days 'breathing space' and said it would need to go through an income and expenditure assessment to establish what else could be done on a longer term basis. Mr M said he would call back later that day to go through this. Halifax says it didn't receive any further contact from Mr M, and the account was closed in April 2016 and a default registered.

In July 2016, Mr M rang Halifax to complain about the charges applied to his account, saying they were excessive and should be reduced – and they'd led to the account defaulting. He also complained that he'd been harassed about the debt.

Halifax investigated the complaint and provided its final response later that month. It said, in summary, that:

- all of the fees and charges had been applied in line with the terms and conditions of the account
- after Mr M had let it know he was in financial difficulty, it had helped by freezing all account fees and charges from March 2015 until the account closed. And by providing an account management facility free of charge for six months
- the increases to the overdraft were all requested by Mr M and were 'subject to status'. He had been eligible for them at the time
- it was a regulatory requirement to maintain contact about the account. Mr M could choose to no longer receive telephone contact if he wished to

Mr M responded to Halifax saying that he'd been struggling to repay other credit at the time of the overdraft increases. Halifax maintained its stance.

In January 2018, Mr M contacted us about his concerns. An investigator here asked Halifax if it was prepared to consent to us looking into the complaint – as it had been referred outside of the six month timeframe in which to bring a complaint to us. Mr M told us the reason for the delay was that he had been unwell. The investigator thought what Mr M had said could be considered exceptional circumstances and Halifax consented to us continuing to look into the complaint.

After reviewing what had happened, the investigator didn't uphold the complaint. In summary, he said that:

- treating a customer positively and sympathetically didn't always mean refunding charges
- the action Halifax took in March 2015 after finding out that Mr M was in financial difficulty was reasonable
- it wasn't wrong of Halifax to increase the overdraft. Mr M hadn't made it aware of him being in any financial difficulty, and large deposits were being made on a fairly regular basis to reduce or clear the overdraft

- Halifax had a duty to maintain contact with Mr M about the account and the contact didn't appear excessive
- the default had been correctly applied
- concerns about home visits carried out by the collection agent would need to be directed to the agent as they were a third party

Mr M disagreed with the assessment. He acknowledged the payments into the account, but said that he would quickly return to being in the overdraft. He also said that he was struggling with day to day expenses and that Halifax ought to have realised this. This didn't change the investigator's mind and so the case was passed to me to decide.

I issued a provisional decision on this case on 29 March 2019. In this I said:

was the lending affordable?

The relevant codes of practice are the OFT guidance on irresponsible lending (published in 2010 and updated in 2011) and the Lending Code (2011).

Section 4 of the OFT guidance says in summary that affordability checks carried out by a lender should be proportionate. This is taking account of factors such as the amount of credit being sought and the borrower's financial situation and credit history – including any indication of the borrower experiencing any financial difficulty.

Section 4 of the Lending Code (2011) says that a lender should consider a range of factors before agreeing to lend, including the potential for borrowing to adversely impact the customer's financial situation and information from CRAs (Credit Reference Agencies).

Halifax has said that Mr M was eligible for the initial overdraft and subsequent increases and that the lending had been granted 'subject to status', but it hasn't explained what either of these things mean in the context of the specific applications made by Mr M. It says that it doesn't hold any record of the affordability checks carried out before the lending was agreed. It has supplied me with a document (dated January 2015) setting out its general approach to making lending decisions. It also says the first time it became aware that Mr M was experiencing financial difficulty was in March 2015.

Mr M says he was already experiencing financial difficulty when he applied to increase the overdraft. He says he had taken out a number of "payday loans" before that point and he has recently provided evidence to show that he was behind (in arrears) with at least one payday loan provider in June 2011.

He has also provided evidence to show that a payment to another payday loan (from a different provider) had been declined by his bank in October 2011.

I recently requested the statements for the other current account that Mr M held with Halifax at the relevant time and Halifax has provided these. I can see that Mr M was making a number of payments from that account to the same payday loan provider around that time. And that he incurred a "Returned D/D" charge in the same month.

I can also see that a number of payments were being made from that account to another payday loan provider, starting in August 2011.

Looking at the history of the account Mr M has complained about, I can see the initial overdraft of £2,000 came into place in September 2011. Based on the 'renewal date' of 24 September 2012, I assume the overdraft was agreed on or around 24 September 2011. At this point, Halifax ought to have known that Mr M was making payments to a payday loan provider (from his other account), but from what I've seen I don't think there had been a returned direct debit (the first one I can see is 3 October 2011).

And looking at the statements, although Mr M's account had been overdrawn on a number of occasions since it began, this was never more than £100 and the account was more often than not in credit.

So I think the initial decision to grant Mr M an overdraft was probably reasonable – in that the account had been managed reasonably well to that point – and nothing had happened on the other account, such as a direct debit having been returned, to cause concern.

However, by the time the overdraft limit increased to £3,150 in October 2011 (from the renewal date I assume this was on or around 10 October 2011), a direct debit had been returned on his other Halifax account. Also, the account subject to this complaint had gone from being £16.49 overdrawn on 24 September 2011, to being nearly £2,000 overdrawn on 10 October 2011.

I think this should have caused Halifax to consider carrying out additional checks before agreeing to increase the overdraft limit. Thinking about proportionality, I think this should have included an income and expenditure (I&E) assessment and credit check. In terms of an I&E assessment, it's not clear what this would have shown. Having said that, I'm not aware that Mr M was using any other current accounts to manage his money beyond the two mentioned here that he held with Halifax. And it seems unlikely there were other accounts as his work income was being paid into the account subject to the complaint.

Thinking about what had happened on his two Halifax accounts (one nearly £2,000 in deficit within 3 months of being open and the other flitting between credit and debit plus numerous payments being made to payday loan providers and a returned direct debit), I think it's reasonable to assume that an accurate I&E assessment would've shown a deficit.

And if Halifax had carried out a credit history check, it's likely (based on the evidence Mr M has provided in terms of being in arrears with at least one payday loan provider) this would've presented a picture of someone struggling to meet their existing credit commitments.

Had Halifax carried out these checks, I think it's unlikely it would've agreed to increase the overdraft limit at that point in time. It follows that I think that lending and the subsequent increases to the overdraft limit, were unaffordable. I'm not aware that Mr M's circumstances fundamentally changed between October 2011 and August 2012 and, although in some months the overdraft balance reduced, the general pattern was that it was increasing.

Mr M has had the benefit of the capital lent to him. So I'm not proposing that Halifax refund any of this. However, I think Halifax needs to re-work the account on the basis of all fees/charges and interest relating to the balance exceeding £2,000, being removed. Halifax is entitled to use the compensation to reduce what Mr M owes. If the figure exceeds what Mr M now owes, it should pay this to Mr M.

Halifax should also amend Mr M's credit file. It's not possible to say for sure what would've happened if the overdraft limit had stayed at £2,000. The simplest and fairest approach is to remove all adverse information relating to this account (including the account default), from the point at which the overdraft was increased to £3,150.

did Halifax treat Mr M fairly when he told them in 2014 that he was experiencing financial difficulty?

Under the relevant codes and regulation, Halifax needed to treat Mr M positively and sympathetically when it became aware he was experiencing financial difficulty. There is no 'one size fits all' approach to positive and sympathetic treatment – it depends on the specific situation a customer finds themselves in.

Mr M told Halifax in February 2015 that he was experiencing financial difficulty, due to ill health and an associated loss of income. In response, Halifax froze all fees, charges and interest on the account (including pending fees from recent account usage) and provided an account management facility that usually comes with a fee, free of charge for 6 months. Halifax wasn't obliged to go beyond that by for example, removing some of the historic fees applied to the account. And I think on balance the actions Halifax took means that it did treat Mr M positively and sympathetically, because it did stop the situation from getting worse at a time when Mr M was struggling.

were the attempts by the agent to recover the money on behalf of Halifax, reasonable?

In his initial view, the investigator said that Mr M would need to direct any concerns about harassment to the third party trying to recover the debt. However, we have since clarified with both Halifax and Mr M that the recovery agent was acting on behalf of Halifax and so can be considered as part of this complaint.

Mr M says the recovery agent's actions amount to harassment, including the agent visiting his home. Halifax says the agent wouldn't have visited Mr M's home and that it was obliged to stay in contact with Mr M about his outstanding debt.

I asked Mr M to provide more detail about the agents visiting his home. He said that he remembers phone calls saying that agents would be visiting his home to discuss collection of the debt. And that he had received letters at his address that weren't post marked, sometimes being left with neighbours. He also said he'd never been in during any of the visits as he'd been at work.

I don't doubt that Mr M found the involvement of the recovery agent distressing. But it's not clear to me from what he's said exactly when field agents visited his property. Mr M hasn't said that he or his wife had any direct contact with any agents during any visits.

Halifax' records of how and when Mr M was contacted don't appear to me to be unreasonable. Halifax says it didn't receive any contact from Mr M for large period of time – and bearing this in mind I don't think it was unreasonable for Halifax (or its agents) to try to make contact with Mr M.

Taking everything into account, I'm not persuaded that the actions of Halifax (or its agents), were unreasonable.

Finally, I've thought about whether Mr M should be awarded any compensation for distress caused by Halifax lending to him when it shouldn't have done. I've taken into account that Mr M was already experiencing financial difficulties when Halifax lent to him. These difficulties and associated factors like ill health were not caused by Halifax. So I don't think any compensation is due.

my provisional decision

My provisional decision is that I uphold this complaint. I currently intend to direct Bank of Scotland plc to restructure the account based on a refund of all fees, charges and interest relating to the borrowing in excess of £2,000. If this results in the account being cleared, Halifax should then pay the remainder to Mr M.

Mr M agreed with my provisional findings. Halifax agreed with my findings about its treatment of Mr M when it knew he was in financial difficulty. However, it disagreed with my findings that it hadn't carried out sufficient affordability checks and that the increases to the overdraft beyond £2,000 were unaffordable. In summary, Halifax said:

- It has a system for evaluating applications for credit. The system takes account of a number of factors relevant to its lending decisions. It set out which factors would have been considered when the relevant applications for credit were made
- The approach Halifax takes is fair, because it produces consistent decisions by applying the same criteria to all of its customers
- Mr M applied for increases in his overdraft limit 56 times during the period 30 September 2011 to 28 June 2014. Of these applications only 11 were accepted, the others being declined
- I'd said that Halifax should have been reasonably aware of the use of payday loans. However, the accounts were not managed by a bank employee and the credit decision system wouldn't identify payday lenders. The information provided through credit scoring would indicate any financial difficulties.

It also said that the removal of all adverse information relating to the account would not be the fairest approach should my view remain unchanged. It would be appropriate to say Mr M's account would have still defaulted, but this event may have occurred earlier. It is not possible to say for sure what actions he would have taken at the time. It would not be fair to say the default should just be deleted, as this is not a true reflection. It said a full review of Mr M's credit file, to see other negative markers, may shed light on this.

my findings

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

Having done so, I still uphold this complaint. I'll explain why.

was the lending affordable?

As set out in my provisional findings, under the relevant codes, when considering an application for credit, Halifax needed to carry out proportionate affordability checks. And take account of a range of factors including any indication of the borrower experiencing any financial difficulty, the potential for borrowing to adversely impact the customer's financial situation and information from CRAs (Credit Reference Agencies).

Halifax has said that Mr M's applications were considered against relevant factors and that the approach was fair because it applied the same criteria to Mr M's applications as it did to applications from all customers – producing consistent outcomes.

Although Halifax hasn't (owing to the passage of time) been able to provide specific information to show what it considered for each of Mr M's applications, I accept that when it considered Mr M's applications for credit, it did so using a system that considered some relevant factors. And I'm prepared to accept that it applied the same criteria to all applications, such that it will have produced consistent 'outcomes'.

My role isn't to consider whether Halifax' general approach to evaluating the affordability of applications for credit was reasonable. I've needed to look at the specific applications made by Mr M, taking account of what I've been able to establish about his circumstances when he made the applications.

I still find that the decision to grant Mr M an overdraft of £2,000 in September 2011 was reasonable. I say this because although Mr M's account had been overdrawn on a number of occasions since it began, this was never more than £100 and the account was more often than not in credit. And nothing had happened on the other account, such as a direct debit having been returned, to suggest that any further checks were necessary.

However, by the time the overdraft limit increased to £2,500 in October 2011, a direct debit had been returned on his other Halifax account. Also, the account subject to this complaint had gone from being £16.49 overdrawn on 24 September 2011, to being nearly £2,000 overdrawn on 10 October 2011. And Mr M was making his fourth application to increase his overdraft, in the space of less than two weeks – which seems unusually high and I think ought to have prompted questions about the sustainability of the lending.

I still think this should have caused Halifax to consider carrying out additional checks before agreeing to increase the overdraft limit. And, thinking about proportionality, I still think this should have included an income and expenditure (I&E) assessment and more detailed credit check.

Halifax has said there was no requirement to carry out an income and expenditure assessment at the time – that such a requirement didn't come into place until the Consumer credit regulations (CONC) started in November 2014.

I disagree. Whilst it's true that income and expenditure assessments are perhaps more explicitly and specifically mentioned in CONC, there are numerous references in both the Lending Code and OFT guidance in 2011, to the need for lenders to take make sure borrowing is *repayable* and *sustainable*. One of the main ways a lender could satisfy those criteria, would be to know about an applicant's income versus expenditure.

As Halifax pointed out in its response to my provisional decision, the Lending Code relevant at the time specifically says that “*The customer’s declared income*” would be a factor to consider in the context of whether lending is affordable. Section 4.5 of the OFT Guidance, says that “*The creditor’s assessment (of affordability) should have regard to the borrower’s ability to pay off the maximum amount of credit available (equivalent to the credit limit) over a reasonable period of time.*”

For the same reasons as set out in my provisional findings, I think it’s likely that an accurate I&E assessment would’ve shown a deficit.

Halifax has said its system for deciding whether to lend wouldn’t have identified payday lenders, but that adverse payment history would have been picked up and factored into the lending decisions. Because of the passage of time, Halifax can’t show the exact basis upon which the overdraft increase in October 2011 was agreed.

I’ve needed to look at the evidence I do have and base my decision on this. I still find it significant that Mr M has been able to show that he was in arrears with at least one payday lender at the time of the application.

For the reasons given earlier, I remain of the opinion that Halifax should have taken a closer look at Mr M’s credit history when he applied to increase the overdraft to £2,500. And that, had it done so, it’s likely this would’ve presented a picture of someone struggling to meet their existing credit commitments.

And I still think it’s unlikely it would’ve agreed to increase the overdraft limit at that point in time. It follows that I think that lending and the subsequent increases to the overdraft limit, were unaffordable.

did Halifax treat Mr M fairly when he told them in 2014 that he was experiencing financial difficulty?

Neither Halifax nor Mr M have provided any new evidence or arguments in relation to this. So I see no reason to depart from my provisional finding. Which is that Halifax did treat Mr M positively and sympathetically, because it did stop the situation from getting worse at a time when Mr M was struggling.

were the attempts by the agent to recover the money on behalf of Halifax, reasonable?

Neither Halifax nor Mr M have provided any new evidence or arguments in relation to this. So I see no reason to depart from my provisional finding – that I’m not persuaded that the actions of Halifax (or its agents), were unreasonable.

In relation to Halifax’s comments that in the event my decision about affordability remains the same, the removal of all adverse information relating to the account would not be the fairest approach.

I accept that the account may have gone on to default anyway, had the limit not increased beyond £2,000. However, as I’ve already conveyed to Halifax – it was around January 2013 when the overdraft commitment jumps beyond around £2,000, regularly and for longer periods of time. Up to that point, there are credits into the account from time to time. After that point, the overdrawn balance tends to increase and the credits to bring it down are generally smaller and less frequent – not really servicing the overdraft.

Arguably, Halifax ought to have realised around this time that the account wasn't being managed in a sustainable way and, had it done so, it's likely a default would've been applied in early 2013. Had that happened, the default would've dropped off by now.

So, I still think it would be fair and reasonable for Halifax to remove all adverse information relating to this account (including the account default), from the point at which the overdraft was increased to £2,500.

my final decision

My final decision is that I uphold Mr M's complaint against Bank of Scotland plc. I direct Bank of Scotland plc to restructure the account based on a refund of all fees, charges and interest relating to the borrowing in excess of £2,000. If this results in the account being cleared, Halifax should then pay the remainder to Mr M.

And remove all adverse information relating to the account (including the account default), from the point at which the overdraft was increased to £2,500.

In relation to the refund of fees, charges and interest, Halifax should provide Mr M with its calculations.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 8 August 2019.

Ben Brewer
ombudsman