

The complaint

Mr L has complained that Nationwide Building Society's refusal to progress a credit card application for his son is discrimination under the Equality Act 2010.

Background

Mr L ("Mr L1") is complaining on behalf of his son, Mr L2, who lacks mental capacity and for whom Mr L1 is a deputy under a Court of Protection Order. By virtue of that order Mr L1, and Mr L2's mother, act as joint and several deputies to support their son in all matters including managing his finances. Mr L1 has the responsibility of managing Mr L2's finances and has brought this complaint with the consent of Mr L2's mother but without her involvement.

As part of his role of managing Mr L2's finances Mr L1 applied for a credit card in Mr L2's name with Nationwide, with whom both he and Mr L2 hold accounts. Mr L1 has explained he did this because he has to file accounts to the Court every year to show how he's managing Mr L2's money. With that in mind he thought it would be better if his son had his own credit card for larger purchases as these would be easier to manage if they were all linked to a single account in Mr L2's name. Mr L1 has also made reference to his son being able to benefit from additional section 75 protections when purchasing more expensive items with a credit card.

Nationwide declined Mr L2's application in the first instance because he lacks mental capacity to consent to the opening of a credit account in his name. It explained it has a policy in place that says deputies, or power of attorneys, acting on behalf of someone else, can't apply for any form of credit on behalf of that person. It has said that the Consumer Credit Act 1974 states that if a business knowingly enters into a contract with someone who lacks mental capacity the contract will be unenforceable. So even though it accepts that Mr L1 is Mr L2's deputy and that the Court of Protection has awarded him with authority to manage Mr L2's finances, it's still not prepared to open a new credit account in Mr L2's name as it would be a legally unenforceable contract.

Mr L1 disagrees with Nationwide's view. He believes that its refusal to provide a credit card to his son, given his specific circumstances and the fact the Court of Protection Order has been in place for so long and will remain in place, means any risk to Nationwide is minimised. He says a blanket ban on all applications from people who are in his son's position is discrimination under the Equality Act 2010 and that Nationwide has failed to show the policy it has put in place is proportionate and necessary to achieve a legitimate aim. He wants Nationwide to remove the blanket ban and decide each application of this nature in full considering the individual circumstances of the person applying for credit.

As he was unhappy with Nationwide's response, Mr L1 brought his son's complaint to this service. One of our investigator's looked into the complaint already. She found, having read the guidance set out the Financial Conduct Authority's ("FCA's") handbook 'The Consumer Credit sourcebook' (CONC), the Consumer Credit Act ("CCA") 1974, the Mental Capacity Act 2005 and the Equality Act 2010, it wasn't unreasonable for Nationwide to have the policy in place.

She clarified that she couldn't make a direct finding on whether or not the policy amounted to discrimination as per the Equality Act (or any other piece of legislation), but found the CCA 1974 did clearly set out that the contract would be unenforceable because Mr L2 lacks capacity. She thought the policy was in place to achieve a legitimate aim and wasn't unreasonable. So, she didn't uphold the complaint.

Mr L1 still felt that it was discriminatory for Nationwide to rely on legislation as old as the CCA 1974 to refuse to provide his son with a credit card. He repeated that he has to provide annual account statements to the Court each year as it monitors how he is managing Mr L2's finances. So, he believes any risk concerning his son's finances potentially being misused is minimised as a result of that Court supervision. He also says the risk to the business is minimal as his son has sufficient funds to repay any spending that might take place on the credit card. He asked for an ombudsman to review the complaint again so it's been passed to me for consideration.

My findings

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 agree with the findings reached by our investigator and I'm not going to uphold the complaint. I know this will upset Mr L1 so I've set out my findings below.

Our investigator set out all of the relevant law in her view, and it is well known to both parties, so I won't repeat it here. Instead, I'll focus on Mr L1's response to the investigator's view and his concern that his son is being discriminated against unfairly by a policy he believes is unreasonably broad in its application. I also want to acknowledge that I've summarised the events of the complaint. But I want to assure both parties that I've reviewed everything on file. And if I don't comment on something, it's not because I haven't considered it. It's because I've concentrated on what I think are the key issues. Our powers allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts.

It is also important that I clarify that this service is unable to make a finding as to whether or not a business has breached a piece of legislation. That is a purely legal consideration and only a court of law can make a finding as to whether or not Nationwide has breached the terms of the Equality Act, or any other piece of law. However, I can consider whether or not I think Nationwide's policy is reasonable, or whether it's inherently unfair. And to do that I'll take all the relevant law, and FCA guidance into consideration, as well as what I think a court might be likely to find.

Mr L1 has pointed out that the Court of Protection Order that appointed him and Mr L2's mother as Mr L2's deputies state they have the power, jointly and separately, to manage Mr L2's finances for him. He has also said that the language used in the CCA 1974 is more appropriately applied to scenarios where there is a question over someone's mental capacity or where someone had capacity and now no longer does. He argues that his son doesn't have capacity and that this isn't something that will change. He has also said that it's unreasonable for Nationwide to rely on the CCA 1974 as he believes it's outdated and has resulted in his son being directly discriminated against, while he and his son's mother have been indirectly discriminated against.

I can understand Mr L1's frustrations regarding Nationwide's policy and why he doesn't think his son represents a 'risk' to Nationwide. And I can understand why Mr L1 feels such a statement questions his own trustworthiness, as he believes Nationwide is trying to protect itself from scenarios where it provides credit to a consumer and then is unable to enforce

repayment of that credit after the funds are spent. So, it makes sense to me that Mr L1 has taken some parts of Nationwide's decision personally as it would be his responsibility as Mr L2's deputy to manage the account and make the necessary repayments.

However, I need to consider what the risk Nationwide is trying to mitigate here is and whether the policy it has put in place is reasonable within those considerations. And in this situation I can't say that Nationwide is being unreasonable, particularly when the CCA 1974 states unequivocally that any credit contract entered into with Mr L2 would be unenforceable in a court of law. I have considered Mr L1's argument that the wording of the Mental Capacity Act 2005, and the specific Court of Protection Order that granted him the power of deputy for Mr L2 in 2009, seem to contradict the wording in the CCA 1974 and imply Mr L1 should be able to sign contracts on Mr L2's behalf.

This is a point that needs to be considered by a Court of law, and it would be inappropriate for me to make a finding on it as to do so would go beyond the remit of this service. Only a Court can decide if two pieces of legislation potentially contradict each other, and if they do, how that should be considered in any given set of circumstances.

At its core, the aim of Nationwide's policy is to protect both vulnerable consumers, and itself, from risk of harm. And of course, it is obliged to stay within the rules set out by the regulator and relevant legislation when it comes to appropriate lending. I accept that Nationwide's policy is very broad, and I know Mr L1 doesn't believe Mr L2 is likely to be harmed by being provided with a credit card. He has also repeatedly stated that the card would be affordable for Mr L2, and that he, in his capacity of deputy, would ensure that all bills were paid in time and as per the credit cards terms and conditions. And I don't doubt that Mr L1 is being entirely honest in his submissions. But that doesn't mean that Nationwide's policy is inherently unfair or that it's being unreasonable by not considering Mr L2's application.

Overall, I understand why Nationwide has put the policy it has in place. And, as I've said above, I don't think the policy is fundamentally unfair. Mr L1 has mentioned that his son is losing access to protection under section 75 rules but given the contract wouldn't be legally enforceable there is no guarantee Mr L2 could rely on these protections either as they only result from the existence of an enforceable contract.

Therefore, although I full appreciate why Mr L1 feels as strongly as he does that Nationwide's policy to deny Mr L2 access to a credit card is unreasonable, I can't say I agree. I think it was put in place in order to adhere with the existing legal requirements and while Mr L1 may believe those requirements are outdated and need to be revisited, until such a time as that happens businesses are obliged to follow them.

So it follows that I don't uphold Mr L1's complaint against Nationwide.

My final decision

For the reasons set out above I don't uphold Mr L's complaint against Nationwide Building Society.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 12 March 2024.

Karen Hanlon
Ombudsman