

## **The complaint**

Miss E is a sole trader. She complains that Santander UK Plc treated her unfairly and acted in a discriminatory way when it declined her Bounce Back Loan application.

Miss E is represented by Ms W, however, for ease I'll refer to Miss E throughout the decision.

## **What happened**

Miss E held a personal bank account with Santander, which she also used for her business.

In May 2020, Miss E applied to Santander for a Bounce Back Loan (BBL). Santander reviewed the application but said it needed more information from Miss E. As Miss E didn't respond within the timeframe the bank provided, the application was cancelled in June.

In August, Miss E applied again for a BBL. Santander declined the application as Miss E works as an escort. The bank has chosen not to provide banking facilities to the adult entertainment sector under its Sensitive Sectors Policy ('the Policy'). Santander also considered there were discrepancies in the information Miss E provided about her turnover and business start date.

Santander's general policy not to provide financial products and/or services to clients in the adult entertainment industry arises from the promotion of gender inequality, ease of access to pornography, human trafficking, forced and child labour, and links to prostitution, drugs, crime and money laundering risk. The policy provides for dispensations and waivers on a case by case basis where the bank is satisfied that the customer is not at risk of harm.

In January 2021, Miss E contacted Santander for an update on her application as she hadn't received the bank's decision. On receiving their response, Miss E complained as she thought the bank had treated her unfairly and been discriminatory.

Santander didn't uphold the complaint. The bank said it made the commercial decision not to support certain industries so it wouldn't be changing its decision to decline her application.

Miss E still didn't think Santander had acted fairly and thought the bank's policy was discriminating against sex workers. So she brought her complaint to the attention of various third parties including her MP and the All-Party Parliamentary Group on Fair Business Banking ('APPG'). Miss E also asked this service to look into her complaint. As part of her complaint, her representative provided us with detailed submissions about why they say Santander discriminated against her, both generally and specifically under the Equality Act 2010.

Miss E continued to contact Santander over the next few months about its decision. The bank reviewed her application and after it had the opportunity to take into account and understand Miss E's individual circumstances, it reversed its original decision and provided her with a loan of £3,000 in April 2021. However Miss E still felt the bank hadn't acted fairly.

Our Investigator recommended the complaint be upheld in part. She said, in summary, that:

- There was no error on Santander's part in cancelling the initial application, as Santander hadn't received the information it had requested from Miss E.
- Santander's decision to decline Miss E's subsequent application was made in line with its policy to automatically decline requests from businesses operating in certain industries. She thought it was up to Santander to decide which industries it wished to lend to and didn't think the policy itself was unreasonable. And she thought it had been reasonable for Santander to adopt a level of automation as lenders had to facilitate a fast application process for BBLs. The possible detriment of this was also offset by the applicant's right to appeal and have the case reviewed manually, which Miss E had utilised.
- There was, though, a delay in Santander reviewing Miss E's application in light of her appeal. Miss E had contacted the bank in January, but the bank didn't start the review until March, despite having all the information it needed. So she thought Miss E ought to have received the loan sooner than she did and that this had caused her inconvenience in having to chase things up on a number of occasions and caused her additional stress during an already difficult time. She recommended that Santander pay Miss E £300 compensation for this.

Santander accepted our Investigator's view, but Miss E didn't. She said, in summary, that:

- She met the bank's published eligibility criteria for the loan, and it was unfair that her application had been rejected due to an unpublished, blanket policy that discriminated against the industry she worked in. The bank had subsequently suggested, on occasion, that the policy contained an element of discretion which she didn't believe to have been the case. And as she couldn't see that the bank had taken into account any new evidence when reconsidering the application, she thought its reason(s) for approving it were likely to be something other than an assessment of her circumstances (such as the pressure put on the bank by the organisations that made representations on her behalf).
- She only received the loan eight months after applying, and only after protracted correspondence from her and organisations acting on her behalf. She'd been caused financial difficulty because Santander took so long to agree her application that her health and ability to return to work had been impacted. The distress and anxiety she'd suffered had also been exacerbated by feeling discriminated against. And she estimated that she'd spent 300 hours on dealing with the matter. So, she didn't think the compensation recommended was sufficient and thought that £10,000 would be appropriate.
- She'd lost the opportunity to apply for further borrowing through a BBL top-up loan as the deadline for applications had passed by the time, she received the BBL.

As an agreement couldn't be reached, the case was passed to me to decide. I issued a provisional decision on 14 June 2022. I said the following:

Miss E and Santander have both provided detailed evidence about this complaint. I've taken on board all their points – although I'm not going to respond to each point individually. Instead I'll set out what I consider to be the key points in how I've reached my decision.

As our Investigator has already mentioned in her opinion, it's not in the remit of this service to look at the impact of a financial business' decision on an industry sector.

We are also unable to make changes to legislation such as the Equality Act 2010 as we don't have the legal authority to do this; only a court of law can make changes to a piece of legislation. So I won't be commenting on the broader issues that Miss E has raised in this regard.

As a service, we are also unable to make direct findings about whether something amounts to discrimination or indirect discrimination, as per the categorisations within the Equality Act 2010. So I won't be responding to Miss E's points about this in my decision.

Our powers come from the DISP rules which only allow us to consider individual complaints, and whether or not a business has behaved in a fair and reasonable way. We cannot make findings on whether or not a law has been broken, although we do take all relevant legislation and regulations into consideration when deciding whether or not a business has behaved reasonably. Therefore, my decision will focus solely whether or not Santander acted reasonably when it processed Miss E's application, and if it didn't, what impact this had on Miss E.

As Miss E successfully obtained the loan in the end, the issue for me to consider is whether errors on Santander's part meant that there was a delay in her doing so – and, if there was, how to fairly compensate Miss E for this.

Miss E doesn't think Santander fairly declined her application initially. She has made a number of points about the bank's policy, against which the application was automatically assessed, and which led the bank to its decision. While I can't make a finding on whether or not the policy was discriminatory, I can consider whether it was reasonable. And I think it was. Santander has a level of discretion in choosing who it does business with and on what terms. Having reviewed the bank's policy, I've seen that it does offer lending to the industry Miss E works in but there are more checks it requires before doing so to protect both the borrower and the bank. That's a decision it was entitled to make. And having considered what it has told us of its reasons for this, I don't think it was unreasonable.

Under the BBL Scheme, lenders were required to process applications expeditiously with the aim of providing finance to businesses quickly. They had some discretion to decide how they would do so, which included the freedom to apply their existing policies and procedure to manage risks and ensure customers were treated fairly. Santander has explained that, to that end, its BBL application was largely automated.

And of relevance here, applications from the industries that were subject to the policy in question were automatically declined. The applicant retained a right to appeal when the application would be manually reviewed in keeping with the bank's policy. While imperfect, I think this was reasonable in consideration of the aims of the Scheme and the demands and expectations of Santander in dealing with the high volume of applications it received.

It follows that I don't think Santander did anything wrong in declining Miss E's application in line with its policy. While there is no dispute that Miss E met the BBL eligibility criteria, Santander wasn't obligated to provide her with a BBL based on this alone. It processed the application in line with its policies and procedures, as it was entitled to do under the rules of the Scheme.

When Miss E challenged the bank's decision on 15 January 2021, Santander agreed to review it. Miss E's application was then approved, and she was given a BBL in April. Miss E says the bank only changed its decision in response to the involvement

from her MP and the APPG - but I don't think that's the case. Santander has explained that Miss E's application was reviewed once she'd made the complaint to the bank and from there onwards, her individual circumstances were assessed in line with the Scheme rules.

I've also seen that in Santander's final response of 16 January, the Investigator explained that the bank did have a general policy for this type of industry. However, they also explained that whilst they couldn't overturn the decision to decline Miss E's application, they had passed on her concerns and feedback to the relevant department. So I think it's likely that the bank was already looking at Miss E's application again in mid-January before any of the third parties became involved from February 2021 onwards.

I do, though, think Santander took longer than it should have to complete its review and, ultimately, provide the BBL in light of Miss E's appeal.

Miss E says she would've challenged the bank's decision sooner than she did – and therefore obtained the loan earlier – but only found out that Santander had declined her application when she called the bank in January 2021. She says the bank didn't notify her of the decision it had made in August 2020. But I don't think that's the case. Santander has provided evidence that shows it emailed Miss E on 28 August 2020 confirming it had been declined. This was the email address it held on file for Miss E, which she used for her BBL application. So while it's regrettable if Miss E didn't receive the bank's decision, I don't think this was Santander's fault.

There was, though, still a delay even after Miss E raised her concerns with the bank in January. It took around three months for Santander to review the information and process the application with the loan funds finally credited to Miss E's account on 7 April. I've also seen that Miss E had to repeatedly chase Santander for an update and I can appreciate why she feels that if she hadn't escalated this matter externally, the bank wouldn't have reviewed her application. Santander had all the information it needed to progress Miss E's application and the bank hasn't been able to explain why there was a delay. So I don't think it treated Miss E fairly in this respect.

Miss E also believes that because of the bank's delay in making its decision about her BBL application, she missed out on the opportunity to get a BBL top-up loan. But I don't think she would've been eligible for a top-up in any event. Under the Scheme rules, borrowers could borrow up to 25% of their annual turnover. Miss E had borrowed close to her maximum entitlement in the initial BBL and would only have been able to borrow a further £250. But the minimum loan amount for a top-up was £1,000. So I don't think the delay impacted Miss E in this way.

Miss E has told us that her health and wellbeing were affected by the bank's decision and that she's experienced financial hardship as a result of the delay. We asked her to provide evidence of this in order to better understand what the impact was. Having reviewed the additional information provided by Miss E, I've been unable to conclude that the delay on Santander's part resulted in her being unable to meet essential bills.

Miss E has said this was a particularly difficult time for her and her family and that the delays caused by the bank made the situation even worse. She has explained it had a direct impact on her mental health and overall stress levels at the time. I don't doubt this is the case and I agree that the bank could've processed her application faster than it did. However, as I've mentioned above, I've seen that it responded to the initial application within a matter of weeks and that Miss E didn't see its response until sometime later. So, I can't hold the bank solely responsible for the problems

Miss E experienced during what was a very difficult and stressful time.

I think it's clear that the bank's handling of Miss E's application caused her distress and inconvenience. And I think Santander should have processed Miss E's application faster once it agreed to review it as the additional delay meant she had to seek support from this service and third parties to get a fair outcome. So to put things right I think Santander should pay Miss E £300 compensation for the distress and inconvenience this caused her.

I invited Miss E and Santander to give me any more evidence and information they wanted me to consider before issuing my final decision. The bank accepted the decision and had nothing further to add. Miss E didn't accept the decision. She said in summary that:

- It's unclear if Santander has a blanket policy of discriminating against sex workers.
- The provisional decision refused to consider if the discrimination itself was unfair or unreasonable – which a service we are obliged to do.
- She wanted explicit consideration by this service on whether it was fair and reasonable for Santander to discriminate against her based on her occupation and gender.

I issued a further provisional decision on 12 August 2022. I said the following:

#### *Our jurisdiction*

The Ombudsman Service has jurisdiction to consider 'complaints' as defined by the Dispute Resolution (or DISP) rules in the FCA Handbook. Broadly speaking, we can only consider complaints about:

- specific acts or omissions
- in the provision of a financial service
- Where the complainant alleges that they have suffered financial loss or material distress or inconvenience.

That means that we are required to focus on the act or omission at the heart of the complaint. We therefore don't have a general jurisdiction to consider complaints about a financial business's policies in the abstract, for example whether they be discriminatory in principle.

In short, in deciding a complaint, we have to look at what has actually happened to the complainant in order to reach a decision about what is fair and reasonable in all the circumstances of the case. In doing so, the rules governing our service require us to pay due regard to relevant law and regulations. That means we may need to consider whether and the extent to which a specific policy, criterion or practice caused unfairness in the circumstances of the individual complaint.

#### *Allegation of discrimination*

Miss E's representatives have argued that, in breach of the Equality Act, Santander discriminated against her by refusing her application for a BBL. We are unable to make direct findings about whether a policy, criterion or practice amounts to discrimination or indirect discrimination for the purposes of the Equality Act. The Equality Act makes clear that only a court has the jurisdiction to do that. But in

deciding what is fair and reasonable in an individual case, it is appropriate for us to consider whether a court might be likely to make such a finding.

Miss E's representative has suggested that the Policy meant that she was subject to discrimination contrary to the Equality Act. The Equality Act provides for a number of 'protected characteristics' in respect of which service providers must not discriminate. Such discrimination is called 'direct discrimination'. None of the 'protected characteristics' relate to specific professions. I therefore can't see that Miss E's job provides any basis for a court to conclude that Santander directly discriminated against her contrary to the Equality Act.

I discuss further below whether, regardless of this, Santander's approach was fair and reasonable, as Miss E's representative has suggested that we need to consider 'discrimination' in a wider sense than the legal concept covered by the Equality Act.

Miss E's representative has also suggested that Santander may have indirectly discriminated against Miss E in refusing her a loan. That's because they say that around 95% of people in Miss E's profession are women, such that the Policy has a disproportionately disadvantageous impact on women.

While I understand the argument, I'm not satisfied that a court would agree. I have reminded myself that Santander did give Miss E the loan she requested, albeit not immediately. I am therefore not satisfied that a court would find that – as a matter of fact and looking at the case as a whole – Santander did discriminate against her on the specific facts of this case.

But even if I am wrong about this, Santander applies the Policy equally to a wide range of people and professions within the adult entertainment industry, and not just those doing Miss E's specific job. I can't see evidence that suggests that the policy would have particularly disadvantaged Miss E in this case due to the fact that she is a woman, as opposed to for other reasons relating to the nature of the industry and the risks Santander had identified.

I am also satisfied that a court would have good reason to think that in this case Santander's general policy proportionately achieved the legitimate aim of addressing the risks the policy identifies. While I note what Miss E's representatives say about various risks in other sectors, the risks in this sector are well documented. The policy was not applied inflexibly but contained dispensations and waivers, building in a degree of flexibility to ensure an appropriate degree of proportionality once Santander was satisfied that there was not a risk of harm in the individual case.

#### *Fair and reasonable*

Even if a court may find that Santander's Policy discriminated against Miss E in some way, I've reminded myself that my primary duty is to decide what is fair and reasonable in all the circumstances, rather than whether a court would necessarily uphold a specific legal claim. So I've considered whether or not Santander acted reasonably when it processed Miss E's application, and if it didn't, what impact this had on Miss E.

As Miss E successfully obtained the loan in the end, the issue for me to consider is whether errors on Santander's part meant that there was an unreasonable delay in her doing so – and, if there was, how to fairly compensate Miss E for this.

Miss E doesn't think Santander fairly declined her application initially. She has made a number of points about the bank's policy, against which the application was automatically assessed, and which led the bank to its decision. While I can't make a finding on whether or not the policy was discriminatory, I have discussed above how I think a court might look at it. And I can consider whether it was reasonable. And I think it was.

Santander has a level of discretion in choosing who it does business with and on what terms. Having reviewed the bank's policy, I've seen that it does offer lending to the industry Miss E works in but there are more checks it requires before doing so to protect both the borrower and the bank. That's a decision it was entitled to make, given the risks to its customers who work in the industry and the potential reputational risks to Santander. And having considered what it has told us of its reasons for this, I don't think it was unreasonable.

I note that the Financial Conduct Authority as the regulator has not intervened or given financial institutions guidance about lending/dealing with the adult entertainment industry, and a bank such as Santander can legitimately exercise commercial discretion as to whether and the extent to which it does business in higher risk sectors.

The remainder of this provisional decision remains unchanged from the one issued on 14 June 2022 from the paragraph which begins 'Under the BBL Scheme, lenders were required to process applications expeditiously with the aim of providing finance to businesses quickly'.

I again invited Miss E and Santander to give me any more evidence and information they wanted me to consider before making my final decision. The bank accepted the decision and had nothing further to add. Miss E didn't accept the decision. She said in summary that:

- She wanted to know what risks in the sex industry I'd referred to as well documented, and what evidence there was of those risks compared to other industries.
- The bank's understanding of the risks involved with the sector wasn't evidence-based and showed a lack of understanding, and that third parties had shown other ways for banks to reduce the risks involved e.g. from people trafficking, without excluding a specific industry sector.
- She wanted an explanation as to why, before issuing my first provisional decision, I'd not considered whether she had been unfairly treated or discriminated against, based on her sex and occupation.

### **What I've decided – and why**

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

Having done so, I've reached the same conclusion as I did in my provisional decision.

Miss E has provided information that she feels shows the sex industry is no riskier than other sectors, but that's not something for me to comment on. I have already explained that I can only look at the circumstances of Miss E's individual complaint and not how the sex industry has been treated by the bank in comparison to other industries and sectors. I also think it's fundamentally accepted that there are risks in this sector which include violence, sexual abuse, fluctuating income, and exploitation - so I think it was reasonable that the bank had additional checks in place when it reviewed Miss E's application.

Miss E says that my first provisional decision didn't consider whether she was unfairly treated or discriminated against because of her gender occupation. But I did consider this as part of my first provisional decision and explained that I couldn't comment about discrimination under the Equality Act, but I could look at whether the bank's actions were reasonable - which I did when considering the application process. I also said that I didn't think Miss E had been treated fairly, and this was the reason that I recommended the bank pay her compensation.

However, Miss E specifically asked for the provisional decision to be considered from a legal perspective. In light of Miss E's response to the first provisional decision, the second decision addresses these points in more detail and also refers to how a court may perceive the complaint – rather than just what I can solely comment on. However, this doesn't change my view that the remit of the service doesn't allow me to make a finding on whether the bank's policy was discriminatory, and that I can only look at whether it was fair and reasonable. And as I have explained in my provisional decisions, taking into consideration all of the circumstances of the complaint, I think it was.

Miss E has provided information that she feels shows that the bank's criteria for dealing with the sex industry aren't reasonable. However, Santander has confirmed that it considers information from a variety of sources when setting its criteria. It's not for me to comment on what information the bank uses or how this is applied, as this is a commercial decision that Santander is able to make. As a service, we would expect the bank to have a reasonable and proportionate mechanism in place to deal with its customers. And based on the information I've seen I'm satisfied that's the case.

It's not in dispute that Santander made an error in not processing Miss E's appeal application as quickly as it should. However, I don't think it was unreasonable for the bank to apply its lending criteria in the way that it did using its automated system to initially decline the application based on her industry. So my final decision – and the compensation I'm requiring Santander to pay in order to put things right - remains the same as that of my provisional decision.

### **My final decision**

My final decision is that I uphold this complaint in part. I instruct Santander UK Plc to pay Miss E £300 for the distress and inconvenience caused.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss E to accept or reject my decision before 16 November 2022.

Jenny Lomax  
**Ombudsman**