

complaint

Mr T complains that American Express Services Europe Limited has treated him unfairly by arbitrarily charging him higher credit card fees than other customers in an identical position to his own.

background

Mr T used to have two credit cards with American Express. One of them was a British Airways American Express Premium Plus Card. Until 2011 Mr T had benefited from a promotion in which the annual fee for that card was reduced from £150 to only £30 for all customers who also had a second credit card with American Express. In July of that year, American Express wrote to Mr T to tell him that the fee reduction was coming to an end, with effect from September. Following a complaint he made to our Service at the time, the effective date of the fee increase was deferred to March 2012. Since then, Mr T has paid £150 a year for his card. In 2017 the fee was increased to £195 a year. This means he has now paid £765 more than he would have paid if he had stayed on the reduced fee for all of this time.

In mid-2016 Mr T cancelled his second American Express card, for reasons unrelated to the increase in the fee for the first card.

In early 2017 Mr T discovered that some other American Express customers had been allowed to continue paying the reduced fee of £30 a year. He complains that this is unfair, because those customers had been in an otherwise identical position to him since 2012, and yet he has been treated differently, apparently for an entirely arbitrary reason or for no reason.

In February 2017 American Express wrote to those other customers to tell them that their reduced fees would soon come to an end, and that they would have to start paying the full fee of £195 a year. But then in March it wrote to them again and said that the first letter had been sent by mistake, and they could continue to pay the reduced fee indefinitely. Mr T complains that this decision compounds the original unfairness, because it doesn't extend to him.

In April 2017 Mr T complained to American Express. He asked for his fee to be reduced back to £30 a year, and for a refund of the extra £765 he had paid since 2012. (He also asked for his second credit card account to be restored to him, since this had always been a condition for the reduction, and he would not have cancelled it if he had known that other customers with a second card had continued to benefit from a reduced fee.)

American Express did not agree. It said that under the terms and conditions of the account, it was entitled to change the fee, and to charge what it liked. It said that the new fee still represented good value for money. And it said only "a small group of customers" (it didn't say how many) had continued to enjoy the reduced fee after the promotion had expired.

Believing American Express to have misunderstood his complaint, Mr T brought his complaint to our Service. He said that American Express's letter implied that the other customers had originally been allowed to stay on the £30 fee in error. Other than that error, there had been no difference between those customers and customers like him. Once that error had been detected, the decision to keep those customers on the reduced fee but not to extend that benefit to customers in his position was unfair. There had been no material

difference between the two categories of customers, and it was unfair to treat like cases differently.

Mr T asked to be put into the position he would have been in if he had belonged to the small group of customers American Express had referred to in its letter. He also argued that a small absolute number of customers might still represent a large *proportion* of the customers who had originally benefited from the promotion, when expressed as a percentage. He wanted American Express to disclose how many customers the promotion had applied to, and how many had continued to benefit from it after it had expired.

American Express argued that Mr T had suffered no financial loss, since he had always been charged the correct annual fee. It had adhered to the terms and conditions of his account. It said fees and promotions were a matter for its commercial judgement, and the higher fee was not excessive. It said that contrary to Mr T's argument, he was indeed in a different position to the customers who had stayed on the promotional fee, and so it followed that he did not have to be treated the same as them. The other customers had been overlooked when the promotion had ended, and he had not been. Alternatively, it did not accept that it was obliged to treat everyone the same, and as an example it pointed out that different customers have different credit limits.

Our adjudicator did not uphold this complaint. She said it was beyond her remit to compare how Mr T had been treated with the position American Express's other customers were in, or to investigate how American Express treated its customers generally. That would be a matter for the Financial Conduct Authority ("FCA"). She accepted that the terms and conditions allowed American Express to increase the fee, and that the fee had been correctly charged. So she could not conclude that American Express had not acted fairly. She also said that the number of customers who had stayed on the lower fee was confidential, and she could not require American Express to disclose this.

Mr T did not accept that opinion, and he asked for an ombudsman's decision. In detailed submissions he said "it is a fundamental legal principle of fairness that like cases should be treated alike." He maintained that it was unfair of American Express to deliberately perpetuate the difference it had (apparently unintentionally) created between its customers' positions, once that difference had been discovered. It would be even more unfair if the "small number" of customers in the more advantageous position were in fact a large proportion of all of the Premium Plus cardholders.

Mr T argued that my remit would be too narrow if it only allowed me to verify whether terms and conditions have been followed in an individual case, as the courts can already do that, and at an affordable cost. Instead, to discharge my statutory duty to decide cases fairly, I should be able to consider the bigger picture, and on finding that American Express had treated him (and others in his position) differently to some of its other customers for no good reason, I should uphold his complaint. By way of analogy, Mr T postulated that if customers born in a certain random month of the year were all charged a higher fee than customers born in the other months, then that would self-evidently be unfair. Yet on the adjudicator's narrow construction of her remit, the Financial Ombudsman Service would be powerless to consider such a complaint. That would be manifestly wrong. So I should be able to consider how American Express treated its other customers in order to determine whether Mr T has been fairly treated.

my findings

Preliminaries

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

Our adjudicator was right to differentiate between the respective roles of our Service and the FCA. Put very briefly, our role is to consider and determine individual complaints, while the FCA, as the regulator, deals with broader issues which affect large numbers of consumers.

That does not always prevent us from comparing how a respondent business has treated an individual complainant with how it treats its other customers. For example, where someone complains that they have been discriminated against as a result of having one of the protected characteristics mentioned in the Equality Act 2010, resolving that complaint would necessarily involve comparing how that complainant was treated with how customers who did not share that protected characteristic (but who were otherwise in the same position) were treated. Mr T's complaint does not engage the Equality Act, but the analogy he proposed is sufficiently arbitrary that I do not think it makes a significant difference. I also accept that American Express is under a regulatory duty to treat its customers fairly. Nevertheless, I do not uphold this complaint. I will explain why.

What happened in 2011

I accept that until the promotion ended, Mr T was in the same position as the customers who continued to benefit from the promotion after it had expired. I agree with his interpretation of American Express's letter in April 2017, which strongly implies that this happened in error and was inadvertent. Since that letter says the promotion had expired, it's reasonable to infer that the customers who continued to benefit from it were not supposed to. I have no doubt that American Express intended to end the promotion for everybody, and that all of the Premium Plus cardholders were meant to start paying the higher fee.

Mr T did not suffer any financial loss as a result of that error. He was supposed to begin paying the higher fee once the promotion had ended, and that is what happened. The fact that others in his position wrongly continued to pay a reduced fee, while somewhat unlucky for those who did not, does not change that fact. Their gain does not equate to Mr T's loss. The fact that Mr T missed out on that advantage does not mean that he was unjustly deprived of the opportunity to pay less, because it was an opportunity no-one was meant to have. I do not think it is unfair to miss out on something to which one is not entitled in the first place.

I might have come to a different conclusion if there had been evidence to show that this had been done on purpose, and that Mr T (and others in his position) had been arbitrarily singled out for different treatment. That could suggest bad faith. But I think that an accident is a different matter. I am unable to say that Mr T has been discriminated against or targeted, or otherwise affected by what happened, and so I do not conclude that he was unfairly treated in 2011.

The cancellation of the second credit card

It's not strictly necessary for me to make a finding about Mr T's decision to cancel his other card in 2016. But for completeness, I will do so. I accept that if he had still been paying £30 a

year at the time, or if he had then known that he had cause to complain about being charged more than that, then he would not have cancelled the card. So I have not held that decision against him.

What happened in 2017

Once the error of 2011 came to light, American Express's initial response was to tell the customers who were still paying the lower annual fee that this would end, and that they would have to start paying the higher fee. A short time later, it changed its mind and told them that they could stay on the lower fee after all. This has not been explained, but I infer from comments made online by some of those customers (which have been brought to my attention by Mr T) that this may be because some customers threatened to leave American Express rather than pay the higher fee. Whether that is right or not, I think that this is a matter between those customers and American Express. I don't agree that the only way open to American Express at this juncture was to put all of the other Premium Plus cardholders into the same position by reducing their fees to £30 a year as well, whether retrospectively from 2011 or only from 2017.

While Mr T was indeed in the same position as those other customers immediately before the error occurred, I do not think that the same thing can be said of his position in 2017. By then, the situation had changed. There were now two categories of customer, who were in rather different positions: those who were still paying the lower fee, and those who were not. I don't think it would be reasonable of me to treat them as being alike just because – but for a quirk of fate – Mr T might have found himself in a different category. The reality was that Mr T was in the position he was supposed to be in, and the fact that some customers were not – whether they made up only a small proportion of all the Premium Plus cardholders or a large proportion – does not mean that everyone now had to be put in the same position as them. I do not agree that how American Express chose to deal with them affects Mr T adversely, or is a matter in which he can be said to have a vested interest. It doesn't affect him. I do appreciate that he feels that he has missed out, and quite naturally that may give rise to a sense of grievance. But while Mr T may still not agree with my decision, I hope I have explained why I do not think it would be fair and reasonable to require American Express to give him the relief he has asked for.

my final decision

For the reasons set out above, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I am still required to ask Mr T to accept or reject my decision before 6 November 2017. But if we do not hear from him, then we will presume that he does not accept it, and he will not be bound by it.

Richard Wood
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