



<u>Decision Ref:</u>	2019-0189
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Debit Card
<u>Conduct(s) complained of:</u>	Fees & charges applied
<u>Outcome:</u>	Rejected

**LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

Background

The complaint is in respect of a current account the Complainant holds with the Provider and he states that this account has regularly been the subject of “*over-limit*” charges in circumstances where he does not have an overdraft facility on the account.

The Complainant’s Case

The Complainant has a personal current account with the Provider, which, he states has been in operation for the last “5 years”.

In an e-mail to the Provider dated 7 March 2017, the Complainant stated “*I have no overdraft on my account but I’m consistently getting charged fees for being overdrawn. One reason is that when I use my contactless card the funds are not coming out of my account until a few days later and I’m spending money that is not in my bank. The second reason is because somehow my payments and withdrawals are sometimes not accounted for or slow to update on your systems which can leave me confused as to my actual balance and I’m spending money that isn’t in my account.*”

The Complainant says that he checks his account balance frequently through his online account during the day and states that the balance amount varies over each 12-24 hour period as the Provider’s system processes daily transactions. The transactions vary from

purchases the Complainant makes through contactless payments, debit card payments and ATM withdrawals.

The Complainant states that there is a discrepancy between the current account balance showing on his online account and the real time balance of the account. The Complainant states that his account has a higher balance at different times over a 12-24 hour period and therefore he believes he has more funds at his disposal, which the Complainant states causes him to incur excessive "*over-limit*" charges.

The Complainant has provided various screen shots of his internet banking account showing the balance fluctuating over a few hours, on a number of different days, when he has not made any withdrawals/payments from the account during that period. The Complainant asserts that oftentimes completed transactions appear in the pending transactions section of his internet banking the following day after they had been marked "completed", and sometimes transactions show up as "pending", then "completed", then back to "pending" and to "completed" again.

The Complainant states that the Provider is allowing the payments to be made in circumstances where he has no overdraft facility, allowing his account to become overdrawn and therefore charging him the over-limit charges. He states that he had addressed this issue with the Provider previously and questions why the Provider did not put measures in place whereby it would refuse to allow such payments being made, when there are not sufficient funds in his account to do so.

The Complainant also states that he had difficulty contacting the Provider, electronically and through its customer service facilities and contends that when he raised his grievances, the Provider did not adequately address them. The Complainant states that he made numerous calls to the Provider. Audio recordings of these calls were provided to this office and to the Complainant. The Complainant identifies one call of which a recording was not furnished. This call was made in **November 2017** and on this call he received a call back from a staff member in his local branch after numerous attempts to reach them. He states that on this call he requested whether paperwork (various screenshots of his online account) handed in by him to the branch had been received by the branch manager and referred to the Provider's complainants department to be included with his open complaint. He states that this epitomises the poor customer service and lack of interest of the Provider in dealing with his complaint. The Complainant states that he finds it extremely questionable that this call was not recorded.

The Complainant further states that when he called into a branch on **4 December 2017** and spoke with the branch manager about the screen shots of his account which he had furnished to the branch in respect of his claim, the branch manager went to copy the documents and returned to the counter 30 seconds later returning the documents to the Complainant. The Complainant states that he does not believe that the manager retained copies of, or indeed even copied, these documents. During the course of the investigation of this matter, the Provider advised that these documents were not submitted to the Provider's complaints department as the screen shots were from the Complainant's

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personal computer and time stamped and the Provider states that these could be easily manipulated.

The Provider states that the documents were shredded because of this. The Complainant does not accept this and states that he believes that these documents were never in fact copied by the branch manager, or referred to the complaints department.

The Complainant is seeking the refund of all over-limit charges applied to his account since it was opened.

He is also seeking compensation for the poor customer service and the manner in which the Provider dealt with his complaint.

The Provider's Case

The Provider contends that the Complainant opened his current account on **18 November 2015** and on that date the Complainant signed a declaration acknowledging he received a copy of the terms and conditions, terms of fees, schedule of fees and charges and overdraft interest rate. Specific reference is made to clauses 31.-3.5 and 13.5-13.7 which the Provider contends set out the terms and conditions as regards payments and over-limit charges.

The Complainant was dissatisfied with over limit charges applied to his account in **December 2015** and a complaint was logged with the Provider in **February 2016**. The Provider states that the Complainant was advised that the charges were applied for over spending and the Provider refunded €40.00 in over limit fees to the Complainant as a goodwill gesture on the **19th of February 2016**.

The Provider contends that it put the Complainant on notice that charges would be applied for over spending on the account. The Provider also contends that the Complainant was on notice as per the online account terms and conditions and in particular section 9.0 and further in particular paragraph 9.3.1 which states as follows:

"The information we give you is not conclusive evidence of the state of your Account (if you need a conclusive statement, please contact your branch)...".

The Provider states that the Complainant was on notice that the "online" account balance would not be "to the minute" accurate as payments made via wireless or online would have to be logged and updated. The Provider states that when logging on to the online account the Complainant may be viewing a pen picture point in time of his account, which is not a true reflection of the actual position of his account. The Provider states that it processes a considerable amount of transactions on a daily basis and items are processed in the order that they are presented to any account. It states that it cannot refuse to honour payments where the Complainant has received the value of the goods or services purchased, regardless of the account balance and it states that the actual posting of a transaction to an account only occurs when retailers submit their file for posting, which can occur some days after the transaction and the Provider has no control over when this is done.

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The Provider further submits that on each occasion that a 4th, 10th and 20th over-limit item was applied in any quarter, the Provider issued correspondence to the Complainant to remind him that over-limit item charges are payable and it identified the charges applicable.

The Provider states that correspondence in this regard issued on **15 August 2016, 3 April 2017 and 16 February 2018.**

The Provider submits that the Complainant had numerous face to face meetings with the customer service manager in its branch and that the Complainant had been advised during those meetings that, when money was lodged into his account the Complainant should withdraw this money instead of using his debit card and/or contactless for payments as this would then stop the over-limit charges.

As regards the second aspect of the Claimant's complaint, the Provider has accepted that it has been lacking in terms of its communication with the Complainant in respect of his complaint and following up with the Complainant when he requested call backs from the Provider.

In respect of the phone call in **November 2017** with the Provider's branch, the Provider states that any calls to and from its branches are not recorded and therefore there is no recording available of the call referred to by the Complainant.

In respect of the screen shots of the Complainants account as provided by the Complainant to the branch, which were subsequently shredded by the branch manager, the Provider states that the manager contacted the complaint department after his meeting with the Complainant and the complaints department advised that there was no requirement to furnish the screen shots to it to investigate as part of his open complaint, as they could not be used in evidence as they were time stamped by the Windows system from the Complainant's personal computer and therefore the time and date could be easily manipulated. The branch manager then shredded the documents.

The Provider had offered the Complainant €100 as a good will gesture by way of apology for this aspect of his complaint relating to these service issues. This sum was accepted by the Complainant and lodged to his account on **5 April 2017.**

Complaint for Adjudication

The complaint for adjudication is that the Provider failed to ensure that the balance on the Complainant's online banking account was up to date, therefore causing the Complainant to spend more money than he had available to him, and in turn the provider incorrectly imposed over-limit charges for this.

Further, there is a complaint that the Provider displayed poor customer service and failed to offer the Complainant a satisfactory response to his grievances and also that it shredded screenshots which the Complainant provided to its Branch.

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Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 17 April 2019, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the issue of my Preliminary Decision, the following additional submissions were received from the parties:

1. Email from the Complainant dated 19 April 2019.
2. Letter from the Provider dated 7 May 2019.
3. Email from the Complainant dated 22 May 2019.
4. Letter from the Provider dated 28 May 2019.

Following the consideration of the additional submissions together with all of the evidence and submissions, my final determination is set out below.

I have reviewed the terms and conditions of the Complainant's account and I draw attention to the following terms and conditions which are of particular relevance:

- “3.1 You must keep your Account in credit unless you already have an agreed overdraft limit. If your Account is overdrawn for any reason you must repay the overdraft to us.*
- 3.2 You must always ensure that you have enough in your Account to complete an account transaction, for example:
(a) withdrawing cash or making a payment at an ATM;*

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- (b) using a debit card;
- (c) writing a cheque;
- (d) making a payment using a telephone or the internet;
- (e) if a standing order or direct debit is due to be paid;
- (f) when you are due to pay interest and charges.

3.3 If you have an agreed overdraft, you can use it to make account transactions. However, you cannot use the value of a paper payment (for example, a cheque) lodged to your account until it is cleared...

3.4 We may refuse to pay money from your Account if this would cause it to become overdrawn or to go over an agreed overdraft limit (where there is one). We do not have to tell you of this refusal beforehand. We will charge you an Unpaid Charge set out in the Schedule of Fees and Charges each time we so refuse to pay money from your Account.

3.5 Sometimes, we may allow you to pay money from your Account even where that money causes your Account to go overdrawn or to go over an agreed overdraft limit (where there is one). No matter how often we allow you to do this, we may refuse to allow it on another occasion...

13.5 We will charge you an Overlimit Item Charge each time you or someone else carries out a transaction (which we call an "Overlimit Item") which causes:

13.5.1 your Account to be overdrawn where there is no agreed overdraft limit;

13.5.2 your Account to go over an agreed overdraft limit where there is one; or

13.5.3 money to be taken out of your Account when it is already overdrawn as set out in paragraphs 13.5.1 or 13.5.2.

...".

Clause 13.6 sets out the Overlimit Item Charges at the date of the terms and conditions.

Having reviewed clauses 3.1-3.5 and 13.5-13.6 being the terms and conditions of the account, which the Complainant signed a declaration confirming he had read, it is clear that the Provider did not indicate that it would ensure "to the minute" accurate online account balances, in fact, it was expressly stated that this would not be the case. The over-limit charges were clearly set out in the terms and conditions received by the Complainant when the account was opened. Therefore, I find that it would be reasonable to expect the Complainant to know that the balance on his online banking may take a period of time to update. I find that the Provider was entitled to apply "over-limit" charges to the Complainants account, in line with the terms and conditions, although I note that the sum of €40.00 has already been refunded to the Complainant to offset these, as a goodwill gesture.

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The Complainant in his post-Preliminary Decision submission of 24 April 2019, raises a number of issues relating to his Data Access Request with the Provider and data protection issues generally. These are issues more appropriate to the Data Protection Commissioner and have not formed part of this investigation or this Decision.

I note that when this goodwill payment was made in **February 2016**, the Complainant was informed of the reason for the over limit charges and yet continued to over spend on the account.

In respect of the online balance not being accurate and up to date, again this had been communicated to the Complainant in communication from the Provider and in its terms and conditions and the Complainant had been advised in face to face meetings with the branch customer service manager that when money was lodged into his account the Complainant should withdraw this money instead of using his debit card and/or contactless payments as this would then avoid the over-limit charges.

I appreciate it can be difficult to keep track of spending and balances on accounts, particularly where multiple contactless payments are made. However, I believe the Complainant must accept some level of responsibility for keeping track of his spending and the balance in his account if he wishes to avoid over-spending and charges.

In respect of the complaint that the Provider displayed poor customer service and failed to offer the Complainant a satisfactory response to his grievances including the shredding of screenshots which the Complainant provided to its Branch, I note that the Provider has addressed this aspect and accepted that the Complainant made several requests for a call back from his branch through contact with the Provider via email and telecommunication. These requests were not fulfilled and this is not disputed. Further, the Provider accepts that it shredded the screenshots provided to it by the Complainant. I note the Provider offered the Complainant €100 by way of apology for the service experience, the Complainant accepted that payment of €100 during a telephone conversation (5 April 2017) with the Provider and that sum was lodged to his account on **5 April 2017**.

This €100 was in addition to the €40 gesture of goodwill refunded to the Complainant in respect of charges in February 2016.

For the reasons outlined above, and as I believe that the sum of €140 (in total) is reasonable in the circumstances, I do not uphold this complaint.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

20 June 2019

Pursuant to **Section 62** of the **Financial Services and Pensions Ombudsman Act 2017**, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

- (i) a complainant shall not be identified by name, address or otherwise,
 - (ii) a provider shall not be identified by name or address,
- and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.