



<u>Decision Ref:</u>	2020-0099
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Variable Mortgage
<u>Conduct(s) complained of:</u>	Maladministration (mortgage) Errors in calculations
<u>Outcome:</u>	Rejected

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

The Complainant entered into a mortgage loan agreement with the Provider in **2004**. In **December 2016**, the Provider informed the Complainant that her loan account had been overcharged with both interest and capital for a 22 month period due to its failure to expire a fixed interest rate period at the correct time. The Provider offered to compensate the Complainant in respect of the overcharging. The Complainant does not accept the Provider's method of calculating the compensation due to her and has advanced an alternative method.

The Complainant's Case

The Complainant states that the Provider overcharged her mortgage loan account for a period of 22 months from **November 2008** to **September 2010**. The Complainant advises that the Provider brought this issue to her attention on **14 December 2016**. The Complainant explains that the Provider offered a refund of the capital and interest overpaid and a redress payment to correctly compensate her for being denied the use of the overcharged funds during the 22 month period. The Complainant states *"[m]y complaint is that the redress payment (of €1746.29) is totally inadequate and does not reflect the true costs to me of being denied the funds (extra borrowing costs etc)."*

The Complainant states that the Provider has offered her €12,270.66 in settlement of her complaint in respect of the overcharging of capital and interest and a goodwill gesture of €2,000.

The Complainant states that she is seeking a goodwill gesture of €5,000. The Complainant submits that *"[t]o properly compensate me for the higher borrowings I had to carry for several years, I am seeking a total of €35,000."*

The Complainant had also furnished submissions dated **30 December 2017** prepared on her behalf in support of her complaint. It is stated that the overcharging comprises two components: an interest overcharge of €4,504.49 and an excess repayment of capital of €3,023.52. The Complainant submits this led to the following refund:

Interest overcharge	€4,808.59
Capital overcharge	€3,561.16
Current account interest	€1,746.29
Goodwill gesture	<u>€500.00</u>
	€10,616.04

The Complainant submits that this offer fell far short of proper redress based on the higher overdraft rate she had to pay on her current account during the period of overcharging and to date. It is also submitted that the Complainant experienced additional stress and anxiety brought about by the financial burden arising from the overcharging because she was in the process of transitioning from being an employee to starting her own business and this should be reflected in an enhanced goodwill gesture.

The Complainant's submissions contain her method of calculating the amount of compensation that should have been offered by the Provider. The Complainant explains that her calculations are based on the average interest rate charged on a current account of 11% and the surcharge interest rate on current accounts for unauthorised borrowings of 6%. The Complainant submits that the overcharging by the Provider is equivalent to unauthorised borrowings and *"... had the roles been reversed, she would have been charged at the 17% rate had she exceeded her overdraft limits set by the bank."* The Complainant submits that her method illustrates a scenario where had she borrowed an amount equivalent to the sums overcharged and made no repayments from when the overcharging occurred to date. The amount of the accumulated interest and capital is what she would now owe the Provider. The Complainant explains that compound interest rates are used in the calculations with interest charged on a quarterly basis. The Complainant submits that as the overcharging was unauthorised, she is justified in applying a 17% interest rate.

It is submitted that the Provider borrowed from the Complainant from **September 2008** to **November 2010** on a gradual basis and from **November 2010** to **November 2017** on a fixed sum basis at a rate of 17%. The Complainant submits that this is a mirror image of the situation that would have arisen had she borrowed these funds from the Provider from **September 2008** onwards and allowed interest and capital to accumulate on a quarterly basis without making any repayments in the meantime. The Complainant submits that the cumulative amounts at 11% and 17% respectively are what the Provider would have been demanding to clear the account. The Complainant states that using the same logic in reverse, these would be the amounts owed by the Provider to the Complainant plus an appropriate amount of compensation.

/Cont'd...

The Complainant has set out in detail in her submissions, the amounts that she states are owed to her based on her method of calculation. Having done so, the Complainant states that a figure of €35,000 (€30,000 redress and €5,000 goodwill gesture) would be sufficient to settle this complaint.

The Complainant submits that should the Provider agree to this, the money should be paid either by cheque or a funds transfer to her current account. There should be no restrictions or conditions imposed as was outlined in the Provider's offer because the borrowings by the Provider were unauthorised.

In a submission to this Office dated **18 July 2019**, the Complainant advised that "*[w]hile we have agreement on some parts of the redress and compensation offer, there is still a dispute between us on the Time Value of Money (TVM) calculations by the Bank.*"

The Provider's Case

The Provider advises that it identified an overcharging error with the Complainant's loan account in **December 2016** and informed the Complainant of this error in a letter dated **14 December 2016**. In this letter, the Provider states that it requested approval from the Complainant to correct the error. The Complainant requested further information outlining the impact of this error. The Provider states that it responded to the Complainant's request on **27 February 2017**. The Provider states that during the period over which the overcharging occurred it was engaged in ongoing communication with the Complainant. It has set these out in its submission to this Office.

The Provider states that within the redress offered to the Complainant, it offered to restore the Complainant's current account to what it would have been had the overcharging not occurred. The Provider explains that in its letter dated **26 January 2018**, it offered a goodwill gesture in the sum of €2,000 to the Complainant in recognition of the error that had occurred and to apologise for this error. The Provider advises that this amount was not calculated by way of any particular formula. The Provider states that the goodwill gesture is in addition to its offer to refund the sum of €1,746.29 in respect of debit interest charged to the Complainant's current account ending 253. The Provider explains that debit interest is payable on any debit balance on an account until the debit balance is repaid. The Provider also wishes to refund €3,664.56 in over-collected capital and €4,859.81 in over-collected interest during the period of **29 November 2008** to **27 September 2010** in respect of the Complainant's mortgage loan account.

In relation to the Complainant's contention that she has been unable to establish the methodology adopted by the Provider, the Provider states that it must reconstruct the Complainant's account which involves replicating every transaction, interest rate and limit change that was applied to the account. The Provider explains that it must reconcile the account to what actually happened to within 0.01c in order to recast the account. Once the account is balanced, the Provider uses this as a foundation to recast the account.

/Cont'd...

The Provider advises that it copied the reconstruction and stripped out all overpayments. This changes the balance on the loan account to what it should have been had the overpayments not occurred. The Provider then inputted the corrected figures allowing for all capitalisations made during the relevant period and this in effect, fully reverses the error. The Provider explains that it deducted the recast interest from the reconciled interest and this is the refund figure.

The Provider states that it used the following information to calculate the Complainant's redress figure:

- the account balance for each day during the period of overcharging (**16 September 2008 to 18 January 2017**);
- the rate of debit interest applicable during this period;
- the rate of surcharge interest applicable during this period;
- the amount of credit interest applicable during this period;
- the amount of uncleared interest applicable during this period; and
- the account overdraft limit applicable during this period.

The Provider rejects the methodology adopted by the Complainant and submits that the process to recast interest must accurately reflect what should have happened on the Complainant's loan account had the error not occurred as outlined above.

The Provider advises that it has not previously calculated *net present value of funds* as it had offered a goodwill gesture of €2,000 to the Complainant in recognition of the error and by way of apology. The Provider explains that compensatory interest refers to the interest paid by it to compensate customers for the loss of interest income they could have earned in the period from the application of an overcharge to the date of refund. Referring to the calculation of compensatory interest, the Provider states that the starting figure of €3,485.69 for **October 2010** includes compensatory interest for the period from **2008** up to **September 2010**.

The Provider's Central Interest unit has calculated compensatory interest on the Complainant's current account from **2010** to **June 2019** and has established that had this error not occurred the value of these funds would now be €1,022.72. The standard compensatory interest rate is based on a 3 monthly average of the 1 month EURIBOR rate compounded monthly. The Provider advises that should the 3 monthly average of the 1 month EURIBOR rate compounded monthly be zero or negative then the prevailing Demand Deposit rate is used. The Provider states that in addition to its previous compensatory offer, it would like to offer this further amount to the Complainant of €1,022.72 as compensatory interest on top of the goodwill gesture of €2,000.

The Provider submits that nine credit applications were completed in the name of the Complainant between **2008** and **2013**. The Complainant submitted details of a car loan application with another financial services provider in **2011**, **2012** and **2013** as part of a credit application with the Provider.

/Cont'd...

The Provider points out that there is no evidence that the Complainant had any other financial commitments and no documentation has been furnished by the Complainant relating to any other indebtedness.

The Provider states that no reports were made to the Irish Credit Bureau and/or the Central Credit Register regarding default/non-compliance by the Complainant in respect of the credit facilities maintained with the Provider during the period **2008 to 2018**.

The Provider explains the redress being offered to the Complainant is as follows. The Provider has offered €1,022.72 as compensatory interest. In the case of the Complainant's current account, the Provider advises that its Central Interest unit have completed the interest calculation twice and is satisfied that the amount of debit interest due to the Complainant is €1,746.29. The Provider states that €3,664.56 is due in over-collected capital on the Complainant's loan account and a refund of this amount is due to the Complainant's current account. The Provider also over-collected interest on the Complainant's loan account totalling €4,859.81 which is due to be refunded to the Complainant's current account. Finally, the Provider *"... apologises for the error we made and for any upset and the inconvenience this has caused the Complainant. In acknowledgement of our failings in that regard and the length of time it has taken the Bank to identify and address same, the Bank is offering the Complainant a goodwill gesture payment in the amount of €2,000 ..."* The Provider advises in correspondence dated **2 August 2019**, that a further €14.08 is being offered in respect of debit interest due to an updated recast of the Complainant's loan account. Therefore, the total redress being offered to the Complainant is €13,307.46.

The Complaint for Adjudication

The complaint is that the redress offered by the Provider in respect of the overcharging that occurred on the Complainant's mortgage loan account between **September 2008** and **November 2010** is inadequate.

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.

/Cont'd...

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 10 February 2020, 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.

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

Analysis

The Complainant entered into a mortgage loan agreement with the Provider in **December 2004**. The monthly repayments under the loan were made from the Complainant's current account. It is not disputed by the Complainant or the Provider that the Complainant's loan account was overcharged in respect of interest and capital repayments due to a fixed interest rate of 3.47% being incorrectly applied to the Complainant's loan account for a 22 month period between **November 2008** and **September 2010**.

The Provider first explained the cause of the overcharging to the Complainant in a letter dated **14 December 2016** as follows:

"During our investigation of your mortgage loan account we discovered that, on expiry of your 1 year interest only arrangement on 27th August 2007, the fixed interest rate period was extended in error for 3 years, to August 2010. As a result, the 3.47% fixed rate period, which was to expire in November 2008, applied for a total of 58 months, 22 months longer than the 36 months you requested. This resulted in an overpayment of €4,808.59, for which we sincerely apologise.

To rectify this, we propose to credit your mortgage account with the sum of €4,808.59, which represents the difference between the actual interest charged to your mortgage account during the period 29th November 2008 (the date the 3 year fixed interest rate period should have expired) to 27th September 2010 (the date your mortgage loan account reverted from fixed interest rate to Standard Variable Rate), and the amount that would have been charged had the Standard Variable Rate been applied on 29th November 2008.

We propose to then debit your mortgage account with the sum of €3,561.16 and credit this to your funding account [ending 253]. This credit to your funding account represents the difference between the monthly repayment you paid during the period 29th November 2008 to 27th September 2010, and the repayments you would have paid had the Bank's Standard Variable Rate been applied to your mortgage account.

...

In addition, the Bank is offering you a goodwill payment in the sum of €500, for any inconvenience caused by our error. This payment can be lodged to an account of your choice or, if you prefer, a cheque for €500 can be posted to you."

The Complainant did not accept the Provider's offer and in a series of subsequent correspondence from the Complainant and/or her representative, the method of redress adopted by the Provider was called into question with the Complainant tendering her own alternative method.

The Complainant's method of calculating the redress due from the Provider is based on the premise that the overcharging constituted unauthorised borrowing by the Provider and calculated the amount of redress due to her on the basis of the amount that would have been owed had the Complainant made the unauthorised borrowings and not made any repayments on foot of this. The Provider's approach was to put the Complainant in the same position she would have been in had the overcharging not occurred.

When the Complainant signed the acceptance form in respect of her loan in **December 2004**, she and the Provider entered into a contractual relationship. The loan agreement and the terms and conditions which it incorporates in conjunction with any subsequent arrangements entered into between the Complainant and the Provider, constitute the terms and conditions of their contractual relationship and dictates, amongst other things, how the interest and capital repayments are calculated. The overcharging arose because the Provider failed to expire a fixed interest rate period at the correct time. This led to an overcharging of interest and capital on the Complainant's loan account and an incorrect reduction of the funds in the Complainant's current account from which the loan repayments were made.

I accept that the conduct of the Provider in failing to expire the fixed interest rate period and apply the correct interest and capital repayments constitutes a breach of contract. Had the breach not occurred the Complainant would not have been overcharged interest or capital and her current account would have had a greater level of funds for the period of overcharging which, most likely, would have accrued interest.

The Provider has sought to refund the Complainant the amount overcharged in respect of interest (€4,859.81) and capital (€3,664.56) for the 22 months period during which the overcharging occurred from **29 November 2008 to 27 September 2010**. The manner in which these figures are set out in the *Mortgage Recast Calculator – Recast* spreadsheet and the *Mortgage Recast Calculator – Reconciliation* spreadsheet.

/Cont'd...

The Provider has also offered the Complainant the sum of €1,746.29 in respect of the debit interest that accrued on her current account as a result of the over-collected direct debits for the overcharging period. The method for calculating this figure is set out in the Schedule of Evidence submitted to this Office and which was provided to the Complainant by email dated **27 February 2017**. In its submissions to this Office, the Provider explains that the debit interest rate is variable and can change on a daily basis. It has supplied a detailed spreadsheet setting out the daily debit interest rate, the actual monetary amount of the accrued debit interest on a daily basis and the amount charged to the Complainant's current account at the end of each quarterly interest period.

The Provider also sets out the two true occasions where surcharge interest would have been applied to the Complainant's account had the overcharging not occurred. The Provider advises in correspondence date **2 August 2019** that its Central Interest unit has since run an up to date recast on the Complainant's account to **June 2019** which increases the debit interest refund by a further €14.08 to €1,760.37.

Additionally, the Provider has offered the sum of €1,022.72 in compensatory interest, calculated by reference to the EURIBOR interest rate as set out in Schedule 10(ii) of the Schedule of Evidence, in respect of the interest that would have accrued on the Complainant's current account had the over-collected direct debits not been debited to her account for the period of **October 2010 to June 2019**. The Provider proposes to transfer these funds to the Complainant's current account.

The Provider has also offered a goodwill gesture of €2,000 for the inconvenience caused as a result of the overcharging. Therefore, the total amount being offered to the Complainant is €13,307.46.

I note that the Complainant has not tendered any evidence which demonstrates that she has suffered any loss or damage beyond what has been discussed in the preceding paragraphs and that is directly associated with the overcharging by the Provider.

In a submission dated **5 February 2018**, the Complainant's representative states:

"During the period when [the Complainant] was 'forced' to look for other funds to replace those taken without authorisation by the Bank, she could have turned to extortionate rate money-lenders, high interest credit card borrowings, higher borrowings from other banks and so on."

In an email dated **10 November 2018**, the Complainant's representative writes:

"The Bank only looked at what happened the immediate ... account servicing the mortgage, which represents only part of the cost imposed on [the Complainant] through having excess charges imposed on her by the Bank. Her other borrowings increased also with higher interest charges and credit card interest, family borrowings, postponed purchases and so on ... all at a time when she was setting up her own business and the trauma that went with that."

/Cont'd...

The first of the above submissions state that the Complainant *could* have sought alternative funds, however, it is not asserted that the Complainant did in fact do so. The second passage suggests that the Complainant's *other borrowings* increased. However, neither the Complainant nor her representative have produced any evidence which sets out the alleged increased borrowings, family borrowings or postponed purchased and how these were directly associated with or caused and/or necessitated by the overcharging error.

While the Complainant has offered an alternative method of calculating the redress due to her, I consider this method to be somewhat hypothetical and is based on a presumption of what would have occurred had the Complainant made unauthorised borrows.

In any event, the Provider is not obliged to adopt this view. Furthermore, I do not accept the Complainant's submission that the overcharging constitutes unauthorised borrowing on the part of the Provider. Rather, I accept, as stated above, that the overcharging constitutes a breach of contract.

The Provider has set out the basis of its calculation of the amounts being offered to the Complainant in respect of the overcharging. Furthermore, the Provider has also offered the rationale underpinning its goodwill gesture. I accept that the amounts of redress offered by the Provider, together with the manner of calculation are reasonable and constitute reasonable compensation in respect of the overcharging that occurred on the Complainant's loan account and the financial implications arising from this error.

Finally, the Provider has outlined the manner in which it proposes to compensate the Complainant for the overcharging on her loan account in its submissions dated **8 July 2019**, (outlined above) with further clarification being provided on **2 August 2019**. I consider this offer by the Provider and the manner in which it is proposed to be implemented, to be a reasonable sum of compensation in respect of the overcharging that occurred on the Complainant's loan account. In these circumstances, on the basis that this offer remains available to the Complainant, 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**

4 March 2020

/Cont'd...

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.

