



<u>Decision Ref:</u>	2022-0173
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Current Account
<u>Conduct(s) complained of:</u>	Maladministration Dissatisfaction with customer service Failure to provide accurate account/balance information Failure to provide correct information
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint concerns banking facilities held by the Complainant with the Provider.

The Complainant's Case

The Complainant submits that on **23 February 2018**, she received a letter from the Provider to inform her that the overdraft facility on the account in question would expire on **15 April 2018**.

She says that she received a further letter dated **26 April 2018** which stated that the overdraft facility would expire on **13 June 2018**.

The Complainant states that she subsequently received a letter from the Provider on **22 June 2018** which informed her that the overdraft facility had expired and that it had been removed from her bank account.

The Complainant submits that on **16 July 2018** she received a letter from the Provider requesting the provision of information in relation to a loan facility, in order to review her business circumstances so that it may consider the appropriateness of offering her an alternative payment arrangement or payment restructuring, pertaining to the account in question. The Complainant states that the Provider informed her in this letter that failure to provide this information within 22 business days, would deem her to be *"not co-operating"*

as outlined under the Central Bank of Ireland's Lending to Small and Medium-Sized Enterprises Regulations 2015. The outstanding balance on the account in question was stated to be **€1,926.50** in the Provider's letter of **16 July 2018**.

The Complainant submits that on **25 July 2018** she responded to the Provider's letters to inform it that the account in question is not a business account and that it never had been a business account and that she refuted the Provider's position that she was "*non co-operative*" regarding the account.

The Complainant submits that, within her correspondence to the Provider dated **25 July 2018** she had offered to pay a sum of €1,200.00 as full and final settlement of the outstanding balance on the account, which she would pay in 40 monthly instalments of €30.00.

The Complainant submits that the Provider reiterated to her in a letter dated **31 July 2018** that the account was a business current account rather than a personal current account and it rejected her proposed settlement offer, seeking instead the total balance.

The Complainant submits that the Provider has refused to engage with her to reach an agreeable resolution in relation to the outstanding balance on the account, and she contends that it continued to demand full repayment even though it regards her as being "*in financial difficulty*".

The Complainant submits that on **12 August 2018**, she wrote to the Provider seeking documentation that indicated that the account in question was a business account. The Complainant submits that on **4 September 2018** she received correspondence from the Provider which stated that the account had been reclassified from a personal account to a business account in **2004** and a copy of the loan application form was enclosed with the letter.

The Complainant states that the loan application form was the only document that referred to the account being a business account and since then, there had been no reference to the account being a business account, including but not limited to within any account statements or fee advices. The Complainant submits that the loan application, as noted, was a restructure of an overdraft facility and placed the balance on a term loan. The Complainant submits that the overdraft facility remained at a personal interest rate rather than a business interest rate.

The Complainant states that the Provider has categorised her as being in "*financial difficulty*" without conducting a review of her financial affairs.

The Complainant submits that the Provider passed the account in question to a third-party debt collection agency to pursue the outstanding balance and that, since the complaint has been made to this office, the Provider and third party agency have continued to contact her in relation to the balance. The Complainant states that the Provider informed the third party agency that the Complainant did not make a complaint to this Office in relation to this matter.

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The Complainant submits that the Provider failed to engage with her to reach a satisfactory outcome for this matter, even though it stated to her that it wished to work with her to reach a mutually agreeable solution.



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The Provider's Case

In its Final Response Letter dated **4 September 2018**, the Provider submits that it has acted in line with its procedures and its terms and conditions. The Provider submits that, although the current account was opened as a personal account, its designation was changed to business account in **February 2004** after the Complainant advised the Provider that the account related to a conservatory business and that audited accounts were available.

The Provider states that, due to the elapse of time, it is unable to produce the account opening form, or statements from **1993** when the account was opened.

The Provider states that, prior to **February 2004** the Complainant availed of an overdraft facility in **February 2001** for personal expenses. The Provider submits that in **April 2003** the Complainant requested an increase in overdraft limit to €3,500.00, again for personal expenses. The Provider contends that in **February 2004** the Complainant requested an increase of the overdraft facility to €6,000.00 on this occasion, for working capital purposes.

The Provider contends that the credit agreement dated **9 November 2005** was a business overdraft, and the Complainant received a premium business rate of interest, which is typically lower than the rate applicable to a personal loan.

The Provider states that the offer of €1,200.00 in settlement of the account debit balance was not acceptable to it.

The Provider states that it categorised the Complainant as being in "*financial difficulty*" as the excess balance on the account had exceeded 90 days, in accordance with the **Central Bank's Regulations relating to Small and Medium-Sized Enterprises 2015**. The Provider contends that these are the applicable regulations as the account is a business account.

The Provider submits that during a phone call on **19 December 2017**, the Complainant agreed to furnish a proposal to the Provider for the resolution of the account, however it has received no such proposal, nor has it received a completed financial review from the Complainant.

The Complaint for Adjudication

The complaint is one of maladministration, insofar as the Complainant says that the Provider failed to engage with her to reach a mutually agreeable solution pertaining to the outstanding balance on the account, it failed to correctly classify the account, and it failed to deal with her complaint in an appropriate manner.

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 **26 April 2022**, 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 consideration of additional submissions from the parties, the final determination of this office is set out below.

This complaint has raised a number of distinct issues, some of which emerged as submissions were exchanged by the parties.

During the exchange of submissions, the Complainant has suggested that the Provider has not complied with its Data Protection obligations. In accordance with **Section 50** of the ***Financial Services and Pensions Ombudsman Act, 2017*** these contentions will not however be investigated by this Office, as they are matters for the Data Protection Commission.

I have addressed the remaining issues under the following headings:

- "Personal" or "Business" Current Account
- Overdraft History
- Withdrawal of Overdraft Facility
- Classification as "not co-operating"
- Failure to engage
- Classification as being in "financial difficulty"

“Personal” or “Business” Current Account

Current account *****120 was opened on **14 January 1993** in the Complainant’s sole name. The Complainant and Provider agree that the account was opened as a personal current account. The relevant terms applicable will have been the Provider’s terms and conditions for Personal Bank Accounts at that time. The Provider has been unable to provide the terms and conditions in force at opening, due to the elapse of time, and given that this was many years before the Consumer Protection Code, I accept this.

I note that in **February 2001**, an overdraft facility of **€1,100.00** was agreed for the account. The Provider states that the Complainant requested this for “personal expenses”. Similarly, in **April 2003** an increase in the overdraft facility to **€3,500.00** was agreed, again for “personal expenses”. I note that these facilities were consistent with the fact that the account was a personal current account, rather than a business one.

It is now clear that the account designation was changed from a personal current account to a business current account in **February 2004**.

The Complainant states that this should not have occurred, and she gave no consent to this change. The Provider however states that it did so on the basis of information given to it by the Complainant herself, and it says that it was entitled to do so. The Provider states that this occurred because the Complainant sought an increase in her overdraft facility for “working capital purposes”.

There are no telephone recordings available from February 2004. The Provider relies primarily on notes made in the context of **Lenders Report(s)** to reconstruct what occurred with this account. The **Lenders Report** dated **23 February 2004** contains the following notes:

“Profile:

*[REDACTED] and [the Complainant], in their 50s, no dependant children ,
rung [sic] a conservatory business.*

Proposal:

*Extend o/d from 3500 to 6000 – clients are owed 26000 and owe 2230.
Account was managed by PCC as we thought this was a personal account.
[REDACTED] spoke to [the Complainant] on 20 Feb, and ascertained that
it is used for business and changed product code.*

Track Record:

*Audited accounts are available and [the Complainant] will bring them in
to us this week....*

[...]

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Management:

Family run business, self employed conservatories – managed by [REDACTED] and [the Complainant].

[...]

Repayment Capacity

Clients gave details of debtors/creditors. They are owed 26000 and owe 2300.

[...]

Business DCA/IDL:

Extension of o/d from 3500 to 6k for two weeks sanctioned.”

I note that by letter dated **23 February 2004** the Provider confirmed an extension of the overdraft facility by adding a “temporary limit” (until **5 March 2004**) of €2,500.00 on top of the “permanent limit” of €3,500.00 – giving a total overdraft facility of **€6,000.00**.

I am satisfied that this temporary overdraft was consistent with the Lenders Note. The Lenders Note confirms that the overdraft application was considered on the basis of the business accounts and creditor/debtor information of a business which the Provider believed – rightly or wrongly – to be run by the Complainant and the third party. In short, the February 2004 overdraft was agreed as a business facility.

I note in passing that the statement dated **18 February 2004** contains notices about personal products (a mortgage), whereas the statements dated **27 February 2004** and **13 April 2004** contains notices about business products (SME roadshows, equipment finance and working capital funding).

The terms and conditions applicable to a personal account for this period (February 2004) have been furnished by the Provider in response to this complaint. I can identify no specific terms which cover a situation where the account is switched from a “personal” account to a “business” account. I note however, that the designation in question occurred in **2004**, 15 years before this issue was raised by the Complainant as a complaint, and the Provider’s conduct in that regard at that time, does not therefore come within the jurisdiction of this Office, owing to the elapse of time. An account of that nature does not come within the statutory definition of a “long-term financial service” and in those circumstances, any complaint concerning the conduct of the Provider in 2004, was required to be made within a period of 6 years from that time, to meet the required time limits. However, I am satisfied in principle that a provider has a discretion to change the designation of a current account to reflect the reality of how an account is being operated.

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Overdraft History

The current account had an authorised overdraft facility from **February 2001**. The authorised overdraft amount varied from time to time in the intervening years.

Lenders reports from 2004 to 2012 show that the Complainant sought to renegotiate credit (overdraft) facilities on several occasions, and the Provider accommodated these requests.

An overdraft facility of €5,000.00 was due to expire on **15 February 2012**. On **11 April 2012** the authorised overdraft limit was €2,000.00, but the account balance was €2,286.51 overdrawn.

The authorised overdraft facility of €2,000.00 was due for review on **21 April 2013**. The overdraft was authorised a number of times on a rolling basis into 2015 and was again due to expire on **16 December 2015**.

I note that the account balance frequently dipped beyond the authorised overdraft limit (primarily due to the application of periodic interest) during the period from 2012 to 2017.

On **16 December 2017** the Provider wrote to the Complainant. The account balance was €2,141.89 overdrawn. The authorised limit was €2,000.00. In this letter the Provider advised the Complainant as follows:

“As arrears on this account have continued for three consecutive months, the Lending to Small and Medium Enterprises Regulations 2015 apply to you....

Unless you have discussed and agreed a repayment arrangement with us, we require payment of the above Arrears/Excess amount immediately...

You may avail of the option of an immediate review of your overall financial position... In order to complete such a review we will require full financial information and documentation...”

On **19 December 2017**, the Provider and the Complainant discussed the account during a telephone call. The Complainant had some difficulty hearing, but she was advised that the account was in an excess position, and that the account had not been used for some time. When the Complainant was advised that no lodgment had been made to the account since October 2016 (statements confirm that this was correct), she initially did not believe the Provider was referring to her account, but ultimately matters were clarified, and the Complainant realised what account was being discussed. The Provider’s agent asked if the Complainant had proposals for clearance of the balance. The Complainant told the Provider’s agent that she would be *“reviewing the overall situation after Christmas”* and confirmed that, although she would not be clearing the debt she would be *“taking steps to reduce it”*. The Provider’s agent agreed to place a follow up call with the Complainant in January.

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On **9 January 2018** the Provider wrote to the Complainant advising that her overdraft facility was due to expire on **15 February 2018** and was due for review.

On **15 January 2018** the Provider attempted to call the Complainant but did not get through and so left a voicemail.

On **22 January 2018** the Provider wrote to the Complainant advising her that in order for a review to be conducted, it required a firm written proposal regarding clearance of the outstanding excess/arrears position(s). It advised that:

“If we do not receive the requested information within 22 business days from the date of this letter then we will classify you as ‘not co-operating’ as outlined within [the SME Regulations]...”.

On **29 January 2018** the Complainant lodged €200.00 to the account and brought it back under the limit of the €2,000.00 overdraft, that had been in place.

On **23 February 2018** the Provider wrote again to the Complainant advising that the overdraft facility was due to expire on **15 April 2018** and was due for review. On **26 April 2018** the Provider wrote to the Complainant advising that the overdraft facility was due to expire on **13 June 2018** and was due for review.

I note that the application of interest to the account again brought the debit balance in excess of €2,000.00 on **18 June 2018**.

Withdrawal of Overdraft Facility

The overdraft facility was withdrawn by the Provider on **22 June 2018**. On that date, it wrote to the Complainant to advise that:

“As no satisfactory agreement has been reached, we are writing to let you know that the limit on your account has expired and because of this, your account must now be operated in credit.”

The Provider’s **General Terms and Conditions Governing Business Lending** provide that *“Overdraft facilities are repayable on demand”*.

I note that at this stage it had been 7 months since the Complainant had told the Provider that she would take steps to reduce the balance, however she had taken no substantive action to do so.

In light of the history of the account and the contractual entitlement of the Provider to withdraw the facility, I do not accept that the Provider acted improperly or otherwise unfairly when it finally withdrew the overdraft facility in June 2018, having given the Complainant a reasonable period, to reduce the liability.

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Classification as not “co-operating”

On **2 July 2018** the Provider wrote to the Complainant to advise that:

“your above account has been overdrawn in excess of/without an approved limit and this matter requires your immediate attention. It is important that you arrange a suitable lodgment to restore the account to credit / within the approved limit. Alternatively, please contact your Branch to discuss a more suitable arrangement for you.”

On **5 July 2018** the Complainant lodged €100.00 to the account and brought it back under a debit balance of €2,000.00. However, at this point, there was no longer any agreed overdraft in place.

On **16 July 2018** the Provider attempted to call the Complainant but did not get through and so left a voicemail.

On **16 July 2018** the Provider wrote to the Complainant advising that in order for a review to be conducted, it required a firm written proposal regarding clearance of the outstanding excess/arrears position(s). It advised that;

“If we do not receive the requested information within 22 business days from the date of this letter then we will classify you as ‘not co-operating’ as outlined within [the SME Regulations]...”

On **25 July 2018** the Complainant wrote to the Provider in the following terms:

“I must point out that this account [...] is not a business account and has never been...”

... With regard to your statement classifying me as non co-operative, never in the life of this account have I failed to co-operate with [the Provider]...

In view of the fact that you have terminated the facility attached to the account and your threat to report my details to credit agencies I am prepared to offer the sum of €1,200 in full and total settlement payable by 40 monthly instalments of €30.”

The Complainant also took issue with the suggestion that she could be categorised as “not co-operative”. It is important to realise that the term “not co-operating” is not a personal evaluation of the character of a customer but in fact, it is a defined term in the context of bank/customer relationships. In this context, “not co-operating” is defined in the **Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Lending to Small and Medium-Sized Enterprises Regulations 2015)** (“the SME Regulations”).

Those SME Regulations provide as follows:

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“not co-operating” means a situation in which—

[...]

(b) the warning letter, required in accordance with Regulation 20(8), has been issued to the borrower, and

(c) the borrower has not carried out the action or actions within the time-frames specified in the letter referred to in subparagraph (b).

In this instance, the Provider required the Complainant to provide a written proposal regarding clearance of the account, within 22 days of 16 July 2018. The Complainant did so by letter dated 25 July 2018 and, even though this proposal was ultimately not acceptable to the Provider, this meant that the Complainant was not then in fact categorised as “not co-operating”.

In those circumstances, although the Complainant was concerned about being categorised in that manner, I am satisfied that the Provider was entitled to communicate with her in those terms, and was in fact obliged to do so in accordance with its regulatory obligations.

Failure to engage

It is important to point out that financial institutions are under no obligation to extend a requested facility to a customer, to accede to a request to amend the terms of a facility, or to agree to a write-down of a debt. For that reason, this Office has no role to play in the decision making process leading up to any such refusal of a request for finance, loan amendment or write-down.

However, in accordance with **Section 60(2)** of the **Financial Services and Pensions Ombudsman Act 2017**, this Office can examine the conduct of a financial institution in order to determine whether the conduct complained of was “unreasonable, unjust, oppressive or improperly discriminatory in its application to the complainant”.

The issue to be determined, therefore, is whether the Provider’s refusal to accept the Complainant’s proposal to pay €1,200.00 over 40 months was unreasonable, unjust, oppressive or improperly discriminatory. Having considered the evidence before me, and in particular the history of the overdraft facilities previously granted to the Complainant and the length of time that the Provider waited for proposals, I do not accept that the Provider’s conduct was in any way improper or in any manner unreasonable, unjust, oppressive or discriminatory in its application to the Complainant.

The Provider has a commercial discretion to accept or reject any proposal from the Complainant and, in the event, it elected to decline her proposal at that time.

Classification as being in “financial difficulty”

On **31 August 2018** the Complainant was notified by the Provider that her proposal was not acceptable to it.

On **24 August 2018** the Provider classified the Complainant as being “*in financial difficulty*”. The Complainant referred to this classification as part of her complaint to this office.

In much the same way as “*not co-operating*”, is important to realise that the term “financial difficulty” is not a personal evaluation of the character of a customer, but in fact it is a defined term in the context of bank/customer relationships. In this context, the **Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Lending to Small and Medium-Sized Enterprises Regulations 2015)** defines the term as follows:

“financial difficulties” means a situation in which one or more of the following apply to a credit facility agreement or alternative arrangement:

(a) the borrower is in arrears under the credit facility agreement or alternative arrangement for 3 consecutive months;

(b) where the credit facility agreement is an overdraft facility, the approved limit on the overdraft is exceeded for 90 consecutive [emphasis added] days;

(c) the regulated entity has, following an assessment carried out in accordance with Regulation 17(2)(b), 17(4)(b) or 35(2)(b), determined that the borrower’s circumstances are such that Regulations 18 to 23 or Regulations 36 to 41 should be applied to the borrower’s case, and “financial difficulties cases” shall be construed accordingly;

I note that by **24 August 2018**, the account had operated in excess of its approved limit for some 70 consecutive days since 18 June 2018. I do not accept therefore that the Provider is correct in its submission in its response to this Office dated 18 June 2020 which states that “*The Complainant was categorised as being in financial difficulty as the excess balance on the account had exceeded 90 days*”.

The Complainant submitted her complaint to the Provider by letter dated **12 August 2018**, which was acknowledged as received by the Provider by letter dated **17 August 2018**. Having reviewed the conduct of the Provider in this complaint, and for the reasons set out above, I do not consider it appropriate to uphold the complaints that:

- the Provider failed to engage with the Complainant to reach a mutually agreeable solution pertaining to the outstanding balance on the account
- the Provider improperly classified the Complainant as being “not co-operating”
- the Provider failed to deal with the complaint in an appropriate manner

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I accept however that the Provider acted mistakenly in categorising the Complainant as being in “*financial difficulties*” given that the stated reason for it doing so was not correct – the approved limit on the overdraft had not been exceeded for 90 consecutive days as of 24 August 2018. However, I do not consider that this error had any material impact on the operation of the account or that it has visited any prejudice on the Complainant, such that it would warrant significant compensation as redress.

I note that in the course of this complaint investigation, the Provider has made efforts to resolve matters to the satisfaction of the Complainant, by making the following offers to her:

- €500.00 on 18 June 2020
- €1,500.00 on 21 July 2020
- €2,500.00 on 11 November 2020

These offers were made in recognition of issues which arose during the exchange of submissions, and which were not the subject of the original complaint. In the circumstances, I consider them genuine attempts at reaching a satisfactory resolution with the Complainant.

Accordingly, in the absence of any evidence of wrongdoing by the Provider impacting on the Complainant or causing her loss or inconvenience, I take the view that it is not appropriate to uphold this complaint.

Insofar as the Provider’s offer of November 2020 as referred to above has been confirmed to remain open to the Complainant, I note that since the Preliminary Decision of this Office was issued last month, the Complainant has indicated a willingness to accept that compensatory measure, and this is something that can be progressed directly between the parties.

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.



MARYROSE MCGOVERN
Financial Services and Pensions Ombudsman (Acting)

26 May 2022

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PUBLICATION

Complaints about the conduct of financial service providers

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.

Complaints about the conduct of pension providers

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension 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.