

Complaint

Miss M has complained about the overdraft charges HSBC UK Plc (“HSBC”) applied to her current account.

Miss M is being represented, by the (“representative”), in her complaint. The representative has said the charges applied to Miss M’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

Miss M opened a current account with HSBC in 1991. Miss M eventually took out an overdraft on this account and the limit on it has been £2,000.00 since July 2022.

In February 2024, Miss M complained saying that she was allowed to continue using the overdraft in a way that was unsustainable and caused her continued financial difficulty.

HSBC did not uphold Miss M’s complaint. This was because it considered that it didn’t need to consider parts of Miss M’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. Miss M was dissatisfied at HSBC’s response and referred her complaint to our service.

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

The representative, on Miss M’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. HSBC has argued that Miss M’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 Miss M’s complaint was one alleging that the lending relationship between Miss M and HSBC was unfair to Miss M 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 Miss M's complaint. Given the reasons for this, I'm satisfied that whether Miss M'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 Miss M's complaint should be considered more broadly than just the individual charges or lending decisions. I consider this to be the case as Miss M has not only complained about the circumstances behind the application of the individual charges, but also the fact HSBC'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 Miss M's complaint is a complaint alleging that the lending relationship between herself and HSBC was unfair to her. I acknowledge the possibility that HSBC may still disagree that we are able to look at the whole of Miss M'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 Miss M's case, I am required to take relevant law into account. As, for the reasons I've explained above, I'm satisfied that Miss M's complaint can be reasonably interpreted as being about that her lending relationship with HSBC 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 (HSBC) and the debtor (Miss M), 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 Miss M's complaint, I therefore need to think about whether HSBC's allowing Miss M to use her overdraft in the way that it did, resulted in the lending relationship between Miss M and HSBC being unfair to Miss M, such that it ought to have acted to put right the unfairness – and if so whether it did enough to remove any such unfairness.

Miss M's relationship with HSBC is therefore likely to be unfair if it allowed Miss M 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, HSBC didn't then remove the unfairness this created somehow.

Did HSBC unfairly allow Miss M 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 Miss M 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 HSBC 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 HSBC's charging structure per se, it won't have acted fairly and reasonably towards Miss M if it applied this interest, fees and charges to Miss M's account in circumstances where it was aware, or it ought fairly and reasonably to have been aware Miss M was experiencing financial difficulty. So I've considered whether there was an instance, or there were instances, where HSBC didn't treat Miss M fairly and reasonably.

In other words, I've considered whether there were periods where HSBC continued charging Miss M 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 Miss M's account statements throughout the period concerned, I can't see that HSBC ought reasonably to have unilaterally taken corrective measures in relation to Miss M's overdraft. I accept that Miss M used her overdraft and there is no dispute over that.

However the representative's arguments appear to suggest that this in itself means that Miss M 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 Miss M'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 Miss M 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 Miss M 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 Miss M's overdraft limit.

Furthermore, I'm satisfied that Miss M's case isn't one where the borrower was permanently in their overdraft. There were periods where Miss M was in credit. It's also fair to say that Miss M would have stayed in credit longer but for transferring funds out of her account. Although I do accept that there were periods of times where Miss M 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 HSBC 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 Miss M lost out as a result of any potential failing. I've also therefore considered whether Miss M's use of her overdraft (and HSBC 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 Miss M expenditure, there are significant amounts of non-committed, non-contractual and discretionary transactions going from Miss M's account. Indeed, there was significant discretionary spend monthly and Miss M also appears to be transferring funds to another account of hers.

Given the repeat usage letters Miss M is likely to have been sent by HSBC, 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 Miss M 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 Miss M's salary together with her other credits was more than 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 Miss M borrowing elsewhere, I can't see anything in the account transactions which ought to have alerted HSBC to the possibility that Miss M was borrowing unsustainably, or that the charges she was incurring was causing her harm either. Miss M did have other credit commitments but this in itself does not mean that she was reliant on credit to meet her essential expenditure.

I accept neither of these things in themselves (or when taken together) mean that Miss M wasn't experiencing difficulty. But I don't agree that Miss M was reliant on credit. She was quite comfortably able to make any essential commitments without using her overdraft. However, HSBC 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.

Given the representative's reference to CONC 5D, I also wish to make it clear that it isn't simply the case that a customer should never be allowed to make discretionary payments from an overdraft. Indeed, its argument appears to be suggesting that a corrective action should be taken against a customer every time they meet the criteria for being sent a letter, irrespective of the circumstances. However, the rules and guidance aren't as blunt a tool as this. The position is far more nuanced.

The representative's interpretation runs contrary to the purpose of the rules and guidance which is to ensure that customers are protected from high cumulative charges where they are likely to cause harm. The rules and guidance aren't to prevent the use of overdraft in all circumstances where a repeat use letter has been sent in the way that the representative's argument suggests.

Even more importantly the representative's argument is at odds with the concept of proportionality – a firm should take action proportionate to the circumstances. This concept of proportionality runs right through CONC 5 as a whole. Given the amount of funds that Miss M was in receipt of, I'm not persuaded that HSBC ought reasonably to have realised that Miss M's overdraft usage was causing her harm.

Overall and having considered everything, I don't think that it was unreasonable for HSBC to have proceeded adding the charges that it did. This is particularly bearing in mind the consequences of HSBC 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 HSBC to demand that Miss M immediately repay her overdraft and if not defaulting her account, in circumstances where there was a realistic prospect of Miss M clearing what she owed in a reasonable period of time.

Therefore, I don't find that the relationship between Miss M and HSBC was unfair to Miss M. I've not been persuaded that HSBC created unfairness in its relationship with Miss M by allowing her to use her overdraft in the way that she did. Based on what I've seen, I don't find HSBC treated Miss M unfairly in any other way either.

So overall and having considered everything, while I can understand Miss M's sentiments and appreciate why she is unhappy, I'm nonetheless not upholding this complaint. I appreciate this will be very disappointing for Miss M. 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 Miss M's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss M to accept or reject my decision before 12 May 2025.

Jeshen Narayanan
Ombudsman