complaint

Mr J has complained that Curo Transatlantic Limited (trading as Wage Day Advance ("Wage Day")) unfairly gave him a number of short-term loans. He's says the loans were clearly unaffordable and one of them had an interest rate of 2400%.

background

I attach my provisional decision of 16 August 2018, which forms part of this final decision and should be read in conjunction with it. In my provisional decision, I explained why I intended to partially uphold Mr J's complaint. I invited both parties to provide any further comments they may have had, by 16 September 2018, before I reached a final decision.

Wage Day responded to confirm it had received my provisional decision and had nothing further to add. Mr J also confirmed that he had nothing further to add in response to my provisional decision.

my findings

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

As neither party has sought to challenge the findings I reached or provided anything further for me to consider, I see no reason to alter the conclusions I reached in my provisional decision of 16 August 2018.

my final decision

For the reasons set out above and in my provisional decision of 16 August 2018, I'm partially upholding Mr J's complaint. Curo Transatlantic Limited (trading as Wage Day Advance) should pay compensation to Mr J as set out in my provisional decision of 16 August 2018.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr J to accept or reject my decision before 17 October 2018.

Jeshen Narayanan
ombudsman

COPY OF PROVISIONAL DECISION

complaint

Mr J has complained that Curo Transatlantic Limited (trading as Wage Day Advance ("Wage Day")) unfairly gave him a number of short-term loans. He's says the loans were clearly unaffordable and one of them had an interest rate of 2400%.

background

Mr J was given five loans by Wage Day. The loans were taken over terms of different lengths ranging from one month to eighteen months. Mr J's full borrowing history is as follows:

- loan one for £150 taken in July 2014 – payday loan (standard advance against income loan due to be paid in one instalment) with a single payment of £194.25
- loan two for £200 taken in September 2014 – payday loan with a single payment of £259
- loan three for £350 taken in October 2014 – this was a multi-pay ("MPay") loan which was to be repaid over eighteen monthly instalments of around £100 (the balance was cleared in November 2015)
- loan four for £500 taken in July 2016 – this was an instalment loan to be repaid over four instalments of around of £194
- loan five for £500 taken in November 2016 - this was an instalment loan to be repaid over four instalments of around of £197.

Mr J's complaint was looked at by one of our adjudicators. In summary she reached the conclusion Mr J's complaint should be partially upheld. In summary, she said:

- Bearing in mind the circumstances, Wage Day carried out proportionate checks before giving Mr J each of his loans;
- The total cost for the credit and what Mr J had to pay back was clearly set out for all the loans;
- But she had other specific concerns about loan three, namely;
  - although Wage Day wasn't wrong to lend the funds for loan three to Mr J it shouldn't have given him a loan on these terms;
  - the total amount Mr J was asked to repay by Wage Day was contrary to good industry practice at the time – which had been set out in the cost cap proposed by the Financial Conduct Authority ("FCA") in Consultation Paper 14/10 ("CP14/10") ;
  - Wage Day had voluntarily agreed to cap the interest and charges on these loans to 100% of the sum initially borrowed – for consumers whose loans were still open in 2016.

Our adjudicator thought that Wage Day should put things right for Mr J in the same way it had agreed to voluntarily cap the interest for consumers whose loans were still open in 2016. So she thought that refunding Mr J the extra he paid over £700 (which is twice what he borrowed) and adding interest at 8% simple per-annum, to the amounts refunded, represented a fair and reasonable way of compensating Mr J.

Mr J didn't dispute our adjudicator's view. But Wage Day did and provided two responses to the assessment.

Wage Day's first response, in summary, said:

- It welcomed the adjudicator's findings on loans one, two, four and five and the finding that the payments to the MPay loan were affordable:
- But it disagreed that the complaint about the MPay loan should be partially upheld:
- Mr J's MPay loan wasn't high-cost short-term credit ("HCSTC") and so wasn't subject to the FCA's proposed price cap or the consultation paper:
- The FCA doesn't expect that when it issues a consultation paper firm should immediately make product changes and stop selling products:
- If the adjudicator's approach is appropriate then it should apply to all credit products across the sector with a similar total costs make up including any HCSTC product and this is not the approach we are taking.

Wage Day then supplemented its initial response with a further letter from its chief executive. In summary this letter said:

- Our adjudicator accepted that it met the relevant sales standards, considered questions around affordability and disclosed the relevant information to Mr J:
- The MPay loan was a medium term loan. So it wasn't a payday loan:
- The adjudicator's view implied that the presence of an FCA consultation automatically makes any consulted on rule change something that becomes good industry practice that the industry must adopt from consultation – not any subsequent implementation date:
- Any consumers whose loans were still open in 2016, were subject to an internal cap as part of an agreement it reached with the FCA during the course of its authorisation:
- The facts don't support the contention that an immediate rate reduction to cap the levels was good industry practice at the relevant time:
- An ombudsman's conclusion reached on a such a basis (as the adjudicator's) would be unsafe and wholly inappropriate not least because it is in direct conflict with our commitment to avoid retrospection in our decisions:
- It understands that when viewed through today's lens the product charges for the MPay loan) are unattractive and higher than it would seek to levy today. But the loan was entered into in full knowledge of the charges and with a proper assessment of affordability. And Mr J doesn't appear to suffered from particular difficulties in meeting the repayments:

- The product was withdrawn from the market before the cap was introduced.

Although I've summarised and only set out the main points of Wage Day's response, I can confirm that I've read and carefully considered its submissions in their entirety.

As Wage Day disagreed with our adjudicator's view, the adjudicator then prepared the case for an ombudsman's review and decision.

Whilst I have only included a summary of the complaint and of Wage Day's arguments made here, I have read and considered all the evidence and arguments available to me from the outset.

When considering what is fair and reasonable, I am required to take into account: relevant law and regulations; relevant regulators' rules, guidance and standards; relevant codes of practice; and, where appropriate, what I consider to have been good industry practice at the time.

the regulatory framework

All of Mr J's loans were provided to him after regulation of Consumer Credit Licensees had transferred from the Office of Fair Trading ("OFT") to the FCA in April 2014. Wage Day gave Mr J his MPay loan while it was authorised by the FCA on an interim basis. And either during or just before it was applying to the FCA for authorisation as a firm. Wage Day's interim permission to provide consumer credit meant it was subject to the FCA rules and regulations from 1 April 2014.

The FCA Principles for Business ("PRIN")

The FCA's Principles for Business set out the overarching requirements which all authorised firms are required to comply with.

The handbook, in PRIN 1.1.1G, says

"The Principles apply in whole or in part to every firm".

The Principles themselves are set out in PRIN 2.1.1R. And the most relevant principle here is PRIN 2.1.1 R (6) which says:

"A firm must pay due regard to the interests of its customers and treat them fairly".

The Consumer Credit sourcebook ("CONC")

This sets out the rules which apply to providers of consumer credit like Wage Day. CONC 5 sets out a firm's obligations in relation to responsible lending. And CONC 6 sets out a firm's obligations after a consumer has entered into a regulated agreement.

It's clear there is a high degree of alignment between the Irresponsible Lending Guidance ("ILG") published by the Office of Fair Trading ("OFT") (Wage Day's regulator prior to April 2014) in March 2010 and the rules set out in CONC 5 and CONC 6. As is evident from the following extracts, the FCA's CONC rules specifically note and refer back to sections of the OFT's *Irresponsible Lending Guidance* on many occasions.

Section 5.2.1R(2) of CONC sets out what a lender needs to do before agreeing to give a consumer a loan of this type. It says a firm must consider:

(a) *the potential for the commitments under the regulated credit agreement to adversely impact the customer's financial situation, taking into account the information of which the* firm *is aware at the time the* regulated credit agreement *is to be made; and*

*[**Note**: paragraph 4.1 of ILG]*

(b) 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, to make repayments within a reasonable period..

*[**Note**: paragraph 4.3 of ILG]*

CONC also includes guidance about 'Proportionality of assessments'. CONC 5.2.4G(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."

*[**Note**: paragraph 4.11 and part of 4.16 of ILG]*

CONC 5.3 contains further guidance on what a lender should bear in mind when thinking about affordability. And CONC 5.3.1G(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.".

*[**Note**: paragraph 4.2 of ILG]*

CONC 5.3.1G(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."

*[**Note**: paragraph 4.1 (box) and 4.2 of ILG]*

In respect of the need to double-check information disclosed by applicants, CONC 5.3.1G(4) has a reference to paragraphs 4.13, 4.14, and 4.15 of ILG and states:

(b) it is not generally sufficient for a firm to rely solely for its assessment of the customer's income and expenditure on a statement of those matters made by the customer.

And CONC 5.3.7R says that:

A firm must not accept an application for credit under a regulated credit agreement where the firm knows or ought reasonably to suspect that the customer has not been truthful in completing the application in relation to information supplied by the customer relevant to the creditworthiness assessment or the assessment required by CONC 5.2.2R (1).

*[**Note**: paragraph 4.31 of ILG]*

CONC 6.7 sets out a firm's obligations in relation to its post contract business practices. CONC 6.7.21G, CONC 6.7.22G and CONC 6.7.23G contained specific obligations for high-cost short-term credit providers like Wage Day.

CONC 6.7.21G says:

A firm should not refinance high-cost short-term credit where to do so is unsustainable or otherwise harmful.

*[**Note**: paragraph 6.25 of ILG]*

CONC 6.7.22G says:

"A firm should not allow a customer to enter into consecutive agreements with the firm for high-cost short-term credit if the cumulative effect of the agreements would be that the total amount payable by the customer is unsustainable."

*[**Note**: paragraph 6.25 (box) of ILG]*

Section 6.2 of the ILG was concerned with what the OFT referred to as 'Deceptive and/or unfair practices'. And Section 6.25 lists as an example of what may amount to a deceptive and/or unfair practice. And it says:

"Repeatedly refinancing (or 'rolling over') a borrower's existing credit commitment for a short-term credit product in a way that is unsustainable or otherwise harmful".

Section 6.25 then goes on to say:

"The OFT considers that this would include a creditor allowing a borrower to sequentially enter into a number of separate agreements for short-term loan products, one after another, where the overall effect is to increase the borrower's indebtedness in an unsustainable manner.

The general purpose of short-term loans, such as 'payday loans', is to provide borrowers with a cash advance until their next pay day and they are usually about 30 days, or just over, in duration. However, in certain circumstances, the borrower can elect to 'renew' the loan for a fee and delay payment for a further agreed period of time.

The purpose of payday loans is to act as a short-term solution to temporary cash flow problems experienced by consumers. They are not appropriate for supporting sustained borrowing over longer periods, for which other products are likely to be more suitable."

While Mr J's MPay loan was taken before the FCA had implemented the total cost cap for high-cost short-term credit, it was taken after CONC 6.7.23R was in place. And CONC 6.7.23R says:

"A firm must not refinance high-cost short-term credit (other than by exercising forbearance) on more than two occasions."

CONC 6.7.17R defines refinancing and says:

(1) *In CONC 6.7.18 R to CONC 6.7.23 R "refinance" means to extend, or purport to extend, the period over which one or more repayment is to be made by a customer whether by:*

(a) agreeing with the customer to replace, vary or supplement an existing regulated credit agreement;
(b) exercising a contractual power contained in an existing regulated credit agreement; or
(c) other means, for example, granting an indulgence or waiver to the customer.

(2) *"Exercise forbearance" means to refinance a* regulated credit agreement *where the result is that no interest accrues at any time in relation to that agreement or any which replaces, varies or supplements it from the date of the refinancing and either:*

(a) there is no charge in connection with the refinancing; or
(b) the only additional charge is a reasonable estimate of the actual and necessary cost of the additional administration required in connection with the refinancing.

(3) *The term "refinance" within paragraph (1) does not include where under a* regulated credit agreement *repayable in instalments a* customer *requests a change in the regular payment date and as a result there is no charge or additional interest in connection with the change.*

the law

The Financial Services (Banking Reform) Act 2013 amended section 137C of the Financial Services and Markets Act 2000 ("FSMA"). These amendments required the incoming regulator (the FCA) to make general rules with a view to securing an appropriate degree of protection for borrowers (of certain types of credit) against excessive charges.

Mr J's MPay loan agreement was also governed by the Consumer Credit Act 1974 ("CCA"). Section 140A sets out circumstances where the court may determine that the relationship between a creditor and a debtor is unfair to the debtor. Section 140A says:

140A Unfair relationships between creditors and debtors

(1) *The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following-*

(a) *any of the terms of the agreement or of any related agreement;*

(b) *the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;*

(c) *any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).*

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).

(3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor.

(4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.

(5) An order under section 140B shall not be made in connection with a credit agreement which is an exempt agreement [for the purposes of Chapter 14A of Part 2 of the Regulated Activities Order by virtue of article 60C(2) of that Order (regulated mortgage contracts and regulated home purchase plans)]

Section 140B sets out the types of order the court could make should it determine that the relationship between the creditor and debtor is unfair to the debtor. Section 140B says:

140B Powers of court in relation to unfair relationships

(1) An order under this section in connection with a credit agreement may do one or more of the following—

(a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);]

(b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;

(c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;

(d) direct the return to a surety of any property provided by him for the purposes of a security;

(e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;

(f) alter the terms of the agreement or of any related agreement;

(g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons.

other relevant publications and good industry practice

CONC sets out the regulatory framework authorised consumer credit providers have to adhere to. But it represents a minimum standard for firms. And as I've explained, I'm also required to take into account any other guidance, standards; relevant codes of practice; and, where appropriate, what I consider to have been good industry practice.

The OFT's Payday Lending Compliance Review Final Report

The OFT published its "Payday Lending Compliance Review Final Report" in March 2013. The purpose of the review was "to establish the extent to which payday lenders [were] complying with the Consumer Credit Act, other legislation and [were] meeting the standards set out in the ILG".

The review sought to highlight examples of what the OFT considered poor practice and evidence of non-compliance with the relevant law and failure to meet the minimum standards expected. The analysis was also put together to help the FCA's work on payday lending ahead of it assuming responsibility for regulating the sector from April 2014.

The report began with an overview section setting out the OFT's concerns. Page two of the report says that the OFT:

"…is particularly concerned by the evidence of irresponsible lending; too many people are given loans they cannot afford, and when they can't repay are encouraged to extend them, exacerbating their financial difficulties This is causing real misery and hardship for a significant number of payday users"

Page three of the report says:

"Our evidence paints a concerning picture of the payday lending market. It appears that irresponsible lending is not a problem confined to a few rogue traders, but it has its roots in the way competition works in this market. The evidence suggests that many consumers are in a weak bargaining position, and that firms compete on speed of approval rather than price"

It then goes on to say:

"Additionally, firms describe and market their product to consumers as one-off short term loans (costing on average £25 per £100 borrowed for 30 days), but in practice around half the revenue comes from loans which last longer and cost a lot more because they are rolled over or refinanced. Lenders do not need to compete hard for this source of revenue because by this time they have a captive market. This, and the misuse of continuous payment authorities to reclaim monies owed, may distort incentives for lenders, encouraging them to make loans to people who cannot afford to repay them first time".

Consultation Paper 14/10

It's also important to note that by the time Mr J took his MPay loan the FCA had also set out how it proposed to enact its statutory duty (set out in S137C of FSMA) to make general rules with a view to securing an appropriate degree of protection for borrowers (of certain types of credit) against excessive charges.

The proposed rules weren't yet in force but most, if not all, of what was set out did go on to make it into CONC 5A.1 where the cost cap ended up being set out. While the contents of CP 14/10 weren't rules at that stage, they did set out examples of what the FCA considered to be poor practice by lenders.

The FCA set out its *"strong commitment and clear remit to tackle poor conduct in the market"* and to protect consumers. It also said the purpose of its cap was to secure *"an appropriate degree of protection for borrowers against excessive charges"*.

The FCA found that these excessive charges were *"harming significant numbers of customers"* and that many borrowers *"pay a high price for a loan that is of limited net benefit or makes their already difficult financial situation worse"*. It noted that *"borrowers who have problems repaying can end up owing significantly more than they originally borrowed".*

CP 14/10 also reiterated that all high-cost short-term credit lenders that were part of the previous OFT regime and which went on to rely on 'interim permission' in order to operate from 1 April 2014, had to apply for formal FCA authorisation from 1 December 2014. The FCA made it clear in the consultation that it would not authorise a firm if it couldn't demonstrate compliance with the proposed price cap.

The Consumer Finance Association Lending Code for Small Cash Advances

The principal trade association representing the interests of short-term lending businesses operating in the United Kingdom is the Consumer Finance Association ("CFA"). The CFA published its Lending Code for Small Cash Advances ("the code") in July 2012.

I understand that Wage Day is currently a member of the CFA. Equally as the code was published by the main trade association representing short-term lenders, I consider it to be indicative of the standards of good practice expected of lenders such as Wage Day at the time. Furthermore most of the relevant parts of this code went on to be included in the 'Good Practice Customer Charter Payday and Short-terms Loans' which members of all the relevant trade associations signed up to just four months later, in November 2012.

Section 1 of the code sets out its purpose. Section 1b says:

"Members of the Consumer Finance Association offer small cash loans predominantly from high street outlets or online".

Section 1c says:

"This type of loan allows customers to borrow a relatively small amount of money, (usually between £50 and £1000) which they repay over a short period (typically one or two months). The loan is not designed for longer term borrowing, but to improve short term personal cash flow."

And Section 1d says:

"The purpose of this Code is to ensure compliance by members with the minimum standards set by the Association, as specified in the Code, and accordingly protects and benefit consumers."

Section 3 sets out the general obligations expected of lenders. Amongst other things Section 3 says members shall:

"b) trade honestly, responsibly and treat customers with respect."

"l) ensure fairness in all dealings with customers including, but not limited to, their dealings with customers both before and after the making of the agreement and the manner in which those agreements are enforced."

Section 4 of the code sets out a lender's specific lending obligations. Part a of this section is concerned with advertising and marketing and amongst other things, it says:

"iii) members shall ensure all advertising is truthful and not misleading and raise awareness to the short term nature of the loan."

Part d of section 4 is concerned with pre contractual information. And it, amongst other things, says:

"v) members shall provide explanations to the customer, to enable them to assess whether the proposed credit agreement is appropriate to their circumstances by explaining, but not limited to:

- *that small cash loans are intended to improve short term cash flow, and therefore not suitable for longer term borrowing."*

Finally, in September 2013 the then Chief Executive of the CFA, in response to being presented with research on Annual Percentage Rates ("APR") said:

"No-one ever pays back thousands of per cent in interest, on a short-term loan. Quite simply, the average charge is £25 per £100 borrowed. APRs associated with payday loans are often the focus of negative comment and discussion, however, a high APR does not mean it is the most expensive form of borrowing, the length of loan affects the APR figure; shorter loans have higher APRs since APR is based on a 12 month period."

my provisional findings

I have read and considered all the evidence and arguments available to me from the outset. in order to provisionally decide what is, in my opinion, fair and reasonable in all the circumstances of the case.

Taking all of the relevant considerations into account, it seems to me that the overarching questions I need to consider in order to decide what is in my opinion fair and reasonable in all the circumstances of this complaint, are:

- Did Wage Day complete reasonable and proportionate checks to satisfy itself that Mr J would be able to repay his MPay loan in a sustainable way?
    - If not, would those checks have shown that Mr J would've been able to do so?

- Taking into account the short-term purpose of the loans provided, did the overall pattern of lending increase Mr J's indebtedness in a way that was unsustainable or otherwise harmful?

- Did Wage Day act unfairly or unreasonably in some other way?

If I determine that Wage Day did not act fairly and reasonably in its dealings with Mr J and that he has lost out as a result, I will go on to consider what is fair compensation.

Did Wage Day complete reasonable and proportionate checks to satisfy itself that Mr J would be able to repay his MPay loan in a sustainable way?

Lenders will determine their own risk appetite when providing short-term loans. But the rules also require lenders to carry out a reasonable assessment of whether the borrower can afford to meet the repayments in a sustainable manner. This is sometimes referred to or called an "affordability assessment" or "affordability check". Checks should be both "borrower-focused" and "proportionate". It's whether Wage Day fulfilled this obligation *to Mr J* that is the first key question I must answer in this case.

What constitutes a proportionate affordability check will be dependent upon a number of factors including – but not limited to – the particular circumstances of the borrower (for example, their financial history, current situation and outlook, and any indications of vulnerability or financial difficulty) and the amount / type / cost of credit they are seeking. Even for the same customer, a proportionate check could look different for different loan applications.

In light of this, I think that a reasonable and proportionate check ought generally to have been *more* thorough:

- the *lower* a customer's income (reflecting that it could be more difficult to repay a given loan amount from a lower level of income)

- the *higher* the amount due to be repaid (reflecting that it could be more difficult to meet a higher repayment from a particular level of income)

- the *greater* the number and frequency of loans, the *longer* the period of time during which a customer has been given loans and/or the *longer* the term of the loan (reflecting the risk that ongoing use of these loans may signal that the borrowing had become, or was becoming, unsustainable and the greater potential difficulty of the consumer being able to maintain payments over a longer period).

There may also be other factors which could influence how detailed a proportionate check should be for a given loan application – including (but not limited to) any indications of borrower vulnerability, any foreseeable changes in future circumstances, or any substantial time gaps between loans. I've thought about all the relevant factors in this case.

loans one, two, four and five - Mr J's payday loans

The information I've seen suggests that before being lent loans one and two, Mr J was asked to confirm who his employer was, how long he'd been employed for and what his monthly income was. Mr J was asked to provide some details about his monthly expenditure as well as the debit card he'd use to repay any loans.

It looks like, for loan one, Mr J confirmed who his employer was and that his monthly income was £2,700.00. The information provided also confirms that Mr J declared he had monthly expenditure of £950, leaving with him with a monthly disposable income of £1,750.00. I can see that Mr J provided (or at the very least reconfirmed) similar information for loan two.

Loan one was for £150 and had a total repayment of £194.25. As Mr J indicated he had a monthly disposable income of £1,750.00 and he had no previous borrowing history with Wage Day, I don't think it was unreasonable for Wage Day to have proceeded with this application on the basis of the information it had been provided with. So I think Wage Day's checks before providing loan one were fair, reasonable and proportionate.

Mr J applied for loan two a couple of weeks after he'd repaid one. The loan was for £200 and the total repayment was £259. While the amount Mr J applied for was more than for loan one, the application was made a couple of weeks after loan one had been repaid.

It could be argued that Mr J applying for loans of increasing amounts in successive months perhaps ought to have prompted Wage Day to have started having doubts as to whether he really had a disposable income of £1,750.00. But Mr J repaid loan one in full and on time. And while loan two was taken a few days after loan one had been repaid, it wasn't for an increased amount.

So, on balance, I don't think that Wage Day ought fairly and reasonably to have suspected that Mr J may not have had as much disposable income as he'd suggested at this stage. And, in these circumstances, I don't think that it was disproportionate for Wage Day to proceed with the application for loan two without carrying out further enquiries. This means that I think Wage Day's checks before lending loan two were also proportionate.

Mr J was lent loan four approaching eight months after loan three (the MPay loan) had been repaid. Loan five was lent a couple of days after loan four was repaid and it was for exactly the same amount.

Wage Day appears to have carried out similar checks for both of these loans. It recorded Mr J's income as having been a little lower than at the time of the applications for loans one to three at £2,600.00. And Mr J appears to have been asked for details of his expenditure too. It looks like Mr J declared that his expenditure was significantly more than what he'd declared for loans one to three. And this means that Mr J declared a less optimistic (and arguably more realistic) figure of £950.00 in relation to his disposable income.

I accept that Wage Day's record of its previous dealings with Mr J was also a source of information for it to consider. But the gap between loan three being repaid and loan four being lent together with Mr J declaring a more realistic monthly disposable income of £950, lead me to think that it wasn't unreasonable for Wage Day to rely on the information provided, or for it not to carry out further enquiries before lending loans four and five .

So overall and having carefully thought about everything, I don't think that Wage Day's checks before providing loans one, two, four and five were unreasonable and/or disproportionate bearing in mind all of the circumstances.

I accept that Mr J's actual financial position wasn't reflected in the information Wage Day obtained. The information I've been provided with shows that Mr J's actual financial position was far worse and it indicates that most of these loans – especially loan two are likely to have been unaffordable.

But Wage Day could only make its decision based on the information it had available at the time. It didn't have the information I currently have and given what I've explained above, I don't think proportionate checks would've extended into Wage Day asking Mr J for this information given the particular circumstances at the time of the individual loan applications.

As this is the case, I think that the checks Wage Day carried out before providing loans one, two, four and five were fair, reasonable and proportionate.

Mr J's application for his MPay loan

From what I've seen, Mr J approached Wage Day for his MPay loan on 1 October 2014. This was only a couple of days after he'd repaid loan two. I don't know if Mr J asked for a multi payment product because it's unclear how he transitioned from a single payment product with a term of sixteen days to a multi payment one with a term of eighteen months.

Wage Day hasn't confirmed what channel Mr J used to make his application. But the information it has provided records the teller as "Web" – which is the same as the previous two loans, which were applied for on Wage Day's website. In any event, even if Mr J did apply for this loan online, I think it's unlikely that he visited Wage Day's website with the intention of applying for a loan over a term of eighteen months.

the checks carried out before Wage Day gave Mr J the MPay loan

Wage Day has told us that the checks it carried out before giving Mr J his loan were broadly similar to those it carried out for loans one and two. This was despite Mr J's MPay loan being his third loan in total with Wage Day.

As I understand it, Mr J confirmed, or reconfirmed, that his total monthly income and total outgoings were unchanged from when he applied for his first two loans. The information Mr J provided indicated that he had a monthly disposable income of £1750. And this suggested that Mr J would have no difficulty sustaining the monthly payments of around £100 for this loan.

Wage Day says it had no reason to suspect that the information Mr J was providing was inaccurate – especially as it didn't have anything such as a credit check that contradicted what Mr J was saying. But I don't think the matter is quite as clear cut as Wage Day says, as I think that the circumstances of this loan meant that it would've been fair and reasonable for Wage Day to have taken steps to verify at least some of the information Mr J provided.

To explain, Mr J declared that he had a monthly disposable income of £1750. Yet this was the third month in a row he was asking for a loan. And the amount he was asking for was for significantly more than he'd asked for on the previous two occasions too.

In these circumstances, I think Wage Day ought to have been alert to the possibility that Mr J was struggling to repay his borrowing from disposable income. After all if his income and expenditure were as declared, why had he been unable to repay his previous two loans without re-borrowing?

So I think it was fair and reasonable for Wage Day to have questioned the information it had been provided with. And I also think it's fair and reasonable to have expected Wage Day to have undertaken further checks to have verified the information Mr J provided about his income and his regular financial commitments in order to check this loan was sustainable for Mr J – especially as he was now being asked to sustain payments (of not too much less than what he'd previously been unable to repay without borrowing shortly afterwards) for a considerably longer period of time – 18 months as opposed to 16 days.

For example, rather than simply continuing to rely on what it had been told by Mr J (given his failure to repay previous loans without further borrowing) Wage Day could have sought further evidence and information about his outgoings. Or it might have asked Mr J to provide proof that his income was what he'd declared. And by this stage, I also think that Wage Day ought fairly and reasonably to have started carrying out enquiries into whether Mr J did have other short term lending commitments elsewhere.

There's no evidence that Wage Day did any of this – or any other additional assessment of affordability – for the MPay loan even though it was a product which required a much more substantial undertaking from Mr J. So I don't think Wage Day completed reasonable and proportionate affordability check before giving Mr J his MPay loan.

Would reasonable and proportionate checks on Mr J have indicated to Wage Day that Mr J would have been unable to sustainably repay his MPay loan?

As I've explained, given Mr J's pattern of borrowing and the loan term he was being asked to commit to, I think that it would've been fair and reasonable for Wage Day to have got a better understanding of Mr J's financial before agreeing to give him this loan.

As proportionate checks weren't carried out for this loan, I can't say for sure what they would've shown. So I need to decide whether it is more likely than not that a proportionate affordability check would have told Wage Day that it was unfair to give this MPay loan to Mr J, given his financial circumstances at the time. Mr J has provided us with evidence of his financial circumstances at the time he applied for this loan.

Of course, I accept different checks might show different things. And just because something shows up in the information Mr J has provided, it doesn't mean it would've shown up in any checks Wage Day might've carried out. But in the absence of anything else from Wage Day showing what steps it took to verify the information provided (and how it interpreted it), I think it's fair and reasonable to place considerable weight on it as an indication of what Mr J's financial circumstances were likely to have been at the time.

Having considered the information Mr J has provided, there isn't enough to persuade me that it's more likely than not, Wage Day would've seen Mr J couldn't have made the monthly payments for the MPay loan if it had gathered adequate information before granting it.

The information I've been provided with does suggest that Mr J's finances weren't in the greatest of shape. Mr J's credit file shows that he had quite a few existing credit commitments. But it doesn't show me that he couldn't have committed to the monthly repayment of around £100, at least in the initial stages, whilst also meeting his normal commitments.

So overall and having carefully thought about everything provided, I don't have enough here to be able to say that proportionate checks would've shown Wage Day the payments for this loan were clearly unaffordable for Mr J.

Taking into account the short-term purpose of the payday loans provided, did the overall pattern of lending increase Mr J's indebtedness in a way that was unsustainable or otherwise harmful?

In addition to assessing the affordability of each *individual payday* loan provided to Mr J by Wage Day, I also think it's fair and reasonable to look at the *overall pattern* of lending. I'm mindful here of the short-term purpose of this type of credit and of the relevant rules, guidance and good industry practice at the time – as summarised in the earlier part of this decision.

Bearing in mind the short-term purpose of this type of credit and the relevant rules, guidance and good industry practice at the time (as summarised in the earlier part of this decision), it seems to me there may be circumstances where offering a loan of this type to a customer who appears to be becoming reliant upon short-term lending would be unsustainable or otherwise harmful. This is irrespective of the fact that the loans, on the face of things, may appear to be affordable.

So I've carefully thought about whether it was fair and reasonable for Wage Day to have offered Mr J his payday loans in the circumstances which it did.

Wage Day gave Mr J four payday loans in two separate blocks or "chains" of two. And despite early warning signs – such as the second loan in each of the chains being taken fairly soon after the first and neither being less than the amount of the first loan – I can't say that Wage Day ought to have been alerted to the fact that the pattern of Mr J's payday loans meant its lending had more likely than not become unsustainable.

I think a pattern was beginning to emerge after the second loan in each of the chains. But as Wage Day didn't give Mr J further payday loans after this, I don't think that there is enough here to say that it ought fairly and reasonably to have regarded the emerging pattern, of Mr J's payday loans becoming unsustainable and otherwise harmful, as having become established.

That said, even though I don't think that the pattern of Mr J's payday loans meant that Wage Day ought to have seen its payday loans were unsustainable and otherwise harmful, I do find myself with significant concerns about the MPay loan Wage Day lent Mr J.

Did Wage Day act unfairly or unreasonably in some other way?

One of the reasons for Mr J's complaint is the interest rate he was charged on his MPay loan. He refers to being charged an interest rate of 2400%. Having looked at his credit agreement, I can see it sets out the interest rate on the loan is 354.00% per annum. The credit agreement also sets out that this translates to an Annual Percentage Rate ("APR") of 2420.31%.

The credit agreement also clearly explains that the total charge for the credit is £1476.79 (which is made up of £1461.79 in interest and an express payment fee of £15). And the agreement also sets out that Mr J was due to make seventeen payments of £100.60 and a final payment of £101.59 on 28 March 2016. So given Mr J was only receiving £350 and he had to pay back £1,811.79 (over 18 months) I think that the cost of this loan is on any basis exceptionally high.

I accept that the cost of the MPay loan was clearly set out to Mr J before he agreed to it.

But whilst the clarity of Mr J's agreement and the monthly repayment, on the face of things, being affordable, might normally be enough for me to conclude that Wage Day didn't do anything wrong, I still think that it acted unfairly and unreasonably to Mr J given the particular circumstances of this case.

To explain, Mr J went back to Wage Day for further funds only two days after paying off his previous loan. So I think that Wage Day ought to have picked up that Mr J may have been looking to borrow a further amount just to cover the hole that repaying loan two had left in his finances. And, in these circumstances, I think that it would have been fair and reasonable for Wage Day to have recognised this when lending to him. In my view, Wage Day didn't do that and instead unfairly took advantage of the situation by providing such an expensive product.

It seems to me that this loan was only affordable because it was to be repaid in instalments. As I've explained earlier in this decision, it's unclear how Mr J transitioned from a single payment loan with a term of sixteen days to a multi payment loan, with a similar rate of interest, over a term of eighteen months. But I don't think that it was unfair per se for Wage Day to transition Mr J onto an instalment product rather than a single pay one, given his apparent need to re-borrow shortly after repaying the capital on a single payment loan - after all this might've allowed him to repay what he owed more gradually and leave him with less of a hole in his finances.

That said even though it wasn't unfair per se for Wage Day to transition Mr J onto an instalment based product, this doesn't mean that it was fair or reasonable for Wage Day to move Mr J onto an MPay loan, with an 18-month term, on the terms it did. As Wage Day only offered an 18 month loan, this meant if Mr J wanted a loan from Wage Day where he could repay what he borrowed in monthly instalments he had to take it over this term.

So Mr J was left in a position where he either took another payday loan (which he'd already been struggling to repay and which proportionate checks would most likely have shown Wage Day was unaffordable), or he instead took this MPay loan on very disadvantageous terms.

I accept that this loan was provided after the extortionate credit bargaining provisions in the Consumer Credit Act 1974[1] were replaced by the Unfair Relationship provisions (set out on pages 6-8 of this decision). But this MPay loan had an interest rate so egregious that I think a court may well have found it grossly exorbitant and that the agreement required payments which grossly contravene ordinary principles of fair dealing. This is especially the case when considering the prevailing interest rates at the time and Mr J's financial position.

And as the Unfair Relationship provisions were brought in to increase consumer protection, I also think it's entirely possible that a court may well find that an unfair relationship existed between Wage Day and Mr J at the time of this loan - although I can't say this for certain.

But, in any event, even if this isn't the case, I'm required to decide what I think is fair and reasonable in all of the circumstances of this case. And I find that Mr J was given a loan which had an interest rate which, on the face of things, wasn't commensurate to the risk Wage Day was taking in providing the funds.

Wage Day had already received over £100 in interest and charges (from loans one and two) from Mr J prior to providing this loan. And as the payments on this loan were for around

[1] s137-140 Consumer Credit Act 1974

£100 a month, it would've arguably recovered the full value of the capital it was advancing to Mr J by month three (if the previous interest and charges are taken in to account) and certainly by month four at the latest. So this means that all of the payments from month five, at the latest, were being made after there was no risk to Wage Day of it not getting its money back.

I think that this agreement (which required at least thirteen and possibly fourteen out of the eighteen payments to be made once Wage Day would already have had its money back) would, to any ordinary observer, be seen as unfair given this loan was provided in circumstances where Wage Day ought to have been alert to the possibility Mr J was struggling financially. And instead of offering assistance and perhaps providing a product where Mr J would repay £100 over a more reasonable period, which I think would've been the fair and reasonable thing to do in the circumstances, Wage Day provided him with a product which required him to repay five times the amount he was borrowing over an 18-month period.

In my view, this had the effect of unfairly excessively increasing and prolonging Mr J's overall indebtedness (his borrowing having worsened noticeably over the course of his previous two loans). I also think that Wage Day failed to take into account the risk of this loan being unsustainable bearing in mind the total charge of the credit relative to Mr J's financial situation as it was. This is especially as it was using an interest rate that according to the principle trade association was only really meant to be used on products repaid over a short term period and bearing in mind the extent of Mr J's financial position - him having had to re-borrow hours after settling his previous payday loan.

I'm also mindful that Wage Day – in a scheme it agreed with the FCA during the process of its authorisation – agreed to take steps to compensate consumers with the MPay product whose loans hadn't been repaid by 2016. It agreed to refund the extra consumers paid over and above the total cost cap introduced by the FCA in January 2015. It's unclear why Wage Day agreed to take this action. Although as I've mentioned the FCA made it clear in CP14/10 that it wouldn't authorise any firm to carry out activities as a high-cost short term credit lender, if it offered products that breached the incoming cost-cap.

In any event, I think it's fair and reasonable to take a similar approach to Mr J, who did manage to pay off his loan, to those consumers who have been either unable or unwilling to repay their loans. Wage Day's reason for treating Mr J differently appears to be because it believes he doesn't look to have suffered any difficulty paying back his loan.

I don't agree with Wage Day's view that a consumer making their loan payments, in itself, means that they weren't experiencing difficulty doing so. But, in any event, leaving aside my concerns with this argument, Mr J somehow making his payments doesn't alter the fact that it was unfair to provide him with this loan, on these terms, in the first place. And that's the crux of what I'm considering here.

Wage Day has suggested that it wasn't unfair for it to have given Mr J this loan because the MPay loan wasn't HCSTC and any total cost-cap wouldn't have applied to it anyway. I understand its argument is that the MPay loan falls outside the FCA's definition of high-cost, short-term credit - as it has a term which may mean there wasn't an intention for it to have been "substantially repaid" within 12 months.

I don't necessarily agree with this. But, in any event, even if this is the case this in itself doesn't mean that it was fair and reasonable for Wage Day to transition Mr J from a HCSTC product to a medium term one with a similar rate of interest in the circumstances that it did. And it doesn't persuade me that it was fair and reasonable for Wage Day to give Mr J this loan in these circumstances.

I've also given careful thought to what Wage Day has said about the MPay product charges being unattractive (and higher than it would seek to levy today) when viewed through today's lens – suggesting that it was fair and reasonable for it to provide this product in to Mr J, in the circumstances that it did, in 2014. But I disagree with this.

I think that Wage Day's argument ignores the published reviews carried out by two separate regulators (the OFT and the FCA), which found that lenders were taking advantage of a captive market of consumers who were in a weak bargaining position. And also Parliament having passed legislation, almost a year before this loan was taken out, to impose a duty on the new regulator to impose a cost-cap precisely because it thought HCSTC borrowers were being subjected to excessive charges. So I think the decision to provide Mr J with this loan in his particular circumstances was unfair whether viewed through a 2014 or 2018 lens – especially as it was marketed to a customer like Mr J who Parliament had decided needed protecting.

I've also thought about the arguments that Wage Day has made about "retrospection". I take this to mean it believes we are applying rules retrospectively. I think it has argued this because it has interpreted our adjudicator's view as saying it shouldn't have given Mr J this loan simply because it breached the cost-cap proposed in CP14/10.

For the avoidance of doubt, my decision is not that Wage Day shouldn't have given Mr J his MPay loan simply because the interest and charges were for more than the 100% of the amount borrowed cost cap proposed in CP 14/10. Rather I find that the total amount Wage Day charged Mr J for his MPay loan, was so much higher than what could be considered fair and reasonable bearing in mind Mr J's previous borrowing history, his financial means, his bargaining power and the circumstances of his relationship with Wage Day. And so Wage Day increased Mr J's overall indebtedness unfairly and unreasonably.

All of this means that I don't think it was fair and reasonable for Wage Day to give Mr J this MPay loan in the circumstances which it did. So I'm intending to uphold this complaint and tell Wage Day to put things right for Mr J.

what I think is fair compensation in the circumstances of Mr J's case

I've given careful thought to what amounts to fair compensation in this case. Where I find that a business has done something wrong, I'd normally expect that business to – as far as reasonably possible – place the consumer in the position they would be in now if the wrong hadn't taken place. So I'm effectively looking for Wage Day to put Mr J in the position he'd now be in if he hadn't been given his MPay loan on these terms.

Mr J was given his MPay loan and he used the funds – albeit I accept that some of it went towards the hole left in Mr J's finances as a result of repaying Mr J's second payday loan. So it's not possible to put Mr J back in the position he would be in he hadn't been given his MPay loan in the first place. And I have to look at what else I can do to put things right in the fairest way I can.

In cases where we think a loan shouldn't have been given we usually tell a business to refund all of the interest and charges the consumer paid on that loan. So I've started by thinking about whether a full refund of the interest and charges Mr J had to pay would be fair here, given Mr J's borrowing history with Wage Day (prior to the MPay loan) and Wage Day's obligations to treat Mr J positively and sympathetically should he have been experiencing difficulty.

But while Mr J's finances were clearly distressed and Wage Day would've seen that he wasn't properly settling his loans (because he was taking new ones shortly afterwards), I'm not persuaded there's enough here for me to say that Wage Day ought to have offered Mr J an interest free loan instead of this MPay one.

So I don't think it would be fair and reasonable for me to say that Mr J should be refunded all the interest and charges he paid on his MPay loan, as I think that Wage Day did complete reasonable and proportionate checks – to assess affordable payments - before giving him the loan. As this is the case, I've given careful thought to what would be fair and reasonable compensation here. I agree that the total cost-cap proposed by the FCA in CP 14/10, which was introduced to Section 5A of the Consumer Credit Sourcebook ("CONC") in January 2015 wasn't officially in force at the time Mr J was given his MPay loan.

That said I think that 100% of the amount borrowed seems about right here – especially as we're talking about a loan with an 18 month term. And Wage Day did think it was appropriate to ensure that any consumers who still had an open loan in 2016 didn't pay any more than twice what they borrowed.

For the avoidance of doubt, I also wish to make it clear that this isn't a case of me simply applying the cost cap in CONC 5A. After all a breach of the cost cap set out in CONC 5A.2 would typically render the agreement unenforceable. And that's not what I'm saying should happen here.

Overall and having given considerable thought to this matter, bearing in mind my reasons for upholding Mr J's complaint, I think it would be fair and reasonable, in all the circumstances of this case, for Wage Day to compensate Mr J by:

- refunding and paying Mr J all the extra he paid over £700 (which is twice the amount Mr J was lent for his MPay loan); and

- adding interest at 8% per year simple on the over-payments from the date they were made to the date of settlement†;

†HM Revenue & Customs requires Wage Day to take off tax from this interest. Wage Day must give Mr J a certificate showing how much tax it's taken off if he asks for one.

my provisional decision

For the reasons I've explained, I'm intending to partially uphold Mr J's complaint and tell Curo Transatlantic Limited (trading as Wage Day Advance) to pay redress as set out above.

So unless the comments and evidence I get by 16 September 2018 change my mind, that's what I'll tell Wage Day to do in my final decision.

Jeshen Narayanan
ombudsman