

Complaint

Mrs P has complained about the overdraft charges Santander UK Plc ("Santander") applied to her current account.

Mrs P is being represented, by the ("representative"), in her complaint.

The representative has said the charges applied to Mrs P's account were unfair as there was a failure to take account her patterns of reliance on debt and hardcore borrowing. In the representative's view, there was no proper consideration of the longer-term impact of the borrowing on her.

Background

Mrs P opened a current account with Santander in 2007. As some point between then and August 2015, Mrs P applied for an overdraft which had a limit of £200. The limit was increased in stages until it reached £2,400.00 in August 2021.

In September 2023, Mrs P complained saying that she was allowed to continue using the overdraft in a way that was unsustainable and caused her continued financial difficulty.

Santander did not uphold Mrs P's complaint. This was because it considered that it didn't need to consider parts of Mrs P's complaint as it was made too late and for the parts that it did consider it didn't think that it had done anything wrong or unfairly. Mrs P was dissatisfied at Santander's response and referred her complaint to our service.

One of our investigators reviewed what Mrs P and Santander had told us. He reached the conclusion that he wasn't persuaded that Santander had acted unfairly by allowing Mrs P to use her overdraft in a way that was unsustainable or otherwise harmful. So the investigator didn't recommend that Mrs P's complaint be upheld.

The representative, on Mrs P's behalf, disagreed with the investigator and asked for an ombudsman's decision.

My findings

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

Basis for my consideration of this complaint

There are time limits for referring a complaint to the Financial Ombudsman Service. Santander has argued that Mrs P's complaint was made too late because she complained more than six years after some of the charges on the overdraft were applied, as well as more than three years after she ought reasonably to have been aware of her cause to make this complaint.

Our investigator explained why it was reasonable to interpret the complaint as being one alleging that the lending relationship between Mrs P and Santander was unfair to Mrs P as described in s140A of the Consumer Credit Act 1974 (“CCA”). He also explained why this complaint about an allegedly unfair lending relationship had been made in time.

Having carefully considered everything, I’ve decided not to uphold Mrs P’s complaint. Given the reasons for this, I’m satisfied that whether Mrs P’s complaint about some of the specific charges applied was made in time or not has no impact on that outcome.

I’m also in agreement with the investigator that Mrs P’s complaint should be considered more broadly than just the individual charges or lending decisions. I consider this to be the case as Mrs P has not only complained about the circumstances behind the application of the individual charges, but also the fact Santander’s failure to act during the periods she alleges it ought to have seen she was experiencing difficulty caused ongoing hardship.

I’m therefore satisfied that Mrs P’s complaint can therefore reasonably be interpreted as a complaint that the lending relationship between herself and Santander was unfair to her. I acknowledge the possibility that Santander may still disagree that we are able to look at the whole of Mrs P’s complaint, but given the outcome I have reached, I do not consider it necessary to make any further comment or reach any findings on these matters.

In deciding what is fair and reasonable in all the circumstances of Mrs P’s case, I am required to take relevant law into account. As, for the reasons I’ve explained above, I’m satisfied that Mrs P’s complaint can be reasonably interpreted as being about that her lending relationship with Santander was unfair to her, relevant law in this case includes s140A, s140B and s140C of the CCA.

S140A says that a court may make an order under s140B if it determines that the relationship between the creditor (Santander) and the debtor (Mrs P), arising out of a credit agreement is unfair to the debtor because of one or more of the following, having regard to all matters it thinks relevant:

- any of the terms of the agreement;
- the way in which the creditor has exercised or enforced any of his rights under the agreement;
- any other thing done or not done by or on behalf of the creditor.

Case law shows that a court assesses whether a relationship is unfair at the date of the hearing, or if the credit relationship ended before then, at the date it ended. That assessment has to be performed having regard to the whole history of the relationship. S140B sets out the types of orders a court can make where a credit relationship is found to be unfair – these are wide powers, including reducing the amount owed or requiring a refund, or to do or not do any particular thing.

Given Mrs P’s complaint, I therefore need to think about whether Santander’s allowing Mrs P to use her overdraft in the way that it did, resulted in the lending relationship between Mrs P and Santander being unfair to Mrs P, such that it ought to have acted to put right the unfairness – and if so whether it did enough to remove any such unfairness.

Mrs P’s relationship with Santander is therefore likely to be unfair if it allowed Mrs P to continue using her overdraft in circumstances where it ought reasonably to have realised that the facility had become unsustainable or otherwise harmful for her. And if this was the case, Santander didn’t then remove the unfairness this created somehow.

Did Santander unfairly allow Mrs P to continue using her overdraft in a way that was unsustainable or otherwise harmful for her?

Before I go any further, as this essentially boils down to a complaint that Mrs P was unfairly charged as a result of being allowed to continue using her overdraft, I want to be clear in saying that I haven't considered whether the various amounts Santander charged were fair and reasonable, or proportionate in comparison to the costs of the service provided. Ultimately, how much a bank charges for its services is a commercial decision. And it isn't something for me to get involved with.

That said, while I'm not looking at Santander's charging structure per se, it won't have acted fairly and reasonably towards Mrs P if it applied this interest, fees and charges to Mrs P's account in circumstances where it was aware, or it ought fairly and reasonably to have been aware Mrs P was experiencing financial difficulty. So I've considered whether there was an instance, or there were instances, where Santander didn't treat Mrs P fairly and reasonably.

In other words, I've considered whether there were periods where Santander continued charging Mrs P even though it ought to have instead stepped in and taken corrective measures on the overdraft as it knew, or it ought to have realised, that she was in financial difficulty.

Having looked through Mrs P's account statements throughout the period concerned, I can't see that Santander ought reasonably to have unilaterally taken corrective measures in relation to Mrs P's overdraft. I accept that Mrs P used her overdraft and there is no dispute over that.

However the representative's arguments appear to suggest that this in itself means that Mrs P was experiencing financial difficulty and therefore the complaint should be upheld. But I think that it is far too simplistic to say that it automatically follows that a customer was in financial difficulty simply because they were using a financial product that they had an agreement to use and which they were entitled to use.

I accept that the rules, guidance and industry codes of practice all suggest that prolonged and repeated overdraft usage can sometimes be an indication of financial difficulty. However, this is not the same as saying that prolonged and repeated overdraft usage by a customer will always mean that they are, as a matter of fact, in financial difficulty. Indeed if that were automatically the case, there would be an outright prohibition on revolving credit accounts being open ended, rather than there being a requirement for a lender to review how the facility is being used.

So I think it's important to look at overall circumstances of a customer's overdraft usage as part of considering their overall financial position. And, in this case, I've considered Mrs P's incomings and outgoings as well as any overdrawn balances and thought about whether it was possible for her to have stopped using her overdraft, based on this.

I think that if Mrs P was locked into paying charges in circumstances where there was no reasonable prospect of her exiting her overdraft then her facility would have been unsustainable for her. So I've carefully considered whether this was the case. The first thing for me to say is that Mrs P was in receipt of credits that were sufficient to clear the overdraft within a reasonable period of time. The total amount of the credits always exceeded Mrs P's overdraft limit.

Furthermore, I'm satisfied that Mrs P's case isn't one where the borrower was permanently in their overdraft. There were periods where Mrs P was in credit. Indeed, there are times where Mrs P has a substantial credit balance. Although I do accept that there were periods

of times where Mrs P would have met the criteria of someone who displayed a pattern of repeat use of their overdraft. For the avoidance of doubt, I accept that there is a section of CONC (CONC 5D) which came into force in December 2019 which specifically relates to this.

However, even if Santander didn't meet all of the requirements set out in CONC 5D, I wish to make it clear that I don't think that simply sending letters will mean that a lender met all of its obligations, I'd still need to consider whether Mrs P lost out as a result of any potential failing. I've also therefore considered whether Mrs P's use of her overdraft (and Santander continuing to allow her to use it) was causing her to incur high cumulative charges that were harmful to her. And having considered matters, I'm satisfied that this isn't the case.

To explain, while I'm not seeking to make retrospective value judgements over Mrs P expenditure, there are significant amounts of non-committed, non-contractual and discretionary transactions going from Mrs P's account. Indeed, there was significant discretionary spend monthly and Mrs P also appears to be transferring funds to another account of hers.

Given the repeat usage letters Mrs P is likely to have been sent by Santander, I think that she ought to have realised that how much she was paying as a result of using her account in this way. So I simply don't agree that Mrs P was using her overdraft purely for essential spending, or because she had a reliance on credit to get by, as the representative says.

Indeed, it's fair to say that Mrs P's salary was sufficient to have cleared the overdraft within a reasonable period of time had she wished to do so. Equally, while I've noted what the representative has said about Mrs P borrowing elsewhere, I can't see anything in the account transactions which ought to have alerted Santander to the possibility that Mrs P as borrowing unsustainably, or that the charges she was incurring was causing her harm either.

Mrs P did have other credit commitments but this in itself does not mean that she was reliant on credit to meet her essential expenditure. Indeed, the accounts statements suggest to me that she used higher cost lenders less when she was able to have a higher overdraft limit. Finally, I can't see that this was a case where Mrs P was always towards the top end of her limit and maxing out the funds available to her either.

I accept neither of these things in themselves (or when taken together) mean that Mrs P wasn't experiencing difficulty. But I don't agree that Mrs P was reliant on credit. She was quite comfortably able to make any essential commitments without using her overdraft. However, Santander was reasonably entitled to conclude that she was choosing to use her overdraft to make discretionary transactions and in periods where she had increased funds her discretionary expenditure increased.

Overall and having considered everything, I don't think that it was unreasonable for Santander to have proceeded adding the charges that it did. This is particularly bearing in mind the consequences of Santander taking corrective action, in the way that it would have done had it acted in way that the representative is suggesting it should have, would have been disproportionate.

I say this because I don't think that it would have been proportionate for Santander to demand that Mrs P immediately repay her overdraft and if not defaulting her account, in circumstances where there was a realistic prospect of Mrs P clearing what she owed in a reasonable period of time.

Therefore, I don't find that the relationship between Mrs P and Santander was unfair to Mrs P. I've not been persuaded that Santander created unfairness in its relationship with

Mrs P by allowing her to use her overdraft in the way that she did. Based on what I've seen, I don't find Santander treated Mrs P unfairly in any other way either.

So overall and having considered everything, while I can understand Mrs P's sentiments and appreciate why she is unhappy, I'm nonetheless not upholding this complaint. I appreciate this will be very disappointing for Mrs P. But I hope she'll understand the reasons for my decision and that she'll at least feel her concerns have been listened to.

My final decision

For the reasons I've explained, I'm not upholding Mrs P's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P to accept or reject my decision before 28 February 2025.

Jeshen Narayanan
Ombudsman